IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CONSOLIDATED CASE NOS. 98-1420, 98-2942, 98-3143, AND 98-3478

NEW PRIME, INC., D/B/A PRIME, INC., AND SUCCESS LEASING, INC.
PETITIONERS,
V.
UNITED STATES OF AMERICA,
FEDERAL HIGHWAY ADMINISTRATION,
SECRETARY OF TRANSPORTATION,
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
HOWARD JENKINS, MARSHALL JOHNSON,
SUSAN JOHNSON, AND JERRY VANBOETZELAER,
RESPONDENTS.

ON PETITION FOR REVIEW OF THE FEDERAL HIGHWAY ADMINISTRATION'S NOTICE OF DENIAL OF PETITION FOR DECLARATORY ORDER

BRIEF OF RESPONDENTS
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
HOWARD JENKINS, MARSHALL JOHNSON,
SUSAN JOHNSON, AND JERRY VANBOETZELAER

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

In August, 1997, the Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), brought suit in federal District Court against interstate motor carrier New Prime, Inc ("Prime"), alleging that Prime had violated the federal motor carrier truth-in-leasing regulations by unlawfully retaining funds that rightfully belong solely to truckers with whom Prime contracted. OOIDA sought to enforce the leasing regulations through an exercise of the private right of action afforded injured parties under the ICC Termination Act of 1995 (the "ICCTA"). The District Court dismissed OOIDA's complaint under the doctrine of primary jurisdiction, holding that the Federal Highway Administration (the "FHWA") is better equipped than the federal courts to adjudicate OOIDA's claims. OOIDA appealed the trial court's ruling to this Court.

While OOIDA's appeal was pending, the FHWA issued a Notice in which it announced its intention, pursuant to the congressional mandate underlying the ICCTA, not to exercise jurisdiction over private disputes involving the federal leasing regulations. Prime and motor carrier Arctic Express, Inc., thereupon petitioned for review of the FHWA notice.

These consolidated proceedings present the first case in which a Court of Appeals must consider whether a plaintiff has recourse in federal court under the truth-in-leasing regulations. Further, this case involves the important issue of whether the FHWA may decline to exercise jurisdiction over a leasing regulation-based dispute after a party has elected to litigate that dispute in federal court pursuant to the ICCTA's private right of action.

As this case implicates matters of critical importance to the interstate motor carrier transportation industry generally, and to independent truck owner-operators specifically, OOIDA respectfully requests that the Court grant OOIDA twenty minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

Pursuant to Federal Rule of Appellate Procedure 26.1, the Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), states that the following listed entities and persons have a pecuniary interest in the outcome of this case:

- **OOIDA**
- **Howard Jenkins**
- **Marshall Johnson**
- **Susan Johnson**
- **Jerry Vanboetzelaer**
- **All putative class members in *Owner-Operator Independent Drivers Association, Inc., et al. v. New Prime, Inc., et al*., Case No. 97-3408-CV-S-RGC (W.D. Mo. 1997) (dismissed by the District Court but on appeal to this Court)**

OOIDA further states that it has no parent companies, subsidiaries (excluding wholly-owned subsidiaries), or affiliates that have issued shares tot he public.

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***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)**

***Love v. Trippy,* 133 F. 3d 1066 (8th Cir. 1998) cert. denied, ___U.S.___, 141 L.Ed.2d 743 (1998)**

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49 U.S.C. 14704

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***Intercity Transportation Company v. United States*, 737 F.2d 103 (D.C. Cir 1984)**

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***Skaw v. United States*, 740 F.2d 932 (D.C. Cir. 1984) cert. denied, 488 U.S. 854 (1988)**

***Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)**

49 C.F.R. Part 376

III. Whether the FHWA's publication of its general policy statement that it would not normally involve itself in private disputes under the federal truth-in-leasing regulations violated Prime's procedural rights under the Administrative Procedure Act or Prime's due process rights, where it appears that the agency's decision did not constitute an adjudication of any substantive rights, and where it appears that all legal and factual issues raised in the underlying District Court dispute were left unresolved following publication of the agency's general policy statement.

***Board of Regents v. Roth*, 408 U.S. 564 (1972)**

***Clouser v. Espy*, 42F.3d 1522, 1540 (9th Cir. 1994) *cert. denied*, ___U.S.___, 115 S. Ct. 2577**

5 U.S.C. 551 *et seq*.

5 U.S.C. 706

49 C.F.R. Part 376

STATEMENT OF THE CASE

On August 14, 1997, the Owner-Operator Independent Drivers Association, Inc., and four individually-named plaintiffs (collectively, "OOIDA") filed suit in the U.S. District Court for the Western District of Missouri against New Prime, Inc., d/b/a Prime, Inc., and Success Leasing, Inc. (collectively, "Prime"). In its action, OOIDA alleged that Prime's lease agreements and equipment rental-purchase contracts unlawfully require truck owner-operators to forfeit, and unlawfully permit Prime to possess and retain, escrow and other funds in violation of federal commercial transportation statutes and regulations set forth under the United States Code and Part 376 of the Code of Federal Regulations. See 49 U.S.C. 13301, 13501, 14102, and 14704; 49 C.F.R. 376.12(i) and (k).

On October 1, 1997, the District Court granted Prime's motion to dismiss OOIDA's complaint under Federal Rule of Civil Procedure 12(b)(6), invoking the doctrine of primary jurisdiction by concluding that the U.S. Department of Transportation (the "DOT") and its agency, the Federal Highway Administration (the "FHWA"), are better suited than the federal courts to adjudicate OOIDA's claims. The District Court did not indicate whether its dismissal of OOIDA's complaint was with or without prejudice, nor did the Court refer the matter to the DOT or the FHWA. OOIDA's appeal from the District Court's dismissal ruling, Case No. 98-1420, is pending before this Court and has been consolidated with the petitions for review filed by motor carriers Prime and Arctic Express, Inc. (Case Nos. 98-2942/3143 and 98-3478, respectively).

On March 5, 1998, while its appeal in Case No. 98-1420 was pending in this Court, OOIDA submitted a petition for declaratory order to the FHWA. *See generally* OOIDA Petition and Cover Letter to FHWA Administrator Kenneth R. Wykle, Jt. App. at 1. In its petition, OOIDA requested that the FHWA initiate a proceeding to exercise whatever authority it considers itself to have to provide the District Court with technical expertise or guidance on the issues identified in OOIDA's petition. *Id*., Jt. App. at 3. In the alternative, OOIDA asked the FHWA to declare that applicable law does not confer upon the FHWA primary jurisdiction over private commercial disputes involving the federal leasing regulations, and that such disputes should be resolved by the federal courts pursuant to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in various sections of Title 49 of the United States Code) (the "ICCTA"). *Id*.

On May 29, 1998, the FHWA issued a Notice in which it announced that it would not exercise jurisdiction over OOIDA's claims. See generally DOT, FHWA, Notice of Denial of Petition for Declaratory Order, 63 Fed. Reg. 31827 (June 10, 1998) (the "FHWA Notice"), Jt. App. at 115-121. The FHWA also published its Notice in the Federal Register "to provide guidance to courts, carriers, owner-operators and other interested parties" regarding the agency's policy in handling leasing disputes. FHWA Notice at 1, Jt. App. at 115. The FHWA initiated no administrative proceeding and adjudicated none of the issues raised in the OOIDA-Prime dispute.

The FHWA confirmed in its Notice that 49 U.S.C 14704 provides a private right of action by which "an injured party may seek both damages and injunctive relief against a motor carrier in federal district court to redress violations of [the federal leasing regulations]." *Id*. at 4-5, Jt. App. at 118-119. With regard to the matter of primary jurisdiction, the FHWA observed that:

> **...[S]pecial expertise is generally not needed to resolve disputes regarding the part 376 truth-in-leasing regulations. These regulations contain specific, straightforward, non-technical requirements which a court is ordinarily competent to construe. Consistent with Congressional intent underlying 49 U.S.C. 14704, the FHWA will generally decline to exercise its primary jurisdiction with regard to court referrals involving violations of part 376.**

***Id*. at 6, Jt. App. at 120**

On June 24, 1998, Prime submitted a motion for reconsideration of the FHWA Notice. Jt. App. at 122-142. On July 1, 1998, the American Trucking Associations, Inc. (the "ATA"), submitted to the FHWA its own petition for reconsideration. Jt. App. at 143-149. Both Prime and the ATA offered arguments that are substantively similar to those set forth in their briefs herein. On August 11, 1998, the FHWA denied Prime's and the ATA's respective requests for reconsideration (Jt. App. at 179 and at 180), and Prime thereupon filed its petition for review of the FHWA Notice with this Court.

Meanwhile, federally-authorized motor carrier Arctic Express, Inc., and its affiliated trucking equipment rental company, D&A Associated, Ltd. (collectively "Arctic"), defendants in a separate action by OOIDA in the U.S. District Court for the Southern District of Ohio, filed their own challenge to the FHWA Notice via petition to the Sixth Circuit Court of Appeals. On September 25, 1998, pursuant to 28 U.S.C. 2112(a)(1) and (5), the Sixth Circuit transferred Arctic's petition to this Court for consideration. (Unless otherwise indicated herein, OOIDA's references to arguments made by Prime and/or ATA apply to arguments made by Arctic as well.)

SUMMARY OF ARGUMENT

On June 10, 1998, the FHWA confirmed that "[u]nder 49 U.S.C. 14704, an injured party may seek both damages and injunctive relief against a motor vehicle carrier in federal district court to redress violations of part 376 [the federal truth-in-leasing regulations]." The FHWA then declined "to exercise whatever authority it considers itself to have to provide the District Court with technical expertise or guidance" on issued raised in OOIDA's litigation against Prime under the federal truth-in-leasing regulations. The FHWA denied OOIDA's request to provide the District Court with technical expertise and guidance "because [OOIDA's litigation] fails to raise issues not adequately addressed by existing legal precedent which require special expertise of the agency."

The FHWA published its denial of OOIDA's petition in the form of a general policy statement in the Federal Register in order "to provide guidance to courts, carriers, owner-operators and other interested parties regarding the agency general policy in handling such petitions, particularly those arising under the truth-in-leasing regulations." The FHWA also acknowledged that its decision was grounded upon a congressional directive that, following transfer of authority over motor carrier regulation from the Interstate Commerce Commission, the FHWA should generally not become involved in resolving disputes between private parties.

49 U.S.C. 14704(a)(1) and (2) set forth, in plain language, a motor carrier's liability for damages sustained as a result of a violation of the laws regulating motor carriers and the right to bring a civil action for injunctive relief for violations of laws regulating motor carriers.

