No. 09-3577

In the
United States of Appeals
for the Eighth Circuit

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
JOSEPH RAJKOVACZ AND CARL SCHAEFER, LLC

Plaintiffs-Appellants

v.

SUPERVALU,INC.

Defendant-Appellee

Appeal from the United States District Court
For the District of Minnesota
Case No. 05-cv-2809
The Honorable John R. Tunheim

APPELLANTS' BRIEF

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ORAL ARGUMENT REQUESTED

SUMMARY OF THE CASE AND REQUEST OF ORAL ARGUMENT

This appeal presents important issues of first impression regarding statutory responsibilities for payment of unloading costs in the chain of distribution of goods in the national transportation system. This appeal further addresses the equitable authority of the federal courts to fashion effective relief for the breach of those responsibilities. The federal lumping statute gives delivery persons the right to compensation for unloading assistance directly from the person who required the use of such unloading assistance. Supervalu raised reimbursement by third parties as an affirmative defense, yet the District Court imposed the burden of proof for this special defense on Plaintiffs who were told that they must prove non-reimbursement. This all but impossible burden ignores the plain meaning of the statute, deprives delivery persons of their right to payment, and allows the party requiring the delivery person to obtain the assistance to evade its statutory duty to compensate. The District Court compounded its error by finding that the statutory equitable relief provided to private parties under 49 U.S.C. §14704(a)(1) did not encompass a monetary remedy, including restitution. This finding ignores controlling Supreme Court and Eighth Circuit precedent, and precludes enforcement of the very protections intended by the lumping statute – compensation of deliverymen for required unloading assistance. Oral argument of 30 minutes will aid the Court's analysis of the case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Owner-Operator Independent Drivers Association, Inc. states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Carl Schaefer, LLC states that it has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

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I. JURISDICTIONAL STATEMENT

Subject matter jurisdiction in this Court is based upon 28 U.S.C. §1331 (federal question) and 1337 (proceedings arising under an act of Congress regulating commerce). This appeal arises from a final judgment entered by the Honorable John R. Tunheim, United States District Judge for the District of Minnesota, on September 30, 2009. Plaintiffs filed their Notice of Appeal on October 27, 2009, within the time permitted under F.R.A.P. 4. Accordingly, this Court has jurisdiction under 28 U.S.C. §1291 (final decision of the district court).

II. STATEMENT OF ISSUES

1. Supervalu raised the issue of third party reimbursement of delivery persons for the cost of required unloading assistance as an affirmative defense. May a person with a statutory obligation to compensate delivery persons for the cost of unloading assistance avoid that obligation by requiring delivery persons to first seek reimbursement from a third party?
2. Assuming reimbursement is available as a special defense, did the District Court err in requiring Plaintiffs to prove non-reimbursement as part of their case-in-chief, thus shifting the burden of proof on this special defense?
3. 49 U.S.C. § 14103(a) imposes an unconditional duty on a receiver to compensate delivery persons for unloading costs where the receiver requires

the delivery person to obtain assistance in unloading his truck. Did the District Court err in creating a judge-made exception to this statutory duty by requiring delivery person to first prove that the requirement to obtain assistance was unreasonable?

4. Does 49 U.S.C. § 14704(a)(1), which authorizes a person to bring a civil action for injunctive relief for violations of Sec. 14103, also authorize remedies of restitution and disgorgement ?

Porter v. Warner Holding Co., 328 U.S. 395 (1946)

Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960).

F.T.C. v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991).

Pierce v. Amaral, 938 F.2d 94 (8th Cir. 1991).

III. STATEMENT OF THE CASE

Proceedings Below

1. The Complaint (Docs. 1 and 134)

The Complaint was filed on December 6, 2005, as a class action alleging violations of 49 U.S.C. §14103 which was enacted to protect truck drivers (delivery persons) from abuses related to the loading and unloading of their trucks. Plaintiffs alleged that Supervalu, a grocery wholesaler, imposed upon the

Plaintiffs proof of extraordinary insurance levels, beyond the requirements mandated by federal law, as a condition for Plaintiffs to unload their own vehicles. Supervalu's proof of insurance requirements, which Plaintiffs could not meet, had the effect of requiring that workers at the loading dock – "lumpers" – to unload Plaintiffs' vehicles at Plaintiffs' expense. The Complaint alleged that Plaintiffs were not reimbursed by Supervalu for the cost of the lumpers in violation of 49 U.S.C. §14103.

2. Order on Cross Motions for Summary Judgment (Doc. 183)

By Order dated June 27, 2007 (Doc. 183),[1] the District Court denied in part and granted in part the parties' cross motions for summary judgment. The District Court denied the motions as to whether the proof of insurance required by Supervalu required the use of lumpers. The Court found that the "reasonableness of the insurance coverage requirement is key to the determination of whether Supervalu violated §14103."[2]

The June 27, 2007, Order granted partial summary judgment to Supervalu, dismissing Plaintiffs' claim for restitution for violations of 49 U.S.C. §14103. The District Court explained that the remedial scheme for violation of Section 14103 is

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[1] June 27, 2007 Order (Doc. 183).

[2] *Id.*

comprehensively provided for in Sections 14905 and 14704. The Court held that Section 14704 provides a private right of action for monetary relief against carriers and brokers, but allows only for injunctive relief, not restitution, against a receiver of freight like Supervalu.[3]

The June 27, 2007, Order denied Plaintiffs' motion to strike Supervalu's defense that Plaintiffs had been reimbursed by others for all costs incurred for lumping services at Supervalu facilities. The District Court interpreted Section 14103 to allow for driver compensation by either the shipper or receiver where the receiver, but not the shipper, required the use of the lumper.[4] The District Court held that to prove Supervalu's (the receiver's) violation of Section 14103, it is Plaintiffs' burden to "show that neither a receiver nor a shipper paid a driver for lumping service costs incurred at Supervalu."[5]

3. Class Certification (Docs. 183 and 218)

The District Court certified Plaintiffs' claims under 49 U.S.C. §14103(a) by Order dated June 27, 2007.[6] The District Court granted Plaintiffs' Motion for

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] June 27, 2007 Order (Doc. 183).

Reconsideration by Order dated March 14, 2008 (Doc. 218), and also certified a class for Plaintiffs' claims under 49 U.S.C. §14103(b).[7] The class is defined as:

> all owners or operators of motor vehicles used to deliver "carrier loads" to Supervalu's distribution centers between March 28, and December 21, 2005, who a) at the time of delivery, did not meet Supervalu's minimum proof of insurance requirement then in effect; and b) paid for lumping services.[8]

4. Order on Supervalu Motion for Summary Judgment (Doc. 265)

By Order dated March 24, 2009, the District Court granted summary judgment to Supervalu on Plaintiffs claims under 49 U.S.C. §14103(a).[9] The District Court found that Plaintiffs had failed to prove an element of their claim, that any member of the class had not been reimbursed by the shipper for receiver-required lumping fees.[10] The District Court accordingly dismissed the claims for violation of Section 14103(a).[11] The District Court denied to Supervalu summary judgment on Plaintiffs' claims for declaratory and injunctive relief under Section

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[7] March 14, 2008 Order (Doc. 218).

