UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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to the address indicated above.

PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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Cattle moved without owner's statement—Civil penalty—Default.

Kris Ikejiri, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER AS TO SINGER RANCH, INC.

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) and regulations promulgated thereunder, by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia,* that respondent Singer Ranch, Inc., violated the Act regulations promulgated thereunder (9 CFR § 71.1 *et seq.,*). Copies of the complaint and the Rules of Practice Governing Proceeding under the Act were served by the Hearing Clerk, by certified mail, upon Singer Ranch, Inc.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Singer Ranch, Inc., was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Singer Ranch, Inc., was also informed that the failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Singer Ranch, Inc., filed neither an answer nor any other document during the twenty day period. Singer Ranch, Inc.'s, failure to file an answer within the time provided constitutes an admission of the allegation in the complaint pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Singer Ranch, Inc.'s failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since Singer Ranch, Inc., is deemed to have admitted the material allegations of fact in the complaint they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Singer Ranch, Inc., respondent herein, is a corporation doing business in Texas, whose mailing address is Route 3, Box 119A, Lewisville, Texas 75056.

2. On or about May 10, 1984, the respondent moved interstate from Lewisville, Texas, to Sand Springs, Oklahoma, approximately 38 cattle in violation of section 71.18 of the regulations (9 CFR § 71.18) because the cattle were not accompanied by an owner's statement or other document, as required.

CONCLUSION

The respondent has failed to file any answer or response to any of the allegations in the complaint. The consequence of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Finding of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore, issued.

ORDER

Respondent Singer Ranch, Inc., is hereby assessed a civil penalty of five hundred dollars ($500), which shall be payable to the "Treasurer of the United States" a certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145)

[This default decision and order became final November 12, 1985.—Ed.]

In re: RONNIE FARRINGTON, DR. CLARENCE R. BROWN, and SINGER RANCH, INC. A.Q. Docket No. 185. Decided September 30, 1985.

Cattle moved without owner's statement—Civil penalty—Default.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER AS TO CLARENCE R. BROWN

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as emended, (Act) (21 U.S.C. § 111 and § 120) and regulations promulgated thereunder by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged, *inter alia*, that respondent Clarence R. Brown violated the Act and regulations promulgated thereunder (9 CFR § 71.1 *et seq.*). Copies of the complaint and the Rules of Practice Governing Proceeding under the Act were served by the Hearing Clerk, by certified mail, upon Clarence R. Brown.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, Clarence R. Brown, was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Clarence R. Brown was also informed that the failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

Clarence R. Brown filed neither an answer nor any other document during the twenty day period. Clarence R. Brown's failure to file an answer within the time provided constitutes an admission of the allegation in the complaint pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Clarence R. Brown's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since Clarence R. Brown is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Clarence R. Brown, respondent herein, is an individual and a doctor of veterinary medicine, whose mailing address is Route 1, Box 1096, Frisco, Texas 75034.

2. On or about May 10, 1984, the respondent moved interstate from Lewisville, Texas, to Sand Springs, Oklahoma, approximately 38 cattle in violation of section 71.18 of the regulations (9 CFR § 71.18) because the cattle were not accompanied by an owner's statement or other document, as required.

CONCLUSION

Respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence, respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Finding of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore, issued.

ORDER

Respondent Clarence R. Brown, is hereby assessed a civil penalty of five hundred dollars ($500), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This default decision and order became final November 13, 1985.—Ed.]

In re: CECIL D. CRABTREE. A.Q. Docket No. 196. Order issued November 13, 1985.

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER GRANTING DISMISSAL OF COMPLAINT

For the reasons set forth in Complainant's Motion to Dismiss, filed November 8, 1985, *IT IS ORDERED*, that the Complaint filed in this matter on August 6, 1985, be, and hereby is, dismissed.

In re: BOBBY A. GUILFOIL, D.V.M. VA Docket No. 33. Decided November 14, 1985.

Veterinary accreditation suspended for six months—Consent.

Kris H. Ikejiri, for complainant.
William E. Johnson, Frankfort, Kentucky, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the regulations governing the Accreditation of Veterinarians and Suspension or Revocation of such Accreditation (9 CFR Parts 160-162), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that Bobby A. Guilfoil, D.V.M. violated the regulations. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138). The parties have agreed that this proceeding should be terminated by entry of the consent decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, Bobby A. Guilfoil, D.V.M. specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Bobby A. Guilfoil, D.V.M. also agrees to waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

1. Bobby A. Guilfoil, respondent herein, is an individual whose mailing address is 719 West Main Street, Glasgow, Kentucky 42141.

2. Respondent is now, and at all times material herein was, a Doctor of Veterinary Medicine and an Accredited Veterinarian in the State of Kentucky under the provisions of the regulations of Title 9, Code of Federal Regulations, Parts 160-162.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent's Veterinary Accreditation is hereby suspended for six (6) months from February 6, 1985 through July* 6, 1985.

This *nunc pro tunc* order shall have the same force and effect as if entered after full hearing.

In re: CONSOLIDATED ENTERPRISES, INC. A.Q. Docket No. 93. Decided November 14, 1985.

Cattle moved within Class B state—Civil penalty—Consent.

Kevin Thieman, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health

* "August" was changed to July to conform to the agreement of the parties.

Inspection Service alleging that Consolidated Enterprises, Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that the proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W. Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: GEORGE J. SCHWEIZER, JR., and CONSOLIDATED ENTERPRISES, INC. A.Q. Docket No. 93. Order issued November 14, 1985.

Order issued by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against George J. Schweizer, Jr., on August 6, 1984, is herewith dismissed.

In re: TAMA MEAT PACKING CORPORATION. A.Q. Docket No. 200. Order issued November 15, 1985.

Order issued by Victor W. Palmer, Administrative Law Judge.

DISMISSAL ORDER

By reason of the premises set forth in Complainant's Motion to Dismiss Cause, filed November 12, 1985, the following Order is hereby issued:

ORDER

The Complaint, filed August 9, 1985, in the above-entitled proceeding, is hereby Dismissed.

In re: CLIFF MARTIN. A.Q. Docket No. 152. Decided November 18, 1985.

Cattle moved interstate—Civil penalty—Consent.

Jaru Ruley, for complainant.
William B. Greene, Cartersville, Georgia, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. The respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with tho proceeding.

FINDINGS OF FACT

1. Cliff Martin, respondent, is an individual whose address is Martin Road, Cartersville, Georgia 30120.

2. Between the dates of March 21, 1984, and May 16, 1984, the respondent moved cattle interstate from the Roanoke Stockyards, Inc., Roanoke, Alabama, to the People's Livestock Market, Cartersville, Georgia.

3. On or about the dates of May 10, 1984, and May 17, 1984, the respondent moved cattle interstate from the Cherokee County

Stockyards, Centre, Alabama, to the People's Livestock Market, Cartersville, Georgia.

4. On or about July 17, 1984, the respondent moved a cow interstate from the Fort Payne Stockyard, Inc., Fort Payne, Alabama, to the Carroll County Livestock Sales Barn, Inc., Carrollton, Georgia.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to the respondent, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of eight thousand dollars ($8,000.00), payable in eight quarterly installments with the first installmant of $1,000.00 due January 15, 1986. The respondent shall make payment by sending a certified check or money order payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400. The remaining seven installments of $1,000 each shall be due on the fifteenth of April, July and October of 1986, and January, July and October of 1987.

In the event the respondent defaults on any of the terms of this consent decision, the balance of the civil penalty assessed herein shall become immediately due.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: CLAYTON MYERS. A.Q. Docket No. 171. Decided November 27, 1985.

Cattle moved interstate—Civil penalty—Consent.

Mark Dopp, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regu-

lations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issue of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Clayton Myers, respondent is an individual whose mailing address is Post Office Box 754, Muleshoe, Texas 79347.

2. On or about October 31, 1984, the respondent moved four (4) head of cattle from the Muskogee Livestock Auction, Muskogee, Oklahoma, to the Muleshoe Livestock Auction, Muleshoe, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the date this order is served upon the respondent.

In re: MICKEL L. WILSON. A.Q. Docket No. 177. Decided December 3, 1985.

Equine infectious anemia reactor horse shipped interstate—Civil penalty—Consent.

Kevin Thiemann, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act), (21 U.S.C. §§ 111, 120, 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Mickel L. Wilson, respondent violated the Act and regulations promulgated thereunder (7 CFR § 75.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Mickel L. Wilson, respondent, is an individual whose address is P.O. Box 2, Chatham, Louisiana 71226.

2. On or about September 15, 1984, the respondent shipped one (1) equine infectious anemia reactor horse interstate from Vicksburg, Mississippi to Winnsboro, Louisiana.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred fifty dollars ($250.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Ave., S.W., Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: JAMES MOSS and BILL WOOD. A.Q. Docket No. 124. Decided October 25, 1985.

Moved interstate without certificate—Civil penalty.

James Moss moved cattle interstate that were nonvaccinates, over 18 age, from herds not known to be affected with brucellosis. Respondent was assessed a civil penalty of $500.00.

tion 78.9(b) of the regulations promulgated under the Act (9 CFR § 78.9(b)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were personally served upon respondent James Moss.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, the respondent was informed in the letter of service that an answer should be filed with the Hearing Clerk, and that the answer should specifically admit, deny, or explain each of the allegations in the complaint. The respondent was also informed that failure to file a request for oral hearing would constitute a waiver of hearing.

Section 1.139 of the Rules, 7 CFR § 1.139, provides that the admission by answer of all material allegations of fact contained in the complaint shall constitute a waiver of hearing, and that upon such admission complainant shall file a proposed decision and a motion for adoption thereof. Further, that unless meritorious objections have been filed by a respondent, the Judge shall issue such decision without further procedure or hearing. Although I find further procedure or hearing unnecessary, I believe that the inclusion of a recitation of the below listed chronology and citation of admissions by respondent is necessary for clarity of the record, and therefore modify the Proposed Decision and Order for James Moss, as submitted by complainant.

On February 8, 1985, respondent James Moss filed a *pro se* answer in which he admitted the allegations in Paragraph II of the complaint. Respondent James Moss did not file a request for oral hearing.

However, he did deny the material allegations of Paragraph III of the complaint. In accordance with section 1.141 of the Rules, 7 CFR § 1.141, complainant properly filed a Motion to Assign Date for Oral Hearing on April 2, 1985. Thus, at this juncture of the proceedings, section 1.141 was not available to complainant as an avenue to invoke the waiver of hearing provision. Additionally, subsequent filings by respondent Moss, as well as the scheduling of the hearing, contemplated that both respondents would participate in the oral hearing.

By Notice of April 25, 1985, oral hearing was scheduled for August 1, 1985, in Portland, Oregon. By letter filed July 19, 1985, respondent Moss requested that this hearing be postponed. My Order of July 26, 1985, rescheduled the hearing to August 29, 1985, in order to accommodate respondent Moss, and for the further purpose of providing the parties an opportunity to conclude this matter through consent negotiations.

On August 23, 1985, complainant filed a Motion to Dismiss Paragraph III of the complaint with respect to James Moss. Additionally, on August 23, 1985, complainant filed a Request for Adjournment of Hearing and a Motion for the Adoption of Proposed Decision and Order for James Moss, together with a proposed Decision and Order for James Moss.

By separate Orders of the undersigned, dated August 27, 1985, the oral hearing scheduled for August 29, 1985, was cancelled and rescheduled to October 30, 1985, and the Motion to Dismiss Paragraph III of the complaint as to James Moss was granted. The record does not show a similar Motion to Dismiss Paragraph III of the complaint as against respondent Wood. On September 30, 1985, a Consent Decision by Bill Wood was filed and issued by the undersigned on October 10, 1985. In the complaint, complainant had sought a total civil penalty of $1,000, $500 per violation, against each respondent. Respondent Wood agreed in the Consent Decision to settle this matter for half of this amount, $500.

On October 11, 1985, following respondent Moss' reply to complainant's Motion for Decision and Order for James Moss, complainant requested postponement of the hearing scheduled for October 30, 1985, until the undersigned ruled on complainant's Motion for Adoption of Proposed Decision and Order for James Moss. The request was granted by my Order of October 18, 1985, and the oral hearing scheduled for October 30, 1985, in Portland, Oregon, was postponed indefinitely. On October 18, 1985, complainant filed a Renewal of Motion for Adoption of Proposed Decision and Order for James Moss.

As previously noted, respondent Wood has entered into a Consent Order in settlement of the allegations against him, thereby leaving respondent Moss as the only remaining respondent in the proceeding. Additionally, Paragraph III of the complaint has been dismissed with respect to respondent Moss. Thus, the only matter to be considered here are the allegations set forth in Paragraph II of the complaint as they pertain to respondent Moss.

Paragraph II of the complaint alleges respondent Moss moved approximately 73 cattle interstate from Oregon, a Class A State, to Cheney, Washington, in violation of § 78.9(b) (9 CFR 79(b)) of the regulations because the cattle, which were nonvaccinated over 18 months of age and from herds not known to be affected with brucellosis, were moved interstate without being accompanied by a certificate, as required. Respondent Moss' Answer, filed February 8, 1985, stated, in part, "Number II of the complaint is a fairly accurate account of the livestock shipped." His answer also stated

that he did everything he was told to do by the veterinarian with regard to the interstate movement of these cattle.

In response to complainant's Motion for Adoption of Proposed Decision and Order for James Moss, respondent Moss stated, in part, that, "The cattle involved in the shipment to Washington were shipped by me." Again, he stated that he had done all he knew to do on the advice of the veterinarian, and did not believe it was his fault if he received wrong information with regard to the shipment of these cattle. Thus, he stated, in essence, that he had acted in good faith, and this was a mitigating circumstance.

As the respondent has admitted the allegations in Paragraph II of the complaint, he has thus admitted all the material allegations of fact contained in the complaint. Under section 1.139 of the Rules of Practice (7 CFR § 1.139), this constitutes a waiver of hearing. A hearing is therefore unnecessary.

In the complaint, complainant requested a civil penalty of five hundred dollars per violation. The original complaint alleged two violations by the respondents. In dismissing Paragraph III of the complaint against respondent James Moss, complainant has halved its requested sanction against him. Further mitigation is not warranted. Therefore, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. James Moss, respondent, is an individual whose address is 20951 Boones Ferry Road N.E., Aurora, OR 97002.

2. On or about March 23 or 24, 1985, respondent moved approximately 73 cattle interstate from Oregon, a Class A State, to Cheney, Washington, in violation of 9 CFR § 78.9(b) because the cattle, which were nonvaccinates over 18 months of age and from herds not known to be affected with brucellosis, were moved interstate without being accompanied by a certificate.

CONCLUSIONS

In his answer, respondent James Moss admitted all the material allegations of fact contained in the complaint. Complainant has halved the penalty originally requested, and no further mitigation is warranted.

By reason of the Findings of Fact set forth above, respondent James Moss has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent James Moss is hereby assessed a civil penalty of five hundred dollars ($500). The respondent shall send, payable to the "Treasurer of the United States", a certified check or money order, to William Jenson, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, no later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 5, 1985.—Ed.]

In re: TRAVIS E. FARMER. A.Q. Docket No. 127. Decided September 30, 1985; Amended Decision and Order Decided October 31, 1985.

Brucellosis—exposed cattle moved interstate without permit—Civil penalty.

Respondent moved brucellosis-exposed cattle interstate without a required permit. Respondent acted entirely on his own volition and initiative. Respondent was assesed a civil penalty of $500, which by amended decision and order is to be paid off in ten equal monthly payments of $50.00.

Joseph Pembroke, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

AMENDED DECISION AND ORDER

This matter involves an alleged violation of quarantine restrictions which prohibit cattle shipments without certain documents.[1]

Respondent Farmer admitted shipping brucellosis exposed cattle as alleged, but contended that the shipment in question was done in accordance with "advice of . . . a federal inspector." Par. 4, Respondent's Answer filed 12/27/84.

The parties agreed that:

[1] Act of February 2 1903, as amended, 21 U.S.C., §§ 111 and 120, and implementing regulations, 9 CFR 78.1 *et seq.*

In particular, the complaint alleged violation of § 78.8(c), that is, movement of brucellosis exposed cattle not accompanied by a permit, as required.

"1) On or about Sunday April 30, 1984, Mr. Farmer moved ten head of cattle from Alabama to a holding pen in Georgia, and then to a sale barn at Carrollton, Georgia for auction.

"2) One of the above cattle tested out as a brucellosis reactor.

"3) Mr. Farmer was allowed to sell the brucellosis reactor and two, or possibly three calf steers at the market.

"4) The remaining cattle were placed in quarantine by Ed Welfe.

"5) Mr. Farmer later returned these remaining cattle from his holding pen in Georgia back to a pasture in Alabama without an owner shipper statement.

Issues Presented at Oral Hearing

"1) Did Mr. Farmer act under the directions of the State and Federal Inspectors, Roy Iverson, and/or Ed Wolfe in returning the cattle to the pasture in Alabama?

"2) If Mr. Farmer acted under the guidance of Mr. Iverson or Mr. Wolfe, what mitigating effect will that have on the civil penalty requested by Complainant?"

Complainant's Exhibit #1

* * * * * * *

The evidence at the hearing confirms essentially the facts as agreed to by the parties. The dispute revolves around a telephone call between a "federal inspector" and Mr. Farmer during the evening of the day the brucellosis reactor cow was discovered.

The federal animal health technician who worked in the brucellosis eradication program, said that Mr. Farmer called the technician at the technician's home that evening to inquire about quarantine questions. The technician said he told Farmer that everything would be quarantined for 120 days. That meant the pasture from which the brucellosis reactor cattle came, the pasture to which they were taken from the stockyard, and anywhere else they may be taken.

The quarantine often continues beyond a 120 days if other cattle show up as brucellosis reacters. The quarantine continues until they have all clear readings over a particular period of time from all cattle in the herd(s).

The technician states that respondent Farmer was uncertain about what he wanted to do with the brucellosis reactor cattle and wanted information to help decide.

In response to respondent Farmer's questions, the technician told respondent Farmer that cattle in the pasture in Alabama from which the cattle came, as well as Farmer's cattle at his Georgia pastures where the cattle were taken from the market, would be subject to quarantine.

The technician said he called the state veterinarian to see if permission would be given to return the cattle. The response was negative. The technician made three trips to tell respondent Farmer that he could not return the cattle to Alabama, and failed to reach him until the following Monday. At that time, respondent Farmer told him the cattle had already been taken back to Alabama.

On the other hand, respondent Farmer claims that the technician phoned when Farmer was unavailable to talk. Later, the technician called back a second time and respondent's wife called him from the yard to talk.

Respondent Farmer testifies that he was advised by the technician to return the brucellosis-exposed cattle to the Alabama pasture from whence they came. Farmer agreed to do so.

Respondent Farmer states that the advice he was given was innocently, but ignorantly given, precipitating his legal dispute.

It seems extremely implausible that a full time animal health technician working in the brucellosis eradication program could be so careless and uninformed. The technician was firm, positive, clear and determined in his presentation of his evidence. There was no hesitation or doubt. The technician firmly and strongly stated the events as he recalled them. They are plausible and carry persuasive weight.

On the other hand, Mr. Farmer has a clear interest to have the brucellosis exposed cattle returned to the Alabama pastures because he knew the cattle in the Alabama pastures would be quarantined (as the point from which the brucellosis reactor cow came from).

If respondent Farmer could keep his own pastures in Georgia free from quarantine restrictions, it would be a clear advantage to him to do so.

No such advantage is seen on the animal technician's part, but in fact, to the contrary, a clear, strong occupational and program-destroying disadvantage exists there, if the technician did what respondent Farmer said he did.

On balance, it appears that the testimony of the animal health technician carries more probative value and weight than did respondent's evidence.

There is more basic plausibility to complainant's side than respondents. To accept respondent's position, would be to determine that the animal health technician made a grievous, basic, fundamental mistake about simple, clear principles of the program he had worked in for years.

Furthermore, it is difficult to accept the contention that the animal health technician volunteered unsolicited advice to send brucellosis-exposed cattle across a State line, in this context, without some caveat or qualification.

* * * * * * *

The preponderance of the credible, reliable and persuasive evidence supports the allegation that respondent moved seven (7) brucellosis-exposed cattle from the stockyards at Carrollton, Georgia to his (shared) pasture at Ranburne, Alabama in violation of § 78.8(c) of the regulations (9 CFR 78.8(c)), because the cattle were not accompanied by a required permit.

Respondent Farmer acted entirely on his own volition and initiative, and did not receive any advice to return the brucellosis-exposed cattle to Alabama (from Georgia) without a required permit.

* * * * * * *

Complainant seeks a civil penalty of $500.00. Great weight must be given to the sanction recommended by the Administrators. *In re Sy B. Gaiber & Co.*, 31 AD 843, 845-51, (1972); *In re J. A. Speight*, 33 AD 280, 310-19 (1974); *In re Samuel Esposito*, 38 AD 613, 665 (1979).

Here, movement of brucellosis-exposed cattle warrants that sanction which is just double that commonly assessed—on the weight required to be given to complainant's recommendation—for mere technical violations, i.e., where *healthy* cattle are shipped without such permits.

* * * * * * *

ORDER

Respondent Farmer is assessed a five hundred dollar ($500.00) civil penalty.[2]

This Decision and Order shall become final 35 days after service, unless appealed within 30 days of service (9 CFR 1.145a and 1.142c). A copy of this Order shall be served upon the parties.

AMENDED DECISION AND ORDER

Complainant has filed a motion to amend the order, entered September 30 1985, averring that "Respondent, has requested that he be allowed to pay the ($500) five hundred dollar civil penalty assessed against him on September 3[0], 1985, in [ten] (10) equal monthly payments of ($50) fifty dollars per month."

The motion should be and hereby is granted.

IT SHOULD BE AND HEREBY IS ORDERED that the Order entered on September 30 1985, is amended and modified to read as follows:

AMENDED ORDER

Respondent Farmer is assessed a five-hundred dollar ($500) civil penalty.[2]

The Respondent shall pay this civil penalty in ten (10) equal monthly payments of fifty dollars ($50) each, beginning on the 1st of the month following the day this Amended Order becomes final. However, if any payment is not received by the tenth (10) day of the month, the remaining uncollected balance shall become due and payable on demand by Complainant.

This Amended Order shall become final 35 days after service, unless appealed within 30 days after service (9 CFR 1.145(a) and 1.142(c). A copy of this Order shall be served upon the parties.

[This amended decision and order became final December 10, 1985.—Ed.]

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[2] The civil penalty shall be paid by certified check or money order, payable to the Treasurer of the United States, and mailed to Attorney Joseph P. Pembroke, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250.

[2] The respondent shall pay the civil penalty by certified check or money order, payable to the Treasurer of the United States, and mailed to Attorney Joseph P. Pembroke, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250

In re: GARY HOFFMAN. A.Q. Docket No. 99. Decided November 6, 1985.

Swine moved interstate without certificate—Civil penalty.

Respondent shipped swine interstate without health certificate. That respondent was without specific knowledge the pigs would be hauled across state lines does not relieve him from responsibility. Respondent was assessed a civil penalty of $500.00.