Prime, Arctic and the ATA struggle to offer alternative interpretations to avoid private enforcement. Each interpretation offered, however, is at odds with the legislative history of the ICCTA, which states with pristine clarity that Section 14704 was intended to permit private parties to seek damages and injunctive relief to enforce "motor carrier leasing and lumping rules." *See ICC Termination Act of 1995: Conference Report*, 104th Cong., H.R. Report No. 104-422 (December 18 (legislative day December 15), 1995). The legislative history also recognizes that the "DOT [FHWA] should not

allocate scarce resources to resolving essentially private disputes." *See ICC Termination Act of 1995: Report of the Committee on Transportation and Infrastructure on H.R. 2539*, 104th Cong., H.R. Rep. No. 104-311 (November 6, 1995).

Petitioners and the ATA, understandably, prefer enforcement to rest with an agency operating with scarce resources rather than with aggrieved parties who have a direct, substantial and immediate interest in regulatory enforcement. Be that as it may, arguments raised by Petitioners and ATA which challenge the existence of a private right of action under Section 14704 do nothing more than point to contrived ambiguities in the legislative language. Assuming for the sake of argument that such ambiguities exist, this Court is obliged to follow a reasonable interpretation of the statute made by the agency charged with its enforcement. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Love v. Tippy*, 133 F.3d 1066 (8th Cir. 1998) *cert. denied*, ___U.S.___, 141 L.Ed.2d 743 (1998); *Miranda v. INS*, 139 F.3d 624 (8th Cir. 1997). In this case, the Court should defer to FHWA's interpretation of Section 14704, which is fully consistent with the words of the statute and its legislative history and is reasonable in all respects.

Having established that Section 14704 creates a private right of action for enforcement of the truth-in-leasing regulations, one must then ask whether the FHWA acted properly when it declined OOIDA's invitation to provide technical guidance to the Missouri Western District Court. The FHWA published its decision in the Federal Register as a general policy statement. In its decision, the FHWA specifically found that special expertise is generally not needed to resolve disputes under the truth-in-leasing regulations. The FHWA found that those regulations contain specific, straightforward, non-technical requirements which courts are ordinarily competent to construe. FHWA also took note of the strong congressional mandate discouraging the agency from using its scarce resources to resolve private disputes between motor carriers and owner-operators.

The FHWA's Notice represented a policy determinations which this Court should not disturb unless "so devoid of reason as to be arbitrary and capricious." *Intercity Transportation Co. v. United States*, 737 F.2d 103, 110 (D.C. Cir 1984). No one is better positioned than the FHWA to determine whether interpretation of the federal truth-in-leasing regulations requires the agency's own special technical expertise. No one is better positioned than the FHWA to decide whether its exercise of primary jurisdiction in a given case would be wise use of its scarce resources. This Court should not substitute its judgment for that of the FHWA on these policy determinations. In any event, courts simply should not intrude when an administrative agency refrains from deciding questions referred to it under the doctrine of primary jurisdiction. *Skaw v. United States*, 740 F.2d 932, 938 (D.C. Cir. 1984); *Atchison, Topeka & Santa Fe Ry. Co. v. Aircoach Transport Association*, 253 F.2d 877 (D.C. Cir. 1958).

Finally, Prime complains that it was denied notice and opportunity to be heard by the FHWA. However, the procedural safeguards of the Administrative Procedure Act apply only to adjudications, under 5 U.S.C. 554(d), and not to publication of general statements of policy, under 5 U.S.C. 553(b), at issue here. Both of Prime's contentions may be set aside on the basis of the fact that the FHWA's Notice did not constitute an adjudication of its legally protected rights. Instead, the FHWA simply refused to become involved i the resolution of the legal or factual issues raised by the OOIDA-Prime District Court litigation. Because no adjudication took place and no legally protected interests were addressed or altered in any way, the FHWA's decision neither violated the Administrative Procedure Act nor implicated any party's due process rights.

This court should accord deference to the FHWA's interpretation of 49 U.S.C. 1470(a)(1) and (2), and find that these provisions create a private right of action for damages and injunctive relief arising out of violations of federal laws regulating motor carriers including the federal truth-in-leasing regulations. Further, this Court should find that the FHWA's decision declining to become involved in the OOIDA-Prime dispute in federal court represented a reasonable exercise of its discretionary authority. Finally, this Court should find that the FHWA's decision not to exercise primary jurisdiction has eliminated the legal and factual predicate for the District Court's dismissal decision in Case No. 98-1420 on the grounds of primary jurisdiction. Accordingly, this case should be remanded to the District Court with instructions to vacate its dismissal and entertain OOIDA's complaint on the merits.

ARGUMENT

I. STANDARDS OF REVIEW

A. The FHWA's Interpretation of Federal Statute: *De Novo*

To the extent that the FHWA Notice sets forth interpretations of federal statutory provisions over which the agency has authority, review by this Court is *de novo*-subject to the deference to which the agency is entitled under *Chevron U.S.A, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See also *Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998) *cert. denied*,___U.S.___, 141 L.Ed.2d 743 (1998) *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1997).

B. The FHWA's Discretionary Determination Not to Exercise Primary Jurisdiction: Arbitrary and Capricious

The FHWA's decision not to exercise primary jurisdiction in this matter was discretionary and may have overturned only if found by this Court to be "so devoid of reason as to be arbitrary and capricious," or an abuse of discretion. Intercity Transportation Company v. United States, 737 F.2d 103, 110 (D.C. Cir. 1984).

C. Whether the FHWA's Issuance of Its Notice Denied Any Party's Right to Due Process of Law or Violated the Administrative Procedure Act: De Novo

The FHWA may be found by this Court, upon de novo review, to have violated the procedural safeguards of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (the "APA") only if the FHWA acted "without observance of procedure required by law" in issuing its notice. 5 U.S.C. 706(2)(D). Further, this Court may find, upon *de novo* review,

that the FHWA acted "contrary to constitutional right, privilege or immunity." and denied Prime, or any other party, due process of law only if the FHWA Notice affected a substantive liberty or property interest entitling Prime, or any other party, to constitutional protection. Id.; *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

II. THE FHWA'S INTERPRETATION OF THE ICCTA IS REASONABLE AND IS ENTITLED TO THIS COURT'S DEFERENCE

A. The Chevron Standard of Deference

In its Notice, the FHWA expressly found that the ICCTA creates a private right of action to enforce the federal motor carrier regulations set forth at 49 C.F.R. Part 376 (commonly referred to as the "truth-in-leasing regulations"):

> **The ICCTA expanded the rights and remedies of persons injured by carriers by providing for private enforcement of its provisions in court. Under 49 U.S.C. 14704, an injured party may seek both damages and injunctive relief against a motor carrier in federal district court to redress violations of part 376 [leasing regulations]. In discussing this provision, the House Transportation and Infrastructure Committee stated that DOT should not allocate its scarce resources to resolving essentially private disputes, and that the right of private enforcement "will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved - by the parties." H. Rep. No. 104-311, pp. 87-88.**

FHWA Notice at 4-5, Jt. App. at 118-119 (emphasis added).

It is axiomatic that where the words of a statute are plain and unambiguous, the statute controls. Where, however, a statute is open to more than one meaning, a reviewing court should defer to a reasonable interpretation made by the agency charged with the statute's enforcement, even where the court might have chosen a different interpretation. Chevron, 467 U.S. at 842-843. As this Court recently observed:

> **It is well-settled that "if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has 'left a gap for the agency to fill,' courts must defer to the agency's interpretation so long as it is 'a permissible construction of the statute.'" *Stinson* [*v. United States*], 508 U.S. [36,] at 44 [(1993)] (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)).**

***Love*, 13 F.3d at 1069. See also Miranda, 139, F.3d at 627 ("if an agency's interpretation is reasonable, we cannot replace it with our own").**

As shown below, the arguments of Prime, Arctic, and the ATA with regard to the ICCTA's private right of action lack merit and, at best, suggest only that Section 14704 contains the sorts of "ambiguities" and "gaps" contemplated by this Court in *Love*. FHWA's interpretation of this provision is reasonable and is completely consistent with the legislative history of the ICCTA. Accordingly, the FHWA's interpretation is entitled to deference by this Court.

B. The FHWA's Jurisdiction to Enforce the Federal Motor Carrier Truth-in-Leasing Regulations Is Neither Mandatory Nor Exclusive

Prime, Arctic, and the ATA contend that the FHWA's jurisdiction over the ICCTA is both exclusive and mandatory. ATA Brief at 6-7. If the FHWA's jurisdiction is exclusive, by definition, there is no room for private enforcement actions under ICCTA Section 14704. The ATA concludes there is no private enforcement under Section 14704 by erroneously reading "exclusivity" into Section 14701. OOIDA's analysis thus will begin with Section 14701, which provides in pertinent part as follows:

> **14701. General authority**
>
> **(a) INVESTIGATIONS. - The Secretary or the Board, as applicable, finds that a carrier or broker is violating this part, the Secretary of the Board, as applicable, shall take appropriate action to compel compliance with this part. . . .**
>
> **(b) COMPLAINTS. - A person, including a governmental authority, may file with the Secretary or Board, as applicable, a complaint about a violation of this part by a carrier providing, or broker for, transportation or service subject to jurisdiction under this part. . . . The complaint must state the facts that are the subject of the violation. The Secretary or Board, as applicable, may dismiss a complaint that it determines does not state reasonable grounds for investigation and action.**

49 U.S.C. 14701(a) and (b)

The exclusivity argument advanced by Prime and the ATA finds no support in Section 14701. Nothing in the plain language of the statute suggests that the DOT's jurisdiction is exclusive. Further, Section 14701 is silent with respect to enforcement action that may be undertaken pursuant to other provisions of the ICCTA. Congress could have mandated the exclusivity of the DOT's jurisdiction, but it enacted no such provision and none should be implied.

The question of whether the provisions of Section 14701(a) are "mandatory" under the circumstances contemplated by the statute is less clear. The statute doesn't say that the DOT "shall take appropriate action," but only *after* the DOT (1) *elects* to conduct an investigation and*then* only after the DOT (2) "finds that a carrier or broker is violating this part." 49 U.S.C. 14701(a). The DOT is not compelled to self-initiate an investigation or to make adverse findings that would require the DOT to "take appropriate action." The ATA's contention that the "shall take appropriate action" language

in Section 14701(a) somehow makes the Secretary's authority either mandatory or exclusive is based more on wishful thinking than on substance.

Thus, viewing the language of Section 1470(a) as a whole, it is difficult to see any mandatory responsibilities on the part of the DOT unless and until the agency conducts an investigation and finds a violation of the statute, particularly where the DOT has initiated a proceeding absent a complaint by an interested party. A stronger case can be made that the provisions of Section 14701 (b) are mandatory following the filing of a party's complaint with the DOT; that is, it seems doubtful that the Secretary would refuse to entertain a well-pleaded and well-documented complaint filed under Section 14701(b), at least where no private civil complaint is pending under Section 14704.

In sum, nothing in Section 14701 renders it the "exclusive' vehicle for addressing violations of the truth-in-leasing regulations. Moreover, Section 14701 "mandates" agency action only under conditions that have no bearing on the present case (*i.e.*, an investigation by the agency followed by an agency finding of a violation).