[8] June 27, 2007 Order (Doc. 183).

[9] March 24, 2009 Order (Doc. 265).

[10] *Id.*

[11] *Id.*

14103(b) for attempted coercion to use lumpers to unload at Supervalu facilities.[12] The District Court found that issues of fact existed regarding whether Supervalu's insurance requirements were intended and did have the effect of attempting to coerce the use of lumpers to unload, and placed these remaining issues on the trial calendar.

5. Order Approving Settlement and Entry of Final Judgment (Doc. 318)

By order dated September 30, 2009, the District Court approved the parties' stipulated settlement of all issues remaining for trial. The District Court entered final judgment in this matter by this same Order.[13]

Plaintiffs timely filed their Notice of Appeal on October 27, 2009 (Doc. 319).

IV. STATEMENT OF FACTS

Named Plaintiffs and class members include independent owner-operator truck drivers and motor carriers who transported grocery products to Supervalu. They all are delivery agents, are all bound by contracts to tender delivery and may be generally referred to here as "delivery persons." Supervalu is a grocery

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[12] *Id.*

[13] September 30, 2009 Order (Doc. 318).

wholesaler. It purchases goods from various vendors for delivery to its distribution centers around the country.[14] In certain circumstances, Supervalu contracted for itself to bear the financial responsibility for transport and unloading. These shipments were referred to as "client loads."[15] All other loads are "Carrier loads," and are the loads that are at issue in this case. Carrier loads were those delivered by motor carriers hired by vendors to deliver their products to Supervalu under transportation contracts.[16] "The contracts for transportation services often do not specify who is responsible for unloading or 'lumping' upon delivery of goods to Supervalu's distribution centers."[17]

"Lumpers" are persons who, for compensation, load or unload trucks. "Lumping contractors" are generally companies which provide lumping services to shippers or receivers. In this case Progressive Logistics and Southland Logistics entered into Master Service Agreements with Supervalu to provide

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[14] Deposition of Greg Heying ("Heying Dep.") (Doc 241, Mead Affidavit, Exh. G at 33), App. at 56.

[15] Deposition of Bruce Trippet, ("Trippet Dep.") (Doc. 241, Mead Aff. Exh. K at 20-22, 35), App. at 98.

[16] Doc. 254-2, Exhibit 2, Trippet Dep. 38:25-39:6 (and deposition Exhibit 1 (filed under seal), Exhibit 3, Exhibit 14, Exhibit 15, and Exhibit 16), April 27, 2006.

[17] June 27, 2007 Order (Doc. 183) at 3.

exclusive lumping services at Supervalu receiving docks.[18] Under those agreements Supervalu received a substantial percentage of the lumping fees paid by delivery persons to those lumpers.[19] A power point presentation by Supervalu employee Tom Hagen shows that Supervalu understood that it could gain a significant increase in revenue from the fees paid to it by the lumping service contractors.[20]

Federal law requires delivery persons to have a minimum of $750,000 in public liability insurance. 49 U.S.C. §31139(b). In March 2005, Supervalu imposed proof of greater levels of insurance as a condition to drivers' unloading their own trucks. Supervalu posted the following notice:

> Effective March 28, 2005 all drivers who wish to lump (unload) their trucks at a SUPERVALU operated facility must provide the following documentation:
> 1. Proof of General Liability Insurance, on an Occurrence Coverage Form
> 1.1 $3 Million Annual Aggregate
> 1.2 $1 Million per Occurrence
> 2. Proof of Workers' Compensation Insurance
> 2.1 Statutory workers compensation
> 2.2 $1 million employers liability insurance;

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[18] Master Service Agreement of Progressive Logistics (Doc. 251, Exhibit 1 (filed under seal)).

[19] *Id.* at page 3, ¶ 2, b, ii.

[20] Tom Hagen's PowerPoint Slides (Doc. 251, Exhibits 5 and 6 (filed under seal)) and (Doc. 254-13)Tom Hagen Dept 111:17-115:15 App. at 145.

3. Proof of Automobile Liability Insurance
    3.1 $1 million Combined Single Limit
4. Proof of Fidelity Bond or Crime Insurance
    4.1 $50,000 per loss.
Distribution Director"[21]

In August 2005, Supervalu reduced the levels of insurance required of drivers who wanted to unload their own trucks, and posted the following notice:

> ...we have established minimum insurance requirements for carriers/drivers unloading goods at our facilities.
> Effective August 1, 2005 all drivers who wish to unload their trucks at a SUPERVALU operated facility must maintain insurance coverage for the categories listed below in the minimum amounts stated, and provide proof of such coverage at the time of unloading:
> 1. General Liability Insurance, (on an Occurrence Coverage Form)
> - $1 million annual aggregate
> - $1 million per occurrence
> 2. Workers' Compensation Insurance
> - Statutory workers compensation
> - $1 million employers liability insurance
> 3. Automobile Liability Insurance
> - $1 million combined single limit
> If your are unable to furnish evidence of the required coverage, SUPERVALU will provide or make available, unloading services at the rates posted at the facility.[22]

The Plaintiffs claim that Supervalu sought to realize greater revenue

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[21] (Doc. 35), Exhibit 1 to Pl.s' Mot. for Class Cert., Sept. 21, 2006 (Doc. No. 32), App. at 33.

[22] (Doc. No. 54) Exhibit 2, at 14 of 16, to Aff. of Steven McLaird submitted in support of Def.'s Memo. in Support of Mot. Summ. J, Sept. 1, 2006 (Doc. No. 53), App. at 36.

through lumping fees by imposing these insurance requirements that few delivery persons can meet. This allegation is supported by an email from the head of Supervalu's "Risk Management" department, Barb Farrell, to Supervalu's head of "Strategic Sourcing," Tom Hagen, reciting her opinion of the Supervalu insurance requirements and admitting that the requirements were a pretext to increase delivery persons use of Supervalu's lumper: "Tom, these [insurance] limits are relatively high. If you recall, our earlier discussions were along the lines that *we wanted to discourage having people other than our national contracted lumpers do the unloading*. In light of that objective, these make sense."[23]

On December 21, 2005, after this lawsuit was filed in the District Court, Supervalu reduced the levels of insurance required under its policy to the minimum required under 49 U.S.C. §31139(b).[24]

Named Plaintiff Joseph Rajkovacz was an independent owner-operator driver under contract to Waymore Transportation, Inc. and delivered goods to

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[23] (Doc. No. 254-11) Barbara Farrell's email dated March 3, 2005. App. at 143 .