Kris Ikejiri, for complainant.
William E. Kretschmar, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative proceeding instituted by a complaint filed on September 6, 1984, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, seeking the assessment of a civil penalty against respondent Gary Hoffman, under 21 U.S.C. §§ 111, 120 and 122. The complainant charges respondent violated the statute and pertinent regulations on September 21, 1983, by moving swine interstate from Ashley, North Dakota to Sauk Center, Minnesota, which were not accompanied by a requisite certificate attesting them to not be known to be infected with or exposed to two contagious diseases (9 CFR §§ 76.6(b)(1), 76.12 (Schedule B) and 85.7(b)).

On September 13, 1985, an oral hearing was held before me in Bismarck, North Dakota, at which the parties stipulated certain facts and agreed that their post-hearing briefs would be limited to specified issues. Briefing was completed on October 28, 1985.

FINDINGS OF FACT

1. Respondent Gary Hoffman is an individual whose address is Lehr, North Dakota 58460.

2. On September 21, 1983, 214 swine were moved interstate from a receiving and shipping facility in Ashley, North Dakota, conducted for American Feeder Pig Co-op by respondent Gary Hoffman, to the American Feeder Pig Co-op receiving facility at Sauk Conter, Minnesota. The swine moved interstate unaccompanied by a certificate attesting that they were not known to be affected with or exposed to hog cholera; were not vaccinated for pseudorabies; and were not known to be infected with or exposed to pseudorabies.

3. On September 21, 1983, Gary Hoffman accepted and shipped swine from a facility in Ashley, North Dakota, on behalf of American Feeder Pig, which paid him 40 cents for each pig received, and

an additional 40 cents on each pig he shipped to local farmers, but nothing additional on the pigs he shipped to the American Feeder Pigs' facility at Sauk Center, Minnesota.

4. The veterinarian who inspected the pigs on September 21, 1983, was paid by American Feeder Pig on the basis of a flat amount for his services for the day. The veterinarian inspected the 214 swine which moved interstate that day and found them to be free of disease. However, he did not fill out and provide the certificate required by 9 CFR §§ 76.6(b)(1), 76.12 (Schedule B), and 85.7(b) because he was not asked to do so. His instructions in these respects were normally given him by Gary Hoffman.

5. Gary Hoffman was attempting to arrange sales of the 214 swine to local buyers and, for that reason, failed to request the preparation of the certificate the regulations required.

CONCLUSIONS

1. Gary Hoffman inadvertently failed to obtain and send the requisite health certificate for swine moved interstate which a veterinarian had inspected and found to show no sign of the communicable diseases that are the subject of federal regulations.

2. The appropriate civil penalty under the circumstances is $500.

DISCUSSION

Respondent contends he should not be held liable for the interstate shipment of swine without the required health certificate because he was only an employee and did not know these pigs would actually be taken out of state. Respondent argues that the responsibility for obtaining the necessary health certificate rested solely with the trucker employed by American Feeder Pig Co-op who made the decision to take the pigs to Minnesota.

Even though I accept respondent's testimony that the interstate shipment of swine without the required health certificate was unintended and inadvertent, Gary Hoffman bears responsibility and is subject to sanction under the Act. He is a dealer in swine who had charge of receiving and shipping operations at the Ashley facility, and who owed a direct responsibility for compliance with the regulations. The fact that he was without specific knowledge that these pigs would, in fact, be hauled across state lines does not relieve him from that responsibility. He became liable for this consequence when he "received (the swine) for movement." *See* the definition of "moved", 9 CFR §§ 76.1(q) and 85.1(r). Moreover, it was understood that unless Hoffman had local buyers willing and able to pay more for the pigs than American Feeder Pig was paying for them, the

pigs were to be moved interstate to the Sauk Center, Minnesota, facility.

Issuance of a warning letter, as respondent alternatively suggests, would be an insufficient sanction where an experienced and knowledgeable dealer such as respondent has failed to comply with swine health law requirements. On the other hand, this is a first offense and a single instance of a violation by respondent. Taking each of these facts into consideration, a civil penalty of $500 shall be assessed.

ORDER

Gary Hoffman, respondent, is assessed a civil penalty of five hundred dollars ($500). The civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order and shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within 30 days of the effective date of this Decision and Order.

This Decision and Order shall be final and effective 30 days after the date of service of this Decision and Order on the respondent, unless there is an appeal to the Judicial Officer, pursuant to section 1.145 of the applicable Rules of Practice (7 CFR § 1.145).

[This amended decision and order became final December 17, 1985.—Ed.]

In re: HAROLD F. (RED) DURHAM. A.Q. Docket No. 182. Decided November 8, 1985.

Cattle moved interstate without required statement or document—Civil penalty.

Respondent moved cattle interstate on two occasions without required owner's or shippers statement or other required document without certificate, and without "Permit for Entry." Respondent was assessed a civil penalty of $2,500.00.

Joru Ruley, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 71.18 and 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance

with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was instituted by a complaint filed on June 10, 1985, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. On August 4, 1985, the complaint was personally delivered to the respondent Harold F. "Red" Durham, at his residence at 903 North Meridian, Waurika, Oklahoma. The complaint alleged that on or about March 24, 1984, and April 12, 1984, respondent transported a total of approximately 137 cattle interstate from Denton, Texas to Oklahoma in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 71.9(d)(3)(iv) in that the cattle were not accompanied interstate by a certificate or by a "Permit for Entry."

Additionally, the March 24, 1984, movement was in violation of section 71.18 of the regulations (9 CFR § 71.18) in that the cattle in that movement were not accompanied by an owner's or shipper's statement, or other document, containing prescribed information. Respondent failed to file an answer, thereby admitting the allegations and waiving a hearing. (See 7 CFR § 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Harold F. (Red) Durham, herein referred to as the respondent, is an individual whose address is Box 144, Waurika, Oklahoma 73573.

2. On or about March 24, 1984, the respondent moved interstate approximately fifty-three (53) cattle from Denton, Texas, to Comanche, Oklahoma, in violation of section 71.18 of the regulations (9 CFR § 71.18), in that the cattle were not accompanied interstate by an owner's or shippers statement, or other document, containing prescribed information, as required.

3. On or about March 24, 1984, the respondent moved interstate approximately fifty-three (53) cattle from Denton, Texas, to Comanche, Oklahoma, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cattle were not accompanied interstate by a certificate, as required.

4. On or about March 24, 1984, the respondent moved interstate approximately fifty-three (53) cattle from Denton, Texas, to Comanche, Oklahoma, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cattle were not accompanied interstate by a "Permit for Entry", as required.

5. On or about April 12, 1984, the respondent moved interstate approximately eighty-four (84) cattle from Denton, Texas, to the State of Oklahoma, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cattle were not accompanied interstate by a certificate, as required.

6. On or about April 12, 1984, the respondent moved interstate approximately eighty-four (84) cattle from Denton, Texas, to the State of Oklahoma, in violation of section 78.9(d)(3)(iv) of the regulations (9 CFR § 78.9(d)(3)(iv)), in that the cattle were not accompanied interstate by a "Permit for Entry", as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated sections 71.18 and 78.9(d)(3)(iv) of the regulations (9 CFR §§ 71.18 and 78.9(d)(3)(iv)).

Therefore, the following Order is issued.

ORDER

Respondent, Harold F. (Red) Durham is hereby assessed a civil penalty of two thousand five hundred dollars ($500.00 per violation). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 17, 1985.—Ed.]

In re: RANDY SHIPP. A.Q. Docket No. 211. Decided December 18, 1985.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Randy Shipp on October 18, 1985, is herewith dismissed.

In re: PAUL BROWN d/b/a PAUL BROWN CATTLE COMPANY. A.Q. Docket No. 202. Decided December 26, 1985.

Brucellosis-exposed cows moved interstate—Backtag and eartag identification removed—Civil penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Paul Brown d/b/a Paul Brown Cattle Company, respondent, violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.8). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Paul Brown d/b/a Paul Brown Cattle Company, herein referred to as the respondent, is an individual whose address is Route 2, Antlers, Oklahoma 74523.

2. On or about April 19, 1984, the respondent moved a brucellosis-exposed cow interstate from the stockyard at Paris, Texas, to his dealer premises at Rattan, Oklahoma.

3. Between the dates of April 19, 1984, and May 4, 1984, the respondent removed backtag and eartag identification from a brucellosis-exposed cow.

4. On or about May 15, 1984, the respondent moved a brucellosis-exposed cow interstate from his dealer premises at Rattan, Oklahoma to the Supreme Beef Packers, Ladonia, Texas.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to the respondent, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of two thousand dollars ($2000.00) The respondent shall pay the civil penalty in eight monthly installments of $250.00 beginning January 1, 1986 with a final payment due August 1, 1986. Each payment shall be by certified check or money order payable to the "Treasurer of the United States," and sent to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: THE UNIVERSITY OF PENNSYLVANIA. AWA Docket No. 355. Decided November 4, 1985.

Research facility—Compliance with the Act—Civil penalty—Consent.

Robert Ertman and *Donald Tracy,* for complainant.
Debra F. Fickler, Philadelphia, Pennsylvania, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*), ("Act") by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the Act and the regulations and standards issued thereunder (9 CFR Parts 1, 2, and 3). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this proceeding to the entry of this decision.

FINDINGS OF FACT

1. Respondent, the University of Pennsylvania, has a mailing address of Office of the President, 101 College Hall, Philadelphia, PA 19104.

2. At all times material herein respondent operated a research facility registered under the Act.

3. At the time of its original application for registration, respondent received a copy of the regulations and standards contained in 9 CFR Chapter 1, subchapter A, and agreed in writing to comply with said standards and regulations.

CONCLUSION

Respondent, The University of Pennsylvania, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

Respondent, The University of Pennsylvania, shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder

(9 CFR Parts 1, 2, and 3) and shall cease and desist from any violation thereof.

To assure that any research at the University of Pennsylvania subject to the Animal Welfare Act is conducted in accordance with the Act and regulations, respondent shall institute the following actions within 30 days after the effective date of this Order:

1. The director of any research project utilizing animals, as defined in the Act and regulations, must consult with the campus veterinarian or his designee:

(a) on the proper use of anesthetics and analgesics; and

(b) on the proper care of injured animals.

It is understood that such consultations are to assure that respondent establishes and maintains an adequate program of veterinary care and are not intended to interfere with the actual conduct of research.

2. Respondent shall establish an advisory committee for laboratory animal care, responsible to the Vice Provost for Research, to oversee respondent's compliance with the regulations and standards issued under the Act.

(a) The committee shall include at least one member who is not affiliated with either animal research or the animal rights movement.

(b) The committee's oversight shall include, but not be limited to, a review of the use of anesthesia, the degree of sanitation maintained in operating rooms, and the post-operative care given research animals.

(c) The committee shall make quarterly reports to the Vice Provost for Research detailing its findings concerning respondent's compliance with the Act and the regulations and standards thereunder. Respondent shall send a copy of these reports to the Area Veterinarian in Charge, APHIS, 2301 North Cameron St., Room 402, Harrisburg, PA 17110, for three years.

3. Respondent shall establish and maintain training programs to assure that all individuals involved in the care and handling of laboratory animals for research purposes are properly trained in the standards under the Act.

4. Respondent shall distribute a copy of this Decision and Order to all of its personnel who are responsible for the care and handling of research animals subject to the Act. Respondent shall maintain an ongoing information program designed to insure that such personnel are aware of the provisions of this Decision and Order.

5. Respondent shall, within sixty days after service of this Decision and Order, send the Area Veterinarian In Charge a written

report setting forth the steps it has taken to implement the requirements of this Order.

Respondent is assessed a civil penalty of $4,000.00 which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: JoEtta L. Anesi, d/b/a Jo's Kennel. AWA Docket No. 267. Order issued November 8, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER FIXING EFFECTIVE DATE

On October 29, 1985, an order was issued denying respondent's Petition for Reconsideration. No effective date was fixed in that order since respondent stated she was going to appeal to the United States District Court. If an appeal is taken, it must be to the appropriate United States Court of Appeals (7 U.S.C. § 2149(c)). Since it is not known whether respondent will appeal to the appropriate United States Court of Appeals within the time limit, the order previously issued in this case shall become effective 20 days after service of this order. If within that 20-day period, respondent files with the Hearing Clerk a copy of a notice of appeal to the appropriate United States Court of Appeals, and requests a stay order, consideration will be given to staying the administrative order pending the outcome of proceedings for judicial review.

In re: Galen Rottinghaus. AWA Docket No. 230. Decided November 22, 1985.

Compliance with the Act—Consent.

Robert A. Ertman, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act") by a Complaint filed by

the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent violated the regulations and standards issued under the Act (9 CFR § 1.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to these proceedings (7 CFR § 1.138).

The respondent admits the jurisdictional allegations contained in the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, and waives oral hearing and further procedure. Complainant and respondent agree for the purpose of settling this procedure to the entry of this decision.

CONCLUSION

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision and order, this decision and order will be entered.

ORDER

Respondent shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR § 1.1 *et seq.*) and shall cease and desist from any violation thereof.

This order shall have the same force and effect as if entered after full hearing and shall become effective on the first day after service of this Decision and Order on the respondent.

In re: WILAUR and SARAH CHRISTENSEN. AWA Docket No. 235. Decided December 2, 1985.

Compliance with the Act—Consent.

Robert A. Ertman, for complainant.
James J. Wheeler, Kaytesville, Missouri, for respondents.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, as amended. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondents. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

Respondents admit the jurisdictional allegations of the complaint, specifically admit that the Secretary of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations of the complaint, and waive hearing and further procedure herein. Complainant and respondents consent to the issuance of this order.

ORDER

Respondents are ordered to cease and desist from violating the Animal Welfare Act, as amended, and the regulations and standards issued under the Act. This order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

In re: JoEtta L. Anesi, d/b/a Jo's Kennel. AWA Docket. No. 267. Order issued December 2, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING STAY ORDER

On November 26, 1985, respondent filed a request for a stay pending the outcome of proceedings for judicial review. Respondent's request encloses a "copy of my appeal to the U.S. District Court Eastern Division at St. Louis, Missouri." That court has no jurisdiction of an appeal in this case. As stated in the Judicial Officer's order fixing effective date filed November 8, 1985, "[i]f an appeal is taken, it must be to the appropriate United States Court of Appeals (7 U.S.C. § 2149(c))." The "U.S. District Court Eastern Division at St. Louis, Missouri" is not a "United States Court of Appeals." Since no valid appeal has been filed, no stay will be issued.

In addition, the reasons set forth in respondent's appeal to the District Court do not raise any serious legal issues that would warrant the issuance of a stay pending the outcome of any appeal. Accordingly, even if respondent files an appeal within the time limit to the appropriate United States Court of Appeals (7 U.S.C. § 2149(c)), and again requests a stay, unless it appears that a stay is warranted, the Judicial Officer will deny the request for a stay.

In re: HOMER STEELEY. AWA Docket No. 340. Order issued December 18, 1985.

Order issued by William J. Weber, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, Complainant's motion to dismiss is granted. Accordingly, it is ORDERED that the complaint be, and hereby is, dismissed without prejudice.

In re: DONALD STUMBO, d/b/a STUMBO FARMS. AWA Docket No. 216. Order issued December 23, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

REMOVAL OF STAY ORDER

The stay order previously issued in this proceeding is hereby lifted.

The provisions of the first paragraph of the order filed on August 7, 1984, shall become effective on the day after service of this order on respondent.

The license suspension provisions of the order issued August 7, 1984, shall become effective on the 30th day after service of this order on respondent.

The civil penalty imposed by the order of August 7, 1984, shall be paid within thirty (30) days after the date of service of this order on respondent.

In re: PATRICIA BLOWERS, d/b/a WINDSONG KENNELS. AWA Docket No. 366. Decided December 26, 1985.

Dealer—Compliance with the Act—Consent.

Robert Frisby, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended, 7 U.S.C. §§ 2131-2156 (1982), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the re-

spondent willfully violated the regulations and standards issued pursuant to the Act, 9 CFR §§ 1.1-3.142 (1985). This decision is entered pursuant to the consent decision provisions of ths Rules of Practice applicable to this proceeding, 7 CFR § 1.138.

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary hss jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Patricia Blowers is an individual doing business as Windsong Kennels, and her mailing address is Route 3, Box 14, Danbury, Wisconsin 54830.

2. The respondent, at all times material herein, was a dealsr within the meaning of that term as defined in the Act and subject to the provisions of the Act and the regulations and standards issued thereunder.

3. Ths respondent, at all times material herein, was licensed as s Class A dealer (No. 35-A-145) under the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Patricia Blowers shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. §§ 2131-2156, and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142.

The provisions of this order shall become effective on ths first day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: BILL SCAMMON and ELAINE SCAMMON. AWA Docket No. 298. Decided December 31, 1985.

Compliance with the Act—Civil penalty—Consent.

Robert Ertman, for complainant.
Charles B. Cowherd, Springfield, Missouri, for respondents.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a proceeding under the Animal Welfare Act. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the Rules of Practice was served upon respondents. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR Section 1.138).

Respondents admit the jurisdictional allegations of the complaint, specifically admit that the Secretary of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations of the complaint, and waive hearing and further procedure herein. Complainant and respondents consent to the issuance of this Order.

ORDER

1. A civil penalty of $500.00 is assessed against respondents. The Administrator acknowledges receipt of said sum and said penalty is hereby deemed satisfied.

2. Respondents shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued under the Act.

3. This order shall have the same force and effect as if entered after a full hsaring and shall be effective on the first day after service upon respondents.

In re: UTICA PACKING COMPANY. FMIA Docket No. 35. Decided November 18, 1982.*

Conviction for bribing a supervisory Federal meat inspector on four occasions—Dismissal of complaint with prejudice following remand order from Sixth Circuit.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER ON REMAND

This matter is on remand from the United States District Court for the Easter District of Michigan, Southern Division, for further consideration consistent with the Order of the United States Ceurt of Appeals for the Sixth Circuit dated September 2, 1982.

In the Decision and Order previously filed in this case (39 Agric. Dec. 590 (1980)), the Judicial Officer withdrew federal meat inspection from respondent indefinitely, but suspended the denial for so long as David Fenster is not associated with respondent and provides no direction or advice to and exercises no control over respondent. The Order was based on David Fenster's felony convictions of bribing a supervisory Federal meat inspector on four occasions which, according to the Judicial Officer, warranted the determination that respondent is unfit to receive meat inspection, so long as David Fenster is associated with respondent, irrespoctive ef any mitigating circumstances.

The original Decision and Order was affirmed by the United States District Court, *Utica Packing Co.* v. *Bergland*, 511 F. Supp. 655 (E.D. Mich. 1981), but was remanded by the United States Court of Appeals for the Sixth Circuit to afford the Judicial Officer an opportunity to consider the mitigating circumstances advanced by David Fenster. In remanding the case, the Court stated (*Utica Packing Co.* v. *Bergland*, No. 81-1383, slip op. at 5 (6th Cir. Sept. 2, 1982)):

> On appeal, Fenster's principal argument is . . . [that] the Judicial Officer erred in refusing to consider mitigating circumstances. We agree. Mitigating circumstances are not immaterial or irrelevant, and may be considered. Whether a particular conviction is itself sufficient to warrant withdrawal of inspection services depends upon the facts underlying the conviction. The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present. *See*

* Case was not included in 1982 compilation. Editor.

Wyszynski Provision Co., Inc. v. *Sec. of Agriculture*, 538 F. Supp. 361, 364 (E.D. Pa. 1982).

> Upon consideration of the briefs, the arguments of counsel, and the record, this Court is of the opinion that this action must be remanded to the district court with directions to afford the Judicial Officer an opportunity to consider the mitigating circumstances advanced by Fenster. This Court expresses no opinion on either the mitigating circumstances or the merits of the action.

Consideration of the mitigating circumstances here is not for the same purpose as in a criminal proceeding, *viz.*, to determine whether punishment should be reduced. In fact, there is no punishment here. This is an administrative proceeding to protect the public interest, *i.e.*, to determine whether respondent is fit to receive meat inspection. The mitigating circumstances here are to be considered solely in determining whether they overcome the determination of unfitness that otherwise would be made based on the felony convictions involved in this case.

Before considering the mitigating circumstances, we should look at the felony convictions which led to the initiation of the administrative proceeding.

On April 25, 1978, David Fenster was found guilty by the United States District Court for the Eastern District of Michigan of having violated 18 U.S.C. § 201(b) by bribing a supervisory United States Veterinarian-Inspector on four separate occasions. Before entering its judgment, the United States District Court handed down a memorandum opinion and order, on April 18, 1978, which states:

> "The defendant herein was charged with violations of the bribery statute, 18 U.S.C. § 201, in a four-count Indictment returned and filed on November 15, 1977. Specifically, defendant is alleged to have paid $200.00 on four separate occasions (viz., November 24, December 3, December 10, and December 17, 1976) to a U. S. Veterinarian-Inspector for the purpose of influencing that official in decisions and actions regarding inspections of meat at a meat-processing plant. On Wednesday, March 1, 1978, defendant waived his right to trial by jury. The government acquiesced in the waiver and the Court, having conducted an inquiry on the record, was satisfied that the waiver was voluntary and intelligent. Trial was begun on that day and concluded on the next. What follows is a narrative exposition of the Court's findings of fact and conclusions of law."

"Prior to March, 1975, health and sanitation inspections at the Utica Packing Plant had been conducted by State officers who were, by virtue of statutory and contractual authority, supervised by federal officers and who enforced pertinent federal regulations. After March, 1975, the responsibility for inspections and enforcement devolved directly on federal authorities, and a staff of federal inspectors assumed the relevant duties. At all times pertinent here, the staff consisted of Craig A. Reed, a Doctor of Veterinary Medicine, and five or six lay inspectors, Dr. Reed having supervisory authority over the lay inspectors assigned to the plant. Dr. Reed was himself responsible to a circuit supervisor and thence to a regional supervisor. The staff worked on the plant premises and every animal was inspected at various stages by the inspectors."

"Utica Packing was engaged in the slaughter and processing of hogs. The production process—killing, cleaning, eviscerating, sectioning, storing, and shipping—was controlled to a large extent by the federal inspectors, who could slow the process by requiring the correction of particular problems in individual units found to be unsatisfactory or who could stop the entire process until correction of a more pervasive unsatisfactory condition was made. For example, an inspector might tag a carcass for having hair on the skin. In that instance, the carcass would be laid aside until the condition was remedied and thereafter returned to the production line. On the other hand, if the inspector discerned a repetition of certain unsatisfactory conditions that might, for example, be attributed to a defect in the cleaning equipment, the entire line would be shut down until the defect was found and remedied. It is appropriate at this point to note that a particularly important part of the inspection process is the examination of hogs for evidence of tuberculosis because of the particular susceptibility of that animal to that disease. Depending on the type of tuberculosis involved, and on the location and extent of the involvement, a carcass may require sectioning with loss of some parts, or it may be rejected altogether or approved altogether. It is readily apparent that the shutdown of the lines, in a plant that employed approximately 100 persons, and the rejection of carcasses as diseased affect directly the efficiency and profitability of the operation."

"As is perhaps inevitable in that type of situation, some friction developed between management and the inspection team. The former complained that some shut-downs were unnecessary or had been unnecessarily prolonged; that inspectors were too strict or picayune; that the inspectors were acting arbitrarily and capriciously. On the other hand, the veterinarian assigned to the plant considered that his conduct and performance were proper, that the plant needed upgrading and that the staff, in the main, was following the regulations and enforcing them fairly."