C. Section 14704 of the ICCTA Establishes a Private Right of Action by Which Private Parties May Enforce the Federal Truth-in-Leasing Regulations

Since Section 14701 is not exclusive, it cannot be interpreted as constraining the scope of Section 14704. Though not a model of clarity, the language of Section 14704, coupled with its legislative history, leaves no doubt that Congress created a private right of action for the enforcement of the federal truth-in-leasing regulations. The FHWA's interpretation of this provision is reasonable in all respects and is entitled to deference by this Court.

For convenience, OOIDA has prepared a side-by-side comparison of the ICCTA's Section 14704 and the statutory provision it replaced, Section 11705 of the former Interstate Commerce Act (the "ICA"). *See* Statutory Addendum at RADD.B.001. A comparison of Section 14704 and the former Section 11705 reveals that the new section creates rights and remedies that did not before exist and that go well beyond the narrow confines of Prime's and the ATA's interpretation of Section 14704.

1. The Statutory Language of Section 14704

Section 14704 of the ICCTA provides in pertinent part as follows:

> ***Rights and remedies of persons injured by carriers or brokers.***
>
> **(a) IN GENERAL.-**
>
> > **(1) . . .A person may bring a civil action for injunctive relief for violations of sections 14102 [giving rise to jurisdiction over motor carrier leasing matters] and 14103.**
> >
> > **(2) DAMAGES FOR VIOLATIONS.-A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 [49 U.S.C. 13501 *et seq*., giving rise to jurisdiction over motor carrier transportation matters generally]is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.**

49 U.S.C. 14704 (emphasis added).

Under the plain meaning of Section 14704, an aggrieved party is permitted to seek both damages (under Section 14704(a)(2)) and injunctive relief (under Section 14704(a)(1)) in federal court. Indeed, it would defy common sense to interpret one subheading of Section 14704 - Section 14704(a)(1) - as specifically providing for injunctive relief through the courts, while concurrently interpreting the companion subheading - Section 14704(a)(2) - as *not* permitting recovery of the damages for which Section 14704 renders a carrier or broker liable.

The ATA's assertion that Section 14704(a)(1) is limited to civil actions to enforce FHWA *orders* is simply wrong. While the first sentences of both Section 11705 and Section 14704 limit the private right of action to enforcement of administrative orders, Section 14704(a)(1) contains a second sentence not found in the prior law: "A person may bring a civil action for injunctive relief for violations of Sections 14102 and 14103." *Compare* Section 11705 *with* Section 14704. The language used by Congress in the second sentence is broad and contains none of the limiting language regarding orders set forth in Section 14704(a)(1)'s first sentence. Thus, nothing suggests that injunctive relief under Sections 14102 and 14103 is limited in any way to orders of the DOT.

Likewise, nothing in Section 14704(a)(2) limits the availability of *damages* to instances where the DOT has first issued an order. Subsection (a)(2) provides generally that a carrier or broker is "liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part." 49 U.S.C. 14704(a)(2). Clearly, Section 14704(a)(2) does not even suggest the requirement of an agency order as a prerequisite to a private action for damages.

Alternatively, even if the word "order" in the first sentence of Section 14704(a)(1) also modifies the private right of action for injunctive relief created by the second sentence, it is well-settled that the word "order" as commonly used under the Administrative Procedure Act has more expansive meaning than merely adjudicatory orders and includes rules and regulations; that is, the terms "order," "rule," and "regulation" often are determined to be interchangeable. The Sixth Circuit, for example, has held that "rules" and "regulations" are "orders." *See, e.g., Alltel Tennessee, Inc. v. Tennessee Public Service Commission,* 913 F.2d 305, 308 (6th Cir. 1990) ("an order resulting from a rulemaking proceeding [i.e., a regulation] can be an order for purposes of [47 U.S.C.] 401(b) [providing for actions to enforce orders of the FCC]. *See also City of Rochester v. Bond*, 603 F.2d 927, 933 (D.C. Cir 1979) ("The [APA] defines 'order' quite expansively"). Further, the Fifth Circuit has held that "regulations" and "orders" are "rules" under the APA's definition. *See U.S. Dept. of Labor v. Kast Metals Corp*., 744 F.2d 1145, 1151 (5th Cir. 1984) ("Since an agency act designed to implement law is by definition a rule, it follows that all regulations regarding the method of workplace inspections are rules"); *id*. at 1151

n.9 ("Rather than place such orders outside the scope of the APA's definition of a rule, we note that the APA does not exempt any form of agency action from falling under the general rubric of a 'rule'").

The test for whether a particular regulation, order, or rule is enforceable is not what the agency called the provision upon its issuance, but whether there is a sufficient administrative record resulting from the provision's promulgation to support a meaningful review by the court. *See Deutsche Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973)(holding that "[i]t is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone" as to what constitutes an "order"). See also Sima Products Corporation v. McLucas, 612 F.2d 309, 312 (7th Cir. 1980), *cert. denied*, 446 U.S. 908 (1980) (noting that "the term 'order' is broadly defined" in both the Federal Aviation Act and the Administrative Procedure Act, the court remarked that "[i]t is argued that the special review statute does not apply to the [agency]'s action because it is labeled a 'regulation,' rather than an 'order.' This [argument] is meritless because the term 'order,' [agency] actions which are the product of informal rulemaking. . .may be reviewed by courts of appeals, provid[ed] an adequate administrative record has been compiled by an agency") (citations omitted)).

As this Court held in *Northwest Airlines, Inc., v. Goldschmidt*, 645 F. 2d 1309, 1313-14 (8th Cir. 1981), the administrative record is sufficient to consider a regulation an order when it includes "the notice and request for comments published in the Federal Register, some of the comments received by the Secretary, various affidavits, the promulgated rule and its published explanation, and supplementary materials." Here, the federal courts have been provided with an extensive administrative record on which to base a meaningful consideration of the federal leasing regulations. Since the term "order" may have the same breadth and scope as the terms "rule" and "regulation," reference to the term "order" in Section 14704(a)(1) may be seen as referring to regulations promulgated by the DOT, including the truth-in-leasing regulations.

2. Cases Decided Under Former Section 11705 Do Not Support the Proposition That Current Section 14704(a)(2) Requires an Agency Order Prior to Enforcement of the Motor Carrier Leasing Regulations

The ATA argues that former Section 11705(b)(2), the precursor to Section 14704(a)(2), required the ICC's prior determination of a statutory violation as prerequisite to enforcement. it then argues that this requirement remains intact under Section 14704(a)(2), required the ICC's prior determination of a statutory violation as prerequisite to enforcement. It then argues that this requirement remains intact under Section 14704(a)(2). The ATA is wrong. This cases cited by the ATA do not support its position that all private enforcement actions under Section 11705(b)(2) required a prior "order" of the ICC.

In *Kraus v. Santa Fe Southern Corp*., 878 F.2d 1193 (9th Cir. 1988), cert. dismissed, 493 U.S. 1051 (1990), the plaintiff challenged the "unauthorized merger or acquisition of control [] over [a railroad] in violation...of the Interstate Commerce Act." *Id*. at 1195. The plaintiff sought the court's jurisdiction over this cause of action through Section 11705(b)(2). What the plaintiffs ignored in that case - and what Prime and the ATA ignore now - "is that the subchapter of the ICA relating to mergers specifically provide[d] that 'the authority of the Interstate Commerce Commission under this subchapter is exclusive.'" *Id*. at 1198 (emphasis added). Thus, because the ICC had exclusive jurisdiction over the underlying issue, the court could not find damages without some prior determination by the agency. This requirement did not stem from the private right of action provisions of Section 11705(b)(2) itself, but from the merger statute the plaintiff sought to enforce through the private right of action under Section 11705(b)(2). The same is not true with regard to the current Section 14704 and the leasing regulations. Unlike the situation in *Kraus v. Santa Fe Southern*, there are no separate statutory prerequisites to the exercise of jurisdiction over truth-in-leasing disputes under Section 14704.

Similarly, the outcome in *De la Fuente v. Stokley-Van Camp, Inc*., 514 F. Supp 68 (C.D. Ill. 1989) was dictated not by the former Section 11705(b)(2), but by Sections 11705 (b)(3) and (c)(2). Subsection (b)(3) provided that a common carrier was "liable for damages resulting from the imposition of rates of transportation or services the Commission [found] to be in violation of this subtitle." Subsection (c)(2) provided that a private party was permitted to bring a civil action to enforce liability found under subsection (b). *Id*. at 77-78. Thus, the claim in De la Fuente was not brought under Section 11705(b)(2)(which at that time did not even apply to motor carriers), and the holding in that case therefore does not support the conclusion that Section 11705(b)(2) was limited to the enforcement of ICC orders. Again, the plaintiff in De la Fuente could not proceed because of limitations found elsewhere in the statute, not because of limitations under Section 11705(b)(2).

In short, neither Prime, Arctic, nor the ATA has cited any authority and OOIDA is aware of none, holding that Section 11705(b)(2) provided a private right of action to enforce only orders by the Secretary or Board. In any event, the ICCTA *expanded* the scope of the private right of action to include private litigation involving motor carriers (in addition to rail and water borne carriers) without the slightest hint that Section 14704 should be limited to the enforcement of orders.

3. The Legislative History of the ICCTA Demonstrates that Congress Contemplated Resolution of Disputes under the Federal Motor Carrier Leasing Regulations in the Federal Courts

Congress has made its position on the private right of action unmistakably clear. In its report entitled ICC Termination Act of 1995: Report of the Committee on Transportation and Infrastructure on H.R. 2549, 104th Cong., H.R. Rep. No. 104-311 (November 6, 1995)(the "1995 House Report"), the House Committee on Transportation and Infrastructure emphasized its goal in enacting the private right of action - *i.e.*, alleviating the Executive Branch of its enforcement

burden, and providing a judicial forum for the adjudication of claims arising under the federal motor carrier leasing regulations:

> **The bill transfers responsibility for all the areas in which the ICC resolves disputes to the secretary [of the DOT] (except passenger intercarrier disputes). The Committee does not believe that DOT should allocate scarce resources to resolving these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution functions in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act. This change will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved - by the parties.**

1995 House Report, at 87-88 (emphasis added). ***See also*** **1995 House Report that 84 (under a heading entitled "Existing ICC functions that have been eliminated, deregulated or reformed." the Committee state that "Federal resolution of routine commercial disputes has been eliminated.")(emphasis added); 1995 House Report at 117 ("The Committee directs that upon transfer, DOT should not continue any dispute resolution functions regarding the ICC leasing rules, but rather only oversee the regulations") (emphasis added).**

Further, immediately prior to the passage of the ICCTA, the congressional Conference Committee undertook a direct comparison and evaluation of the versions of the ICCTA offered by the Senate and the House. In the Join Conference Report of the House and the Senate, the Conference Committee stated as follows:

> **RIGHTS AND REMEDIES**
>
> ***House bill***
>
> **Sec. 10474. . . . .This section provides for private enforcement of the provisions of the Motor Carrier Act in court. This expands the current law, which only permits complaints brought under the Act to be brought before the ICC. . . .This section also provides that complaints brought to enforce the motor carrierleasing and lumping rules may also seek injunctive relief.**
>
> ***Senate amendment***
>
> **Sec. 10474. . .incorporates from 49 U.S.C. 11705 the right of an injured person to bring a civil action to enforce an order of the Secretary or the Board under Part B. It would remove any requirement that an injured person bring the complaint to the agency first.**
>
> ***Conference substitute***
>
> **The Conference adopts the House provision. The ability to seek injunctive relief for motor carrier leasing and lumping violations is in addition to and doe snot in any way preclude the right to bring civil actions for damages for such violations.**

ICC Termination Act of 1995: Conference Report, 104th Cong., H.R. Rep. No. 104-422 (December 18 (legislative day, December 15), 1995) (emphases added).