[24] (Doc. No. 54) Exhibit 2, at 13 of 16, to Aff. of Steven McLaird submitted in support of Def.'s Memo. in Support of Mot. Summ. J, Sept. 1, 2006 (Doc. No. 53), App. at 36.

Supervalu during the class period.[25] Rajkovacz did not carry the insurance types and levels required by Supervalu in March and August 2005, carrying only the amount required under federal law.[26] As a result, Rajkovacz was required by Supervalu's proof of insurance policy to hire lumpers to unload his truck at Supervalu distribution centers during the class period.[27] Rajkovacz was not reimbursed by Supervalu for the costs he incurred associated with his use of lumpers.[28]

Named Plaintiff Carl Schaefer conducts his business under his own operating authority, and is a one-person motor carrier. Named Plaintiff Carl Schaefer LLC is a limited liability company of which Carl Schaefer is the sole owner and manager.[29] Generally, Schaefer negotiated directly with shippers or brokers for payment of transportation charges.[30] Schaefer did not carry the higher insurance levels required by Supervalu in March and August 2005, carrying only

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[25] Declaration of Joseph Rajkovacz (Doc. 100-9, Exhibit 10), App at 52.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] March 24, 2009 Order (Doc. 265).

[30] Deposition of Carl Schaefer ("Schaefer Dep.")at 50-51, (Doc. 241-14) Mead Aff. Exh. J, App at 81.

the amount required under federal law.[31] As a result, Schaefer was required by Supervalu's proof of insurance policy to hire lumpers to assist him in unloading his truck during the class period.[32] Schaefer was not reimbursed by Supervalu for the costs associated with the services of lumpers.[33]

V. SUMMARY OF ARGUMENT

Plaintiff truck drivers (sometimes referred to as "delivery persons") and OOIDA brought this action for relief from Supervalu's proof of insurance practices at its unloading docks. Supervalu's requirement for proof of insurance far in excess of minimum levels required by federal law had the effect of requiring the Plaintiffs to hire helpers, known in the trucking industry as "lumpers," to unload their trucks. 49 U.S.C. §14103(a) provides that, where unloading assistance is required by a shipper or receiver, the person imposing that requirement, here Supervalu, must compensate the delivery person for all costs associated with the required assistance. The holding of the District Court that delivery persons must prove non-reimbursement from third parties before they are entitled to compensation from the party imposing the requirement to obtain

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[31] Declaration of Carl Schaefer, (Doc. 100-9, Exhibit 10), App at 54.

[32] *Id.*

[33] *Id.*

lumping assistance completely frustrates the statutory goal of providing compensation for unloading costs to delivery persons.

The lumping statute imposes an *unconditional* obligation on the party requiring the assistance to provide the unloading assistance or to compensate the delivery person for the cost of that unloading assistance. Section 14103(a) provides an unambiguous if-then structure: if the receiver requires, then the receiver must compensate. Nothing in the statute allows the requiring party to shift to a third party its statutory duty to compensate the delivery person for the lumping costs it necessitated. Supervalu asserted reimbursement by third parties as an affirmative defense. The statute itself does not address the question of reimbursement nor does it identify any conditions under which the actions of such third parties can excuse the statutory duty to compensate delivery persons. Even if third party reimbursement were a relevant consideration, the District Court erred by shifting the burden of proof on this affirmative defense to Plaintiffs when it required them to prove "non-reimbursement" as one of the elements of their claims under Section 14103(a).

The District Court erred further in limiting the protections of Section14103(a) to circumstances where the requirement for unloading assistance is "unreasonable." The plain language of the statute contains no such

qualification. Congress did not intend for the courts to get into the business of deciding whether a receiver's loading dock policies were reasonable business decisions or not. If Congress intended that a reasonableness standard should apply it would have said so and would have provided some standards for courts to use when assessing reasonableness. It did neither. The statute provides that whenever the receiver requires the delivery person to be assisted in unloading, the receiver shall compensate the delivery person for the costs associated with such assistance. The requirement for assistance is unmodified, and the mandate to compensate for the costs of the assistance is unconditional. The District Court erred in legislating a judge-made condition on a delivery person's statutory right to compensation.

Lastly, the District Court erred in holding that 49 C.F.R. §14704(a)(1) does not provide for monetary relief for the violation of Section 14103(a). Section 14704(a)(1) grants a private right of action for injunctive relief for the violation of the lumping statute, and is silent as to any limit on a court's authority regarding other equitable remedies. The Supreme Court and this Circuit have consistently held that the inherent equitable powers of the federal courts encompass the full range of remedies necessary to effect complete relief. A contrary legislative intent may only be established by "explicit" language or by "necessary and inescapable inference." Section 14704 does not satisfy this very high standard.

The enactment of the private right of action was intended to shift enforcement of the requirements of the Motor Carrier Act from the government to private parties.[34] Proper enforcement of Section 14103(a) implicates important public policy concerns which Congress intended to advance through private enforcement actions under Section 14704(a)(1). Further, Section 14103(a) was intended to ensure that delivery persons not bear the costs of required unloading assistance. If a court is precluded from awarding restitutionary relief for failure to provide such compensation, then the intended protections of the statute are illusory at best. The equitable relief provided by Section14704(a)(1) must include the full range of equitable powers inherent in the federal courts to effect the protections intended by Section 14103(a) and to advance the public policy objectives that Congress sought to achieve through those protections.

VI. ARGUMENT

A. Standard of Review

This Court reviews rulings on summary judgment by the District Court *de novo*, using the same standard as applied by the District Court. The reviewing court must consider the entire record in the light most favorable to the non-moving

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[34] *OOIDA v. New Prime,* 192 F.3d 778, 781 (8th Cir. 1999).

party.[35]

B. A Person Who Requires A Delivery Person to be Assisted in Unloading Has the Duty to Compensate the Delivery Person for the Cost of that Assistance.

1. Procedural Setting

Plaintiffs contend that 49 U.S.C.§14103(a) imposes an unqualified duty on receivers like Supervalu to provide delivery persons with compensation where those receivers require the delivery persons to obtain unloading services. Supervalu raised an affirmative defense alleging that "Plaintiffs have been paid by shippers or others for any lumping service costs incurred at Supervalu facilities during the applicable time period."[36] Plaintiffs contend that third party reimbursement is irrelevant to a receiver's duty to compensate under Section 14103(a). In disposing of Plaintiffs' motion to strike this defense, the District Court entered an order that required Plaintiffs to prove non-reimbursement as an element of their case-in-chief under 49 U.S.C.§14103(a).[37] The Plaintiffs first

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[35] *Adkinson v. G.D. Searle & Co.,* 971 F.2d 132, 134 (8th Cir. 1992); *Nitsche v. CEO of Osage Valley Electric Cooperative,* 446 F.3d 841, 845 (8th Cir. 2006); *Enterprise Bank v. Magna Bank of Missouri,* 92 F.3d 743, 747 (8th Cir. 1996).

[36] Supervalu's Eleventh defense. (Doc. 152) at 16.