"In September, 1976, an inepection of the plant was conducted by the regional office of the U. S. Department of Agriculture and resulted in a rating of 1 on a scale of 1 through 4, 4 being the best and 1 the worst rating assignable. This result was brought to the attention of David Fenster, a part-owner of the plant, by Dr. Reed on September 21, 1976. At that meeting, Fenster suggested to Reed that an arrangement be made between them which would be worth $100 to $200 a week to Reed and which would result, in return, that there be fewer stoppages of the line and a lower condemnation rate. Thereafter, Reed attempted to contact an FBI agent whom he knew as a result of a prior, unrelated investigation, but did not succeed in reaching him until November, 1976. The two of them devised a plan whereby Reed would appear to accept the offer made by Fenster. Reed was provided with a concealed body transmitter and recorder and, so equipped, met with Fenster on the four dates delineated in the Indictment. On each such occasion Reed received the sum of $200 from Fenster. The conversations between Reed and Fenster were recorded and subsequently transcribed; the transcripts were received in evidence as Exhibits 1B, 2B, 3B, and 4B."

"There is no doubt that David Fenster paid over the funds to the federal officer and that it was his intent to influence the officer in the performance of his official duties. The issue remains, however, as to the nature of Fenster's intentions, since that issue will determine whether he is guilty of a violation contemplated in 18 U.S.C. § 201(b) or of one described in § 201(f), the former carrying a much higher potential penalty than the latter."

"Section 201(b) of Title 18 of the United States Code provides for the imposition of penalties on

> " '[w]hoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any public official * * * with intent—
>
> '(1) to influence any official act; or
>
> '(2) to influence such public official * * * to commit or aid in committing, or collude in or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> '(3) to induce such public official * * * to do or omit to do any act in violation of his lawful duty, . . .' "

"Subsection (f), on the other hand, is directed against

> " 'Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, * * * for or because of any official act performed or to be performed by such public official * * *; . . .' " [1]

"Subsection (f) sets forth a lesser offense included in the offense described in subsection (b), the difference consisting in the higher degree of criminal knowledge and purpose betokened by the adverb 'corruptly.' *See U.S.* v. *Umans*, 368 F.2d 725 (2d Cir. 1966), *cert. dismissed* 389 U.S. 80; *U.S.* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974) [construing the analogous provisions of § 201(c) and (g) applicable to *recipients* of bribes]."

"In *Brewster*, the court was squarely faced with the problem of dividing the subtle gradations of the respective intent requirements prescribed in subsection (c), which it termed the bribery section, and subsection (g), which it

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[1] Section 201(a) defines "public official" to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, * * * in any official function, under or by authority of any such department, agency, or branch of Government * * *."

"Official act" is defined in the same subsection to include "any decision or action on any question * * * which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

called the gratuity section. It concluded, as to this question:

> " 'The bribery section makes necessary an explicit *quid pro quo* which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.' "
>
> "Id. at 72."

"The thrust of the two sections and the functions they were designed to serve are radically different, and it is from the perspective of that difference that they are to be construed and applied. Section 201(f) is a gratuity section."

> " 'It is apparent from the language of the subsection that what Congress had in mind was to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity for or because of an official act already done or about to be done.' " "*U.S.* v. *Irwin*, 354 F.2d 192 at 196 (2d Cir. 1965), *cert. denied* 383 U.S. 967."

"Section 201(b), on the other hand, is directed against impairment of the actual and apparent integrity of public life."

> " 'The evil sought to be prevented by the deterrent effect of 18 U.S.C. § 201(b) is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty. Thus the purpose of the statute is to discourage one from seeking an advantage by attempting to influence a public official to depart from conduct deemed essential to the public interest.' " "*U.S.* v. *Jacobs*, 431 F.2d 754 at 759 (2d Cir. 1970), *cert. denied* 402 U.S. 950."

"In light of these standards, the Court is satisfied that the facts established at trial bespeak beyond a reasonable doubt a violation of § 201(b). It is clear that in offering the payments and later making them David Fenster had a

more focused purpose in mind than merely to build a reserve of good will toward his company on the part of influential officials. It was Dr. Reed's understanding that in return for the money he was to alleviate Fenster's problems, specifically by reducing the number of line-stoppages and by giving the company the benefit of the doubt with regard to hogs of questionable soundness. This understanding is borne out by the transcripts of the recorded conversations between Reed and Fenster. They reveal that while Fenster expected Reed to maintain an appearance of conscientious enforcement (Exhibit 1B, pp. 11 and 14), he also expected that more hogs would be passed (Exhibit 1B, pp. 9, 13-14; 2B, pp. 21 and 23; 3B, p. 29), that the production line would be shut down less frequently (Exhibit 1B, pp. 14, 15-18 [falsify time sheets so that inspectors would have less inducement to stop the line for the purpose of earning overtime pay]; 2B, p. 21; 3B, pp. 30-31), and that Reed would attempt to control an overzealous inspector (Exhibit 3B, pp. 29-31, 35).[2] In short, the evidence of a quid-pro-quo arrangement sufficient to establish a violation of § 201(b) is, in the opinion of this court, overwhelming. . . ."

The circumstances and considerations underlying the Federal Meat Inspection Act are set forth in the Congressional statement of findings as follows (21 U.S.C. § 602):

§ 602. *Congressional statement of findings*

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is *essential* in the public interest that the health and welfare of consumers be protected by *assuring* that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and

[2] It is of no particular significance or consequence that not all the terms of the understanding were set out on every occasion that Fenster made payments to Reed. While the Court, as trier of fact, must consider each count separately, what was said on one occasion has a proper bearing on the question of the briber's intent on another occasion. *See Krogmann* v. *U.S.*, 225 F.2d 220 at 228 (6th Cir. 1955)."

> meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers. [Emphasis added.]

In the present case, David Fenster, respondent's president and half-owner, was convicted under 18 U.S.C. § 201(b) of bribing the supervisory Federal meat inspector at respondent's plant on four separate occasions. The Court explained that 18 U.S.C. § 201(b) requires that the bribe be given "corruptly" to "influence a public official to depart from conduct deemed essential to the public interest." The Court stated that "[i]n light of these standards, the Court is satisfied that the facts established at trial bespeak beyond a reasonable doubt a violation of § 201(b)."

A highly qualified psychiatrist, who conducted a psychiatric interview of David Fenster and testified on his behalf, agreed with the Court's finding as to Fenster's purpose, stating (Tr. 622):

> I do believe the finding of the Court was most likely accurate, that Mr. Fenster did want to influence the officials, which I believe is the definition of bribery, which is a harsh sounding word, but I think he did have that intention at one point.

It is clear that David Fenster's conduct strikes at the heart of the meat inspection program. This would be true even if we were to consider the effect of Fenster's bribery attempt, if successful, only at respondent's plant. That is, if Dr. Reed had in fact been corrupted by the bribes, meat inspection at respondent's plant would not have been conducted impartially, with the public interest in mind.

The necessary result of Fenster's bribery, if successful, would have been a likelihood that, at least on some occasions, unwholesome meat would have been introduced into commerce. As stated

by Judge Tayler in her decision reviewing the original decision in this case (*Utica Packing Co.* v. *Bergland*, 511 F. Supp. 655, 662 (E.D. Mich. 1981), *rev'd on other grounds*, No. 81-1383 (6th Cir. Sept. 2, 1982)):

> This court has evaluated those transcripts [of the recordings used to convict Fenster], and this court fully concurs in Judge Pratt's above-quoted analysis of what they show. . . . They include not only Fenster's repeated requests for inspection leniency in return for cash paid, but also suggestions that the Veterinarian falsify the time sheets of his supervisees to provide them with unearned overtime and thereby soften the acuity, and repeated assertions that the Veterinarian's expressed reluctance and fears about accepting bribes were only a function of his youth, which he would presumbably outgrow in time. . . . Even if the Administrator had been obliged by § 671 to make a finding that there was a likelihood of Fenster's introduction of unwholesome meat into commerce through Utica if not suspended, which finding is not required under that section, these transcipts are substantial evidence of that likelihood.

In addition to considering the effect of Fenster's bribery attempt at respondent's plant, we must consider the cancerous nature of bribery. Unless stopped, bribery can spread until it is the routine course of business in a large area. See *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 172-73 (1978), in which it is explained:

> In southern California between 1974 and 1976, 17 meatpacking houses and 35 employees of meatpackers were indicted and convicted of either bribery or illegally giving gratuity to meat graders. The involved plants constituted "a major part of the slaughtering companies or those using Federal grading service" in southern California (Tr. 19).
>
> Sixteen Federal meat graders were indicted and convicted of receiving money.

Since meat inspectors cannot observe every activity at a plant by every employee which affects the wholesomeness of the product, the inspection service must be able to depend on the reliability and integrity of the plant's management to be assured that the health and welfare of consumers will be protected. *See In re Norwich Beef Co.*, 38 Agric. Dec. 380, 394-96 (1979), *aff'd*, No. H 79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982).

Also, meat inspectors are relatively low paid Federal employees. Packers have, at times, paid weekly (tax free) bribes to meat inspectors or graders equal to or more than their Federal take-home pay (*see In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 171-72 (1978)). Accordingly, if we are to be assured of having wholesome meat and meat food products from a particular plant, we must know without question that the plant's management will not attempt to bribe any inspector at the plant.

It is the view of the Administrator of the Department's meat inspection program and the Judicial Officer that every person convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector, with the necessary proof of criminal knowledge and purpose, is unfit to receive Federal meat inspection, irrespective of any mitigating circumstances. That conduct alone so strikes at the heart of the meat inspection program as to prove conclusively, without regard to any mitigating circumstances, that the convicted felon is unfit to receive Federal meat inspection.

Accordingly, in the present case, the Judicial Officer held that respondent was unfit to receive Federal meat inspection because of David Fenser's bribery convictions, irrespective of any mitigating circumstances. The Judicial Officer's decision made it clear that mitigating circumstances are to be considered in the case of felonies not striking at the heart of the meat inspection program. Specifically, the Judicial Officer held (*In re Utica Packing Co.*, 39 Agric. Dec. 590, 603 (1980)):

> In the *Norwich Beef* case, the felony which afforded the jurisdictional basis for withdrawing inspection service involved the receipt of a truck load of stolen beef. Since that felony is not directly involved with meat inspection, all of the facts and circumstances had to be considered to determine whether the recipient of meat inspection was unfit to receive inspection because of that type of felony conviction.
>
> But in the present case, the felony conviction relates to the heart of the meat inspection program. Respondent's president and half-owner was convicted of "corruptly" giving money to the supervisor of the meat inspectors at respondent's plant under a statute which "is to discourage one from seeking an advantage by attempting to influence a public official to depart from conduct deemed essential to the public interest" (Finding 4, *supra*). In view of the type of felony involved in the present case, there is no need to consider any other circumstances in order to determine

> whether the conviction of this felony renders respondent unfit to receive inspection services.

In a thoughtful and well-reasoned decision, the District Court affirmed the Judicial Officer's original decision in this proceeding. *Utica Packing Co.* v. *Bergland*, 511 F. Supp. 655 (E.D. Mich. 1981).

I believe that the original administrative decision in this case is correct, notwithstanding the reversal by the Court of Appeals. The decision by the Court of Appeals in this case will assure the distribution of unwholesome or adulterated meat in some instances. That is, under the Sixth Circuit's opinion, if there are enough mitigating circumstances, a felon convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector must, nonetheless, be determined to be fit to continue to receive Federal meat inspection. Since the judicial system has not had outstanding success in predicting which criminals will repeat their criminal conduct, we are not likely to have any better batting average in predicting which felons convicted of bribing a meat inspector will not repeat that unlawful conduct, or otherwise attempt to subvert the meat inspection program.

It is true that the Court of Appeals' decision indicates that in the case of a bribery conviction, it is "likely" it will support a determination of unfitness regardless of the mitigating facts present. Specifically, the Court states (slip op. at 5):

> The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present.

Although that suggests that the great majority of persons convicted of bribery under 18 U.S.C. § 201 (b) will be found unfit to receive Federal meat inspection regardless of the mitigating facts present, it also suggests that some mitigating facts would outweigh a bribery conviction. Otherwise, the Court would not have remanded the present case to consider the mitigating circumstances, notwithstanding Fenster's convictions for bribing the supervisory meat inspector.

In other words, the Court's statement quoted above was made in this case where the Judicial Officer had held that Fenster's conduct so strikes to the heart of the policies of the Federal Meat Inspection Act that no possible mitigating circumstances could outweigh the felony convictions in determining respondent's fitness to receive Federal inspection. The Court of Appeals did not agree.

The Court's decision must, of course, be followed here—but not in cases in which an appeal does not lie to the Sixth Circuit.

For the reasons set forth above, the decision of the Court of Appeals in this case will not be followed in any case in which an appeal does not lie to the Sixth Circuit. In all cases in which an appeal does not lie to the Sixth Circuit, anyone who is convicted under 18 U.S.C. § 201(b) of the felony of bribing a Federal meat inspector will automatically be found unfit to receive Federal inspection, and Federal inspection will be withdrawn indefinitely from the plant (unless it is appropriate, as in the present case, to continue inspection if the convicted felon is completely disassociated from the plant).

However, since other reviewing courts might agree with the Sixth Circuit's decision in the present case, the Administrative Law Judges should in every case receive evidence as to mitigating circumstances and indicate their opinion as to such circumstances.

Respondent relies on a number of so-called mitigating circumstances. David Fenster testified that prior to offering the bribes, he felt that the inspectors were enforcing the rules unfairly, arbitrarily and in a discriminatory manner at respondent's plant. He was receiving offers to buy his plant, and he believed that the Federal inspectors might be part of a conspiracy to induce him to sell; that they might be stopping his production line unnecessarily so as to earn overtime pay; and that some of the inspectors were harrassing him because of a personal dislike for him.

There is much evidence in the record to demonstrate the reasonableness of Mr. Fenster's beliefs as to the inspectors. His production line was stopped by the inspectors for an average of two or more hours a day during the period preceding the bribes. This not only caused respondent to have to pay over 100 employees for their lost time, but, also, frequently prevented the plant from completing the killing of the hogs that arrived by truck each day.

On many days during the summer of 1976 (preceding the bribes in November and December 1976), more than 15 or 20 hogs died on the trucks because the line had been stopped by the inspectors (Tr. 277–280). Some Federal inspectors felt that inspection at respondent's plant was more strict than at its competitors' plants, and David Fenster's son observed that at a competitor's plant the line was not stopped for conditions which he felt were far worse than at respondent's plant.[2]

[2] Weighty evidence proves that much corrective action by the inspectors at Utica was justified. A Compliance Review Staff gave respondent's plant the lowest possible rating in September 1976. If conditions were worse at competitors' plants, inspection there might have been too lax. Also, the record suggests that other plants have a "kick-out" rail which allows animals to be set aside without stopping the line. The addition of a "kick-out" rail should be explored by respondent.

Respondent contends that the ring leader of the inspectors harrassing the plant was John Stadler, a close friend of Dr. Reed, who received the bribes in this case. John Stadler "hated the black people" at respondent's plant (Tr. 1026); he "had no use for blacks" (Tr. 1053). He also "hated Yugoslavians" (Tr. 1053), who comprise a large portion of respondent's work force. He referred to David Fenster's partner as "a stupid Yugoslavian" (Tr. 1025-26).

David Fenster is a Jew, and inspector Stadler made such obscene and derogatory comments about Jews that decency precludes me from quoting his comments or even giving the record citation (counsel for both parties are aware of the transcript reference). In particular, Inspector Stadler had a "personal dislike or hatred toward David Fenster" (Tr. 1050-51).

Inspector Stadler, Dr. Reed (who received the bribes) and another inspector "would go to a bar after work and think of ways to set up Mr. Fenster, or cause problems to him the following day at the plant," to "make it rough on the plant" (Tr. 1055).

These circumstances lend support to the view that David Fenster at least had a reasonable basis for believing that he was being harrassed by some of the inspectors and subjected to discriminatory treatment.

Respondent complained frequently to Dr. Reed's supervisors, but conditions did not change at the plant, and Fenster felt that he was being given the "run around" by Dr. Reed's supervisors.

Notwithstanding these circumstances, they are no excuse for bribery. An individual who feels that he is being mistreated by Federal inspectors (or who actually is suffering mistreatment from inspectors) cannot take the matter into his own hands by offering bribes. He must pursue the administrative avenues which are available. If his initial efforts are unsuccessful, he must continue bringing his problem to the attention of higher officials until he reaches the top. If all that fails, bribery is still inexcusable.

If an individual having difficulty because of Federal inspectors (real or imaginary) could solve his problems by bribing the Inspectors, it would lead to the public interest being subverted, not only at that individual's plant, but at other plants, where the practice would soon spread.

Accordingly, I would give no weight to this circumstance in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also contends that Fenster's conduct was aberrant behavior resulting from particularly stressful conditions and exacerbation of old psychic injuries while a victim of the Nazi Holocaust. David Fenster witnessed the killing of his father by the

Nazis, and, together with his mother, sister, and brother, he escaped from a train en route to a gas chamber. He never saw his family again. He was recaptured and taken to a concentration camp before being liberated in 1945.

David Fenster undoubtedly was under great stress and emotional strain at the time of the bribery in 1976. In 1975 he lost the sight of his right eye, after several operations. For months after the operation, he had headaches and nerve problems, requiring him to take sleeping pills, tranquilizers, and other drugs. Then his left eye started to go bad in 1976. He consulted numerous doctors, receiving conflicting advice as to the desirability of surgery, which subjected him to great emotional stress. He had additional problems because his partner drank heavily. His problems with meat inspectors, referred to above, further contributed to his stress.

Respondent contends that because of the unusually stressful circumstances referred to above, David Fenster regressed to the old way of dealing with danger that he learned while a victim of the Nazi Holocaust, during which period of time bribery was a necessary way of life to survive.

Although David Fenster deserves much sympathy for the many problems referred to above, they do not excuse bribery of a Federal meat inspector, and do not cause me to change my views with respect to respondent's unfitness to receive meat inspection so long as David Fenster is associated with respondent.

I agree with Judge Taylor (*Utica Packing Co.* v. *Bergland*, 511 F. Supp. 655, 663 (E.D. Mich. 1981), *rev'd on other grounds*, No. 81-1383 (6th Cir. Sept. 2, 1982) that this argument by respondent—

> is a slander not only on the Jewish survivors of the Holocaust but on this country, to which Fenster immigrated and in which he has built an enterprise which his economist testified is worth $200 million to his community; in which this record indicates that he has had access to every level of the United States Department of Agriculture including the Secretary of Agriculture to discuss his difficulties in the Meat Inspection Program; in which a United States Senator has sworn to his high character, as have the aides of two State Senators (one of whom is now his employee) and a bank President.

I further agree with Judge Taylor that this argument, if credited, further "establish[es] the propriety of Fenster's suspension from the meat inspection program" (*ibid.*). That is, if Fenster's experience through the Nazi Holocaust could cause him to revert to bribery more than 30 years later because of stressful circumstances,

there is certainly the possibility that he would again revert to bribery under further stressful circumstances. Mr. Fenster's situation could get worse, both with respect to his health and his business. Many well run businesses have gone bankrupt or are on the verge of bankruptcy. Accordingly, if Fenster's experiences through the Nazi Holocaust over 30 years before had some part in leading to the bribery involved in this case, I could not be sure that he would not again repeat that conduct under more stressful conditions.

Accordingly, these mitigating circumstances would have no weight with me in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also relies on the prior good record of respondent and David Fenster, and his present good reputation, despite the conviction. Here again, I give more weight to the facts involved in the felony convictions than to opinions as to respondent and Fenster. I have reviewed too many files where highly respected persons testified as to a person's excellent character and reputation, despite unchallenged evidence in the file proving that he engaged in serious, fraudulent conduct, to attach any significant weight to such testimony.

Accordingly, I would give no weight to these circumstances in determining respondent's fitness to receive Federal meat inspection, in the absence of the Sixth Circuit's opinion in this case.

Respondent also relies on the fact that it is not now having any problems with the meat inspection program. In fact, on October 15, 1979, the U.S. Veterinarian who serves as Area Supervisor filed a report advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and "now is producing very clean hogs and plant management can be proud of their product."

Although this is the most substantial of the mitigating circumstances relied on by respondent, it would not begin to tip the scales in respondent's favor, in the absence of the Sixth Circuit's opinion in this case. The argument that respondent is not now violating the Act is made in almost every disciplinary case that comes before the Judicial Officer, and is almost always true. Only a foolhardy respondent would continue to violate a regulatory statute, after a complaint is filed, pending the outcome of the litigation. Exemplary conduct during the course of litigation is not as revealing or weighty as conduct occurring before the spotlight of litigation is turned on a respondent.

Where a serious and wilful violation of a regulatory statute administered by this Department is found to have been committed, it

is the consistent policy of this Department to impose a remedial sanction without regard to the respondent's present compliance with the Act and without making any determination that it is likely that respondent will again violate the Act in the future.[3] No second chance is given. There is even less reason for giving a meat plant a second chance where the public health is at stake as in this case.

If a second chance were to be given to violators of the Department's regulatory programs even where the first violation was wilful and serious, the remedial statutes would be rendered ineffective. It is a rare case where the violator has not ceased violating by the time the final order is issued. It is a rare case where the violator cannot produce some witnesses who regard his reputation as good irrespective of the violation. It is a rare case where the violator would not appear to be truly sorry for his misconduct and indicate that the violation will never again be committed. Accordingly, unless we were to adopt a second chance policy as to all of the Department's regulatory programs (which is not contemplated), there is no basis whatever for adopting it in this proceeding where the public health is at stake.

In addition, if we were to adopt a second chance policy in Meat Inspection Act cases, it would, at least to some extent, be inconsistent with the Congressional policy set forth in the statute, which permits withdrawal of meat inspection because of conviction of a single felony or more than one lesser violation (21 U.S.C. § 671). A second chance policy would, in effect, result in withdrawing inspection only after conviction of more than one felony.

Accordingly, in the absence of the Sixth Circuit's opinion in this case, I would give no weight to respondent's conduct after the complaint was filed in this case.

Respondent also relies on the length of time since Fenster's illegal conduct. It is indeed unfortunate that so much time has

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[3] *E.g., In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 238-39 (1980), *appeal dismissed*, No. 80-1298 (10th Cir. Aug. 11, 1980); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1872, 1887-88 (1979), *aff'd per curiam*, 630 F.2d 370 (6th Cir. 1980), *cert. denied*, 101 S. Ct. 1701 (1981); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862, 868-64 (1980), *aff'd*, No. 80-3898 (D. N.J. June 28, 1982); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1622, 1630 (1977); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Catanzaro*, 36 Agric. Dec. 26, 36 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 63, 62, 81, *aff'd per curiam*, 498 F.2d 1088 (6th Cir. 1974).

elapsed. The bribery occurred at the end of 1976. The indictment was returned and filed on November 15, 1977. The criminal proceeding was concluded August 22, 1978. The criminal conviction formed the basis for the present administrative proceeding, which was initiated on October 18, 1978. The Administrative Law Judge decided the case February 11, 1980, and the Judicial Officer decided the case June 25, 1980. The remand order was received in September 1982. Although this six year period since the violation is most unfortunate from the standpoint of the public interest in assuring a wholesome meat supply, it does not afford the basis for finding that respondent is fit to receive meat inspection with David Fenster still associated with respondent.

Accordingly, I would give no weight to this circumstance, in the absence of the Sixth Circuit Court's opinion in this case.