As the Conference Report attests, both Houses of Congress had an opportunity to preserve the private right of action's limited applicability, but each chose instead to expand the enforcement right to private parties. Notably, the Conference Committee adopted the House version, which specifies that the ICCTA's private enforcement provisions apply to "complaints brought to enforce the motor carrier leasing and lumping rules." ***Id.*** **(emphasis added). Thus, the Conference Report removes any doubt as to the meaning of the final language adopted by Congress, as it reflects the conferees' understanding of the language that was presented to the two Houses for final passage.**

Moreover, Congress was not along in seeking to afford litigants a private right of action to enforce the motor carrier leasing regulations. The DOT, prior to the passage of the ICCTA, reported to Congress on the need for a judicial forum for parties injured by motor carriers' violations of the leasing regulations:

> **The leasing rules have no doubt provided protections to owner-operators in their dealings with regulated carriers. However, the cost of Federal enforcement of these rules has been significant. . . .There does not appear to be sufficient justification to continue these enforcement expenses. . . .Given the uneven bargaining power of owner-operators, the small dollar amount of their claims, and the unique nature of their operations, DOT recommends that. . . .the leasing rules be retained in their present form. In lieu of Federal enforcement, owner-operators will be given the right of private action to enforce them. . . .**

U.S. Dept. of Transportation, ***Report on the Functions of the Interstate Commerce Commission*****(July 1995)(the "1995 DOT Report") at 86 (emphasis added).**

4. <u>Any Ambiguity in Sections 14704(a)(1) and (2) Was Introduced Through a Drafting Error In Section 14704(c)</u>

As shown above, Sections 14704(a)(1) and (2), standing alone, establish private enforcement actions for damages and injunctive relief. Any ambiguity that may exist with respect to the operation of these provisions is easily resolved by reference to the ICCTA's legislative history. Since the legislative history is so strong on this subject, it is fair to ask why Congress did not use greater precision in spelling out what it obviously intended. The answer to this question lies in a drafting error in Section 14704(c) introduced during the final phase of the legislative process.

Section 14704(c) grants an aggrieved party an "election" to either "file a complaint with [the DOT]. . .under section 14701(b) or being a civil action under subsection (b) to enforce liability against a carrier." 49 U.S.C. 14704(c). But subsection (b) of Section 14704 now refers only to tariff overcharges and not to more broadly based private rights of action. The most sensible interpretation of Section 14704(c) was provided by the DOT itself in ***National Association of***

Freight Transportation Consultants, Inc. - Petition for Declaratory Order **(the "NAFTC Decision"), 61 Fed. Reg. 60140 (November 26, 1996). In that proceeding, the DOT observed and concluded as follows:**

> **We note an apparent technical error in [Section 14704]. Section 14704(c) authorizes a person to "bring a civil action under subsection (b). . .to enforce liability against a carrier or broker providing transportation or service subject to jurisdiction under chapter 135." As codified, subsection (b) refers only to tariff overcharges, while the provision allowing recovery of damages from carriers is contained in section 14704(a)(2) (as to which the statute does not expressly authorize a civil action). Both the House and the Senate bills (H.R. 2539 and S. 1396) that became the ICC Termination Act of 1995, however, placed the damages provision in subsection (b)(2), as to which the statute does authorize a civil action. Subsection (b)(2), as passed by both Houses, reads as follows:**
>
> > **A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.**
>
> **Thus, as enacted by Congress, section 14704(c)(1) authorized civil actions*both* for damages and for charges exceeding the tariff rate. Notwithstanding the fact that section 14704(b)(2) was misplaced [having been codified as section 14704(a)(2)], in our opinion, section 14704(c)(1) was intended to authorize a person to bring a civil action against a carrier or broker or broker for damages sustained by that person as a result of any act or omission of the carrier in violations of Part B, Subchapter IV, of Title 49.**

NAFTC Decision, 61 Fed. Reg. at 60141 (emphasis added). This technical error in the final version of ICCTA's drafting is unfortunate and opens the door for Prime and ATA to point to ambiguities in Section 14704(a)(1) and (2). The FHWA has resolved these ambiguities, however, with an interpretation that is both reasonable and entirely consistent with the ICCTA's legislative history. This Court should defer to that interpretation under *Chevron, Love,* and*Miranda.*

D. <u>The Private Right of Action Created under Section 14704 Extends Both to the ICCTA's Statutory Provisions and to the ICCTA's Implementing Regulations</u>

The ATA argues that even if a private right of action was created under Section 14704, that private right of action extends only to Sections 14102 and 14103 and not the implementing regulations found in Part 376. The ATA bases its argument on the fact that Section 14704(a)(1) refers to Sections 14102 and 14103 and not the regulations promulgated thereunder. The ATA's argument, however, draws an unprecedented distinction between the statute from which a remedy provision stems and the regulations promulgated under that statute. The ATA's position is unsupportable.

As a threshold matter, it is important to note that the ATA's argument applies *only* to the injunctive relief provision of Section 14704(a)(1), and *not* to the private right of action for damages under Section 14704(a)(2), which contains no references to specific statutory provisions. Thus, the private right of action for damages is in no way implicated in the ATA's argument.

In support of its distinction between actions for statutory violations and actions for violations of regulations, the ATA refers to the language of 49 U.S.C. 14702(a)(2), which authorizes the Secretary of the Board "to enforce this part, or a regulation or order of the Secretary or Board." The ATA argues that since Section 14702(a)(2) refers to enforcement of *both* the statute *and* the regulations and order promulgated under the statute - whereas Section 14704(a) does not - Congress must have intended to limit Section 14704(a) to statutory enforcement only. *See* ATA Brief at 9.

The common-sense response to the ATA's argument is that regulations adopted pursuant to statute have the force and effect of law and represent an extension of the statute itself. to say that statutory violations are actionable, while regulatory violations are not, effectively would render any regulatory scheme void. As a practical matter, the typical regulatory statute's text acts primarily as the vehicle through which functionally meaningful legal provisions - *i.e.,* the regulations - are effected. In effect, the regulations are but an extension of the statutes themselves; in their absence, the statutes are reduced to neutered authorizing provisions with no content and no methods of enforcement. Accordingly, reason requires that a provision for the enforcement of a statute necessarily carries with it the right to enforce the regulations promulgated pursuant to that statute. As the Third Circuit announced in *Angelsatro v. Prudential-Bache Securities, inc.,* 764 F.2d 939, 947 (3 Cir. 1985), *cert. denied* 474 U.S. 935 (1985):

> **Where the enabling statute authorizes an implied right of action, courts should permit private suits under agency rules within the scope of the enabling statute if doing so is not at variance with the purpose of the statute. As one commentator has stated, if Congress intended to permit private actions for violations of the statute, "it would be anomalous to preclude private parties from suing under the rules that impart meaning to the statute."**

***Angelas*tro, 764 F.2d at 947, citing Note, Private Causes of Action Under SEC Rule 14e-3, 51 Geo. Wash. L. Re. 20, 303 (1983). There is no reason for a different result where Congress, as in the present case, has provided for an express right of action 4.**

Further, the ICCTA's legislative history clearly indicates that Congress contemplated private party "complaints brought to enforce the motor carrier leasing and lumping rules." 1995 Conference Report, *supra*, at 18. That congressional intent reflects the DOT's recommendation to Congress that "the *leasing rules* be retained in their present form" and that "[i]n lieu of Federal enforcement, owner-operators will be given the right of private action to enforce them." 1995 DOT Report, *supra*, at 86. This legislative history reflects a studied understanding of the principle that regulations are extensions of statutes, and the authority to enforce a regulation grows naturally out of the authority to enforce the statute under which it is promulgated.

Moreover, courts have long held that the authority to bring private enforcement actions under laws includes the right to enforce regulations implementing those laws. For example, an abundance of authority supports the proposition that a litigant's rights under 42 U.S.C. 1983 to secure "rights, privileges and immunities secured by the Constitution and laws" includes the rights secured by regulations promulgated under such laws. *See Kessler v. Town of Niskayuna,*1991 U.S. Dist. LEXIS 18833 at *4-6 (N.D.N.Y. 1991) (holding that an FCC order is a regulation having sufficient force of law to constitute a "law" within the meaning of section 1983, and is therefore enforceable by private persons); *West Virginia University Hospitals, Inc. v. Casey,* 885 F.2d 11, 18 (3 Cir. 1989), *cert. denied*, 496 U.S. 936 (1990) ("With respect to the existence of the private right requirement, valid federal regulations as well as federal statutes may create rights enforceable under section 1983"); *Samuels v. District of Columbia,* 770 F.2d 184, 199 (D.C. Cir. 1985) ("At least where Congress directs regulatory action, we believe that the substantive federal regulations issued under Congress' mandate constitute 'laws' within the meaning of section 1983"). Instructively, the Supreme Court has explicitly confirmed that a section 1983 remedy is available to vindicate the rights secured by *all* "federal laws" - including regulations. In *Maine v. Thiboutot*, U.S. 1, 4 (1980), the Court stated:

> **The question before us is whether the phrase "and laws," as used in 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statue undoubtedly embraces respondents' claim that petitioners violated the Social Security Act [when they violated the regulations promulgated thereunder].**

The strength of the Section 1983 analogy to the ICCTA's expressly granted private right of action cannot be denied. The truth-in-leasing regulations clearly create individual rights which can be enforced through the ICCTA's private right of action in a fashion similar to the way in which Section 1983 permits private actions under its regulations.

Finally, the ATA's reliance on *Gebser v. Largo Vista Indep. Sch. Dist.*, ___U.S.___, 188 S. Ct. 1989, 1998 U.S. LEXIS 4173 (1998) is misplaced. The holding of *Gebser*, a Title IX case, is not nearly so broad as ATA would have this Court believe. The *Gebser* was dictated by the fact that, in contrast to the present case , the regulations at issue did *not* provide for the relief sought by the plaintiff.