[37] June 27, 2007 Order (Doc. 183) at 12-15; see also March 24, 2009 Order (Doc. 265) at 5-9.

argue that in cases like this, where Supervalu neither provided loading assistance nor compensated the driver for the cost of hiring a lumper, that Plaintiffs' efforts to seek reimbursement for those costs from other parties at a later point in time are irrelevant in determining Supervalu's liability. But even if the driver's reimbursement from a third party is a legitimate affirmative defense, the District Court's ruling has the effect of shifting the burden of proof on Supervalu's affirmative defense to the Plaintiffs who were required to prove a negative (non-reimbursement) before it can enforce a receiver's statutory duty to compensate.

2. The District Court Misinterpreted Section 14103(a)

49 U.S.C.§14103(a) was intended to shield delivery persons from bearing the cost of unloading where one of the parties to the sale transaction (the shipper or receiver) requires the delivery person to be assisted in unloading the shipment. Plaintiffs contend that the statute imposes a duty to provide compensation only on the person that imposes the requirement to obtain unloading assistance – typically a receiver like Supervalu that operates the facility where the shipment is unloaded. The Plaintiffs assert that the elements of a claim that a receiver breached a duty to pay a delivery person imposed by 49 U.S.C. § 14103(a) are as follows:

1. Receiver required a delivery person to have assistance unloading.
2. The delivery person had assistance unloading.

3. The delivery person paid the one assisting unloading.

4. The receiver did not pay the delivery person that amount.

Upon proof of those elements, proof of the violation is complete. The receiver's duty arises upon the proof of the third element, and the violation upon proof of the fourth. What remedy is appropriate for the violation may be influenced by events thereafter, but the determination of whether there was a violation is not affected by later events.

The District Court interpreted the statute as having an additional element. The District Court ruled that a delivery person must prove:

1. Receiver required a delivery person to have assistance unloading.

2. The delivery person had assistance unloading.

3. The delivery person paid the one assisting unloading.

4. The shipper did not pay the delivery person that amount.

5. The receiver did not pay the delivery person that amount.

The District Court therefore implicitly ruled that before the receiver's duty to pay a delivery person arises, the shipper must either breach its duty to pay the delivery person, or fail to pay voluntarily, i.e. after proof of the fourth element. The receiver's breach, and therefore violation, and therefore liability, arises upon the occurrence of the fifth element.

The effect of the District Court's ruling is not only to erroneously recognize as a affirmative defense premised upon what happens after the violation is complete, but requires the injured delivery person to disprove that erroneous defense as part of his or her case. Again, what may happen after the violation is complete may have a bearing on remedy, but it should have no bearing on whether a violation has taken place.

49 U.S.C.A. §14103(a) reads as follows:

> (a) Shipper responsible for assisting.--Whenever a *shipper or receiver* of property *requires that any person* who owns or operates a motor vehicle transporting property in interstate commerce (whether or not such transportation is subject to jurisdiction under subchapter I of chapter 135) *be assisted* in the loading or unloading of such vehicle, the *shipper or receiver* shall be responsible for providing such assistance or *shall compensate* the owner or operator for all costs associated with securing and compensating the person or persons providing such assistance.(Emphasis added).

There are two ways to interpret this language. First the interpretation favored by Plaintiffs: If either a shipper or receiver requires a delivery person to obtain assistance, the person who imposed that requirement must compensate delivery person. Second, the interpretation found by the District Court: If either the shipper or receiver requires a delivery person to obtain assistance, either the shipper or receiver must compensate the delivery person.

The District Court's interpretation of 49 U.S.C.§14103(a) requires Plaintiffs

seeking compensation from a receiver to affirmatively prove non-reimbursement by a shipper for lumping expenses required by a receiver.[38] Put another way, the District Court interpreted the statute to create a right to compensation in a delivery person for unloading costs, but no corresponding duty in the receiver whose requirement triggered the creation of that right.

The District Court's concept contemplates all but impossible circumstances. It suggests that a *shipper* may have a duty to pay the delivery person triggered by what the *receiver* unilaterally requires at the point of delivery; or b) that the receiver's duty to compensate is triggered only by the shipper first declining to comply with a duty imposed upon it by the actions of the receiver at the point of delivery. Under the District Court's interpretation of the statute, the statute is silent as to which party, if either, the delivery person must seek reimbursement from first. The statute gives the delivery person no guidance as to how he or she is to moderate between the shipper and receiver as to who will fulfill a duty with which only one of them need comply.

The simplest and least burdensome interpretation of the statute, for all parties, is that when a receiver requires a delivery person to use lumpers, its duty under the statute arises immediately and it must fulfill that duty immediately, at its

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[38] *Id.*

point of contact with the delivery person at the unloading dock.

The District Court's error in interpreting the statute stems from its mistaken focus on reimbursement, rather than on the rights and duties created by its provisions. The District Court misconstrued the language of the statute as implying relations between shippers and delivery persons that may or may not exist. Rather than construing the statute as simply establishing the relations between shippers and delivery persons on the one hand, and receivers and truckers on the other, the District Court reads into the statute relations between shippers and truckers and between shippers and receivers that may not exist. In the case at bar there is no evidence of any agreement between delivery persons and Supervalu, regarding "Carrier loads" it received. Further, there are no sales and transportation contracts in the record between the shippers and Supervalu addressing who was responsible for unloading.

The statutory protection breaks down if the trucker is left in the dark regarding who has the obligation to pay lumping costs. Yet that is precisely what the District Court's interpretation of the statute does. It apparently seeks to honor the delivery persons' right without identifying who has the corresponding duty, and thus fails to achieve what it appears to intend. The intent of Section 14103(a) is served only if it is interpreted to read: If the receiver requires, then the receiver

must provide assistance or directly compensate the delivery person. The statute makes no provision for the discharge of a receiver's duty by a third party.

The rights in delivery persons created by the statute can only be given effect if the receiver requiring the unloading assistance is held to its corresponding duty to compensate for the costs it required. Under the District Court's ruling, a delivery person may not proceed against a receiver who imposed the requirement to obtain assistance (and took a share of the lumping fee for itself) unless the delivery person proves a negative – that he failed or will fail to get reimbursed by the shipper. A driver who picks up a load from a shipper is in no position to negotiate unloading charges with the shipper that may or may not be imposed at the time of delivery and, if imposed, will be in an amount not known until the time of delivery. For these and other reasons, third party reimbursement for the lumping assistance required by the receiver is simply irrelevant to the statute's clear command – if the receiver requires, then the receiver must provide assistance or directly compensate the delivery person.