Respondent contends that withdrawal of meat inspection would adversely affect its employees and the community. But under the terms of the order in this case, there is no need for inspection service to be withdrawn if David Fenster becomes disassociated with respondent. Although Mr. Fenster feels that he is indispensable to the successful operation of the plant, it seems likely that someone could be found to fill his role. In any event, however, it has consistently been held by the Judicial Officer that the public interest must prevail, and that an appropriate order must be issued, irrespective of any local damage to respondent, his employees or the community.[4]

Accordingly, I would give no weight to this circumstance, in the absence of the Sixth Circuit's opinion in this case.

Two other circumstances that I regard as totally irrelevant, but which should be mentioned if we are to look at all the facts underlying the conviction, should be mentioned.

First, although any conviction under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector strikes so closely to the heart of the Federal meat inspection program that it proves conclusively to me that the convicted felon is unfit to receive meat inspection,

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[4] *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 826 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 89 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd mem.*, 575 F.2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1562, 1562 (1970), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1618 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

nonetheless, there are, of course, degrees of bribery. In this case, the bribery was not as flagrant as it could have been. That is, although Mr. Fenster did not want the line stopped as often, there is some basis for his belief that the line was being stopped unnecessarily. Also, during the bribery conversations, Mr. Fenster made it clear to Dr. Reed that he wanted a clean plant, and that he wanted Dr. Reed's help in achieving that objective. As to tuberculosis hogs, although Mr. Fenster suggested several times during the bribery conversations that borderline hogs should be passed, he also stated on many occasions during the same bribery conversations that he had no right to tell Dr. Reed what to do as to tuberculosis hogs, and that Dr. Reed should use his own judgment as to them.

Second, the testimony in this proceeding indicates that the bribes would not have been given if Dr. Reed had not misunderstood a comment by David Fenster, and later hinted strongly to Fenster that he wanted money from Fenster. Fenster testified that in September 1976 when Dr. Reed was in Fenster's office, Fenster asked him "What do you want?" (Tr. 760). By this, Fenster meant, "What am I doing wrong? What do you want from me? What do you want me to do?" (Tr. 760).

Dr. Reed took Fenster's statement as suggesting a bribe, went to the FBI, got wired-up with a tape recorder, and then went back to Fenster's office on November 24, 1976. Dr. Reed initiated the discussion by saying, "Well, you told me, you asked me what I want?" (Tr. 772). Dr. Reed then said, "Well you know"—"You know what" (Tr. 772). Fenster naturally took this as an invitation for a bribe, and immediately said, "What do you want, money? Well, I'll give you a hundred," "What do you want, you want $200?" (Tr. 772).

Although Fenster's testimony in this proceeding is different from Dr. Reed's testimony in the criminal proceeding, Dr. Reed did not testify in this proceeding notwithstanding the fact he was originally scheduled as a witness (Tr. 902) and Judge Palmer warned complainant's counsel that an adverse inference might be drawn from the failure to call "any witness who could be available who does not testify" (Tr. 903). Since David Fenster did not testify in the criminal proceeding and Dr. Reed did not testify in the administrative proceeding, neither judge had an opportunity to resolve the conflict in their testimony by observing their demeanor.

Respondent concedes that Dr. Reed's conduct was not sufficient entrapment to constitute a defense to a criminal proceeding, but, nonetheless, if the facts are as sworn by David Fenster at the administrative proceeding in this case, this would be a mitigating circumstance to be considered under the Sixth Circuit's remand order

(although I would give such circumstance no weight in the absence of the Sixth Circuit's order).

Considering all of the mitigating circumstances in this case, I strongly believe that respondent is unfit to receive Federal inspection so long as David Fenster is associated with the plant. However, my belief is based on the strongly held view that *any* person who is convicted under 18 U.S.C. § 201(b) of corruptly bribing a Federal meat inspector is unfit to receive Federal inspection regardless of *any* mitigating circumstances.

The Administrative Law Judge who saw and heard the witnesses testify in this case stated (Initial Decision 8-9) that the evidence establishes that:

> 1. Mr. Fenster's reputation in his community, despite his conviction by the United States District Court, is excellent;
>
> 2. His bribing of the Veterinarian-Inspector was apparently aberrant behavior for him resulting from: a) serious health problems, b) exacerbation of old psychic injuries while a victim of the Nazi Holocaust, and c) misapprehensions concerning the motivation of various inspectors who had undertaken stricter enforcement of Federal Meat Inspection Act requirements; and,
>
> 3. The problems which led to his aberrant behavior have largely disappeared leading the U. S. Veterinarian who serves as Area Supervisor to file an official report, on October 15, 1979, advising the Director of Meat and Poultry Inspection that the respondent plant had, since December of 1978, established "a clean meat program" and "now is producing very clean hogs and plant management can be proud of their product."

Based on those facts, the Administrative Law Judge made "the consequent finding that recurrence is unlikely because of the general excellence of Mr. Fenstar's character and reputation and the elimination of the conditions and motivations which led to the commission of the felony" (Initial Decision 9).

If mitigating circumstances must be considered, I cannot reasonably imagine any stronger mitigating circumstances than appear here. If any felon convicted under 18 U.S.C. § 201(b) of bribing a meat inspector is fit to receive Federal meat inspection, then David Fenster is fit to receive Federal meat inspection (or, more accurately, respondent is fit to receive Federal meat inspection even with David Fenster associated with the plant).

Furthermore, David Fenster has already been precluded from working at respondent's plant for 9 or 10 months, since a stay order was not issued following the District Court's decision in this case. This is not a significant factor to me since I believe that *no* period of time away from a meat plant could make a person convicted under 18 U.S.C. § 201(b) of bribing a meat inspector fit to receive Federal inspection (just as no passage of time could make a Federal inspector who accepted a bribe fit to be reemployed as a Federal inspector). But this is a circumstance that is as relevant as the other circumstances referred to above.

For the reasons set forth above, I am with great reluctance and misgiving dismissing the complaint in this case.

I would not want to eat meat from any plant managed by a person who has been convicted under 18 U.S.C. § 201(b) of corruptly bribing a meat inspector. I deeply regret that I feel compelled by the Sixth Circuit's remand order to cause other persons to have to do so.

ORDER

The complaint in this proceeding is hereby dismissed with prejudice.

In re: FORT PLAIN PACKING CO., INC. FMIA Docket No. 75. Decided October 11, 1985.

Withdrawal and denial of inspection services, suspended with conditions.

Because of the felony convictions of respondent and its president for conspiracy to violate the Federal Meat Inspection Act, respondent was alleged unfit to engage in any business requiring inspection under the Act. Such inspection services were ordered withdrawn and denied. However, this order was suspended provided respondent's President follow stipulations as given in the order.

Marshall Marcus, for complainant.
Peter O. Safir, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

On September 21, 1983, the United States Department of Agriculture, for purposes of convenience of reference, hereinafter sometimes referred to as the "USDA" or, the "Department," filed a Complaint against Fort Plain Packing Co., Inc., hereinafter sometimes referred to as "Fort Plain," alleging that Fort Plain is unfit

to engage in any business requiring inspection services and requesting that such services be withdrawn from the company pursuant to 21 U.S.C. sections 601 *et seq.*, and 671. The action was instituted by Dr. Donald Houston, Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture.

The Complaint alleged, in general, that because of the felony convictions of Respondent and its President, Leopold Koppel, for conspiracy to violate the Federal Meat Inspection Act (21 U.S.C. section 601, *et seq.*) sometimes hereinafter referred to as the "Act," the Respondent is unfit to engage in any business requiring inspection under Title I of said Act within the meaning of section 401 (21 U.S.C. section 671).

In an Answer filed October 18, 1983, Respondent admitted the jurisdictional allegations, denied certain material allegations of the Complaint, asserted several defenses, and requested an oral hearing on the matter. In preparation for its defense at the hearing, Fort Plain requested that the Administrative Law Judge, Dorothea A. Baker, issue a *subpoena duces tecum* with respect to documents in the possession of the Department relevant and material to the existence of mitigating circumstances concerning Fort Plain's fitness to receive inspection services. Judge Baker issued the *subpoena duces tecum* and, at the hearing, certain documents were provided to Fort Plain. However, the Complainant refused to produce certain documents pertaining to current compliance by Fort Plain, asserting that they were exempt from disclosure under the Freedom of Information Act, 5 U.S.C. section 552, *et seq.* It was ruled that such documents were relevant and material with respect to the issues involved in this proceeding. However, the Department takes the position that it need not produce such documents. A Motion by Respondent's counsel to stay the proceeding pending an action to obtain the documents under the Freedom of Information Act was denied. It is asserted by the Respondent that the refusal by the Department to produce these relevant and material documents seriously hampered Respondent's, Fort Plain's, ability to establish mitigating circumstances and violated the Respondent's right to due process of law.

It is noted that Complainant's refusal to produce the requested documents is premised upon the assertion of exemption.

Fort Plain indicates that it attempted to enforce Judge Baker's *subpoena duces tecum* in the United States District Court in proceeding: *Fort Plain Packing Company, Inc.* v. *United States Department of Agriculture*, Civil Action No. 84-0191. Judge Jackson dismissed the action, finding that until termination of the administra-

tive proceeding, Fort Plain had not exhausted its administrative remedies and the action was not ripe for judicial review. Fort Plain seeks to reserve this issue for appeal, if necessary.

Hearings on this matter were held on June 18, 19, and 20, 1984, in Washington, D. C. and on August 16, 1984, in Albany, New York, before Administrative Law Judge Dorothea A. Baker. The Complainant was represented by Marshall Marcus, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250, and the Respondent was represented by Peter O. Safir, Esquire, of Kleinfeld, Kaplan & Becker, 1140 Nineteenth Street, N. W., Washington, D. C. 20036.

FINDINGS OF FACT

1. Fort Plain Packing Co., Inc., hereinafter sometimes referred to as the Respondent, is a corporation, operating a meat packing establishment, at Route 5, Nelliston, New York 13410.

2. Respondent, is now, and at all times material herein, was the recipient of inspection services, under Title I of the Act, at said establishment.

3. Mr. Leopold Koppel is now, and at all times material herein was, President and Chief Executive Officer of Fort Plain Packing Co., Inc.

4. On July 28, 1983, Respondent corporation was convicted in the United States District Court for the Northern District of New York, of one felony, conspiracy to defraud the Government and feloniously violate the Federal Meat Inspection Act (21 U.S.C. section 601 *et seq.*), in violation of 18 U.S.C. section 371.

5. On July 28, 1983, Leopold Koppel was convicted, in the United States District Court for the Northern District of New York, of one felony, conspiracy to defraud the Government and feloniously violate the Federal Meat Inspection Act (21 U.S.C. section 601 *et seq.*), in violation of 18 U.S.C. section 371.

6. As part of a plea agreement [1] with the United States, Leopold Koppel executed a sworn Affidavit outlining the details and specifics of the above referenced conspiracy. It is this Affidavit which furnishes the basis for much of Complainant's case.

7. In the above referenced Affidavit, Mr. Koppel acknowledged his awareness of the Federal laws regulating establishments preparing wholesome meat for commerce. Notwithstanding this, he admitted to giving orders to accomplish and personally participating in, among others, the following illegal activities:

[1] There is some evidence that the plea agreement, in part, was induced by reason of fear that Mr. Koppel's son would be indicated.

(a) Butchering of carcasses from cattle and cattle which had died otherwise than by slaughter;

(b) Slaughter of disabled, dying or diseased cattle without the required ante-mortem inspection;

(c) Concealment from Federal inspectors of possibly diseased heads, and viscera from cattle slaughtered at Fort Plain Packing Co., Inc.;

(d) Removal and concealment from the Federal inspectors of growths, lesions, tumors, abscesses, cysts, bruises and other abnormalities from cattle carcasses prior to the completion of the required post-mortem inspection;

(e) Removal of growths, lesions, tumors, abscesses, cysts, bruises and other abnormalities from the carcasses retained by a Federal inspector for further examination by an official veterinarian in order to deceive the reviewing veterinarian; and

(f) Fostering at Fort Plain Packing Company, Inc., an atmosphere of conflict and confusion through verbal abuse, harassment and intimidation of Federal employees assigned to that establishment.

8. Except for the transitional period set forth in the Order herein, as long as Mr. Leopold Koppel is associated with Respondent corporation, and possesses stock ownership therein, the Respondent corporation is unfit, as that term is used in the Act, to receive inspection services.

9. The evidence shows that if Mr. Leopold Koppel, after the transitional period provided herein, disassociates himself from the corporation, and disposes of his stock ownership, and particularly if such stock ownership is acquired by the employees pursuant to a plan set forth at the hearing, then, in such event, the Respondent corporation is fit to receive inspection services under Title I of the Federal Meat Inspection Act (21 U.S.C. section 601 *et seq.*).

CONCLUSIONS

This was a rigorously contested proceeding and centered primarily upon the sanction, if any, and the extent thereof. It is not contested by either party that both the corporate Respondent and its President Mr. Koppel each pled guilty to a felony conviction.

In addition to the appropriateness of sanction, the Respondent has put in issue the correctness of Complainant's refusal to produce certain documents.

The Respondent has made a clear demand for production of two documents: (1) an intensified regulatory enforcement plan; and (2) the intensified regulatory log for the subject company. The Secretary of Agriculture declined to produce these documents.

With respect to my Decision and Order herein, although I have not had such documents, nevertheless, I have taken into consideration the stipulation of the Complainant's attorney that the corporate Respondent is in full compliance with the applicable regulations and that were such documents to have been produced, they would have reflected this full compliance. Assuming that this is so, then the Secretary, should base his review of this proceeding on the same assumption. However, in the event that the Secretary has information or documents within his possession which would indicate otherwise or upon which reliance may be made in determining the sanction herein, then, the Respondent has preserved its due process argument in this regard. Also, entering into the due process argument, and the mitigating circumstances herein, is the contention of the Respondent that the many letters addressed to the sentencing United States District Court Judge were not considered by the Secretary in formulating the Complaint herein wherein the Respondent is alleged to be unfit to receive Federal Meat Inspection Services. The composite summarization of these letters reflects the high regard in which Mr. Koppel was held both personally and in a business relationship, with the community-at-large. The Complainant maintains that these letters should not be considered by the Secretary in his determination of fitness and they were admitted for the limited purpose of showing that there was wide-spread community support for Mr. Koppel. Two of the authors of the letters testified at the hearing and were available for cross-examination by the Complainant.

One of such individuals who both testified and wrote a letter in support of Mr. Koppel to the sentencing United States District Court Judge was John M. King, D.V.M., a Veterinary Pathologist and a Professor teaching Veterinary Pathology at Cornell University. Dr. King had the opportunity to examine and in fact did examine the Affidavit signed by Mr. Koppel (Exhibit 5). Mr. King's excellent qualifications and extensive experience lend great credence to his testimony which was relevant to the "fitness" of the Respondent corporation. His testimony related to the degree of seriousness of the activities described by Mr. Koppel in his Affidavit, Exhibit 5, as well as the extent to which such activities did or did not present a danger to the public or involve matters detrimental to human consumption and human health. His testimony regarding these matters is regarded as credible and most persuasive.

An evidentiary document of significance is an eight page letter which was written by the said John M. King, D.V.M., dated August 24, 1983, in which he addressed the Honorable Howard Munson, United States District Judge, for the Northern District of New York. At that time and in that letter, Dr. King addressed the court with respect to the significance of the terminology and the possible consequences of the acts described in both the Information and in Mr. Koppel's Affidavit submitted to his Honor in that matter. It was Dr. King's desire to share certain information which he believed the court would find useful in evaluating the degree of seriousness of Mr. Koppel's offense. Inasmuch as Dr. King testified at the oral hearing, the Complainant had the opportunity to examine him as to his testimony and his expert views.

A brief summary of the views of Dr. King indicate that it was his opinion as an expert in the field of Veterinary Pathology that there was only a remote possibility that conditions which might successfully be concealed by the acts outlined in Mr. Koppel's Affidavit and in the Information in this case would have presented any danger to the public, or otherwise render the meat inedible. He further indicated that conditions which would render meat unwholesome for human consumption are not confined to a discrete part of the carcass, and cannot successfully be concealed by hiding or discarding part of the carcass. It was said that the conditions and growths which can successfully be concealed by such activity do not present any danger to the public and, in his opinion once removed, should not cause the remainder of the carcass to be condemned for health reasons, except in extremely rare cases. Dr. King could not remember the last time he had ever seen such a case in his 25 years of experience.

It was not Dr. King's intention to criticize the Federal meat in-

The letters to which the Complainant strenuously objected were written on behalf of the Respondent. Incident to the plea agreement, Mrs. Koppel, wife of Leopold Koppel, sought and obtained expressions of the high regard in which Mr. Koppel is held, and of leniency, from various parties such as charities, friends, relatives, children, business associates and others. These letters directed to Judge Munson, United States District Court, were from outstanding persons and institutions in the community. Complainant's objection went to the fact that the authors of such letters, except in two instances as noted above, were not available for cross-examination.

The history of the Respondent's discontent with the inspecting personnel provided to his plant pursuant to the Federal Meat Inspection Act is one of longstanding controversy, although neither the Respondent corporation nor Mr. Koppel had ever been convicted of any crime prior to the ones which are involved in this proceeding. For instance, the Respondent Mr. Koppel addressed a letter to his Congressman seeking assistance in a situation which he described as being that of an inspector assigned to the Respondent corporation who had acted improperly in the discharge of his duties in carrying out meat inspection requirements.

Perhaps the plight of Respondent is best described by the Respondent on Brief. It is the Respondent's position that the Secretary must evaluate whether or not the sanction which he seeks is unduly harsh and unwarranted under the circumstances. In support thereof it is the position of the Respondent, as set forth by its counsel at the oral hearing:

> "* * * the evidence will show that the USDA has an enormous hostility towards Fort Plain Packing Company over many years, primarily because of its president, Mr. Leo Koppel. Mr. Koppel has been a thorn in the side of the USDA since the early 1970's, continuously complaining about harassment and constantly pushing both his company and the inspectors to increase the productivity of his plant. This often resulted in forcing USDA employees to work harder and more days than any comparable plants.
>
> "Beginning in 1982 with the placement of a new inspector who had previously left the service and in spite of a hiring freeze was rehired by the service particularly to work at Fort Plain Packing, the Department finally had an individual who was able to collect evidence on Leo Koppel. * * * Indeed, he had a private vendetta because of a romantic liaison with one of Mr. Koppel's employees,

who left the company in January of 1983 and was, subsequently, denied unemployment compensation in March of 1983.

"As will be testified to by various witnessea, there was a marked change in the attitude of this inspector toward Fort Plain Packing coincident with the departure of his girl friend from the operation.[2]

"As a result of unreasonable inspections and demands placed on the company, the very economic existence of the company was threatened. The conflict between this inspector and Fort Plain management contributed to the climate of hostility and mistrust that may have led to the specific acts alleged in the information.

* * * * * * *

"* * * There is no allegation or admission in the plea documents that any meat shipped by Fort Plain was contaminated, unwholesome or otherwise unfit to eat.

"The fact remains, however, that the Department of Agriculture was out to convict Leo Koppel. They did. He has suffered enormous personal anguish and through the public and trade crafts, has been subject to notoriety and public humiliation.

"The present action is designed to put the employees of Fort Plain Packing out of business.

* * * * * * *

"* * * two public industrial development authorities will participate in the employee buy-out of Mr. Koppel and in a plan to effect employee management of the operation. This is not a pie-in-the-sky operation. Specific steps have been taken * * *." (Tr. 10-13).

Both the Respondent and the Complainant recognize that the issue for determination in this proceeding is the extent and nature of the sanction. The Respondent is seeking to rely upon mitigating circumstances to achieve a sanction less than that of indefinite withdrawal of inspection services under the Act.

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[2] In addition, some employees, such as the boner, believed the Respondent was treated differently from other plants by the inspector commencing in 1983. (Tr. 240-242). This view was concurred in by the union representative.

The Complainant maintained continuing objections to the receipt of certain evidence in this proceeding. However, Complainant's counsel did acknowledge in objecting to a question posed to Dr. Prucha that the Secretary has broad powers of judicial review as well as with respect to the circumstances which he may consider. In entering an objection, Complainant's counsel stated:

> "This witness [Dr. Prucha] is not competent to answer that question. He is an official of an agency under the direction of the Secretary. He holds no judicial authority for judicial review. He is totally incompetent to answer with respect to what the Secretary will or will not consider or how it will [be] consider[ed] in a judicial proceeding." (Tr. 610).

Complainant's counsel acknowledged that what the Secretary will consider in mitigation and how the Secretary will consider it is a judicial function. (Tr. 611).

Pursuant to arrangements at the oral hearing, counsel for both parties made a joint search for final orders of litigated and decided cases under the Federal Meat Inspection Act. According to this joint search, the Department has issued final orders in the following cases which are briefly summarized herein. For a more complete understanding of them, the entire order in each case should be read.

> *Indiana Slaughtering Co., Inc.* FMIA No. 3 (November 30, 1976) wherein an indefinite withdrawal of inspection services was sanctioned and imposed but suspended for so long as the individual named had "no contact or dealings with Federal meat inspection or grading service personnel, and" complied with other conditions.
>
> *Stevens Food Inc., et al* FMIA No. 10 (June 10, 1981) inspection services under Title I were indefinitely withdrawn from the respondent and meat grading and inspecting services were indefinitely withdrawn from the respondent and any establishment operated by the respondent therein or from any establishment in which said respondent was an officer, director, partner or substantial investor or had any authority with respect to the establishment.
>
> *Norwich Beef Company, Inc.* FMIA No. 29 (March 7, 1979) wherein the indefinite withdrawal of inspection service under Title I was suspended under certain conditions. The reasons for these conditions were said to be:

"In the present case, however, since * * * is the principal stockholder and key figure in the respondent's business, and the Department's loose procedure contributed to inspection being provided to Respondent's plant for several years, respondent should have some time in which to attempt to find someone else to lead the firm. Also, [Respondent] should have time within which to sell his stock in an orderly manner. It would seem appropriate, therefore, *to permit [Respondent] to be associated with the firm for an additional 90 days and to have one year within which to sell his stock.*" (Emphasis added).

Utica Packing Company, Inc. FMIA No. 35 (March 20, 1984) wherein the indefinite withdrawal of inspection services was suspended provided certain conditions were complied with, and there was the *further proviso* that the respondent therein would be permitted to be associated with the respondent firm for one year subsequent to the date the order became final and would have one year subsequent to the date the order became final to dispose of his stock.

Toscony Provision Company, Inc. FMIA No. 40 (May 18, 1984) wherein the indefinite withdrawal of inspection services was suspended on the condition that a certain individual not be associated with the Respondent, etc. but *with the proviso* that the named individual would be permitted to be associated with the Respondent's firm for one year subsequent to the date the order became final and would have one year subsequent to the date the order became final to dispose of his stock.

Wysznski Provision Company FMIA No. 41 (February 13, 1981) wherein the indefinite withdrawal of inspection services was suspended for so long as certain conditions were met, with the *further proviso that* the named individual should be permitted to be associated with the Respondent's firm for 90 days subsequent to the date the order became effectivs and that such individual would have one year subsequent to the date the order became effectivs to dispose of his stock.

3-D Meat Inc. FMIA No. 55 (July 6, 1982) inspection service was withdrawn for a period of two years subsequent to the date the order became final.