> **E. <u>The ATA's Analysis of Sections 14102 and 13301, Giving Rise to the DOT's Authority to Issue the Leasing Regulations, Is Misleading and Erroneous</u>**

The ATA further attempts to emasculate the private right of action by claiming that Section 14704 does not apply specifically to the escrow provisions of the leasing regulations. ATA Brief at 14. In support of its argument, the ATA again cites the second sentence of Section 14704(a)(1)'s reference to "violations of Sections 14102 and 14103," and postulates that since (in the ATA's view) the escrow provisions are promulgated pursuant to the grant of rulemaking authority under 49 U.S.C. 13301, a private right of action under Section 14704 does not extend to the escrow provisions. Even a cursory evaluation of the ATA's argument reveals a number of glaring weaknesses.

First, as with its "statute versus regulation" argument, the ATA's escrow provision argument applies *only* to the injunctive relief provision of Section 14704(a)(1), and *not* to the *damages*provision of Section 14704(a)(2). Thus, the ATA does not, and cannot, challenge a party's right to bring an action for damages based on a violation of the escrow provisions of the leasing regulations.

Further, the ATA fails to acknowledge that the authorizing language set forth in the leasing regulations themselves specifically cites Section 14102, as well as Section 13301, as the authority "applicable to [the] entire part." 49 C.F.R. 376.1 ("Applicability") (emphasis added). Such clear language leaves no doubt that Section 14102 was the DOT's statutory source for Part 376 of the leasing regulations, and that the private right of action under Section 14704 extends directly to the escrow provisions at issue in OOIDA's disputes with Prime and Arctic.

Moreover, the ATA's assertion that *Global Van Lines, Inc. v. ICC*, 627 F.2d 546 (D.C. Cir. 1980) holds that the sole legal authority for promulgation of the Part 376 truth-in-leasing regulations was the predecessor of 49 U.S.C. 13301 is entirely without merit. The core problem with the ATA's analysis is its assumption that the Part 376 truth-in-leasing regulations were upheld*solely* on the basis of the predecessor to Section 13301, a general statutory provision that states that "[t]he Secretary may prescribe regulations in carrying out this part." *See* 49 U.S.C. 1330(a).

A faithful reading of *Global Van Lines*, however, leaves no doubt that the ICC's authority to promulgate the truth-in-leasing rules was based upon the agency's exceptionally broad authorityto regulate the interstate trucking industry, and not on the specific housekeeping provision authorizing the promulgation of regulations generally, now set forth in Section 13301:

> **The seminal case on the [former ICC]'s authority to regulate leasing activities is *American Trucking Associations v. United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953). . . .[The leasing] rules were challenged on the ground that the [Interstate Commerce Act] did not contain any express delegation of power to regulate leasing practices, and that such power could not implied from the separate provisions of the Act granting regulatory authority. Conceding the absence of express authority in the Act, the Supreme Court nevertheless rejected this attack, stating that "Our function. . .does not stop with a section-by-section search for the phrase 'regulation of leasing practices' among the literal words of the statutory provisions." *Id.* at 309, 73 S.Ct. at 314. The Court took the position that "the promulgation of these rules for authorized carriers falls within the Commission's power, despite the absence of specific reference to leasing practices in the Act." *Id.* at 312, 73 S.Ct. at 315. In reaching this holding, the Court looked to the Commission's general regulatory authority, concluding that since the aim of the rules was to promote "the maintenance of sound transportation services" and to prevent conditions which**

may 'frustrate the success of the regulation undertaken by Congress," the Commission's action was within its rulemaking power, which is "coterminous with the scope of agency regulation itself." *Id.* at 310, 311, 73 S.Ct. at 315.

****

Like the rules approved in *American Trucking*, the purpose of the present regulations "is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." *American Trucking*, 344 U.S. at 310, 73 S.Ct. at 314. As such, they are within the scope of the Commission's authority and, if rationally supported, must be upheld. *United States v. Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749, 92 S.Ct. 1941, 1946 32 L. Ed. 2d 453 (1972).

***Global Van Lines,* 627 F.2d at 550-551 (emphasis added).**

Indeed, the *Global Van Lines* court stated expressly that the authority of the ICC to regulate did not depend upon any specific statutory provision:

> **Petitioners' restrictive interpretation of the 1956 amendment is incompatible with the overall structure of the Act, the legislative history surrounding the amendment, and the holding in American Trucking. The section of the Act dealing with the general powers of the Commission, 49 U.S.C. 10321(a), provides that "Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." This is entirely consistent with the holding of *American Trucking* that the Commission can regulate even in the absence of express statutory authority, so long as the regulations are reasonably designed to carry out the overall purposes of the Act. Absent any express statutory limitation, the Commission's authority is not restricted to only the powers enumerated in 11107.**

***Id.* at 551-52.**

Thus, the Court in *Global Van Lines* upheld the promulgation of the truth-in-leasing regulations on the authority of the ICC to regulate the interstate trucking industry for the purpose of the "maintenance of sound transportation services" and to prevent frustration of the regulation undertaken by Congress. The Atlas suggestion that the truth-in-leasing regulations were promulgated solely on the basis of the housekeeping provision authorizing the ICC to promulgate regulations seriously distorts the legal framework for motor carrier regulation. Accordingly, the absence of any reference to Section 13301 in Section 14704(a)(1) does not diminish in any respect the private right of action created thereunder.

Generally, the ATA appears to consider Sections 14102 and 13301 somehow to be mutually exclusive. Both sections, however, afford the DOT broad authority to carry out Congress's mandate under the ICCTA. Section 13301 states that "[e]numeration of a power of the [DOT] in this part does not exclude another power of the [DOT] may have in carrying out this part" (49 U.S.C. 13301), and therefore in no way limits the DOT's ability to act under other provisions of the ICCTA. For its own part, Section 14102 provides as follows:

> ***Leased Motor Vehicles***
>
> **(a) GENERAL AUTHORITY OF THE [DOT]. - The [DOT] may require a motor carrier providing transportation subject to jurisdiction under. . .chapter 135 that uses motor vehicles not owned by it to transport property under an arrangement with another party to-**
>
> > **(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;**
> >
> > **(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the [DOT] on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.**

49 U.S.C. 14102 (emphasis added).

Contrary to the ATA's characterization of Section 14102 as *only* "a requirement for lessee (carrier) control and responsibility" (*see* ATA Brief at 17), the statute clearly empowers the DOT with broad authority to act on a wide range of leasing-related issues. Thus, notwithstanding the ATA's attempts to pigeonhole the leasing regulations, Section 14102, provides ample authorizing language under which the DOT could have chosen - and obviously has chosen - to prescribe the escrow-related regulations set fort under 49 C.F.R. Part 376. Ultimately, rather than limiting one another, Sections 14102 and 13301 work in conjunction with and complement one another.

F. <u>Even under an Implied Test, Section 14704 Provides for a Private Right of Action</u>

The ATA's assertion that the FHWA overstepped its jurisdictional bounds by recognizing an "implied" right of action (see ATA Brief at 1 0) is premised on an inaccurate reading of the FI-FHWA's Notice. At no point in its Notice does the FHWA so much as hint that the ICCTA's private right of action is implied. Rather, as the FHWA explicitly acknowledges in its Notice, Section 14704's right of action is express and is the product of Congress's clearly stated intention to afford private parties a means of resolving leasing regulation-based disputes the way that all other commercial disputes are resolved-by the parties."' FHWA Notice at 5, Jt. App. at 119 (citing H. Rep. No. 104-31 1, pp. 87-88).

In fact, Congress's pronouncements regarding its intentions would be the determining factor even if, for some reason, this Court wished to apply the implied right of action analysis established by the Supreme Court in Co,t v. Ash, 422 U.S. 66 (1975). Under Cot and its progeny, the ultimate issue is whether Congress intended to create a private cause of action."' Kaahalios . National Fed'n of Fed. Employees, 489 U.S. 527, 532 (1989) (citing California v. Sierra Club, 451 U.S. 287, 293

(1981)). Thus, given Congress's clear-stated intentions in passing the ICCTA-and putting aside the fact that the right of action is expressly set forth in the ICCTA's plain language recognition of an "implied" right of action under the ICCTA would be eminently reasonable.

G. Conclusion Regarding the ICCTA's Private Right of Action

Prime, Arctic, and the ATA misread the applicable law in arguing that Section 14701 of the ICCTA vests with the FHWA "mandatory and exclusive" jurisdiction over enforcement of the truth-in-leasing regulations. The words chosen by Congress to amend the language now codified in the 29

ICCTA's Section 14704 evince Congress's express intention to provide parties, with the right to pursue private remedies for both damages and injunctive relief in federal court. At most, the arguments raised by Prime, Arctic, and the ATA point to potential ambiguities in Section 14704. The FHWA has resolved those ambiguities by interpreting the statute in a fashion that is completely consistent with obvious legislative intent. Since the FHWA's interpretation is entirely reasonable, this Court must defer to that interpretation under the Supreme Court's ruling in Chevron.

III. THE FHWA'S DECISION TO DECLINE TO EXERCISE PRIMARY JURISDICTION OVER A DISPUTE INVOLVING THE FEDERAL LEASING REGULATIONS REPRESENTS A PROPER EXERCISE OF ITS DISCRETION

A. The FHWA's Determination Not to Exercise Discretionary Jurisdiction in This Case Was Reasonable

Nothing requires an agency to accept jurisdiction over a matter simply because the agency may have concurrent jurisdiction with the courts to resolve issues arising under a statute. In Atchison, Topeka & Santa Fe Ry. Co. . Aircoach Transport Association, 253 F.2d 877 (D.C. Cir. 1958), cited by the FHWA in its Notice, the court determined that, even where the questions at issue (involving the rate practices of commercial passenger carriers) were "appropriate for [ICC] consideration" and the court resolved to defer to the ICC on certain issues, the ICC maintained license to "disclaim jurisdiction, or for some other reason [to] refrain from deciding these questions." Atchison, 253 F.2d at 885-886 (emphasis added). Further, in citing Atchison for precisely the same proposition cited above by OOIDA, the District of Columbia Circuit more recently has held that:

> **We do not think that the doctrine of primary jurisdiction requires a court to refer a question to an agency where, as here, the agency has declined to decide the precise question on a prior reference by the court. Atchison, Topeka & Santa Fe Ry. Co. -,. Aircoach Transport Association, et al, 102 U.S. App. D.C. 355, 253 F.2d 877, 886253 F.2d 877 (D.C. Cir. 1958). As the Supreme Court has observed, "the doctrine of primary jurisdiction is not a doctrine of futility." [citation omitted].**

***Skaw v. United States*, 740 F.2d 932, 938 (D.C. Cir. 1984), cert. denied, 488 U.S. 854 (1988) (emphasis added).**

Also illustrative is *Intercity Transportation Company*, cited supra, where the appellant challenged the ICC's refusal-based on the ground that it could not commit scarce resources to a private commercial dispute-to initiate a declaratory order proceeding under Section 554(e) of the Administrative Procedure Act, which commits the issuance of a declaratory order to the agency's discretion. In sustaining the ICC's decision to decline jurisdiction over the matter, the D.C. Circuit noted that, in reviewing this type of agency action, the court's role was not to evaluate the wisdom of the agency's policy judgment, "but only to guard against arbitrary and capricious decision making." *Intercity Transportation Company*, 737 F.2d at 108. The Court further explained that:

> **[W]e may not question the wisdom of an agency's judgment in matters of administrative policy, especially when that judgment pertains to the allocation of agency resources and efficient operating procedures. [citations omitted]. Whether classification disputes are best resolved through agency complaints, court referrals, or declaratory orders is one such judgment. Accordingly, our review is limited to determining whether the Commission's decision was so devoid of reason as to be arbitrary and capricious.**

***Id*. at 110, n.13.**

Like the ICC in Intercity, the FHWA here has sought to honor Congress's goal of preventing the allocation of limited agency resources to resolution of what are essentially private disputes. The FHWA responded directly to Congress's intention that private parties exercise their right under Section 14704 to remedy violations of the leasing regulations through federal court actions. Since the FHWA's determination to decline jurisdiction in this case was completely rational and in accord with congressional intent, this Court should not disturb the agency's policy judgment.