The District Court recognized that the reality of the delivery transaction would put the receiver in the immediate position of requiring the lumping service and be the first and logical participant in the transaction to bear responsibility for

payment of the service required.[39] But the District Court nevertheless ruled:

> [T]he plain language of the statute binds the Court in its interpretation. Allowing payment by a shipper to relieve a receiver from having to compensate a driver when the receiver requires a driver to use lumpers *may be burdensome for the driver, but this interpretation of the statute is not absurd.* . . . To prove that Supervalu violated §14103(a), plaintiffs must show that neither a receiver nor a shipper paid a driver for lumping service costs incurred at Supervalu.[40]

The District Court's interpretation all but excuses shippers and receivers from complying with the statute without litigation. How will a delivery person at the unloading dock respond to a receiver who asks him to prove that he has not or will not be reimbursed by the shipper? Under Section 14103(a), what form of proof should a delivery person provide at the unloading docks to convince either the shipper or receiver that the other party hasn't, or won't, pay for lumpers?

Section 14103(a) does not forbid receivers from requiring delivery persons to use lumpers. It merely requires the receiver to either provide or pay for lumping services when it requires a driver to use such services. The statute is intended to be self-enforcing on a day-to-day basis governing the millions of unloading transactions that occur every year. The District Court reads Section

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[39] June 27, 2007 Order (Doc. 183) at 14.

[40] *Id.* at 14-15 (citations omitted); (Emphasis added).

14103(a) as if it were intended to prohibit certain conduct and then provide for damages if such conduct occurs. The District Court's ruling turns Section 14103(a) into a statute that only provides relief to delivery persons through litigation and deprives them of the day-to-day benefits that the statute contemplates.

The District Court defends its interpretation of this language finding that it is, "not absurd." But the role of a court is to give effect to the intent of the legislature. That role is not well-served by a reading of the words of a statute that produces an interpretation for which the best that can be said is that it is, "not absurd." The District Court should have given more attention to its own realization that its interpretation "may be burdensome to the driver."[41] We leave it to others to decide whether the District Court's interpretation is absurd. Suffice it to say that the District Court's interpretation must yield to one that is more faithful to the remedial purpose of the statute protecting delivery persons from the burden of unloading costs incurred because of requirements imposed by either the shipper or receiver.

3. Conclusion

The record below establishes that Plaintiffs were not compensated by

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[41] *Id.*

Supervalu for costs associated with the lumping assistance it required. The record discloses no formal agreements between the delivery persons and either shipper, freight brokers or Supervalu covering unloading costs. We suppose that shippers, receivers and freight brokers may agree among themselves as to who must bear the burden of those costs. But such agreements cannot deprive a delivery person of his right to compensation under Section 14103 (a). The District Court erred in finding that Plaintiffs' reimbursement for lumping costs by third parties precluded a finding that Supervalu violated 49 U.S.C. §14103(a). Reimbursement by third parties does not discharge a receiver's legal duty to the delivery person. Even if it did, the District Court placed the burden of proof as to such affirmative defense on the wrong party. Supervalu should have been required to prove its own affirmative defense. The District Court's entry of summary judgment in favor of Supervalu is tainted by this error. This Court should reverse the District Court's finding in that regard, and remand for further proceedings consistent with this Court's findings.

C. 49 U.S.C. § 14103(a) Contains No Qualification on the Duty to Compensate for Lumping Costs. The District Court Erred In Holding that Only Unreasonable Requirements Trigger a Duty to Compensate.

Section 14103(a) provides for compensation for lumping costs paid by the

delivery person only where a shipper or receiver "requires" the trucker to engage the services of a lumper, *i.e.* to require assistance is to incur the expense of assistance. Plaintiffs alleged below that proof of the types and levels of insurance, over the minimum set by federal law, required by Supervalu before drivers would be permitted to unload their own trucks, had the effect of "requiring" the truckers to use lumpers at Supervalu's distribution centers. The District Court did not reach this issue in granting summary judgment to Supervalu because it found that even if the extraordinary levels of insurance imposed by Supervalu had the effect of requiring the use of lumpers, the fact that Plaintiffs had failed to prove "non-reimbursement" precluded a finding of a violation of Section 14103(a).[42] In an earlier ruling, however, the District Court concluded that:

> Supervalu cannot be considered to have required the use of lumpers solely by its imposition of a requirement for insurance above the statutory minimum *if the insurance coverage requirement is reasonable*. On the other hand, if the insurance coverage requirement is *unreasonable* and unattainable for drivers, Supervalu could be considered to have in effect required drivers to pay for lumping services in violation of §14103(a).[43]

As established above, the plain language of Section 14103(a) provides simply that "whenever a ... receiver... requires that any (trucker)... be assisted in

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[42] March 24, 2009 Order (Doc. 265) at 6 n.1.

[43] June 27, 2007 Order (Doc. 183) at 6-7(Emphasis added).

... unloading..., the ... receiver shall be responsible for providing such assistance or shall compensate the (trucker)... for all costs (of)... such assistance." The statute provides an unambiguous if-then structure; the requirement triggers the duty. If the receiver requires, then the receiver must compensate. There is no qualification, stated or implied, limiting the word "requires" in any way.

Section 14103(a) does not prohibit receivers from requiring delivery persons from using the assistance of others to unload their truck. It merely requires that the receiver who does impose such a requirement either provide such assistance or compensate the driver for its cost. By injecting a reasonableness test into this regulatory provision, the District Court turned a statute that was intended to relieve delivery persons of the burden of lumping costs as a regular practice, into a statute that imposes a penalty for bad behavior that can only be enforced through litigation. No receiver is going to freely admit to violating such a law by imposing an *unreasonable* requirement to use a lumper. Litigation becomes the most likely course of action to resolve issues of reasonableness injected by the District Court.

There is no evidence that Congress intended to impose on the Courts the responsibility of determining what constitutes a reasonable requirement on delivery persons to use lumpers. The statute provides no guidance as to what

would be reasonable. Reasonable from the receiver's business perspective? Reasonable from the driver's ability to meet such conditions? The inquiry of reasonableness is so fact intensive, as the parties' discovery efforts in this litigation demonstrate, that resolution of claims under Section 14103(a) will require expensive and protracted litigation in each case.

But the District Court, without explanation or citation to authority, read a limitation into the statute, qualifying the shipper or receiver's obligation to compensate truckers to circumstances where the requirement to use lumpers is found to be "unreasonable." The District Court erred by reading into the unloading statute a qualifier of "reasonableness" not found in the plain language of Section 14103(a).

The touchstone of statutory interpretation is the language of the statute itself:

> To resolve... questions of statutory interpretation, we begin, as always, by looking to the relevant statutory text. *985 *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). Where statutory language is plain, "the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." Id. (quotation omitted). Thus, if the relevant text is not reasonably susceptible to more than one interpretation, we will not look beyond it unless application of the plain language "will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 103

L.Ed.2d 290 (1989) (quotation omitted).[44]

Nothing in the plain language of Section 14103(a) supports the District Court's limitation on the receiver's duty to compensate the delivery person for lumping costs *only* where the requirement to use lumping assistance is unreasonable. The statute is not judgmental - - it imposes a duty to compensate when *any* requirement to use assistance in unloading is imposed. The District Court here imposed upon Plaintiffs the task of demonstrating that the amount and scope of the insurance coverage required was unreasonable in relation to the risks involved and the practice of other receivers.[45] The burden placed upon delivery persons just to invoke their statutory right to compensation is enormous.