Bristol Meat Company FMIA No. 56 (February 9, 1982) the order therein provided for the resumption of inspection of Respondent's establishment on the conditions enumerated therein which included the exclusion from the kill floor of a certain individual during certain hours for 90 days; the regulation of communication between the named individual and assigned food inspectors for a period of 90 days; and further restriction upon such individual with respect to his relationship to assigned inspectors. (The Agency had requested 6 months to a year).

Omega Packing Limited FMIA No. 66 (August 13, 1984) inspection services were withdrawn for a period of four years and "The facts and circumstances as set forth [therein] shall be published."

Golden West Meat Company, Inc. FMIA No. 70, and PPIA No. 10 (January 11, 1984) Federal inspection services pursuant to the Federal Meat Inspection Act and the Poultry Product Inspection Act were withdrawn for a period of three years from the effective date of the order.

As the Respondent has noted, and from the above referenced cases, there has been a variance in the cases before the Department of Agriculture as to the sanctions to be applied in cases of this nature. Although the Respondent refers to this as being a matter within the purview of the Administrative Law Judge to formulate, and although such formulation has been done by this Administrative Law Judge, nevertheless, I am sure that both the Respondent and the Complainant recognize that this is a matter within the discretionary authority of the Secretary who exercises his authority in these cases through the Judicial Officer. The courts recognize and respect the authority of the Secretary of Agriculture and "The Secretary's choice of sanction is not to be overturned unless the reviewing court determines it is unwarranted in law or without justification in fact * * * *." The Secretary may make an allowable judgment in his choice of remedy and the fashioning of an appropriate remedy is for the Secretary of Agriculture. *Magic Valley Potato Shippers, Inc.* v. *Secretary of Agriculture* (C.A. 9th, No. 81-7863, April 1, 1983).

In support of its requested sanction that Federal Meat Inspection Services should be indefinitely withdrawn from the Respondent, the Complainant adduced at the oral hearing a number of substantial witnesses who testified to the seriousness of the actions resulting in the felony convictions of both Mr. Koppel and the Respondent corporation. Included among such witnesses was Doctor Jack

Leighty a Veterinarian of many years experience with the Department; Doctor Ronald J. Prucha, Deputy Administrator with the Department's Meat and Poultry Inspection Operations; and Mr. Gonter, Compliance Official with the Department. The testimony of these witnesses indicated that they regarded the actions resulting in the felony convictions to be those of a most serious and far-reaching nature. Mr. Gonter indicated that in his consideration of a sanction, he took into consideration facts which led him to believe that there had been a course of conduct extending over a three and a half year period from 1979 which represented a continuing pattern of conduct which showed a, "* * * complete, in my judgment, total disdain for the spirit, intent and purposes of the Federal Meat Inspection Act." (Tr. 25).

The principal piece of evidence upon which the Complainant relies consists of a ten page Affidavit (Complainant's Exhibit 5) signed by Mr. Koppel with respect to the felony conviction. With respect to other matters relating to the three and a half year period, the evidence does not show that any violations of the Federal Meat Inspection Act occurred prior to the year 1983. The evidence in the record of this case does show that Mr. Koppel made frequent complaints about the inspectors to various people and in attempting to rectify the situation as he saw it, engaged in correspondence as well. It was noted by counsel for the Complainant (Tr. 376) that: "Mr. Koppel is not here, although everybody is testifying as to what Mr. Koppel meant in his sworn Affidavit."

The Complainant admits and the case law [3] of the Department reflects that mitigating circumstances may and should be taken into consideration in a proceeding of this nature. (Tr. 91-113). Accordingly, evidence relating to mitigating circumstances was received and has been evaluated herein. The penalties for the criminal violations of the Federal Meat Inspection Act have already been determined and paid. The purpose of this proceeding is not to reexamine those results or to impose penalties in excess of those imposed by the United States District Court Judge. The Complainant's interest in this proceeding is to assure the wholesomeness of

[3] See *In re: Apex Meat Company,* FMIA Docket No. 78 (September 5, 1985) and the *rationale* and cases cited therein. As noted in that case, the statutory grant of authority to the Secretary to withdraw meat inspection for a felony conviction is expressly limited to a withdrawal for "such period, or indefinitely, *as he deems necessary to effectuate the purposes of this Act* [i.e., Federal Meat Inspection Act, as amended]" (Emphasis added); 81 Stat. 584, 597 (1967), codified in 21 U.S.C. section 671). And the statutory grant of authority is limited to cases where the felony is of such nature as to support a finding that the recipient of inspection services is unfit to engage in any business requiring inspection as a result of the felony conviction.

the meat which reaches the consuming public and to assure that this particular meat facility abides by the law.

As has been noted previously, the determination of a remedy is clearly within the administrative discretion of the agency. The matter for determination in this proceeding relates to the nature of the sanction.

One way to achieve the purposes of the Complainant is to withdraw Federal Meat Inspection Services which would result in the closing of the plant facilities of the Respondent. Another remedy would be to achieve a sale of the plant facilities to a third party having no prior association with the Respondent. If the plant and facilities were sold outright to a third party with no prior association with the Respondent there would be no apparent basis for denying inspection services.

However, the Secretary has indicated in previously decided cases that there are other alternatives available to him and which he may exercise in his discretion. Some examples of these alternative procedures are illustrated more fully in the cases set forth hereinabove.

In formulating a workable sanction and solution to this proceeding, evidence of the mitigating circumstances has been considered carefully together with the sanctions approved by the Secretary in other proceedings.

Among the mitigating circumstances which are clearly shown by the persuasive evidence of record are those of: (1) the plant at the time of the oral hearing was operating in full compliance with the requirements of the Agriculture inspectors; [4] (2) Mr. Koppel has removed himself from the kill floor and from any association with the inspectors at the plant; and, (3) considerable effort has been devoted to finding a means to keep the plant in operation, which would be of benefit to the community and to the employees.

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[4] However, cf. *Apex Meat Company*, FMIA Docket No. 78 (September 5, 1985). In this most recent case, the Respondent therein sought to show that it was currently putting out a product in compliance with Department regulations. The decision therein stated:

> "However, such evidence would not be sufficient to change the result in this case.
>
> "The argument that a respondent is presently complying with the relevant regulatory program is made in almost every disciplinary case that comes before the Judicial Officer, and is almost always true. Only a foolhardy respondent would continue to violate a regulatory statute, after a complaint is filed, pending the outcome of the litigation. Exemplary conduct during the course of litigation is never considered as a weighty, mitigating circumstance.

Whether they be called mitigating circumstances, or, circumstances under which the Respondent corporation seeks to retain the inspection services, the evidence herein suggests a program whereby the employees would obtain ownership of the corporation. This would not appear to be objectionable to the Complainant. However, such new ownership would have to make a showing that it could operate on a business like and profitable basis in order to obtain the services and funding which would be forthcoming from the Montgomery County Industrial Development Agency and the Mohawk Valley Economic Development Corporation, as well as satisfying the requirements of the bank and/or lending institutions.

The evidence further indicates that such funding and services would not be forthcoming unless the Respondent were allowed a transitional period wherein the services of Mr. Koppel could be continued in the buying and selling area. The evidence clearly shows that Mr. Koppel is regarded as a very capable cattle buyer and seller and that these are attributes not easily attainable. It is this latter point that basically is the stumbling block for the Complainant.[5] The Complainant's objective is to remove Mr. Koppel entirely from the business. This obviously would be achieved by his relinquishing ownership in the corporation and divesting himself of his stock ownership. However, in order to provide a basis for the profitable operation of the business entity under new ownership, it is clear from the evidence that a transition period would be required under conditions whereby Mr. Koppel would not be permitted a presence or association with the slaughtering of the animals and he would not be permitted to have contact with the inspectors. However, for a period of time, until new personnel, or his son could be trained, he would be permitted to buy and sell the cattle. Various times of duration have been suggested by the evidence and the duration periods have been stated to be from one and half to two years.

If the Complainant wishes the plant to be closed and the physical facilities sold for substantially less then they could be sold for as a going concern, then, of course, that is within the Secretary's discretion. However, if the Secretary, in keeping with other previously

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[5] As previously noted, the crucial determining factor, with respect to sanction relates to the presence or nonpresence of Mr. Koppel. For instance Mr. Prucha, the Deputy Administrator, representing Mr. Houston, testified, among other things:

> "Q—Were Mr. Koppel to divest himself of ownership in that plant and, in addition, not have any activities in the plant whatsoever, would that modify your position?
>
> "A—I would consider it, yes." (Tr. 599).

decided cases, and in considering the voluminous evidence of record with respect to the mitigating circumstances of this case, decides that the Respondent corporation as restructured and without the presence of Mr. Koppel, is fit to continue in business, then it is a reasonable condition that a transition period should be allowed. There is little to be achieved by letting a potentially unprofitable entity continue in business, and, in view of the astuteness, experience, and knowledge of the witnesses who represented various entities or were knowledgeable of various entities which would provide the funding, it is doubtful that the financing would be forthcoming unless there is a transitional period, within which Mr. Koppel would be allowed to buy and sell cattle.

In view of the considerable lapse of time which has transpired since the oral hearing and this Decision, it is believed that a transitional period of one year beyond the effective date of this Decision is both needed and appropriate, if the employee buy-out plan is to go into effect, although this is far less than the testimony indicates was needed at the time of the oral hearing. By transitional period is meant that period of time during which Mr. Leopold Koppel would be allowed to buy and sell cattle for the corporation and to train others in the necessary abilities and techniques required. Inherent in this formulation of a sanction in this proceeding is the premise that the employees of the Respondent corporation can take over the ownership of Respondent corporation and can obtain the funding which they believed was available and which the evidence so indicates was available, at the time of the oral hearing. In the event change in corporate ownership and the funding as contemplated and as set forth at the oral hearing are not available or capable of being put into effect, or some other similar arrangement is not available, on the effective date of this Decision and Order, then, in such event, it is inherent in this Decision and Order that Mr. Leopold Koppel will be permitted one year from the effective date of this Decision and Order to divest himself of all stock ownership and must disassociate himself, within six months, completely from the operations of the corporate Respondent, including the buying and selling of cattle, and all other activities relating to the corporation, except those pertaining to stock ownership. During such six month period his activities shall be confined to buying and selling cattle and the training of others. The Brief submitted on behalf of the Respondent indicates that as of that time [October 26, 1984] funding was available and accordingly the following Order is being issued with the understanding that if funding is not available as set forth above, then the conditions so mentioned above and in the Order shall prevail.

Inasmuch as the facts set forth in the record, as a whole in this case, hsve considerable similarity to those of the *Utica Packing Co.* case *supra*, I believe that, after considering all the circumstances, the following Order will serve to protect the public interest, to promote the ends to be achieved by the Federal Meat Inspection Act, and that such Order will be in accord with the alternative sanctions set forth in the above cases.

ORDER

Inspection service under Title I of the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*) is indefinitely withdrawn from and denied to Respondent, its officers, directors, successors, and assigns, directly or through any corporate or other device;

Provided, however, that such withdrawal and denial of inspection shall be suspended for so long as Leopold Koppel is not associated, beyond the time durations set forth herein of six months, or one year, whichever is applicable, with Respondent, its successors, or assigns, directly or through any corporate or other device, as a partner, officer, director, shareholder or employee, and for so long as Leopold Koppel provides no direction nor advice to, and exercises no control over Respondent, its successors or assigns, directly or through any corporate or other device;

Provided further, that Leopold Koppel shall be permitted to be associated with the Respondent firm for six months subsequent to the date this Order becomes final and shall have one year subsequent to the date this Order becomes final to dispose of his stock and ownership in the Respondent corporation, and said association of six months ahall be in the limited capacity of buying and selling cattle and for the purpose of training others;

Provided, however, and notwithstanding the foregoing last *proviso*, if the employee purchase of the corporate stock and the funding contemplated at the time of the oral hearing and on Brief, or some similar arrangement takes effect, then, in such event, Leopold Koppel, is permitted to be associated with Respondent corporation in a capacity limited to buying and selling of cattle and training others for a transitional period of one year;

Provided further, in the event the employee purchase of the stock and the funding contemplated at the time of the oral hearing and on Brief, or some other similar arrangement, does not have current feasibility at the time of the effective date of this Decision and Order, then, the following conditions shall be met: (1) Leopold Koppel shall disassociate himself entirely from the operations of the Respondent corporation within a period not to exceed six months from the effective date of this Decision and Order; and, (2)

Leopold Koppel shall have a period of one year from the effective date of this Decision and Order within which to divest himself of ownership in the Respondent corporation, and inasmuch as the evidence indicates that some of the stock is owned by Laurie Koppel (wife of Leopold Koppel), then, to the extent applicable, this Decision and Order with respect to the divesiture of stock ownership shall be applicable to the stock of Mrs. Laurie Koppel (Tr. 371);

And provided further, that if it is determined, after opportunity for a hearing under the Federal Meat Inspection Act, that any term of the above provisions has not been or is not being complied with, the suspension will be terminated and the withdrawal and denial provisions of this Order shall become effective immediately.

The many requests, motions, and contentions of the parties have been considered carefully, and, to the extent not ruled upon and which are inconsistent with this Decision and Order, they are hereby denied.

This Decision and Order will become final 35 days after service thereof unless appealed to the Secretary's Judicial Officer within 30 days as provided for in the Rules of Practice and Procedure, 7 CFR section 1.131 *et seq.*

Copies hereof shall be served upon the parties.

[This decision and order became final November 22, 1985.—Ed.]

In re: JAMES AUSTIN FRALEY, JR. t/a ROCKO MEATS. FMIA Docket No. 91, PPIA Docket No. 13. Decided December 18, 1985.

Withdrowel and denial of inspection services, suspended with conditions.

Kris Ikejiri, for complainant.
Marvin B. Segal, New York, New York, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

These are proceedings under Title I of the Federal Meat Inspection Act (FMIA) as amended (21 U.S.C. §§ 601 *et seq.*) and the Poultry Products Inspection Act (PPIA) (21 U.S.C. §§ 451 *et seq.*) to withhold and deny inspection services under the above acts to respondent. These proceedings were initiated by a complaint filed on June 12, 1985, by the Administrator of the United States Department of Agriculture's Food Safety and Inspection Service. Respondent filed its answer to the complaint on August 2, 1985.

The parties have agreed that these proceedings should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulation:

1. For purposes of this stipulation and the provisions of the Consent Decision only, respondent admits all of the jurisdictional allegations set forth herein, and waives:

(a) Any further procedural steps;

(b) any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of this decision.

2. Respondent waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fees and other expenses incurred by Respondent in connection with this proceeding.

3. This Stipulation and Consent Decision are for settlement purpose in this proceeding only and do not otherwise constitute an admission or denial by respondent, that it has violated the regulations or statutes involved.

FINDINGS OF FACT

I

(a) James Austin Fraley, Jr., T/A Rocko Meats, is an applicant seeking to operate a meat processing establishment located at 12623 Catoctin Furnace Road, Thurmont, Maryland 21788.

(b) James Austin Fraley, Jr., T/A Rocko Meats, is an applicant for Federal meat and poultry products inspection services under Title I of the FMIA and under the PPIA, at the above-named establishment.

(c) James Austin Fraley, Jr., is now, and at all times material herein was, listed as the only individual responsibly connected with the respondent's proposed operation.

II

On three occasions between September 1965 and January 1976, James Austin Fraley, Jr., was convicted in the United States District Court for the District of Maryland and the United States District Court for the District of Columbia, of 47 felony and misdemeanor violations of the Federal Meat Inspection Act. At least 44 of these aforementioned convictions were felony violations involving the illegal transportation, sale, and offer for sale of non-federal-

ly inspected meat products with intent to defraud, in violation of 21 U.S.C. 610(b) and 676.

CONCLUSION

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceedings, such Decision will be issued.

ORDER

Inspection servicas under Title I of the FMIA and the PPIA are, withheld from and denied to respondent, its successors, affiliates and assignees for a period of five years. However, said withholding and denial shall be suspended and held in abeyance and inspection services shall be provided to respondent so long as, in addition to all other requirements of inspection:

1. James Austin Fraley, Sr., not participate in the conduct of the respondent's regulated business in any way or physically be in the facility at any time.

2. James Austin Fraley, Jr., surrender a Maryland state license, authorizing the hauling of dead animals and that he will not participate in any business involving the handling of dead or dying livestock or any meat products from such livestock.

3. Respondent does not accept or receive returned product due to its condition or the condition of the box or container without prior notics to and supervision by the on-site U.S.D.A. Inspector.

4. Respondent does not process, handle, or store custom exempt products or game, whether for customers, employees, the owner, friends or relatives.

5. Respondent does not process, handle or store any non-federally inspected product. This special condition precludes the processing, handling or storage of state-inspected product.

6. Respondent maintains full, complete, accurate and appropriate written records of its business activities.

7. Respondent does not knowingly hire or permit the employment of any person who has baen convicted of any violations of the FMIA, the PPIA, similar State and local food safety laws or of any crime of moral turpitude.

The special conditions set forth in paragraphs 1 through 7 shall be applicable for a period of five yaars. During the five-year period, the Secretary shall have the right to summarily withdraw inspection service upon a finding by appropriate national headquarters staff of a violation of any special condition set forth in paragraphs 1 through 7. Any summary withdrawal of inspection service shall

be subject to respondent's right to request an expedited hearing on the violations alleged.

After thirty months from the initial grant of inspection service, the Food Safety Inspection Service may consider any petition for good cause to modify the special conditions set forth in paragraphs 3 through 7 with a view to terminate or amend some or all of the special conditions. After five years from the initial grant of inspection, provided all of the above conditions have been followed, respondent shall be issued, upon request, an unconditional grant of inspection.

DISCIPLINARY DECISIONS

In re: R. D. PLUNKETT. P&S Docket No. 6471. Decided November 8, 1985.

Dealer—Insufficient funds checks—Failure to pay when due—Bonding requirements—Suspension—Consent.

Ben Bruner, for complainant.
Jack Jones, Templer, Texas, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. R. D. Plunkett, hereinafter referred to as the respondent, is an individual whose mailing address is 1417 McClanhan Road, Apt. 216, Marlin, Texas 76661.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) Engaged in the business of selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary as a dealer to buy and sell livestock in commerce for his own account and as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks to any person in payment of the net proceeds resulting from the sale of consigned livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks;

2. Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors;

3. Failing to remit, when due, the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors; and

4. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of forty-five days and thereafter until respondent demonstrates that he has an adequate bond or bond equivalent. When respondent demonstrates that he has adequate bond coverage, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the forty-five day period of suspension.

The provisions of this order shall become effective on November 6, 1985.

Copies of this decision shall be served upon the parties.

In re: RANDY CROOK and ROY WAYNE HARRIS. P&S Docket No. 6526. Decided November 8, 1985.

Market agency—Custodial Account for Shippers' Proceeds—Suspension—Consent.

Jory Hochberg, for complainant.
Respondant, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Depart-

ment of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Randy Crook, hereinafter referred to as respondent Crook, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.

2. Roy Wayne Harris, hereinafter referred to as respondent Harris, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.

3. Respondents Crook and Harris are partners doing business as Ringling Livestock Auction, and are, and at all times material herein were:

(a) Engaged in the business of conducting and operating the Ringling Livestock Auction stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Crook and Harris, their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), amounts due from the sale of consigned livestock; and

3. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes of their own or for any purpose other than the payment of net proceeds to the owners, consignors or shippers of such livestock, or for the payment of amounts due the respondents for lawful marketing charges.

The respondents are suspended as a registrant under the Act for 21 days and thereafter until such time as they demonstrate that the deficit in their custodial account has been eliminated. When respondents demonstrate that the deficit in their custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the 21-day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: STATE WIDE MARKETING, INC., a corporation; RUSTY THOMPSON, an individual; and LARRY ROSS, an individual. P&S Docket No. 6588. Decided November 8, 1985.

Dealer—Liabilities exceeded assets—Insufficient funds checks—Failure to pay when due—Suspension—Consent.

Andrew Stanton, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION CONCERNING STATE WIDE MARKETING, INC. AND LARRY ROSS

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remain-

ing allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. State Wide Marketing, Inc., hereinafter referred to as respondent State Wide, is a corporation with its principal place of business located at Colfax, Iowa, and whose business mailing address is Box 92, Colfax, Iowa 50054.

2. Respondent State Wide is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account.

3. Rusty Thompson, hereinafter referred to as respondent Thompson, is, and at times material herein was, the president and 50% shareholder of respondent State Wide. His mailing address is 23 South Lincoln, Colfax, Iowa 50054.

4. Larry Ross, hereinafter referred to as respondent Ross, is, and at all times material herein was, the secretary and treasurer and 50% shareholder of respondent State Wide. His mailing address is R.R. 1, Runnells, Iowa 50237.

5. Respondents Thompson and Ross direct, manage and control all business activities of respondent State Wide.

CONCLUSIONS

The respondents, State Wide Marketing, Inc. and Larry Ross, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent State Wide, its officers, directors, agents, employees, successors and assigns, and respondents Thompson and Ross individually or through any corporate or other device, shall cease and desist from:

1. Engaging in the business as a dealer while current liabilities exceed current assets;

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks; and

3. Failing to pay, when due, the full purchase price of livestock.

Respondents shall create, keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in the business of respondent State Wide, including but not limited to: (a) fully completed purchase and sales invoices; (b) purchase and sales journals; (c) cash receipts and disbursements journals; and (d) a check register.

Respondent State Wide is suspended as a registrant under the Act for a period of 120 days and thereafter until it demonstrates that it is no longer insolvent. When it demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the 120 day period of suspension.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: LANDY PACKING COMPANY, JAMES LANDY, and ALLEN BRIGHT.
P&S Docket No. 6497. Decided September 30, 1985.

Packer—Liabilities exceeded assets—Insufficient funds checks—Failure to pay when due—Failure to pay full purchase price—Default.

Stephen Luparello, for complainant.
Reapondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondents. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in

the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Landy Packing Company, hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Minnesota, with its principal place of business located in St. Cloud, Minnesota. The corporate respondent's business mailing address is P. O. Box 670, St. Cloud, Minnesota 56031.

(b) Corporate respondent, at all times material herein, was:

(1) Engaged in the business of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(2) A packer within the meaning and subject to the provisions of the Act.

(c) James Landy, hereinafter referred to as respondent Landy, is an individual whose business mailing address is P. O. Box 670, St. Cloud, Minnesota 56031.

(d) Respondent Landy, at all times material herein, was:

(1) Treasurer of corporate respondent;

(2) Owner, in combination with other family members, of the corporate respondent; and

(3) Responsible for the direction, management and control of the corporate respondent.

(e) Allen Bright, hereinafter referred to as respondent Bright, is an individual whose business mailing address is P. O. Box 670, St. Cloud, Minnesota 56031.

(f) Respondent Bright, at all times material herein, was:

(1) President of corporate respondent;

(2) Owner, in combination with other family members, of the corporate respondent; and

(3) Responsible for the direction, management and control of the corporate respondent.

2. (a) As of July 7, 1984, the corporate respondent's current liabilities exceeded its current assets. As of that date, the corporate respondent had current liabilities totalling $4,808,174.00, and current assets totalling $4,608,466.00, resulting in an excess of current liabilities over current assets of $199,708.00.