B. The FHWA's Exercise of Its Jurisdiction Is Not Appropriate in This Case

1 . An Agency's Exercise of Jurisdiction Is Inappropriate Where Federal Statute Assigns Dispute Resolution Functions to the Federal Courts

The applicability of the doctrine of primary jurisdiction is determined by Congress's intent in adopting a statute as determined from the statute's language, structure, purpose, and legislative history. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994). As this Court has declared, "[i]t is inappropriate to invoke the doctrine of primary jurisdiction in a case in which Congress, by statute, has decided that the court should consider the issue in the first instance." United States v. McDonnell Douglas Cop., 751 F.2d 220, 224 (8' Cir. 1984). See also ICC v. Chicago, Rock Island & Pacific Railroad Company, 501 F.2d 908, 913 (8' Cir. 1974) ("absent the express provision of the statute requiring the district court to exercise its jurisdiction, the rationale of primary jurisdiction has no application to the facts of the th[e] case"); United States v. General Dynamics Cop., 828 F.2d 1356, 1362 (9' Cir. 1987) ("It is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine").

As discussed above, Section 14704 of the ICCTA expressly provides that parties are entitled to seek redress for violations of the federal motor carrier leasing regulations in federal court.

Consequently, an exercise of jurisdiction by the FHWA in the present case would run counter to Congress's intention in passing the ICCTA.

2. The Doctrine of Primary Is Not Applicable Where, as Here, There Are No Issues Whose Resolution Requires an Agency's Technical Expertise

Putting aside OOIDA's prerogative to seek adjudication of its claims in federal court, the FHWA's involvement in the OOIDA-Prime dispute is not necessary because resolution of the dispute does not require the agency's technical guidance. As the Supreme Court has stated:

> **The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency [citations omitted], particularly when the issue involves technical questions of fact uniquely within the expertise and experience of the agency such as matters turning on an assessment of industry conditions [citation omitted]. In this case, however, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the [agency]. Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or [agency] regulation applicable to disclosure practices. Petitioner also makes no challenge . . . to limitations on common-law damages imposed through exculpatory clauses included in a tariff... Referral of the misrepresentation issue to the [agency] cannot be justified by the interest in informing the court's ultimate decision with 'expert and specialized knowledge [citation omitted] of the [agency].**

Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304-305 (1976) (emphasis added). See also Reiter v. Cooper, 507 U.S. 258, 268 (1993) (primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency").

It logically follows that the doctrine of primary jurisdiction should not be invoked where the issues at hand "are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of th[e] case." Nader, 426 U.S. at 305. This Court has acknowledged that the doctrine of primary jurisdiction is to be applied rarely and only under specific circumstances: "The doctrine . . . 'should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution."' McDonnell Douglas Cop., 751 F.2d at 224 (citing Locust Cartage Co. Transamerican Freight Lines, Inc., 430 F.2d 334, at 340, n.5 (1st Cir. 1970) (emphasis added).

OOIDA's cases against Prime and Arctic do not require the court to make technical determinations akin to the "validity of [an agency] rate or practice" or an "assessment of industry conditions." See Nader', 426 U.S. at 304. Rather, OOIDA's claims merely turn on whether motor carriers Prime and Arctic took money from owner-operators and then failed to give that money back. Such matters do not require the "special competence" or "unique technical expertise" of the DOT, and are well within the "conventional experience" and competence of the federal courts. As the FHWA itself states in its Notice, "special expertise is generally not needed to resolve disputes regarding the Part 376 truth-in-leasing regulations" as "[t]hese regulations contain specific, straightforward, non-technical requirements which a court is ordinarily competent to construe." FHWA Notice at 6, Jt. App. at 120.

3. The Doctrine of Primary Jurisdiction Is Not Applicable Where Relevant Agency Precedent Makes Primary Jurisdiction Unnecessary. Here, the DOT Already Has Ruled that the Federal Leasing Regulations Apply to the Circumstances Implicated by OOIDA's Claims

It is unnecessary to invoke primary jurisdiction where, as here, the "agency's position is sufficiently clear." Columbia Gas Transmission Corp. Allied Chemical Cop., 652 F.2d 503, 520 (5' Cir. 1981); see also Shew v. . Southland Corp. 370 F.2d 376, 379-80 (5th Cir. 1966) (where the former ICC's position regarding motor carrier regulatory issues was "sufficiently clear," the "answer [to the question in dispute] should properly be determined by the judicial process"). In this instance, the DOT already has provided precedent on the key issues implicated by OOIDA's claims against 34 motor carriers Prime and Arctic-i.e.,whether the sorts of funds collected and retained by Prime and Arctic qualify as regulated escrow funds, and under what circumstances such funds must be returned.

As discussed at length in OOIDA's appellate brief in consolidated Case No. 98-1420, the former ICC ruled in its 1993 Dart decision that a motor carrier "should treat money remitted to [its affiliated equipment company's] maintenance reserve fund the same way it would if the money were remitted to Dart's own fund." OPA Information Bulletin No. 93-103, No. MC-C-30192, *Dart Transit Company -Petition for Declaratory Order*, 9 I.C.C.2d 701, 710, 1993 MCC LEXIS 84, 118 (June 28, 1993) (emphasis added). The FHWA confirmed Dart's relevance to escrow retention in its Notice, stating that "the [former] ICC fully addressed the applicability of the [leasing] regulations to [carrier-affiliated equipment leasing companies] in the *Dart* decision." FHWA Notice at 7, Jt. App. at 121.

IV. THE FHWA'S NOTICE NEITHER VIOLATED THE ADMINISTRATIVE PROCEDURE ACT NOR DEPRIVED PRIME OF DUE PROCESS OF LAW

A. OOIDA's Petition to the FHWA for a Declaratory Order

The District Court's dismissal of OOIDA's complaint created a number of uncertainties. First, the District Court did not state whether its dismissal was with or without prejudice. Further, the District Court failed to follow the proper procedure under the primary jurisdiction doctrine, which requires the court to stay court proceedings while the parties

pursue whatever administrative remedies are available to them through agency action. See Reiter, 507 U.S. at 268 (the primary jurisdiction doctrine "requires the court to enable 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling").

As discussed above, a party challenging violations of the federal truth-in-leasing regulations may elect either to file a complaint with the FHWA under 49 U.S.C. 14701(b), or to file suit in federal court pursuant to the private right of action under 49 U.S.C. 14704. In this case, having 35 already elected to pursue its remedy in Court under Section 14704, OOIDA had no interest in seeking an adjudication of its dispute with Prime at the FHWA. OOIDA also was well aware of the fact that Congress created the private of right of action in part to get the DOT out of the business of resolving commercial disputes between private parties. Although it appears that the FHWA had the legal authority to exercise jurisdiction over the OOIDA-Prime dispute, it is by no means clear that an exercise of such authority would have represented a sound exercise of the agency's discretion once the matter had been presented to a federal court.

Under the circumstances, OOIDA decided to invite the agency to exercise whatever jurisdiction it felt was appropriate. OOIDA's letter of transmittal to the FHWA underscores the fact that OOIDA was not seeking the agency's adjudication of the OOIDA-Prime dispute:

> **[OOIDA has] appealed the Western District's dismissal ruling to the Eighth Circuit Court of Appeals. Pending that appeal, however, Petitioners here have determined it prudent, and in the interests of justice, to submit the present Petition to the FHWA. This petition does not seek the FHWA's adjudication of the legal and factual issues raised in the District Court litigation. We do, however, ask the agency to exercise whatever authority it considers itself to have to provide the District Court with technical expertise or guidance on the issues identified in the Petition.**

OOIDA Cover Letter to FHWA Administrator Kenneth R. Wykle at 3, Jt. App. at 3.

The FHWA announced that it would provide no technical expertise or guidance to the District Court in Missouri or, for that matter, on most disputes brought to federal court under the federal truth-in-leasing regulations. See generally, FHWA Notice, Jt. App. at 115-121. The FHWA's hands-off approach left the parties to the federal court litigation in exactly the sane position they were in before OOIDA filed its petition for a declaratory order. The only change resulting from the FHWA's Notice was that "courts, carriers, owner-operators and other interested parties" were informed regarding "the agency's general policy in handling such petitions." FHWA Notice at 1, Jt. App. at II 5. As such, the FHWA's Notice amounts to nothing more than a general 36 policy statement which does not implicate Prime's, or any other party's, rights under either the Administrative Procedure Act or the Fifth Amendment's Due Process Clause.

B. The FHWA Issuance of Its Notice Does Not Violate the Administrative Procedure Act

1. The FHA's Notice Is Not an Adjudication within the Meaning of the APA

The rights of parties to notice and the opportunity to participate in agency adjudications are established by the Administrative Procedure Act (the "APA") at 5 U.S.C. 554(b) and (c). The FHWA's Notice, however, falls within a crucial exemption from these procedural requirements-an exemption conveniently ignored by Prime.

The plain language of Section 554(a) makes clear that the procedural requirements of the A.PA apply only to cases involving an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." The FHWA did not conduct an adjudication of any kind-let alone one "required by statute to be determined on the record." 5 U.S.C. 554(a).' To the contrary, OOIDA sought nothing more than a statement by the FHWA-for the guidance of the Missouri Western District Court-addressing the legal issues implicated in the dispute between OOIDA and Prime. Even if the FHWA had responded affirmatively to OOIDA's request, convened a proceeding (to which Prime would unquestionably have been made a party), and provided the guidance sought by OOIDA, the underlying controversy eventually would have been referred back to the District Court or final adjudication (see Reiter, supra, 507 U.S. at 268-9, n.3). Consequently, the OOIDA-Prime dispute would remain "a matter subject to a subsequent trial of the law and facts de novo in a court" within the meaning of the express exemption set forth in 5 U.S.C. 554(a)(1).