The District Court became a super-legislator when it took it upon itself to inject a condition on the implementation of the statute as written. Congress imposed no requirement of reasonableness and therefore provided no guidance as to what may be reasonable or unreasonable. Because there are no standards in the statute that there is nothing that would inform a court or the parties before it as to what is necessary to satisfy that judicially imposed precondition.

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[44] *Contemporary Indust. Corp. v. Frost*, 564 F.3d 981, 984-985 (8th Cir. 2009)

[45] Order dated May 31, 2007, 2007 WL 1576120(D.Minn) at *3.

This Court should reverse the District Court's finding in this regard, and remand for further proceedings on Plaintiffs' claims that Supervalu's insurance requirements in excess of the statutory minimum had the effect of requiring that Plaintiffs engage the services of lumpers to unload their trucks at Supervalu distribution centers.

D. 49 C.F.R. §14704(a)(1) Authorizes the Full Range of Equitable Remedies Necessary to Effect Complete Relief

The District Court erred in finding that the remedy available under 49 U.S.C. §14704(a)(1), which grants a private right of action for violation of Section 14103, is limited to injunctive relief only.[46] The District Court explained its ruling, stating that Section 14704 provides for monetary relief against carriers or brokers in allowing a civil suit for damages under Section 14704(a)(2), but is silent as to any monetary relief against receivers.[47] The Court "concludes that the remedial scheme provided for in Sections 14905 and 14704 is *comprehensive*" and it ". . . interprets the statutory silence as an indication that Congress intended to limit private actions for monetary relief to actions against carriers or brokers and does not authorize private actions for monetary relief against receivers like

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[46] June 27, 2007 Order (Doc. 183) at 10-12.

[47] *Id.* at 10.

Supervalu."[48]

The District Court's conclusion ignores decades of Supreme Court precedent, and decisions of the Eighth Circuit and other Circuits considering the issue of a federal court's equitable powers to fashion a remedy which provides *complete relief.* Section 14704(a)(1) expressly provides that "a person may bring a civil action for injunctive relief for violations of 14102 and 14103." Section 14103(a) has little purpose beyond ensuring that delivery persons be *"compensated"* for the costs of required lumping assistance. Without a monetary remedy, no effective relief can be awarded for a violation of Section 14103(a). Moreover, as discussed in more detail below, this Court has previously found that Section 14704 is riddled with "linguistic imperfections and inconsistencies" and does not provide a "comprehensive" remedial scheme.[49] Thus, failure to include the words "restitution" and "disgorgement" in Section 14704(a)(1) does not signify an intent to circumscribe a court's ability to provide full equitable relief.

The analysis begins with *Porter v. Warner Holding Co.*, where the Supreme Court ruled that "[u]nless otherwise provided by statute, all the inherent equitable

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[48] *Id.* (Emphasis added).

[49] *Owner-Operator Independent Drivers Association, Inc. v. New Prime, Inc.*, 192 F.3d 778, 784-85 (8th Cir. 1999) (hereinafter "*New Prime I*").

powers of the District Court are available for the proper and complete exercise of that jurisdiction."[50] In *Mitchell v. Robert De Mario Jewelry, Inc.*, the Supreme Court overturned the district court's ruling that equitable remedies cannot be exercised unless "expressly conferred."[51] The Court verified that the "proper criterion is that laid down in *Porter*.... When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[52] Significantly, in *OOIDA v. Swift Transp., Inc.*, where the Ninth Circuit was dealing with the Interstate Commerce Commission Termination Act ("ICCTA")[53] - the same statute at issue here - it held: "Congress has not clearly indicated an intent to restrict the courts' equitable discretion in enforcing these regulations."[54]

This Court has adhered to *Porter* and *Mitchell* in upholding the power of the district courts to order restitution and disgorgement under injunction statutes. In

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[50] 328 U.S. 395, 398 (1946).

[51] 361 U.S. 288, 290-92 (1960).

[52] *Id.*

[53] Pub. 2, 104 - 88, codified in various sections of Title 49, United States Code.

[54] 367 F.3d 1108, 1114 (9th Cir. 2004).

FTC v. Security Rare Coin & Bullion Corp., this Court rejected the argument on which the District Court rests its conclusion – that explicit authorization of some remedies implies that other remedies are unavailable.[55] Relying on *Porter*, this Court explained:

> Where Congress allows resort to equity for the enforcement of a statute, all the inherent equitable powers of the district court are available for the proper and complete exercise of the court's equitable jurisdiction, unless the statute explicitly, or 'by a necessary and inescapable inference,' limits the scope of that jurisdiction."[56]

This Court therefore refused to infer a limitation on equitable authority either from Congress' explicit reference to some equitable remedies, or from its silence about others.[57] Only explicit Congressional pronouncements create limitations on court authority.[58] In *Pierce v. Amaral*, this Court held:

> The Hoehns contend section 1714(a) limits the Secretary's remedy to an injunction. We disagree. . . . By authorizing the Secretary to seek an injunction, section 1714(a) allows the Secretary to invoke the district court's equitable jurisdiction. . . . Thus, we easily conclude the district court has power to order the Hoehns to disgorge, remit, and

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[55] 931 F. 2d 1312, 1314 (8th Cir. 1991).

[56] *Federal Trade Commission v. Security Rare Coin & Bullion Corp.*, 931 F. 2d 1312, 1314 (8th Cir. 1991); *see also Pierce v. Amaral*, 938 F. 2d 94, 96 (8th Cir. 1991).

[57] *Id.*

[58] *Id.*

account for their illgotten gains.[59]

Other Courts are in accord. The Fifth Circuit has held that by allowing plaintiffs to seek injunctive relief, a federal statute "carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it."[60] Similarly, the Eleventh Circuit found that "Congress, when it gave the district court authority to grant a permanent injunction...also gave the district court the authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary or inescapable inference."[61] Indeed, every Circuit that has addressed this question has reached a similar conclusion.[62]

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[59] 938 F. 2d 94, 95-96 (8th Cir. 1991)(citing *Porter*, *Mitchell*).

[60] *FTC v. Southwest Sunsites, Inc.*, 665 F. 2d 711, 718 (5th Cir. 1982).

[61] *AT&T Broadband v. Tech Communications, Inc.*, 381 F. 3d 1309, 1316 (11th Cir. 2004).