(b) As of August 29, 1984, the corporate respondent's current liabilities exceeded its current assets. As of that date, the corporate respondent had current liabilities totalling $3,430,635.00, and cur-

rent assets totalling $2,859,667.00, resulting in an excess of current liabilities over current assets of $570,968.00.

(c) The corporate respondent's current liabilities presently exceed its current assets.

3. Respondents, in connection with their operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the Complaint and Notice of Hearing, purchased meat and issued checks in payment therefor which were returned unpaid by the bank on which they were drawn because respondents did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

4. (a) Respondents, on or about the dates and in the transactions set forth in paragraphs III and IV of the Complaint and Notice of Hearing, purchased meat and failed to pay the full purchase price of such meat.

(b) As of August 29, 1984, there remained unpaid by respondents $1,111,420.67 for such meat purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the corporate respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents have wilfully violated section 202(a) of the Act (7 U.S.C. §§ 192(a)).

ORDER

Respondents Landy Packing Co., James Landy and Allen Bright, their officers, directors, agents, employees, and successors and assigns, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Purchasing livestock while insolvent;

2. Issuing checks in payment for meat or livestock purchased without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;

3. Failing to pay, when due, the full purchase price of meat or livestock; and

4. Failing to pay the full purchase price of meat or livestock.

This decision and order shall becoms final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.
[This decision and order became final November 12, 1985.—Ed.]

In re: ALVIN BARTELS, ALLEN BARTELS and GAILEN GAGE. P&S Docket No. 6601. Decided November 18, 1985.

Dealer—Misrepresentation of weights—Prohibited from inducing or causing favored treatment based on offering or giving money, gifts, or services—Suspension—Prohibited from business subject to the Act—Consent.

Stephen Luparello, for complainant.
William J. O'Connor, New Ulm, Minnesota, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO ALVIN BARTELS AND ALLEN BARTELS

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents Alvin Bartels and Allen Bartels admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Alvin Bartels, doing business as Bartels Livestock, hereinafter referred to as respondent Alvin Bartels, is an individual whose business mailing address is Winthrop, Minnesota 55396.

2. Respondent Alvin Bartels is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. Allen Bartels, hereinafter referred to as respondent Allen Bartels, is an individual whose business mailing address is Winthrop, Minnesota 55396.

4. Respondent Allen Bartels is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(b) A dealer, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondents Alvin Bartels and Allen Bartels having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Alvin Bartels, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Misrepresenting to customers or other purchasers of livestock from the respondent the original or actual purchase weights of livestock;

2. Preparing or issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices or billings showing false, inaccurate or misleading entries for such livestock;

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate or misleading accounts of purchase, invoices or billings; and

4. Attempting to induce or cause, inducing or causing, accepting or receiving favored treatment or undue preference or advantage related to the purchase or sale of livestock in commerce from any customer or prospective customer based on the offering or giving by respondents money or gifts or services to or for the benefit of any customer, prospective customer, their officers, agents or employees.

Respondent Allen Bartels, his agents and employees, directly or through any corporate or other device, shall cease and desist from attempting to induce or cause, inducing or causing, accepting or receiving favored treatment or undue preference or advantage related to the purchase or sale of livestock in commerce from any customer or prospective customer based on the offering or giving by respondents money or gifts or services to or for the benefit of any customer, prospective customer, their officers, agents or employees.

Respondents Alvin Bartels and Allen Bartels shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including but not limited to scale tickets issued or received in connection with the purchase or sale of livestock, and worksheets made or caused to be made in connection with the purchase or sale of livestock.

Respondent Alvin Bartels is suspended as a registrant under the Act for a period of four (4) months.

Respondent Allen Bartels is prohibited for a period of four months from engaging in business or operating subject to the Act as a market agency, buying or selling livestock in commerce on a commission basis or furnishing stockyard services, or as a dealer, buying or selling livestock in commerce either on his own account or as the employee or agent of the vendor or purchaser.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: ALVIN BARTELS, ALLEN BARTELS, and GAILEN GAGE. P&S Docket No. 6601. Decided November 18, 1985.

Market agency—Prohibited from receiving anything of value except as consideration for services lawfully rendered—Prohibited from business subject to the Act—Consent.

Stephen Luparello, for complainant.
David D. Meyer, Lakefield, Minnesota, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO GAILEN GAGE

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Gailen Gage admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing

and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Gailen Gage, hereinafter referred to as respondent Gage, is an individual whose address is 113 Mill Road, Lakefield, Minnesota.

2. Respondent Gage is, and at all times material herein was:

(a) Engaged in the business of buying livestock on a commission basis in commerce; and

(b) A market agency, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondent Gailen Gage having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Gailen Gage, his agents and employees, directly or through any corporate or other device, shall cease and desist from receiving or accepting anything of value as a commission, brokerage or other compensation, or any allowance except as consideration for services lawfully rendered in connection with the purchase or sale of livestock.

Respondent Gailen Gage is prohibited from operating subject to the Act for a period of four (4) months, effective November 1, 1985.

Copies of this decision shall be served upon the parties.

In re: LAVERNE JENKINS. P&S Docket No. 6388. Decided September 30, 1985.

Market agency—Bond requirements—Suspension—Civil penalty.

Respondent continued to operate as a market agency after being notified of bond requirements and that his surety bond had been terminated. Respondent was ordered to cease and desist from business subject to the Act for which bonding is required, was suspended as a registrant for 30 days and thereafter until in compliance with the bonding requirements, and was assessed a civil penalty of $4,000.00.

Eric Paul, for complainant.
W. F. Countiss, Amarillo, Texas, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 USC 181 *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on June 15, 1984, by the Administrator of the Packers and Stockyards Administration, United States Department of Agriculture.

The complaint alleges that LaVerne Jenkins, hereinafter referred to as the respondent, is an individual doing business as LaVerne Jenkins Cattle and Grain Co., with a mailing address of Box 159, Campo, Colorado. The complaint further alleges that the respondent is and, at all times material herein, was engaged in the business of buying livestock in commerce on a commission basis and registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

The complaint further alleges that respondent continued to operate as a market agency purchasing livestock on a commission basis despite having been notified of the termination of his $55,000.00 surety bond on May 14, 1984, and that his operations subject to the Act required bond coverage in the amount of $85,000.00.

Such activities are alleged to be in wilful violation of section 312(a) of the Act (7 USC § 213(a)) and sections 201.29 and 201.30 of the regulations (9 CFR 201.29, 201.30).

Respondent filed an answer to the complaint on July 16, 1984, admitting the jurisdictional allegations and denying all other allegations of the complaint. An oral hearing was held in Lamar, Colorado on January 22, 1985. Respondent appeared *pro se*, and complainant was represented by Eric Paul, Office of the General Counsel, United States Department of Agriculture. Two witnesses testified during the presentation of complainant's case and seventeen (17) exhibits were admitted for complainant. Respondent conducted cross-examination and testified on his own behalf.

FINDINGS OF FACT

1. LaVerne Jenkins, doing business as LaVerne Jenkins Cattle and Grain Co., hereinafter referred to as the respondent, is an individual whose mailing address is Box 159, Campo, Colorado. (admitted in answer)

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account (admitted in answer).

3. Respondent has been engaged in the business of buying livestock for others for approximately twenty (20) years and considers himself to be an "order buyer" rather than a "dealer" or "trader" since he purchases livestock on order and receives compensation from his principals by way of a commission rather than a profit on speculative resale. (Jenkins, Tr. 72-74, 79).

4. On May 12, 1976, an earlier surety bond which respondent maintained to secure the performance of his livestock obligations under the Act and regulations was terminated. Notwithstanding written notice, respondent engaged in the purchasing of livestock in commerce on a commission basis without filing and maintaining a reasonable bond or its equivalent until May 9, 1977. (Cx 1; Stroud, Tr. 9-10).

5. On August 5, 1977, a consent order was entered in *In re LaVerne Jenkins,* P&S Docket No. 5389, that provided:

> "Respondent shall cease and desist from engaging in any business in commerce in any capacity for which bonding is required under the Packers and Stockyards Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations. (Cx 1, pg. 4)."

6. Between May 9, 1977 and May 14, 1984, respondent maintained reasonable bond coverage in compliance with the requirements of the Act and regulations (Stroud, Tr. 10-11).

7. On May 14, 1984, the $55,000.00 surety bond maintained by respondent was officially terminated after the expiration of a thirty day notice period. Respondent was notified by a certified mail letter dated April 16, 1984, of the coming termination date, and advised that any continuation of livestock operations after May 14, 1984, without the filing of an adequate bond or trust fund agreement would be in violation of the Act and regulations. (Cx 3).

8. The surety bond which terminated on May 14, 1984, was duly terminated in accordance with a prescribed condition clause which required the surety to terminate the bond upon making a determination that a bond claim received was timely filed and nonfrivolous (Stroud, Tr. 50). This condition clause provides:

> "(k) This bond may be terminated by either party hereto delivering written notice of termination to the other party and the Administrator of the Packers and Stockyards Administration at Washington, D. C., at least thirty (30) days

prior to the effective date of such termination. In the event that the Surety named herein writes a new bond to replace this bond for the same Principal named herein, the 30-day termination provision will be waived, and this bond will become terminated as of the effective date of the replacement bond. *Immediately upon filing a claim for recovery on this bond, unless the Surety believes that such claim is frivolous, the Surety shall cause termination of this bond in accordance with this paragraph.* (emphasis added) (Form P&SA–1 (7/76); 41 FR 53771, Dec. 9, 1976)."

9. The livestock purchase transactions which eventually led to the May 14 1984 bond termination, occurred almost eight months previously, on September 9 1983. Respondent purchased 46 head of livestock from the Cattleman's Livestock Commission Company of Dalhart, Texas, for a disclosed principal, Mr. Robert Kula, a Colorado feedlot operator who was not registered and bonded under the Act. Mr. Kula paid for the livestock with a $16,420.18 NSF check and Cattleman's Livestock Commission Company filed a claim against respondent's bond (Cx 15; Stroud, Tr. 58–59; Jenkins, Tr. 74).

10. The packers and Stockyards Administration's Denver Regional Office notified respondent's surety on August 14 1984, with copies going to both respondent and to the Colorado official who acted as trustee on the bond, that the bond claim had been withdrawn after an attorney employed by respondent had obtained payment from Mr. Kula (Cx 15; Stroud, Tr. 59; Jenkins, Tr. 76).

11. This August 14 1984 letter served two purposes: (1) it authorized a full release of the proceeds from the terminated surety bond; and (2) it provided respondent, his surety, and the state official who served as trustee on the bond with express written notice that the bond which had terminated on May 14 1984, could not be reinstated and would have to be replaced with a new bond or bond equivalent (Cx 15; Stroud, Tr. 34).

12. The new bond that respondent was required to file with the Secretary, however, was now in the amount of $85,000. This requirement had been communicated to respondent by letters dated April 25, 1984 and June 4 1984, as well as by subsequent telephone conversations with complainant's Denver regional supervisor, Mr. C. James Stroud, and a marketing specialist working under his supervision, Mr. Darcy White (Cs 3; Stroud, Tr. 15–16; White, Tr. 61–62).

13. This $85,000 bond requirement represented a normal increase of $20,000 ($55,000 to $75,000) based upon a sharply higher reported dollar volume of livestock purchased on commission during the cal-

endar year 1983, plus an additional $10,000 adjustment ($75,000 to $85,000) to compensate for an unusually high second quarter purchase volume of $4,953,468 (Cxs 2, 3; Stroud, Tr. 11-16).

14. Respondent has not filed a new bond with complainant, either in the amount of $55,000 or $85,000 (Stroud, Tr. 17). An unsuccesaful attempt was made on September 5, 1964, however, to reinstate the bond terminated on May 14 1984 apparently retroactive to the termination date (Cx 16; Stroud, Tr. 39-41, 49; White, Tr. 63-64).

15. The letter purporting to reinstate the $55,000 bond was not received for filing by complainant's Denver regional office. Witness Stroud testified that the Packers and Stockyards Administration would have refused to permit reinstatement and accept this letter as a reinstatement because the termination hed already occurred (Stroud, Tr. 39-41, 49).

16. During the period May 16 1984 through December 28 1984, respondent was shown to have purchased livestock on a commission basis from five posted stockyards or auction markets located in New Mexico, Texas end Oklahoma, primarily for various principals located in Colorado (Cxs 5-14; Stroud, Tr. 17-33). Such purchases constitute only a semple of his full time business during this period.

17. The invoices obtained from the five auction markets show purchases of livestock that exceed $350,000 in total dollar volumo and which earned respondent a total of $1,255.13 in commissions. These commissions were paid to respondent by the various selling market agencies on the day of sale and charged to his principals (Cxs 5-14; Jenkins, Tr. 85-86).

18. Purchases made on a commission basis by respondent wore generelly paid for by his principal. One purchase made on Novembor 9 1984 at Cattleman's Livestock Commission Company was paid for by Mr. Jenkins (Stroud, Tr. 32; Cx 1). In the case of purchases made for 3T Cattle Co. of Fort Morgan, Colorado, respondent would write a check using a 3T Cattle Co. checking account on which he was authorized to draw (Cxs 6, 9-10, 12-14; Jenkins, Tr. 79-80, 93).

19. Respondent is engaged in the purchasing of livestock for a number of feedlots on a regular basis with about 75 percent of the cattle going to 8T Cattle Co. (Jenkins, Tr. 92-93). In addition, respondent explained that it was his practice to purchase for new customers only after checking with their bankers to see if their money was good (Jenkins, Tr. 80).

20. Complainant's regional supervisor, Mr. C. James Stroud, presented direct testimony, unrefuted by respondent, to the effect that all indications show "that Mr. Jenkins is continuing to operate at

the same level in which he reported for 1983 (Stroud, Tr. 69)." Respondent's 1983 annual report (Cx 2) shows the purchase on a commission basis of 24,436 head of cattle for a total buying commission income, after expenses, of $74,345. Assuming that the dollar volume of respondents livestock purchases remained the same for the 3rd and 4th quarters of 1984, as reported for 1983 ($2,513,628 out of a total of $9,049,535 or 27.8%), he would have earned a net buying commission income after expenses of some $20,668 ($74,345 $\times$27.8%) while operating for six months without bond coverage. Even assuming that his surety could be equitably held to a $55,000 liability to potential bond claimants after September 5 1984, by reason of its collection of premiums and unsuccessful attempted reinstatement (Cx 16), the bulk of such income would have been received while no protection of any kind was in effect.

21. The statement in the September 5 1984 letter from Lumbermens Mutual Insurance Company that respondent relies upon—"We now wish to reinstate this bond and consider it in full force as if it was never cancelled" merely implies an intention to provide coverage from May 14 1984 onward. There is no express commitment to honor bond claims arising out of transactions that occurred between May 14 1984 and September 5 1984, or any explanation of how a claim might be handled if filed untimely (more than 120 days after the transaction) because a claimant had made an inquiry as to the existence of bond coverage in June and had been advised that coverage was no longer in effect.

22. Respondent explained that he could not have obtained a $85,000 bond prior to the oral hearing, and in fact, had not attempted to do so, because he had not yet obtained the necessary financial information from his accountant for submission to a surety company (Jenkins, Tr. 78-79, 90-91, 93).

CONCLUSIONS OF LAW

Respondent's Operations as a Market Agency Buying Livestock in Commerce on Commission after May 14, 1984, Constitute a Wilful Violation of the Act and Regulations

There is no real controversy in this proceeding as to the nature of the business engaged in by respondent. He has admitted being registered as a dealer and buying livestock in commerce on commission (Answer; Cxs 1-3). Whether he is called a market agency buying on commission in accord with the language of the Act or an order buyer to follow industry custom is immaterial. In either case he is required under the bonding regulations to file and maintain a reasonable bond or approved bond equivalent (9 CFR 201.27 *et. seq.*).

He has failed to maintain this bond coverage on two occasions. During the first occasion, in 1976, he continued to purchase livestock on commission for approximately a year before obtaining a new bond (Cx 1; Finding 6). He has explained during the oral hearing in this proceeding that his bond was terminated in 1976 because his surety became nervous after American Beef or American Packing Company went bankrupt (Jenkins, Tr. 96). What he has failed to explain is why he engaged in business without a bond during this one year period.

A Consent Order was entered against respondent on August 5, 1977, to ensure that he did not again engage in the business of buying livestock in commerce on a commission basis without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations (Cx. 1).

Unfortunately, respondent failed to learn that his obligation to comply with this order was mandatory. When notified in April, 1984, that his bond was going to be terminated on May 14 1984, because of a bond claim (Cx 3; Finding 12), he failed to either act to prevent this termination before the May 14, 1984 termination date by paying the $16,420.18 claim or to take the alternative action of promptly obtaining and filing a replacement bond. Neither did he stop engaging in business for which bond coverage was a requirement.

It is apparent that he considered himself to be somehow excused from both the bonding requirement and the terms of the 1977 Consent Order until after the purchase amount was finally obtained from his principal.

It is reasonable to infer that he believed that the former bond coverage was not needed in his case because he was only buying on commission and was prudent in accepting prospective customers. While these factors might serve to diminish the likelihood that a new bond claim might arise, they provide no valid basis for a continued operation in noncompliance with the bonding requirements and the 1977 Consent Order.

Respondent has repeatedly shown a lack of good faith effort to comply with the bonding requirement and a willingness to blame others for such noncompliance. For example, his operation without bond coverage between May 12, 1976 and May 9, 1977, was attributed to an improper refusal of his surety to continue coverage (Jenkins, Tr. 96-97). No explanation was forthcoming as to why he did not obtain a bond from a different surety or file a trust fund agreement in lieu thereof.

His subsequent failure to file a timely annual report was blamed upon his former wife (Stroud, Tr. 67, Jenkins, Tr. 83-84), and his

current noncompliance is apparently to be excused because his surety, the selling auction market, and the Packers and Stockyards Administration failed to take sufficient actions to help him collect the purchase price from his principal (Jenkins, Tr. 75-77).

At no time did he recognize that he had an obligation to pay for the livestock, take prompt action to maintain bond coverage, or cease to operate while not in compliance. His assertion that there was no wilful violation of the Act rings hollow when contrasted to his actions. At most, it can be inferred that he was too busy traveling back and forth buying livestock on commission to give adequate attention to his responsibilities under the Act.

Certainly, his explanation as to why he has not obtained the $85,000 in bond coverage required fits this pattern. He explained that his accountant was too busy with tax work to get him the necessary financial information to submit to a surety company (Jenkins, Tr. 78-89). Unexplained is why he did not go to his accountant in May 1984. Perhaps the true reason respondent has not made a real effort to comply with the increased coverage demand is simply that he believes it is unreasonable to require the same bond coverage of an order buyer as a dealer buying livestock for his own account. However, operating subject to the Act requires full compliance with all of the regulations issued thereunder, not just those regulations that are deemed reasonable by each registrant.

Respondent contends that the violations should be excused because of his lack of responsibility coupled with a good faith attempt at compliance. Unfortunately, the acts and omissions of respondent Jenkins cannot be passed over so simply. It is true that Mr. Jenkins did not "anticipate" the failure of his disclosed principal, Mr. Robert Kula, to pay for livestock purchased on his behalf.

The possibility that one of the principals for whom respondent purchases livestock might not pay for such livestock is, on the other hand, an anticipated contingency that is provided for in the bonding regulations. Respondent voluntarily assumed the obligation (of a market agency buying livestock on commission) to make payment for such livestock, at least up to the amount of bond coverage under the Act, in the event of non-payment by a disclosed principal.

Respondent also assumed the obligation of maintaining bond coverage that fully complies with the Act and regulations or ceasing to purchase livestock on commission. These fundamental obligations of engaging in a regulated business rested on respondent LaVerne Jenkins in full force. They were reinforced by the entry of a prior order of the Secretary. He was again advised with respect to such obligations on May 25, 1984 (Darcy White, Tr. 62).

The record in this proceeding demonstrates that respondent neither lacked responsibility for the violations here nor acted in a reasonable and timely manner to comply with his responsibilities.

It is a flagrant example of a registrant operating in noncompliance with the bonding requirements over an extensive period of time in direct violation of the terms of a prior consent order. The public was endangered by this absence of compliance. If any other principal for whom respondent had purchased livestock after May 14 1984 had failed to pay for such livestock, the required bond coverage under the Act and regulations would simply have been unavailable. Even assuming *arguendo* that respondent made a good faith attempt at obtaining the required bond protection, such action would not alter the fact that respondent *continued to operate as a market agency buying on commission without bond coverage* and earned substantial income from such activity. (See Complainant's Finding No. 20).

It must be concluded from respondent's actions and from his failures to act, that he has wilfully violated section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder (9 CFR 201.29, 201.30).

II

Sanctions

Sanction testimony was presented by complainant's Denver regional supervisor, Mr. C. James Stroud (Tr. 66-69). He explained that four sanctions were necessary: (1) a cease and desist order against operating without filing and maintaining the required bond; (2) an indefinite suspension until compliance with the bonding requirement was achieved; (3) a suspension for a 30-day period and (4) a $5,000 civil penalty.

Great weight must be given to complainant's recommendations concerning sanctions. *In re Sy B. Gaiber and Company,* 31 Agri. Dec. 843, 845-51 (1972); *In re J. A. Speight,* 33 Agric. Dec. 280, 310-319 (1974); *In re Samuel Esposito,* 38 Agri. Dec. 613, 665 (1979). Severa sanctions hava baen the clearly established policy for some time now. *In re Braxton Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974).

A ceasa and desist order is routinaly imposed whanaver substantial noncompliance with the bonding regulations is found to hsve occurred. Respondant violated the 1977 ceasa and dasist order (Cx 1).

Respondent did not refute the evidance presented by complainant as to the increased bond coverage required ($85,000), or with respact to respondent's failura to obtain a bond (or approved bond

equivalent) in any amount. Accordingly, an indefinite suspension is warranted.

The 30 day suspension and the $5,000 civil penalty are warranted by the lengthy period of time during which respondent operated without any bond coverage and in express violation of the 1977 Consent Order (Stroud, Tr. 66-67).

Complainant argues that to deter similar noncompliance, a civil penalty equal to five percent (5%) of the unsatisfied bonding requirement is appropriate. This would amount to $4,250 in this instance, however, rounding up to the next $1,000 increment is appropriate because of the circumstances established in this proceeding.

However, consideration must be given to the fact that Respondent in good faith reasonably (from his limited perspective) believed that he did have at least $55,000 bond coverage from the time he received the September 5, 1984 insurance company letter. This belief was not fully or legally well founded, but it is an ameliorating factor, not credited by complainant.

For this reason, the rounding off will be downward rather than upward, to $4000, not to $5000.

The respondent's continued operations without full compliance with the bonding regulations is an unfair trade practice. See *United States* v. *Hulings,* 484 F.Supp. 562, 566-67 (D. Kan. 1980). If unchecked, it would make it very difficult to enforce compliance from other individuals who buy livestock on commission (Stroud, Tr. 68-69).

Respondent's testimony has established that he is a careful and experienced professional order buyer and, therefore, less likely to get "burned" by a nonpaying principal than many other order buyers. But, this is irrelevant. The bonding regulations can not be applied on an arbitrary basis. Either *all* order buyers must be required to obtain bond coverage based on the volume of their livestock purchases just as are dealers who buy for speculative purposes, or *all* order buyers should be permitted to provide a lesser bond coverage.