In seeking to transform the FHWA Notice into an "adjudication," Prime makes much of the fact that OOIDA set forth in its petition to the FHWA a brief description of the nature of its dispute with Prime. Prime speculates that "the [FHWA] clearly considered the facts presented by OOIDA before ruling that the agency would not exercise its primary jurisdiction to resolve the dispute between OOIDA and Prime" and "relied on these 'facts' when it refused to exercise its primary jurisdiction because the 'special expertise' of the agency was not needed." Prime Brief at 10, 12. Prime's argument ignores the fact that the FHWA's decision to deny OOIDA's petition for a declaratory order was not in any sense based upon the specific facts of OOIDA's dispute with Prime. The FHWA issued a general policy statement for the guidance of "courts, carriers, owner-operators and other interested parties," and emphasized that "[t]his policy applies to all petitions for declaratory orders." FHWA Notice at 1, Jt. App. at II 5 (emphasis added). The general nature of the FHWA's Notice makes it quite clear that the FHWA's policy statement was not based upon case specific facts. Prime has not and cannot show that it would have submitted to the FHWA facts that would have compelled a result different from the policy statement announced by the FHWA.

The plain fact of the matter is that the FHWA neither initiated a proceeding nor addressed the underlying merits of the controversy raised in the OOIDA-Prime dispute. Thus, nothing the FHWA did could serve as a basis for a claim that Prime's procedural rights, applicable only in adjudicatory3O% proceedings, were violated.

2. The FHWA's Notice Constitutes a General Policy Statement Exempt From the Notice and Comment Requirements of the Administrative Procedure Act

While the APA very carefully sets forth the sorts of agency actions to which the statute does apply, it also expressly delineates the sorts of actions to which it does not apply. Specifically, at 5 U.S.C. 553(b), the APA sets forth the requirements for notice and comment in agency proceedings, in pertinent part, as follows:

> **Except when notice or hearing is required by statute, this subsection does not apply-**
>
> > **(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice ....**

5 U.S.C. 553(b) (emphasis added).

Everything about the FHWA Notice-"[t]his policy applies to all petitions for declaratory orders (FHWA Notice at 1, Jt. App. at 115)-confirms that it is the sort of general policy statement that falls squarely within the Section 553(b)(A) exemption from the notice and comment provisions of the APA. The FHWA's Notice altered no substantive or procedural rights of any specific parties. More important, the FHWA chose to publish its denial in the Federal Register to provide guidance to courts and other interested parties. As such, the FHWA's Notice constitutes a general policy statement that is exempt from the notice and comment provisions of the APA. The FHWA's policy determination must be respected by this Court unless it is "so devoid of reason as to be arbitrary ad capricious." Intercity Transportation Company, 737 F.2d at 110.

C. <u>The FHWA's Notice Does Not Deprive Prime of Due Process of Law</u>

In evaluating a party's claim that its due process rights have been violated, the threshold question to be addressed by the Court is whether a liberty or property interest exists that entitles an individual to due process. Roth, 408 U.S. at 569. In order to be characterized as "property" for due process purposes and to qualify for constitutional protection, such a liberty or property interest must have its source in positive law-i.e., state common law, a statute, or a contract. Closer . Espy, 42 F.3d 1522, 1540 (9th Cir. 1994), cert. denied, _ U.S. _, 115 S.Ct. 2577 (1995).

In this instance, Prime insists that the FHWA Notice constituted an ex prate adjudication depriving it of notice and an opportunity to comment. As noted above, however, the FHWA Notice is not an adjudication or any other type of proceeding for which notice is required under the APA. In issuing its policy statement, the FHWA did not address the underlying controversy in the OOIDA-Prime dispute. That dispute remains unresolved and subject to a full adjudication in federal court. Indeed, the FHWA's policy statement is not binding, in the sense of a holding or a ruling, on any particular parties to any particular legal dispute, and it is hardly the last word on the issues underlying the OOIDA-Prime dispute. While the FHWA's Notice may have the effect of shifting the adjudication of OOIDA's claims against Prime (and any similar disputes between owner operators and federally-authorized motor carriers) back to federal court, it cannot be characterized as an adjudication of Prime's-or any other party's-rights. Since no substantive rights were determined by the FHWA in its Notice, no property interest protected by the Fifth Amendment's Due Process Clause was implicated or altered by the agency.

V. <u>CONCLUSION</u>

In light of the FHWA's reasonable decision not to exercise jurisdiction over OOIDA's claims under the federal leasing regulations, this Court should:

1. **hold that the ICCTA affords interested parties a private right of action by which to enforce the federal leasing regulations;**
2. **deny the petitions for review filed with this Court by Prime and Arctic;**
3. **in consolidated Case No 98-1420, reverse the decision of the U.S. District Court for the Western District of Missouri; and**
4. **remand consolidated Case No. 98-1420 to the District Court with instructions to vacate its order of dismissal and to permit a full adjudication on the merits of OOIDA's claims.**

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CERTIFICATE OF SERVICE

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STATUTORY ADDENDUM

Explanatory Note: Part A of this Statutory Addendum contains the text of cited statutory sections, as downloaded from the LEXIS database. No changes have been made to the wording of the text of these sections, but LEXIS history, cross-references, and annotation sections have been deleted for the sake of brevity, and formatting has been changed. Part B of this Statutory Addendum contains a side-by-side comparison of relevant sections from the former ICA and the current ICCTA. The text is downloaded from the LEXIS database, and the wording of the text has not been changed. However, the order of the subsections in section 1 1705 of the ICA has been switched, where noted with a bold bracketed section number, to facilitate comparison to Section 14704 of the ICCTA. This bold bracketed section number is the only parenthetical added in the preparation of the side-by-side comparison; any other parenthetical as may exist was added by LEXIS.

STATUTORY ADDENDUM - PART A

TITLE 49. TRANSPORTATION SUBTITLE IV. INTERSTATE COMMERCE CHAPTER 11 7. ENFORCEMENT: INVESTIGATIONS, RIGHTS, AND REMEDIES 49 USCS 11 701 (1994)

II 70 1. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker or freight forwarder is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. If the Commission finds that a foreign motor carrier or foreign motor private carrier is violating section 10530 of this title, the Commission shall take appropriate action to compel compliance with such section. The Commission may take that action only after giving the carrier, broker or freight forwarder notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the Jurisdiction of the Commission under this subtitle or a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title, or freight forwarder. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title *[49 USCS 10501* et seq.] because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section related to a rail carrier is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

TITLE 49. TRANSPORTATION SUBTITLE IV. INTERSTATE COMMERCE CHAPTER 11 7. ENFORCEMENT: INVESTIGATIONS, RIGHTS, AND REMEDIES 49 USCS 11702 (1994)

II 702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action--

(1) to enjoin a rail carrier from violating section 10901--10907 or 10933 of this title *[49 USCS* 10901--10907, or 10933], or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title *[49 USCS 10527 or* 10930 or11109 or11111 or 11323], or subchapter III of chapter113 of this title*(49 USCS 11341* et seq.] and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money, when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title *[49 USCS 10501* et seq.];

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or pen-nit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter 11 of chapter 105 of this title *[49 USCS 10521* et seq.] or by a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title; to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter HI of chapter 105 of this title *[49 USCS 10541* et seq.]; and

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title *[49 USCS 10561* et seq.].

(b) In a civil action under subsection (a)(4) of this section--

(1) trial is in the judicial district in which the motor carrier, foreign motor carrier (as defined under section 10530(a)), foreign motor private carrier (as defined under section 10530(a)), or broker

(2) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(3) a person participating with a carrier or broker in a violation may be joined in the civil action without regard to the residence of the person.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE COMMERCE
CHAPTER 11 7. ENFORCEMENT: INVESTIGATIONS, RIGHTS, AND REMEDIES
49 USCS 11 705 (1994)

I 1 705. Rights and remedies of persons injured by certain carriers

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter TV of chapter 107 of this title or the applicable freight forwarder rate, as the case may be.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *(49 USCS 10501* et seq: or 10541 et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) A person may file a complaint with the Commission under section II 701 (b) of this title *[49 USCS I1* 701 (b)] or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 10501* et seq. or 10541 et seq.]. A person may begin a proceeding under section 10704 or 10705 of this title *[49 USCS 10704* or 10705] to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section I 1 701 (b) of this title *[49 USCS* I *1* 701 (b)].

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 10501* et seq. or 10541 et seq.] to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d) (1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation subject to he jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 1 0501* et seq. or 10541 et seq.], the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff

resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier runs, or (D) if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

TITLE 49. TRANSPORTATION

SUBTITLE IV. INTERSTATE TRANSPORTATION

PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS

CHAPTER 133. ADMINISTRATIVE PROVISIONS

49 USCS 13301 (1998)

13301. Powers

(a) General powers of Secretary. Except as otherwise specified, the Secretary shall carry out this part. Enumeration of a power of the Secretary in this part does not exclude another power the Secretary may have in carrying out this part. The Secretary may prescribe regulations in carrying out this part.

(b) Obtaining information. The Secretary may obtain from carriers providing, and brokers for, transportation and service subject to this part, and from persons controlling, controlled by, or under common control with those carriers or brokers to the extent that the business of that person is related to the management of the business of that carrier or broker, information the Secretary decides is necessary to carry out this part.

(c) Subpoena power.

(1) By Secretary. The Secretary may subpoena witnesses and records related to a proceeding under this part from any place in the United States, to the designated place of the proceeding. If a witness disobeys a subpoena, the Secretary, or a party to a proceeding under this part, may petition a court of the United States to enforce that subpoena. (2) Enforcement. The district courts of the United States have jurisdiction to enforce a subpoena issued under this section. Trial is in the district in which the proceeding is conducted. The court may punish a refusal to obey a subpoena as a contempt of court.

(d) Testimony of witnesses.

(1) Procedure for taking testimony. In a proceeding under this part, the Secretary may take the testimony of a witness by deposition and may order the witness to produce records. A party to a proceeding pending under this part may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding is at issue on petition and answer.

(2) Subpoena. If a witness fails to be deposed or to produce records under paragraph

(1) of this subsection, the Secretary may subpoena the witness to take a deposition, produce the records, or both.

(3) Depositions. A deposition may be taken before a judge of a court of the United States, a United States magistrate judge, a clerk of a district court, or a chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any State, or a notary public who is not counsel or attorney of a party or interested in the proceeding.

(4) Notice of deposition. Before taking a deposition, reasonable notice must be given in writing by the party or the attorney of that party proposing to take a deposition to the opposing party or the attorney of record of that party, whoever is nearest. The notice shall state the name of the witness and the time and place of taking the deposition.

(5) Transcript. The testimony of a person deposed under this subsection shall be taken under oath. The person taking the deposition shall prepare, or cause to be prepared, a transcript of the testimony taken. The transcript shall be subscribed by the deponent.

(6) Foreign country. The testimony of a witness who is in a foreign country may be taken by deposition before an officer or person designated by the Secretary or agreed on by the parties by written stipulation filed with the Secretary. A deposition shall be filed with the Secretary promptly.

(e) Witness fees. Each witness summoned before the Secretary or whose deposition is taken under this section and the individual taking the deposition are entitled to the same fees and mileage paid for those services in the courts of the United States.