[62] *I.C.C. v. B & T Trans. Co.*, 613 F.2d 1182, 1185 (1st Cir. 1980)("It is difficult to see how we could deny equitable jurisdiction to order restitution of overcharges in this case without disregarding *DeMario*."); *accord SEC v. Texas Gulf Sulpher Co.*, 446 F. 2d 1301, 1307 (2d Cir. 1971); *U.S. v. Lane Labs-USA, Inc.*, 427 F. 3d 219, 224-25 (3d Cir. 2005)("Though the FDCA does not specifically authorize restitution, such specificity is not required . . . ."); *accord CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F. 3d 187 (4th Cir. 2002); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982)("Although the plain language of the statute speaks only of enjoining an allegedly unlawful act … virtually identical statutes … have been interpreted as invoking the full equitable

Upon this authority, when Congress provided for injunctive relief under Section 14704(a)(1), it invoked the District Court's broad equitable jurisdiction, thereby making available, in the absence of a compelling inference to the contrary, all equitable powers to remediate violations of Section 14103.

The language used in Sections 14704(a)(1) and (2) provides no basis to conclude that Congress intended to limit the equitable remedies "by necessary and inescapable inference". In *New Prime I*, this Court issued a thoughtful and carefully reasoned opinion addressing the remedial scheme set forth in Section 14704. This Court acknowledged that it was "mystified by the inconsistent language" used in Section 14704[63] and it pointed to a number of linguistic and

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jurisdiction of the district court."); *accord United States v. Universal Mgmt. Svs., Inc.* 191 F.3d 750, 761 (6th Cir. 1999); *CFTC v. Hunt*, 591 F. 2d 1211, 1222-23 (7th Cir. 1979)("The Commodity Exchange Act does [not] have any provision restricting the equitable power of the district court. *Porter* and *Mitchell* indicate that the latter fact is a sufficient basis for concluding that a district court possesses the authority to order restitution ...."); *accord CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir.1982); *United States v. RX Depot*, 438 F.3d 1052, 1061 (10th Cir. 2006)("order of disgorgement is permitted if it furthers the purposes of the FDCA"); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989)("We see no indication ... that even implies a restriction on the equitable remedies of the district courts. ... Disgorgement, then, is available simply because the relevant provisions of the Securities Exchange Act of 1934 ... vest jurisdiction in the federal courts.").

[63] *Id.* 192 F.3d at 784.

structural anomalies in the statute as drafted:[64]

- Injunctive relief under Section 14704(a)(1) applies *only* to enforcement of §14102 and 14103.
- Damages under Section 14704(a)(2) applies to violations arising under *any* provision of part B of Title 49.
- Section 14704(a)(1) is written in the active mode (giving rights to persons to seek injunctive relief).
- Section 14704(a)(2) is written in the passive mode (imposing liability on carriers or brokers).

After discussing these "linguistic imperfections and inconsistencies,"[65] this Court noted that Sections 14704(a)(1) and (2) were brought together by the Conference Committee but were "not previously linked."[66] It specifically "decline[d] to read these two sections as interrelated."[67] Without such a link, the availability of damages under Section 14704(a)(2) has no bearing on the scope of equitable relief available under Section 14704(a)(1).

The *New Prime I* analysis completely undercuts the District Court finding that Sections 14704(a)(1) and (2) represent a "comprehensive" regulatory scheme.

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[64] *Id.* 192 F.3d at 785.

[65] *Id.*

[66] *Id.* 192 F.3d at 784.

[67] *Id.*

There is no hint that Congress intended to limit the normal availability of restitution and disgorgement as part of general equitable authority under Section 14704(a)(1).

The District Court's attempt to limit *Porter* and its progeny finding that courts may exercise their broad remedial powers only where the government seeks relief has no support in the law. In *AT&T Broadband v. Tech Communications, Inc.,* the plaintiff, a non-governmental cable operator, obtained an order from the district court freezing the assets of the defendant who was alleged to have violated the Cable Communications Policy Act, 47 U.S.C. § 553 (c)(2)(A)("CCPA").[68] The defendant argued that the CCPA only authorized temporary and final injunctions to restrain violations, and did not explicitly authorize the district court to freeze assets. The Court concluded that the freeze was a proper use of the district court's equitable powers, and reaffirmed the proposition that:

> Congress, when it gave the district court authority to grant a permanent injunction . . . also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that power explicitly or by necessary and inescapable inference.[69]

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[68] 381 F.3d 1309 (11th Cir. 2004).

[69] *Id.* at 1316.

Thus the District Court's finding in this case that a federal court's broad inherent equitable powers may only be exercised when invoked by the government is not correct.

The District Court's reliance on *U.S. v. Lane Labs-USA, Inc.*[70] does not support its conclusion in this regard.[71] *Lane Labs* reinforced the ruling in *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946) that a court's equitable powers "assume an even broader and more flexible character" when the public interest is involved.[72] *Lane Labs* distinguished *Meghrig v. KFC Western, Inc.,*[73] involving a citizen's suit remedy under RCRA, because the Court took a "more restrictive view of RCRA," whose language focused on "preventing future harm by limiting citizen's suits to situations with a risk of 'imminent and substantial' harm."[74] *Lane Labs* concluded: "There was no such limitation in the statutes considered in

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[70] 427 F. 3d 219, 231 (3d Cir. 2005).

[71] June 27, 2007 Order (Doc. 183) at 11-12.

[72] 427 F. 3d at 231.

[73] 516 U.S. 479 (1996).

[74] 427 F. 3d at 231.

Porter or *Mitchell*, nor in the provision of the FDCA we examine here."[75] Similarly here, there is no language in ICCTA limiting the court's equitable jurisdiction. On the contrary, the whole purpose of Section 14103(a) is to provide compensation to delivery persons for unloading services. Without restitution and disgorgement of on the lumping fees paid by Plaintiffs (including the profits made by Supervalu from kickbacks it received from its lumpers) this statutory goal is completely frustrated.

The District Court's conclusion that a government request for expanded equitable relief is more compelling because it acts on behalf of the public interest is also misplaced. Properly stated, the rule has been that when the public interest is involved, the district court's powers assume "an even broader and more flexible character."[76] Accordingly, while the court's powers may be more flexible when the public interest is involved, that does not mean they are inflexible or unavailable simply because a private litigant seeks remedies for violations of federal law.

Further, the lumping statute is not without its own public purpose. The legislative history indicates that the statute was enacted to regulate coercion and

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[75] *Id.*

[76] *Porter*, 328 U.S. 395, 398.

other extortionate practices commonly employed at loading docks.[77] Truckers refusing to pay lumpers were often forced to wait hours to unload there trucks, incurring great expense; or worse were threatened or subjected to physical violence.[78] The ICCTA serves public interests vital to the stability of the interstate trucking industry, including:

- "to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system;" *Global Van Lines, Inc. v. I.C.C.*, 627 F.2d 546, 551 (D.C. Cir. 1980)(quoting *American Trucking Ass'ns v. United States*, 344 U.S. 298, 310 (1953));

- "to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry." *Lease and Interchange of Vehicles*, 131 M.C.C. 286 (June 13, 1978, 1978 WL 10541*1 (I.C.C).