The policy decision to require market agencies buying on commission to maintain the same dollar amount of bond coverage as dealers buying for their own account is well established (Cx. 17). The regulations requiring such coverage are specifically authorized by statute (7 USC 204) and, therefore, are entitled to the full force and effect of law as substantive regulations.

Respondent has failed to demonstrate anything in his particular operations sufficiently different from the order buying businesses of other registrants as to warrant an exception. He does not buy

exclusively for one principal as a *bona fide* employee of such principal.

He buys livestock as a middleman under the Act, and has an obligation to pay for such livestock whenever his principal fails to do so, regardless of whether the name of the principal was disclosed prior to the purchase. See *In re Hoth,* 36 Agric. Dec. 1812, 1819 (1977); *Arnold Livestock Sales Co.* v. *Pearson,* 383 F.Supp. 1819, 1320-23 (D. Neb. 1974); *United States Fidelity & Guarantee Co.* v. *Clover Creek Cattle Co.,* 92 Idaho 889, 452 P. 2d 993, 994-1003 (1969).

The protection provided livestock sellers by the bond required of a market agency buying on commission (or a dealer-agent of a purchaser if his compensation is not a commission) is relied upon in the industry.

> "Q. Mr. Stroud, when a purchase of livestock is made by an individual buying on commission for a disclosed principal, is the bond of that individual liable if the principal does not make payment?
>
> A. Yes.
>
> Q. With respect to sales by various stockyards, do they rely as a general proposition on the market agency buying on commission for payment if principal does not pay?
>
> A. That is correct.
>
> Q. And in releasing livestock that has been sold through auction, is reliance placed on who buys on commission?
>
> A. Yes.
>
> Q. That is typical in the industry practice: reliance on the middleman?
>
> A. This is absolutely—this is industry practice to look to the person who is on the market who is actually doing the buying. Look to him for absolute payment.
>
> Q. If the principal——
>
> Judge WEBER: Whether it's disclosed or undisclosed"
>
> A. That's correct, Your Honor."

Tr. 37-38)

Respondent's failure to obtain a new bond after May 14, 1984 deprived the industry of this protection. His assertion that such injury was cured by a retroactive reinstatement of his $55,000 bond

is unfounded. Moreover, respondent was compelled to admit that his surety would have been unlikely to agree to a reinstatement if there had been a failure to pay by a principal during June or July of 1984 (Jenkins, Tr. 98–99).

The only way the public can be fully protected when a market agency or dealer continues to buy livestock after termination of bond coverage is to provide an adequate deterrent to such conduct. The assessment of a $4,000.00 civil penalty and a 30-day suspension in addition to the routine indefinite suspension and cease and desist order is considered necessary by the complainant to deter such conduct on the part of respondent and others similarly situated.

When due consideration is given to the volume of respondent's unbonded operations, the length of time involved (approximately a year now, as well as in 1976–77), the substantial earnings he has derived through such operations, and his failure to take prompt and decisive action either to head off a termination of his $55,000 bond or obtain the subsequently required $85,000 bond, it must be concluded that these sanctions, when considered under the cited precedents, must be assigned here.

CONCLUSION

The evidence of record and applicable precedents presented herein clearly and convincingly establish that respondent has wilfully violated section 312(a) of the Act (7 USC § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30). Respondent's actions constitute an unfair and deceptive practice and imperil the public. Therefore, the following order should be issued.

ORDER

Respondent LaVerne Jenkins, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, as amended and supplemented, shall cease and desist from engaging in business subject to the Act for which bonding is required without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for thirty (30) days and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued terminating this suspension after the expiration of the thirty (30) day suspension.

In accordence with section 312(b) of the Act (7 USC 213(b)), spondent is assessed a civil penalty in the amount of Four Tho sand Dollars ($4,000.00).

The suspension will begin on the 30th day after this Decision a Order become final.

The civil penalty shall be paid by the 120th day after the De sion and Order become final.

The Decision and Order will become final 35 days after servic unless appealed within 30 days of service (9 CFR 1.145a and 1.142 A copy of this Order shall be served upon the parties.

[This decision and order became final November 19, 1985.—Ed

In re: BEEF NEBRASKA, INC. P&S Docket No. 6094. Decided Novem ber 26, 1985.

Packer—Issuing checks on remote banks to delay check collection process.

The Judicial Officer affirmed Judge Weber's order ordering respondent to cease and desist from issuing checks on remote banks. Delaying the check collection process violates the 1976 prompt peyment legislation. Where different words are used in the same sentence, it is presumed Congress used the words to express different ideas. The word "or" is to be given its normal disjunctive meaning. In construing a statute, courts look to the historical events which prompted the Act. There is no need to cross-examine with respect to legislative facts. Legislative history involving discussions at congressional hearings is not as weighty as legislative reports and floor debates. Intent is not an element of prompt payment violation. "Any" is a broad and comprehensive term. A delay in the check collection process is unfair even if the check is mailed on the same day as the purchaser. The seller has the option as to how payment should be made under prompt payment legislation. Discovery is not available under Packers and Stockyards Act or rules of practice.

Kenneth H. Vail, for complainant.
William T. Oakes, Omaha, Nebraska, for respondent.
William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).[1] An initial Decision and Order was filed on April 8, 1985, by Administrative Law Judge William J. Weber (ALJ) ordering respondent to cease and desist from "issuing checks in payment for

[1] *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 8 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

livestock drawn on remote, distant, or country accounts, including any account with the State Bank of Palmer, Nebraska, for the purpose of or resulting in extending the time necessary to collect such checks, or of causing or extending delay in the collection of funds thereon."

On May 8, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).[2] The case was referred to the Judicial Officer for decision on August 27, 1985.

Based upon a careful consideration of the record, I agree with the ALJ's findings and conclusions. But in view of the great importance of this case to the $33 billion livestock industry, I am setting forth a more extensive discussion of the findings of fact and conclusions of law.

Before reading the findings of fact, a brief explanation of the statutory provision and banking scheme at issue may be helpful.

Following the bankruptcy of American Beef Packers in January 1975, which left "producers in 13 States unpaid for a total of over $20 million in livestock sales" (S. Rep. No. 932, 94th Cong., 2d Sess. 5 (1976)), Congress amended the Packers and Stockyards Act in 1976 by requiring packers to pay promptly for livestock by check or wire transfer of funds (7 U.S.C. § 228b(a)), and providing that (7 U.S.C. § 228b(c)):

> Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter.

The House Report on the 1976 amendatory legislation recognizes that one of the principal complaints by producers was the use of banking practices which delayed payment for livestock. The report states (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 8 (1976)):

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[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1958, 18 Fed. Reg. 8219 (1958), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962–January 1971).

> The principal complaints from the producer and feeder representatives were the lack of protection from packer failures and from various devices (such as use of drafts or checks drawn on distant banks) utilized by packers to delay payment for livestock purchased. The resulting "float," which amounts to enormous sums on a national aggregate basis, is used by packers to help finance their operations. This group of producer and feeder representatives overwhelmingly supported enactment of a Federal statute which requires bonding of, and prompt payment by, packers. . . .

On July 12, 1982, respondent began participating in a "scheme" (I would use the word "scam" if we were not dealing with reputable banking officials) offered by its bank (Omaha National Bank, a "city" bank under the Federal Reserve System) under which respondent wrote checks on State Bank of Palmer (a "country" bank under the Federal Reserve System), instead of Omaha National Bank. (This is referred to as a "Controlled Cash Disbursement Account.") However, State Bank of Palmer never saw the checks or processed them. Instead, under an "intercept" agreement, Omaha National Bank intercepted respondent's Controlled Disbursement Account checks at the Omaha Federal Reserve Bank, and processed and accounted for them as if they had been drawn on Omaha National Bank. This had advantages for all concerned (Palmer Bank, Omaha National Bank and respondent) except the livestock seller. The scheme (or scam) generally resulted in an additional day's delay in the check clearing process.

Any delay in the check clearing process increases the packer's float, thereby increasing the risk of loss to livestock sellers in case of the packer's bankruptcy, and also delays the time for the livestock seller's bank to receive credit for the check deposited by the livestock seller.

FINDINGS OF FACT

1. Respondent Beef Nebraska, Inc., is a corporation with its principal place of business located at Omaha, Nebraska.

2. Respondent is, and at all times material herein was, engaged in the business of buying livestock in commerce for purposes of slaughter and manufacturing or preparing meats and meat food products for sale or shipment in commerce.

Respondent purchases and slaughters approximately 500 head of cattle a day, which cost $300,000 to $350,000 daily in 1983 (Tr. 302-

03, 308-09, 336).[3] Respondent is, and at all times material herein was, a packer as that term is defined in the Packers and Stockyards Act (7 U.S.C. § 191), and is subject to the provisions of the Act.

3. Respondent purchases cattle for slaughter in Nebraska, Iowa, Kansas, Minnesota, South Dakota, Illinois, and occasionally in Colorado (Tr. 303). Respondent purchased $84,547,474 worth of cattle during its fiscal year ending October 31, 1981, and $91,106,147 worth of cattle during its fiscal year ending October 31, 1982 (CX 8, p. 2).

4. Respondent generally pays for its livestock purchases on the day of purchase or the next day by giving a check to the seller or the seller's trucker, or by placing a check in the mail (CX 1, 2, 3; Tr. 300-02, 322-25). An analysis of all of respondent's livestock checks (except for a few where dates were "totally obscured on the back of the check" (Tr. 197)) during four sample periods (June 21-July 2, 1982; July 6-10, 1982; July 12-16, 1982; September 20-24, 1982) shows that 80 of 159, or 50.3%, were dated the day of purchase, and 79 of 159, or 49.7%, were dated the day after purchase (computed from CX 1, 2, 3; Tr. 193-99). (This analysis excluded numerous purchases at the Omaha stockyard, which were not paid for by check (Tr. 198); most of those payments were made the day after purchase (see CX 2, 3; Rule 3, Omaha Livestock Exchange Rules and By-Laws)).

5. Respondent is, and for a substantial period of time has been, a customer of Omaha National Bank, Omaha, Nebraska. Prior to July 1982, respondent maintained its general checking account in that bank, and paid for its livestock purchases with checks drawn on that account (Tr. 49, 303-05, 310-11, 327, 341).

6. On June 28, 1982, respondent entered into an agreement with Omaha National Bank to subscribe to Omaha National Bank's Controlled Cash Disbursement Account program, under which respondent continued to be a customer of Omaha National Bank, but wrote checks on Palmer State Bank instead of Omaha National Bank. Respondent paid Omaha National Bank $125 per month for the privilege of writing Controlled Disbursement Account checks on Palmer State Bank (CX 5, pp. 21, 22).

A Controlled Disbursement Account is a relatively new cash management product offered by banks primarily to corporations. Such accounts are widely available throughout the country (CX 5; Tr. 30, 118-20, 362, 371-74, 400).

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[3] Some record citations are included for convenience, but no effort has been made to include all relevant record citations.

7. Omaha National Bank is a "city" bank under the Federal Reserve System regulations with a 1040 "city" routing symbol. State Bank of Palmer is a "country" bank or "country" endpoint under the Federal Reserve System regulations with a 1041 "country" routing symbol (CX 5, pp. 9, 13; RX 11; Tr. 37-39, 384-85). In order for Omaha National Bank to be able to offer its customers the benefits of a Controlled Disbursement Account, Omaha National Bank entered into a Controlled Disbursement Agreement in May 1982 with Palmer State Bank under which Omaha National Bank customers are permitted to draw checks on Palmer State Bank (which have the "country" Federal Reserve System routing symbol "1041" encoded on them instead of the "1040" "city" routing symbol), but Palmer State Bank never sees or processes the checks (CX 5, pp. 19-20). They are intercepted at the Federal Reserve Bank of Kansas City, Omaha Branch, by Omaha National Bank pursuant to an Intercept Agreement signed in May 1982 by Omaha National Bank, State Bank of Palmer and the Federal Reserve Bank of Kansas City authorizing such interception (CX 5, p. 18). Omaha National Bank then processes the checks, and settles for them with the Omaha Federal Reserve Bank, just as if the checks had been drawn on Omaha National Bank instead of State Bank of Palmer (CX 5, 6; Tr. 27-82, 383-86, 395, 404-406, 411-12).

8. The Controlled Disbursement Agreement between Omaha National Bank (ONB) and State Bank of Palmer (Palmer) provides (CX 5, pp. 19-20):

> 1. Palmer shall allow all ONB controlled disbursement customers to open an account or accounts at its Bank, and shall allow checks to be drawn on Palmer's ABA routing number in order that these items might be intercepted and settled for by ONB.
>
> 2. Palmer shall execute an Intercept Agreement with the Federal Reserve Bank of Kansas City-Omaha Branch for the interception of Palmer's cash letter by ONB, and shall maintain an Automatic Cash Letter Payment Agreement with the Federal Reserve Bank of Kansas City-Omaha Branch for the settlement of Palmer's cash letter through ONB's reserve account.
>
> 3. Palmer authorizes ONB to intercept and settle controlled disbursement items before those items are charged to the Palmer account, and ONB is further authorized to send presorted Palmer items directly to Central Nebraska Computer Center for further processing.

4. Palmer shall provide an account statement on each account on a periodic basis.

5. ONB shall have the following responsibilities and duties under this Agreement:

(a) ONB shall obtain all documentation required by Palmer in establishing an account at their bank.

(b) ONB shall provide a specification sheet to the customer on required check and draft layouts, with the customer being responsible for all printing charges.

(c) ONB shall be responsible for the interception and settlement of Palmer's Federal Reserve cash letter.

(d) ONB shall be responsible for the linterception and settlement of controlled disbursement items received from the Federal Reserve.

(e) ONB shall be responsible for the settlement of Federal Reserve differences in received cash letters.

(f) ONB shall indemnify, save and hold Palmer harmless against action taken against ONB's controlled disbursement accounts.

(g) ONB shall process and settle disbursement items using normal bank practices, and act as the contact for any questions or problems that might occur between Palmer and the controlled disbursement customer.

6. ONB shall cause controlled disbursement customers to maintain a $3,000.00 collected balance in their respective accounts at Palmer as long as the account is an open and active account.

In the words of Mr. Nelson, Omaha National Bank's Second Vice-President, in charge of its check processing activities (Tr. 59):

From a bank standpoint, Palmer was only giving us the right to use the ABA number, that is their bank routing

number,[4] for the use of our controlled disbursement product. . . .

This was a "device to take advantage of the Federal Reserv system" (Tr. 70), in effect making "Omaha National Bank a coun try bank for purposes of [its] controlled disbursement product" (Tr 70).

9. Pursuant to the Intercept Agreement and the Controlled Dis bursement Agreement, each day the Omaha Branch of the Federa Reserve Bank of Kansas City processes and gives to Omaha Nation al Bank all State Bank of Palmer cash items (including checks) re ceived in time to meet the Federal Reserve System's country end point deadlines (discussed in Findings 12-14, *infra*). The cash items are generally delivered to or picked up by Omaha National Bank by 10:00 p.m. each day. Thereafter, Omaha National Bank process es the items, segregating the checks drawn on State Bank of Palmer by Omaha National Bank's Controlled Disbursement Account customers from the checks drawn by State Bank of Palmer customers. The checks written by State Bank of Palmer customers are forwarded to a further processing center, but Omaha National Bank settles with the Federal Reserve Bank for its Controlled Disbursement Account customer's checks drawn on State Bank of Palmer. Thus, Omaha National Bank's Controlled Disbursement Account checks drawn on State Bank of Palmer are never sent to Palmer nor are they charged against the $3,000 idle balance account Omaha National Bank's customers maintain at State Bank of Palmer (CX 5, 6; Tr. 27-82, 383-86, 395, 404-06, 411-12).

Mr. Nelson, Omaha National Bank's Second Vice-President (in charge of its check processing activities), testified that after its computer sorts out the checks that actually belong to State Bank of Palmer, the remaining checks are run through the computer again, but the computer is instructed this time to disregard State Bank of Palmer's "country" routing number and, instead, read the checks as if they had Omaha National Bank's "city" routing number. He testified (Tr. 404-05):

> [O]nce the items are initially read through our reader-sorter—that's a hardware that actually does the sorting of

[4] Each bank is assigned an identifying routing number "similar to a Social Security number, but it is for banking" (Tr. 68). The first four digits are the routing symbol, i.e., 1040 in the case of Omaha city banks. The fourth digit, "0," tells when the bank's checks clear through the Federal Reserve System, i.e., when cash is available to the depositor's bank. The "0" means "immediate" availability of funds. In "country" banks, which have a 1041 routing symbol, the fourth digit, "1," means next day availability of funds (RX 11, p. 2; Tr. 69-71).

> the documents—once it has read it the first time, read the routing number and the account number and the amount, we segregate those out—I testified to that yesterday—into Palmer items, those that are drawn strictly on Palmer customrs, and those checks that are drawn on Omaha National Bank or accounts of Omaha National Bank.
>
> Once that is done, the computer automatically substitutes our routing number for Palmer's and that item becomes—is treated identical to any item that would bear our own ABA [routing] number. So in effect, what we've done is created a mirror image of our own account number, super-injected it over, and told our machines, "Don't read Palmer's ABA number; read ours."
>
> It's sorted as if it was our own item and treated in the return process in the bookkeeping procedures as if it was actually our item.

10. The Federal Reserve System operates the largest check collection system in the country. Mr. Foley, Vice-President of the Federal Reserve Bank of Kansas City, testified concerning a 1979 study showing that 40% of all checks are handled through the Federal Reserve System. The other checks are exchanged directly between banks within a clearinghouse area or they are collected through a private correspondent relationship between banks (Tr. 90). Some banks choose to participate in private collection systems rather than, or in addition to, the Federal Reserve System because they can negotiate better deposit and credit availability schedules than those established by the Federal Reserve System (Tr. 94).

11. When a person (such as a livestock seller) receives a check, the bank in which he deposits the check is referred to as the "depositing bank," "depository bank" or "sending bank." The bank on which the check is drawn is referred to as the "payor bank" or "paying bank." The check goes from the depositing bank to the Federal Reserve Bank, where it is sorted and then "presented" to the paying bank (Tr. 374-75).

The funds can be transferred from the paying bank to the depositing bank by means of ledger entries on their respective accounts at the Federal Reserve Bank, i.e., the paying bank's account is debited and the depositing bank's account is credited. After a check reaches the Federal Reserve Bank, the day on which the funds are available to the depositing bank (i.e., the day on which the check "clears" the check collection system, e.g., by a debit to the account of the paying bank and a credit to the account of the depositing bank) varies, depending on whether the paying bank is, e.g., a city

bank, a country bank, or an RCPC (regional check processi center) bank (Tr. 36-41, 51-52, 69-75, 95-107, 120, 374-413; CX 5, 9; RX 11, 12).

12. The Federal Reserve System has different "cut-off" times f different types of banks. Checks reaching the Federal Reser Bank by the cut-off time applicable to the particular type of ban on which the check is drawn are credited to the depositing ban (i.e., the funds are actually available to the depositing bank) in a cordance with schedules published by the Federal Reserve Syste (Tr. 36-41, 51-52, 69-75, 95-107, 120, 374-413; CX 5, p. 9; RX 11, 12

Effective February 16, 1982, the Federal Reserve Bank of Kansa City, Omaha Branch, gave immediate credit (i.e., same day fun availability to the depositing bank) if (i) checks drawn on an RCP bank were received by the Omaha Federal Reserve Bank by 12:0 a.m.,[5] or (ii) checks drawn on a city bank (such as Omaha Nationa Bank) were received by the Omaha Federal Reserve Bank by 8:3 a.m.[6] Checks drawn on a country bank (such as State Bank o Palmer) received next day credit if they were received by th Omaha Federal Reserve Bank by 3:00 p.m. (CX 5, p. 9). If a check i deposited with (i.e., received by) the Omaha Federal Reserve Ban on Day 1 shortly after the cut-off time, it is treated the same as check deposited with the Omaha Federal Reserve Bank on Day 2 right at the cut-off time. In other words, minutes can make a day's difference in fund availability (Tr. 54, 76). The cut-off times just dis cussed are set forth in the following table (see CX 5, p. 9):

[5] If the RCPC checks were "fine sorted," the cut-off time was 2:00 a.m. (CX 5, p. 9). RCPC banks are located within about 90 miles of Omaha, and checks deposited with the Omaha Federal Reserve Bank by 12:01 a.m. are processed and sent out to the RCPC banks by about 5:00 a.m. or 6:00 a.m. of the same day (Tr. 96-97).

[6] The "credit" given by the Federal Reserve Bank to the depositing bank's account at the Federal Reserve Bank is "provisional" credit (Tr. 381-82, 410), subject to later cancellation if the check is returned (Tr. 417-18). But "provisional credit given by the Fed," or any bank, is considered for "practical purposes" as "tantamount to final credit" (Tr. 417; and see Tr. 99).

Class of Item	Cut-Off Time	Fund Availability
City		
Machine processnble checks	8:30 e.m.	Immediate
RCPC		
Machine processable checks	12:01 e.m.	Immediate
Fine sort [7]	2:00 a.m.	Immediete
Country		
All checks	3:00 p.m.	Next day

13. Effective May 27, 1983, the Omaha Federal Reserve Bank schedules were slightly altered. The deposit or cut-off time and fund availability schedules established by the Omaha Federal Reserve Bank as of that date were as follows (RX 11, p. 2):

Class of Item	Cut-Off Time	Fund Availability
City		
Unsorted	9:00 a.m.	Immediate
Fine Sort	10:00 a.m.	Immediate
RCPC		
Unsorted Regular	12:01 e.m.	Immediate
Unsorted Premium	1:00 a.m.	Immediate
Fine Sort	2:00 a.m.	Immediate
Country		
Unsorted	3:00 p.m.	Next day
Fine Sort	4:00 p.m.	Next day

14. The following examples illustrate the Omaha Federal Reserve Bank's schedule (see Finding 12) for checks drawn on a city bank, an RCPC (regional check processing center) bank and a country

[7] Fine sorted items are items sorted "to a epecific ABA number or routing transit number" (Tr. 71).

bank during the period in 1982 when Omaha National Bank estr lished its Controlled Cash Disbursement Account program.

Example 1. If checks drawn on a city bank, an RCPC bank and country bank were received by the Omaha Federal Reserve Bar at 8:00 a.m. on Day 1, the funds would be credited (i.e., available) the depositing bank as follows:

Item	*Fund Availability*
City check	Day 1
RCPC check	Day 2
Country check	Day 2

Example 2. If the same checks were received by the Omaha Fed eral Reserve Bank at 9:00 a.m. on Day 1, the funds would be cred ited (i.e., available) to the depositing bank as follows:

Item	*Fund Availability*
City check	Day 2
RCPC check	Day 2
Country check	Day 2

Example 3. If the same checks were received by the Omaha Fed- eral Reserve Bank at 4:00 p.m. on Day 1, the funds would be cred- ited (i.e., available) to the depositing bank as follows:

Item	*Fund Availability*
City check	Day 2
RCPC check	Day 2
Country check	Day 3

These examples illustrate that there is more delay, or "float," in the check collection system for checks drawn on country banks than checks drawn on city banks, unless the checks reach the Fed- eral Reserve Bank after the 8:30 a.m. cut-off time for city banks and before the 3:00 p.m. cut-off time for country banks. The exam- ples also illustrate that for checks reaching the Omaha Federal Re- serve Bank after 3:00 p.m., there is more delay, or "float," in the

check collection system for checks drawn on country banks than checks drawn on RCPC banks.[8]

15. The additional delay, or "float," resulting from Omaha National Bank becoming, in effect, a country bank instead of a city bank enables Omaha National Bank to offer its customers (such as respondent) a valuable service. Prior to the utilization of Omaha National Bank's Controlled Disbursement Account, respondent was unable to forecast accurately what checks would clear through the check collection system each day. Respondent wrote its checks on Omaha National Bank, which is a participant in the Federal Reserve System and, also, the Greater Omaha-Lincoln Clearinghouse Association, a private check collection system. Omaha National Bank is also a city bank with established banking relationships across the country, including major money center banks. Consequently, items drawn on Omaha National Bank could be and were presented and debited throughout the day, from 3:30 a.m. until 9:00 p.m. Under these circumstances, Omaha National Bank could provide neither accurate daily forecasting of funding requirements nor increased float to its customers (CX 5, p. 13; Tr. 39, 49–51, 373, 385).