(f) Powers of Board. For those provisions of this part that are specified to be carried out by the Board, the Board shall have the same powers as the Secretary has under this section.

TITLE 49. TRANSPORTATION

SUBTITLE IV. INTERSTATE TRANSPORTATION
PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 135. JURISDICTION
SUBCHAPTER I. MOTOR CARRIER TRANSPORTATION
49 USCS 13501 (1998)

13501. General jurisdiction

The Secretary and the Board have jurisdiction, as specified in this part *[49 USCS 13101* et seq.], over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier--

(1) between a place in--

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) , in a reservation under the exclusive jurisdiction of the United States or on a public highway.

THIS SECTION IS CURRENT THROUGH 105-235, APPROVED 8/14/98
*****WITH GAPS OF 220,225 AND 231*****
TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 141. OPERATIONS OF CARRIERS
SUBCHAPTER I. GENERAL REQUIREMENTS
49 USCS 14102 (1998)

14102. Leased motor vehicles

(a) General authority of Secretary. The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 *[49 USCS 13501* et seq.] that uses motor vehicles not owned by it to transport property under an arrangement with another party to--

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

(b) Responsible party for loading and unloading. The Secretary shall require, by regulation, that any arrangement, between a motor carrier of property providing transportation subject to jurisdiction under subchapter I of chapter 135 *[49 USCS 13501* et seq.) and any other person, under which such other person is to provide any portion of such transportation by a motor vehicle not owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE COMMERCE
CHAPTER 11 7. ENFORCEMENT: INVESTIGATIONS, RIGHTS, AND REMEDIES
49 USCS II 705 (1994)

11705. Rights and remedies of persons injured by certain carriers

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title or the applicable freight forwarder rate, as the case may be.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 10501* et seq. or 10541 et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) A person may file a complaint with the Commission under section 11701(b) of this title *[49 USCS* I*I* 701 (b)] or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 10501* et seq. or 10541 et seq.]. A person may begin a proceeding under section 10704 or 10705 of this title *[49 USCS 10704* or 10705] to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title *[49 USCS 11701(b)].*

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 10501* et seq. or 10541 et seq.] to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d) (1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation subject to he jurisdiction of the Commission under subchapter I or III of chapter 105 of this title *[49 USCS 10501* et seq. or 10541 et seq.], the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier runs, or (D) if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 147. ENFORCEMENT; INVESTIGATIONS; RIGHTS; REMEDIES
49 USCS 14701 (1997)

14701. General authority

(a) Investigations. The Secretary or the Board, as applicable, may begin an investigation under this part *[49 USCS 13101* et seq.] on the Secretary's or the Board's own initiative or on complaint. If the Secretary or Board, as applicable, finds that a carrier or broker is violating this part *[49 USCS 13101* et seq.], the Secretary or Board, as applicable, shall take appropriate action to compel compliance with this part *[49 USCS 13101* et seq.]. If the Secretary finds that a foreign motor carrier or foreign motor private carrier is violating chapter 139 *[49 USCS 13901* et seq.], the Secretary shall take appropriate action to compel compliance with that chapter. The Secretary or Board, as applicable, may take action under this subsection only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) Complaints. A person, including a governmental authority, may file with the Secretary or Board, as applicable, a complaint about a violation of this part *[49 USCS 131 01* et seq.] by a carrier providing, or broker for, transportation or service subject to jurisdiction under this part *[49 USCS 13101* et seq.] or a foreign motor carrier or foreign motor private carrier providing transportation registered under section 13902 of this title. The complaint must state the facts that are the subject of the violation. The Secretary or Board, as applicable, may dismiss a complaint that it determines does not state reasonable grounds for investigation and action.

(c) Deadline. A formal investigative proceeding begun by the Secretary or Board under subsection (a) of this section is dismissed automatically unless it is concluded with administrative finality by the end of the 3rd year after the date on which it was begun.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 147. ENFORCEMENT; INVESTIGATIONS; RIGHTS; REMEDIES
49 USCS 14702 (1997)

14702. Enforcement by the regulatory authority

(a) In general. The Secretary or the Board, as applicable, may bring a civil action--

(1) to enforce section 14103 of this title; or

(2) to enforce this part *[49 USCS 13101* et seq.], or a regulation or order of the Secretary or Board, as applicable, when violated by a carrier or broker providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 of this title *[49 USCS 13501* et seq. or 1353 1] or by a foreign motor carrier or foreign motor private carrier providing transportation registered under section 13902 of this title.

(b) Venue. In a civil action under subsection (a)(2) of this section--

(1) trial is in the judicial district in which the carrier, foreign motor carrier, foreign motor private carrier, or broker operates;

(2) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and (3) a person participating with a carrier or broker in a violation may be joined in the civil action without regard to the residence of the person.

(c) Standing. The Board, through its own attorneys, may bring or participate in any civil action involving motor carrier undercharges.

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 147. ENFORCEMENT; INVESTIGATIONS; RIGHTS; REMEDIES
49 USCS 14704 (1997)

14704. Rights and remedies of persons injured by carriers or brokers

(a) In general.

1. **Enforcement of order. A person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 *[49 USCS 13501 et* seq.] does not obey an order of the Secretary or the Board, as applicable, under this part *[49 USCS 131* 01 et seq.], except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.**
2. **Damages for violations. A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 *[49 USCS 13501* et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part *[49 USCS 13101* et seq.].**

(b) Liability and damages for exceeding tariff rate. A carrier providing transportation or service subject to jurisdiction under chapter 135 *[49 USCS 13501* et seq.] is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702.

(c) Election.

(1) Complaint to DOT or Board; civil action. A person may file a complaint , with the Board or the Secretary, as applicable, under section 14701 (b) or bring a civil action under subsection (b) to enforce liability against a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 *[49 USCS 13501* et seq.].

(2) Order of DOT or Board.

(A) In general. When the Board or Secretary, as applicable, makes an award under subsection (b) of this section, the Board or Secretary, as applicable, shall order the carrier to pay the amount awarded by a specific date. The Board or Secretary, as applicable, may order a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 *[49 USCS 13501* et seq.] to pay damages only when the proceeding is on complaint.

(B) Enforcement by civil action. The person for whose benefit an order of the Board or Secretary requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier or broker does not pay the amount awarded by the date payment was ordered to be made.

(d) Procedure.

(1) In general. When a person begins a civil action under subsection (b) of this section to enforce an order of the Board or Secretary requiring the payment of damages by a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 of this title *[49 USCS 13501* et seq.], the text of the order of the Board or Secretary must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board or Secretary are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district in which the plaintiff resides or in which the principal operating office of the carrier or broker is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff. (2) Parties. All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(e) Attorney's fees. The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action.

STATUTORY ADDENDUM - PART B

OLD	NEW
TITLE 49. TRANSPORTATION	**TITLE 49. TRANSPORTATION**
SUBTITLE IV. INTERSTATECOMMERCE	**SUBTITLE IV. INTERSTATETRANSPORTATION**
	PART B. MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 117. ENFORCEMENT: INVESTIGATIONS, RIGHTS, ANDREMEDIES	**CHAPTER 147. ENFORCEMENT: INVESTIGATIONS; RIGHTS; REMEDIES**
11705. Rights and remedies of persons injured by certain carriers	**14704. Rights and remedies of persons injured by carriers or brokers**
(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter105 of this title or a freight forwarderdoes not obey an order of theCommission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.	**(a) In general.** **(1) Enforcement of order. A person injured because a carrier orbroker providing transportation or service subject to jurisdiction under chapter 135 [*49 USCS 13501 et seq.]*, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103. A person injured because a carrier orbroker providing transportation or service subject to jurisdiction under chapter 135 [*49 USCS 13501 et seq.]*, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.**
[(b)](2) A common carrier providing transportation subject to the jurisdictionof the	**(b) Liability and damages for exceeding tariff rate. A carrier providing**

Commission under subchapter I or III of chapter 105 of this title [*49 USCS 10501 et seq. or 10541 et seq.*] is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV or chapter 107 of this title or the applicable freight forwarder rate, as the case may be.	**transportation or service subject to jurisdiction under chapter135 [*49 USCS 13501 et seq.*] is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part {*49 USCS 13101* et seq.].**
(b)(1) A common carrier providing transportation or service subject to thejurisdiction of the commission under chapter 105 of this title or freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed undersubchapter IV of chapter 107 of this title or the applicable freight forwarder rate, as the case may be.	**(b) Liability and damages for exceeding tariff rate. A carrier providing transportation or service subject to jurisdiction under chapter135 [*49 USCS 13501* et seq.] is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702.**
(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.	
(c)(1) A person may file a complaint with the Commission under section 11701(b) of this title [*49 USCS 11701*(b)] or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdictionof the Commission under subchapter I or III of chapter 105 of this title [*49 USCS 10501* et seq. or 10541 et seq.]. A person may begin a proceeding under section 10704 or 10705 of this title [*49 USCS 10704* or 10705] to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title [*49 USCS 11701*(b)].	**(c) Election.** **(1) Complaint to DOT or Board; civil action. A person may file a complaint with the Board or the Secretary, as applicable, under section 14701(b) or bring a civil action under subsection (b) to enforce liability against a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 [*49 USCS 13501* et seq.].**
(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or IIIof chapter 105 of this title [49 USCS 10501 et seq. or 10541 et seq.] to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.	**(2) Order of DOT or Board.** **(A) In general.** **(A) In general. When theBoard or Secretary, as applicable, makes an award under subsection (b) of this section, theBoard or Secretary, as applicable, shall order the carrier to pay the amount awarded by a specific date. The Board or Secretary, as applicable, may order a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 [49 USCS 13501 et seq.] to pay damages only when the proceeding is on complaint. (B) Enforcement by civil action. The person for whose benefit an order of theBoard or Secretary requiring the payment of money is made may bring a civil action to enforce that order under this**

	paragraph if the carrier or broker does not pay the amount awarded by the date payment was ordered to be made.
(d)(1) when a person begins a civil action under subsection (b) of this section to enforce an order of the Commissionrequiring the payment of damages by acommon carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or IIIof chapter 105 of this title [49 USCS et seq. or 10541 et seq.], the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of theCommission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located,(C) if a rail carrier, through which the railroad line of that carrier runs, or (D) if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.	**(d) Procedure . (1) In general.When a person begins a civil action under subsection (b) of this section to enforce an order of the Board or Secretary requiring the payment of damages by a carrier or brokerproviding transportation or servicesubject to jurisdiction under chapter135 of this title [49 USCS 13501 et seq.], the text of the order of theBoard or Secretary must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board or Secretary are competent evidence of the facts states in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district in which the plaintiff resides or in which the principal operating office of the carrier or broker is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on a appeal taken by the plaintiff.**
(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of nay of those plaintiffs against the defendant found to be liable to that plaintiff.	**(2) Parties. All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.**
(3) The district court shall award a reasonable attorney's fee as part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.	**(e) Attorney's fees. The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action.**