- "the promotion of safe, adequate, economical and efficient transportation and . . . encouragement of fair working conditions in the transportation industry." *ICC, Lease & Interchange of Vehicles*, 46 Fed.Reg. 44013-01, 44014-15 (proposed Sept. 2, 1981), available at 1981 WL 107853.

The District Court also disregards the authorities establishing that the Motor Carrier Act has consistently been ruled to be "remedial and to be construed

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[77] P.L. 96-296, Motor Carrier Act of 1980, House Report No. 96-1069, Section 15, June 3, 1980, reprinted in 1980 U.S.C.C.A.N 2283, 2313.

[78] *Id.*

liberally."[79]

Additionally, to the extent that the equitable remedies available may be determined based upon the governmental – public – interest, when Congress enacted ICCTA, it explicitly transferred authority from the DOT to owner-operators "to enforce the provisions of the Motor Carrier Act,"[80] thus conferring upon the district courts "the full range of equitable relief that was originally in the hands of the ICC."[81] In addition to seeking injunctive relief for violations of the Motor Carrier Act,[82] the ICC also sought and obtained equitable relief, including restitution. In *I.C.C. v. B & T Trans. Co.*,[83] the ICC sued a motor carrier in federal court, alleging that the carrier overcharged its customers and seeking restitution of the overcharges. The First Circuit noted that while the

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[79] *McDonald v. Thompson*, 305 U.S. 263, 266, 59 S.Ct. 176, 178 (1938); *I.C.C. v. W.H Dudgeon*, 213 F.Supp.710, 714 (S.D. Cal. 1961); *Intercoastal Xpress, Inc. v. United States*, 49 Fed. Cl. 531 (2001).

[80] H.R.Rep. No. 104-311, at 87-88 (1995), *reprinted in* 1995-2 U.S.C.C.A.N. 793, 799-800 (cited in *OOIDA v. New Prime*, 192 F.3d 778, 781 (8th Cir. 1999).

[81] *OOIDA v. C. R. England,* 2007 WL 1795768 *7 (D. Utah).

[82] Section 14103 is part of the Motor Carrier Act. H.R. Rep. No. 96-1069, 96th Congress, 2d Sess. 3 (1980), reprinted in 1980 U.S.C.C.A.N 2283, 2313.

[83] 613 F. 2d 1182 (1st Cir. 1980).

Motor Carrier Act only expressly provided for the ICC to seek "prospective injunctions to restrain future conduct," the court rejected the argument that the ICC lacked the authority to seek other equitable relief. The Court concluded that "the traditional power of an equity court to grant complete relief may be said to have provided the I.C.C. with residual, untapped authority to seek equitable restitution once it has invoked the equity jurisdiction of the district courts."[84]

In *New Prime I,* this Court recognized that one major purpose in enacting Section 14704, and creating private rights of action under that section, was to shift government enforcement of the Act to private parties.[85] Congress directed the DOT to refrain from continuing to use its scarce resources to resolve essentially private commercial disputes. The "dispute resolution programs" shifted to private enforcement by Section 14704 covered a wide range of transportation industry regulation other than owner-operator leasing, including household goods, auto driveaway carriers, loss and damage claims, duplicate payments, overcharges and ***lumping***.[86] As this Court ruled, as the means to effect the shift from government to private enforcement, Congress concluded that the ICCTA broadly "provides

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[84] *Id.* at 1186.

[85] 192 F.3d at 781.

[86] *Id.*

that private parties may bring actions in Court to enforce the provisions of the Motor Carrier Act."[87]

Finally, The District Court's conclusion that 49 U.S.C. §14704 does not contemplate monetary relief for violation of Section 14103 makes a mockery of the statutory scheme by precluding the very protection that Section 14103 was intended to accomplish. Section 14103(a) was intended to ensure that delivery persons be compensated for the costs of unloading assistance required by the shipper or receiver.[88] If a court is precluded from awarding that compensation as relief for failure to pay as required by the statute, then the intended protections are illusory at best. This is especially true here where the record shows that Supervalu's agreements with the companies providing the unloading assistance called for Supervalu to receive a significant percentage of the fees paid by Plaintiffs and the class they seek to represent. The equitable relief provided by Section 14704(a)(1) must include restitution and disgorgement to effect the protections intended by Section 14103(a).

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[87] *Id., citing* H.R. Rep. No. 104-311, at 87-88 (1995) reprinted in 1995-2 U.S.C.C.A.N. 793, 799-800.

[88] H.R. Rep. No. 96-1069, 96th Congress, 2d Sess. 3 (1980), reprinted in 1980 U.S.C.C.A.N 2283, 2313.

This Court should reverse the findings of the District Court, hold that 49 U.S.C. §14704(a)(1) provides for the full range of equitable remedies inherent to the powers of the federal courts, and remand to the District Court for further proceedings as to the relief warranted by Supervalu's violations of 49 U.S.C. §14103(a) consistent with this Court's holding.

VII. CONCLUSION

For the foregoing reasons this Court should find that the District Court erred by:

1. Failing to assign the duty to compensate delivery persons for the cost of obtaining unloading assistance to the person who imposed the requirement to obtain such unloading assistance;

2. Holding that the unqualified right to compensation for unloading assistance given to delivery persons by the statute is unavailable unless the delivery persons can prove that the requirement to use such unloading assistance was unreasonable; and

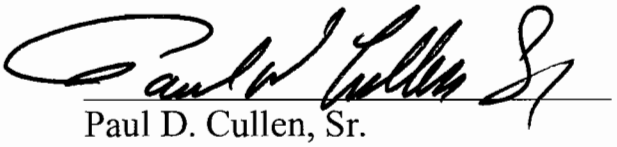
3. Holding that the authority to grant injunctive relief under Section 14704(a)(1) does not authorize a court to provide full equitable relief including the remedies of restitution and disgorgement.

For these reasons, this Court should reverse the grant of summary judgment

to Supervalu, and remand to the District Court for further proceedings consistent with the findings of this Court.

Respectfully submitted,

Date: February 1, 2010



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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,530 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 in Time New Roman font, size 14.

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The undersigned counsel hereby certifies that a full copy of Appellant's Brief has been provided to the Eighth Circuit in digital form contained in a CD-ROM and counsel certifies that the CD-ROM is virus free.

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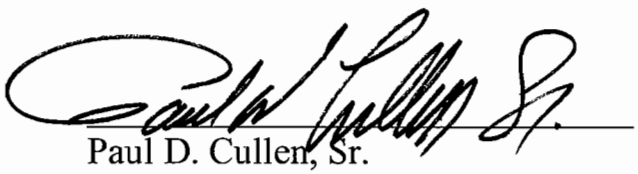

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The undersigned hereby certifies that:

(a) on the 1st day of February 2010one (1) original and ten (10) copies the foregoing Appellants' Brief and Addendum were sent by Federal Express, next business day delivery, for filing with:

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