Prior to its participation in Omaha National Bank's Controlled Disbursement Account program, respondent had to estimate what checks would clear the collection system each day. This resulted at times in respondent borrowing money under its revolving note from Omaha National Bank (which is reduced or increased each day) and paying interest on funds put into its checking accounts that were not actually needed that day. If respondent underestimated its cash requirements for a particular day, Omaha National Bank honored the checks, and charged respondent an "overdraft" charge identical to the interest charge respondent would have paid if respondent had accurately estimated its cash needs. But continuous overdrafts are not regarded as a good banking practice, and banks discourage customers from continuously having overdrafts (Tr. 327–36, 345–48, 355–58, 401–03).

16. A Controlled Disbursement Account (i) enables the bank offering the account to notify its customer each day of the exact daily funding requirements that will be necessary that day to cover its checks and other cash items that will "clear" that day, (ii) takes advantage of the disbursement float inherent in the Federal Reserve's check collection system, and (iii) permits maximum use of the customer's funds for investment or debt paydown. A customer

[8] There is a 9-hour time period in which country checks have more delay, or "float," than RCPC checks, i.e., checks deposited with the Omaha Federal Reserve Bank between 3:01 p.m. of Day 1 and 12:01 a.m. of Day 2 (Tr. 45, 48; CX 5, p. 9)

such as respondent can maintain a zero-balance checking account in which the exact funds needed each day to cover checks cleared that day are deposited in the checking account that day.

17. For Controlled Disbursement Account checks written on a "country" bank that are received by the Federal Reserve Bank on Day 1, the Federal Reserve Bank has until noon of Day 2 to present the items to the paying bank. However, such items are normally made available to Omaha National Bank by 10:00 p.m. on Day 1 (Tr. 51-52, 72, 384). Omaha National Bank then runs the items through its computer and is able to advise its customers by 8:00 a.m. on Day 2 as to the exact amount of money needed in the customers's checking account on Day 2 (Tr. 30). Since the Controlled Disbursement Account checks are written on a country bank, checks presented to Omaha National Bank on Day 1 are not credited to the depositing bank, or debited to the paying bank, until Day 2 (Tr. 52, 384-85). Accordingly, on Day 2, a customer such as respondent is able to borrow money, if needed, on its revolving note and deposit the exact amount needed in its checking account on Day 2, by means of a telephone call (Tr. 306-07, 327-28, 348, 355-56, 402-03, 423).[9]

18. In order to offer a Controlled Disbursement Account to its customers, Omaha National Bank had to limit the number of presentments in any given day (Tr. 51). Omaha National Bank identified State Bank of Palmer from among its correspondent banks as a suitable bank to participate with it in establishing and operating its Controlled Disbursement Account program (CX 5, p. 13; Tr. 51-52). State Bank of Palmer was selected because it was a country point 125 miles from Omaha, it was sufficiently small that it was not likely to receive direct presentments from other banks, and it was not then a member of any clearinghouse association. Thus, virtually all of Omaha National Bank's Controlled Disbursement Account checks would be presented through the Federal Reserve's check collection system. In addition, State Bank of Palmer receives only one presentment per day from tha Federal Reserve Bank (CX 5, p. 13; Tr. 51, 384-85).

19. Omaha National Bank selected State Bank of Palmer to take advantage of the deposit and credit availabllity schedules of the Fedaral Raserve Bank applicable to cash items drawn on "country" banks. By choosing State Bank of Palmer rather than an RCPC bank, Omaha National Bank obtained additional "float," i.e., delay in the check collection process (CX 5; Tr. 33-37, 44-48). Some of

[9] Omaha National Bank accepts deposits for same-day ledgar credit as lata as 9:00 p.m. on any banking day (Tr. 423).

Omaha National Bank's competitors originally offered Controlle Disbursement Accounts on RCPC banks, but they switched t "country" banks after Omaha National Bank began using a "cou try" bank (Tr. 38, 414).

20. When Omaha National Bank officials met with their accou executives who would be marketing its Controlled Disbursemer Account program to customers, the additional "float" time fro the use of a "country" bank rather than an RCPC bank or cit bank was one of the "selling points" (Tr. 44-47). The outline use to explain Omaha National Bank's Controlled Disbursement A count program lists as one of the seven features (Tr. 44; CX 5, 25):

> 6. Presentment times are longer than those associated with disbursing from a bank located in a RCPC or Fed City zone.

Omaha National Bank's "handbook for our sales people and ou account executives to use when they are out with their customers (Tr. 46) states (CX 5, pp. 27-28; emphasis added):

> *Customer Benefits*
>
> Using the State Bank of Palmer as our controlled disbursing affiliate bank, we will be able to supply significant cash management benefits to our corporate customers:
>
> - Maximum use of cash for investments, debt paydown or funds mobilization.
> - Accurate daily information for greater control and forecasting.
> - Decreased idle balances.
> - *Increased utilization of disbursement float inherent in the system.*
> - Automated and easily integrated into Omaha National's corporate cash management system featuring Automated Investment Checking, the liquidity fund, and OmniLink.
>
> *Market*
>
> Large corporations or middle market customers that have significant disbursing dollars.
>
> * * * * * * *

Competition

At the present time, U.S. National Bank is the only competition in our middle market. Larger corporations will be solicited by U.S. National and large "money center banks" that are aggressive in cash management services.

Omaha National Advantages

Omaha National has a distinct advantage over U.S. National by providing an additional day of disbursing float to the customer.

Advantages to our local customers in relationship to "money center banks" is that we will process their checks locally at Omaha National and not at some distant location, facilitating stop pays, cautions, etc.

Omaha National Bank's marketing pamphlet or brochure which was given to potential customers (Tr. 47) states (CX 5, p. 30; emphasis added):

Controlled Cash Disbursement

By processing your company's disbursements through an Omaha National affiliate, same-day clearing information can be provided at the start of your business day. Advantages of controlled cash disbursement include:

- Maximum use of cash for investments, debt paydown or funds mobilization.
- Accurate daily information for greater control and forecasting.
- Decreased idle balances.
- *Increased utilization of disbursement float inherent in the system.*
- Automation and easy integration into Omaha National's corporate cash management system.

Respondent's President did not remember whether he was shown a copy of the foregoing marketing brochure, but he admitted that he was shown some "literature" by the Omaha National Bank representative and that he studied the literature (Tr. 309-10).

21. Since approximately July 12, 1982, respondent has used its Omaha National Bank Controlled Disbursement Account to pay for its livestock purchases with checks drawn on State Bank of Palmer (CX 3-7; Tr. 194-204). All of these checks are collected through the

Federal Reserve Bank check collection system, and are subject to the deferred (i.e., next day) credit availability provided by the Federal Reserve's deposit and credit availability schedule applicable to checks drawn on "country" endpoints (CX 3, 5, p. 9; RX 11; Tr. 194–204, 411–12).

22. Mr. Nelson, Omaha National Bank's Second Vice-President in charge of check processing, testified that on average the increased "float" resulting from Omaha National Bank's Controlled Disbursement Account program would be a fraction of a day, 80% to 90% of a day in case of national firms, and much less for customers located in the Omaha area. That is because there might be no delay or there might be a full day's delay, depending on when an item reached the Federal Reserve Bank and what type of item it was. So in the aggregate, looking at all of a customer's Controlled Disbursement Account checks, the delay would average a fraction of a day (Tr. 396–99, 403, 412–13, 417, 420–21).

23. The increased "float," or delay in the collection of respondent's checks, resulting from its use of Omaha National Bank's Controlled Disbursement Account checks is shown by an analysis prepared by complainant of almost all of respondent's livestock checks issued during four sample periods, two before and two after respondent began writing Controlled Disbursement Account checks. (The only checks omitted were those where "dates were totally obscured on the back of the check" (Tr. 197)). The first sample contains the endorsement stamp dates and, also, the check clearing dates (i.e., the dates on which respondent's account at Omaha National Bank was debited (Tr. 195, 212), which would be the same date Omaha National Bank's account at the Federal Reserve Bank was debited and the depositing bank's account at the Federal Reserve Bank was credited (Tr. 381–86, 423–27; RX 12)) for 32 checks issued by respondent from June 21 through July 2, 1982, before respondent began using Controlled Disbursement Account checks (CX 1). Of these 32 checks, 27 cleared through the Omaha Federal Reserve Bank,[10] and 24 of the 27 (or 89%) cleared the check collection system (i.e., the depositing bank was credited and Omaha National Bank was debited) on the *same day* on which the check was received by the Omaha Federal Reserve Bank (CX 1).[11]

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[10] The initials "FO" on Complainant's Exhibits 1-3 refer to the "Omaha Branch of the Federal Reserve Bank of Kansas City" (Tr. 200). The initials "SC" stand for the Sioux City, Iowa Bank, and the initials "ONB" stand for the Omaha National Bank (Tr. 200).

[11] The only three exceptions out of the 27 checks clearing through the Federal Reserve Bank were all deposited by Producer Order Buyers, Sioux City, Iowa. Each

Continued

The second sample period, from July 6 through July 10, 1982, also prior to respondent's use of Controlled Disbursement Account checks, contains 42 checks (CX 2). Of those, 15 cleared through the Federal Reserve Bank, and 13 of the 15 (or 87%) cleared the check collection system on the *same* day on which the check was received by the Omaha Federal Reserve Bank (CX 2).[12] The remaining 15 checks that did not clear through the Federal Reserve Bank all cleared the check collection system on the *same* day the checks were first deposited in any bank.

The two sample periods after respondent began writing livestock checks on Palmer State Bank under Omaha National Bank's Controlled Disbursement Account program were from July 12 through 16, 1982, and September 20 through 24, 1982 (CX 3). The 85 livestock checks written during this period all cleared through the Omaha Federal Reserve Bank, and all 85 (or 100%) cleared the check collection system on the banking day *after* the checks were received by the Omaha Federal Reserve Bank (CX 3). The 1-banking-day delay involved 3 calendar days for 16 of the 85 checks.

24. The impact of a delay in the check collection process on a depositing livestock seller depends on the policy of the depository bank. One bank official testified that his bank gives livestock sellers who are good customers of the bank immediate credit that is as good as cash as soon as the livestock seller deposits a Controlled Disbursement Account check from respondent (Tr. 430–38). On the other hand, another bank official testified that his bank does not give a livestock seller credit for a Controlled Disbursement Account check written by respondent until the second day after the check is deposited (Tr. 166–91). He explained that when a livestock customer deposits a check drawn on Omaha National Bank (with a 1040 routing symbol), the customer receives ledger credit the day of receipt, but he does not receive availability of the funds until the *following business day.* However, when a livestock customer deposits one of Omaha National Bank's Controlled Disbursement Account checks drawn on State Bank of Palmer (with a 1041 routing

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of the three checks contains two endorsement stamps by Omaha Federal Reserve Bank, one on June 28 and one on June 29, 1982. All three were endorsed by Omaha National Bank on June 29, and cleared on June 29 (CX 1, p. 1). Of the five checks that did not clear through the Federal Reserve Bank, two cleared the same day they reached the first bank involved, one cleared the next day after reaching the first bank, and the initial depositing dates on two are not shown.

[12] The two exceptions involve checks written to Mr. Johnson, each of which was endorsed on two different dates by the Omaha Federal Reserve Bank, and the checks cleared the same day as the second endorsement date by the Omaha Federal Reserve Bank.

symbol), the customer receives ledger credit the day of receipt, but does not receive availability of funds until the *second business day* following receipt (Tr. 166–91). He explained that the added day of delay in the availability of funds caused by the use of one of respondent's Controlled Disbursement Account checks cost a cooperative association, Producers Order Buyers, $11.17 on a single check for $22,978.06 (Tr. 127–58; CX 7).

25. When respondent began writing Controlled Disbursement Account checks for livestock purchased at the Omaha stockyard, Mr. Cunningham, Executive Secretary of the Omaha Livestock Exchange (an organization of livestock commission firms), advised respondent that under the Exchange rules, all livestock must be paid for with a local check, and that if respondent wanted to do business with his members, respondent would have to comply with the Exchange rules. As a result, respondent pays for livestock bought at the Omaha stockyards with a local check (Tr. 313–17).

26. Omaha National Bank was not required to (and did not) obtain formal approval of its Controlled Disbursement Account program. Nonetheless, it discussed the program informally with Federal Reserve System [13] and Federal Deposit Insurance Corporation officials, who advised that the program did not appear to violate their regulations (Tr. 58, 112, 364–67; CX 5, p. 10; RX 9, 10). The letter to Omaha National Bank from the Regional Counsel of Federal Deposit Insurance Corporation states (CX 5, p. 10):

> We have reviewed your description of The Omaha National Bank's proposed "Controlled Disbursement Account."
>
> In offering this product, it does not appear that the bank would violate any federal laws or regulations which FDIC enforces. It is possible, however, that controlled disbursement accounts might be used to increase the amount of "float" time of checks for bank customers. If this were the case, the FDIC might find that an unsafe and unsound banking practice existed.

27. On January 11, 1979, the Federal Reserve Board issued a press release discouraging the use of remote disbursement checking accounts, stating (CX 10): [14]

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[13] When the Federal Reserve official signed the Intercept Agreement involved in Omaha National Bank's Controlled Disbursement Account program (see Findings 7–9), he did not approve the Controlled Disbursement Account program (Tr. 112).

[14] The Federal Reserve Board's press release and report (CX 9, 10), received only as an offer of proof (Tr. 115–16), were erroneously excluded (since they are relevant background information), and are considered a part of the record (7 CFR

Continued

The Federal Reserve Board today made public a statement of policy concerning the practice known as remote disbursement and announced a course of action intended to discourage such abuse of the check collection system. . . .

Remote disbursement involves arrangements between a bank and a customer (frequently a corporation) designed expressly to delay payment of the customer's checks. For example in such an arrangement, a bank customer making most of its payments in Pennsylvania might make payments by checks drawn on a bank in Oregon. Recipients of these checks may suffer a delay in receiving credit in their accounts.

The Board has the following principal concerns with respect to remote disbursement:

— It can expose both the bank involved and recipients of the remotely disbursed payments to risks of loss—that they may not be aware of—during the deliberately prolonged clearing time.

— Consumers and small businesses—who may not be in a position to negotiate better payment terms—may be denied prompt access to funds due to them.

— Remote disbursement could result in unsafe or unsound banking practices if the customer's funds at the remote disbursing bank are not sufficient to cover the customer's checks (that is, if settlement procedures between the customer and the bank are not on an "immediate funds" or "collected balance" basis). This would result in unsecured extensions of credit by the bank to the customer. Such extensions of credit might not be warranted as a matter of loan policy. In the case of small banks, such loans might exceed the legal limit for lending to any one customer.

The Board gave the following policy guidance:

1.141(g)(7)); *In re DeJong Packing Co.*, 86 Agric. Dec. 1181, 1223 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978)). For the same reason, CX 8, p. 1, received as an offer of proof (Tr. 279), is received as a part of the record.

The Board believes the banking industry has a public responsibility not to design, offer, promote or otherwise encourage the use of a service expressly intended to delay final settlement and which exposes payment recipients to greater than ordinary risks. The Board is calling on the nation's banks to join the effort to eliminate remote disbursement practices intended to obtain extended float.

There is no intention to discourage corporate disbursement arrangements with banks that provide for improved control over daily cash requirements, provided that these arrangements do not result in the undesirable effects noted above. Banks should provide the cash management services needed by their customers through the use of payments methods that facilitate prompt funds availability to payment recipients and that protect banks from unnecessary risk.

Attached to the Federal Reserve Board's press release quoted immediately above was a Staff Report which states (CX 9, pp. 1–2):

1. *Remote disbursement unnecessarily delays payment to check recipients who rarely are able to determine the manner in which payments are made to them.*

Recipients of remotely disbursed checks may be exposed to risk of loss associated with the longer clearing time. Perhaps the best example of this risk was the case involving American Beef Packers, Inc., which case was the subject of recent Congressional hearings resulting in the enactment of legislation to require next-day final payment for livestock transactions.

American Beef Packers paid for cattle purchased from farmers in the midwest with checks drawn on a bank in Oregon. When the company went bankrupt, the checks were dishonored. Actually, payable through drafts were used in lieu of checks by this company but banks treat such drafts as checks and the public is generally not informed of nor concerned with the technical differences. During Congressional hearings, the point was frequently made that the length of time required for clearing and return of the drafts probably caused much of the loss to the draft recipients. Specifically, the longer clearing time may have affected the collectability of some of the drafts, and the combination of the longer clearing and longer

return times delayed identification and claim of assets (livestock).

Because check recipients are generally not aware of the risks associated with remote disbursement and are not in a position to negotiate an alternative payment instrument (such as more readily collected checks, currency, or wire transfer), the Board believes that the banking industry has a responsibility not to encourage or even offer a service that is intended solely to delay final settlement and that thereby exposes check recipients (particularly individuals) to greater risks.

The Board is not discouraging corporate disbursement arrangements with banks that provide for improved control over daily cash requirements provided that the purpose of such arrangements is not to delay the collection of funds to the disadvantage of the payee or other participants in the payment system. Banks should provide the cash management services needed and demanded by their customers using payment methods that facilitate rapid collections, assure the prompt availability of funds to payment recipients, and protect banks from unnecessary risks.

Mr. Foley, Vice-President of the Federal Reserve Bank of Kansas City, who has the senior supervisory responsibility over the check collection system in the 10th Federal Reserve District (which includes Omaha), testified that he does not know whether Omaha National Bank's Controlled Disbursement Account program violates the Federal Reserve System's policy statement as to remote disbursements (Tr. 117-23).

28. On February 23, 1984, the Federal Reserve Board issued a policy statement discouraging the use of delayed disbursement practices that increase "the collection time for checks by at least a day." The policy statement is as follows (emphasis added): [15]

Policy Statement on Delayed Disbursement Practices

The Federal Reserve Board is concerned that the practice of delayed disbursement has become increasingly prevalent. Delayed disbursement consists of arrangements designed to delay the collection and final settlement of checks by drawing checks on institutions located substantial distances from the payee, or on institutions located

[15] Officiel notice was taken of this policy stetement (7 CFR § 1.141(g)(6)).

outside of Federal Reserve cities when alternate and more efficient payment arrangements are available.

The increase in delayed disbursement practices has reduced the efficiency of the check collection system. The concerns expressed by the Board in its 1979 policy statement on delayed disbursements are still valid today. Recipients are denied availability of funds to the extent that funds would be available earlier if the transaction had been consummated using a check disbursement point where collection could be more readily accomplished. A check drawn on an institution remote from the payee often increases the costs of handling the check. First, more institutions are likely to handle the check before it is finally paid, increasing processing costs. Second, higher transportation costs are incurred to move checks greater distances. It has been estimated that the incremental cost for handling checks drawn on delayed disbursement accounts is approximately 7 cents per item. In addition, the practice delays the return of unpaid checks. These disbursement practices result in increased possibilities for check fraud and other losses, higher processing and transportation costs, increased incidence of delayed funds availability, and higher processing and transportation costs for return items.

The remote location of institutions offering delayed disbursement arrangements often increases the collection time for checks by at least a day. Recipients of delayed disbursement payments, moreover, are exposed to increased risk of loss. The extended collection time for checks drawn on such accounts increases the chances that the checks will not be paid when presented for payment due to reasons such as insolvency of the payor.

Finally, delayed disbursement arrangements could give rise to supervisory concerns since a bank may unknowingly incur significant credit risk through such arrangements. The primary risk is payment against uncollected funds, which could be a method of extending unsecured credit to a depositor and lead to violations of legal lending limits. Absent proper and complete documentation regarding the credit worthiness of the depositor, paying items against uncollected funds could be considered an unsafe or unsound banking practice. Further, even if properly docu-

mented, such loans might exceed the bank's legal lending limit for loans to one customer. Examiners are instructed to review routinely a bank's practices in this area during the course of examinations to ensure that such practices are conducted prudently. If undue or undocumented credit risk is disclosed or if lending limits are exceeded, examiners will continue to take appropriate corrective action.

The Board believes that the banking industry has a responsibility not to offer or otherwise encourage the use of arrangements that result in a delay in the collection and final settlement of checks. The Board has implemented a program designed to accelerate the collection of checks and encourages the banking industry to seek further improvements in check collection and funds availability. The Board intends to monitor the success of voluntary efforts to reduce and eliminate the use of delayed disbursement arrangements. In instances where delayed disbursement abuses continue, the Board intends to pursue appropriate action. This may include Federal Reserve operational changes to speed up the collection of checks drawn on these institutions.

CONCLUSIONS

Mr. Nelson, Omaha National Bank's Second Vice-President in charge of check processing, admitted that its Controlled Disbursement Account program resulted in a delay of 1 day in the check collection process with respect to some checks, depending on when they reached the Federal Reserve Bank (Finding 22). As to other checks, there would be no delay, i.e., for checks reaching the Federal Reserve Bank after the 8:30 a.m. cut-off time for "city" banks and before the 3:00 p.m. cut-off time for "country" banks (Finding 14, Example 2). Accordingly, Mr. Nelson testified that the delay from using Controlled Disbursement Account checks would average a fraction of a day, considering all of the checks written by a customer (Finding 22). In the case of respondent, its use of Controlled Disbursement Account checks instead of checks drawn on its regular bank account at Omaha National Bank resulted in a 1-day delay as to most of respondent's livestock checks (Finding 23).

Omaha National Bank officials admit that the additional "float" time from the use of a "country" bank rather than an RCPC bank in its Controlled Disbursement Account program was one of the "selling points" used in selling its program to customers (Finding 20). Respondent's President admitted that he studied "literature"

provided by Omaha National Bank's representative relating to its Controlled Disbursement Account program. Omaha National Bank's literature lists five "benefits" to customers, including "Increased utilization of disbursement float inherent in the system" (Finding 20). Accordingly, it is clear that respondent's President knew that when respondent stopped writing checks on its regular checking account at Omaha National Bank, and began writing checks on State Bank of Palmer, there would be additional delay in the check collection system, at least as to some checks.

But even if respondent's President had not known that the use of Controlled Disbursement Account checks drawn on State Bank of Palmer would cause delay in the check clearing process, at least with respect to some checks, the plain words of the Act show (and the legislative history confirms) that any practice by a packer that results in a delay in the check clearing process is an unfair practice in violation of the Act, irrespective of intent. The 1976 amendments to the Act provide (7 U.S.C. § 228b):

§ 228b. *Prompt payment for purchase of livestock*

(a) *Full amount of purchase price required; methods of payment*

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place

a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) *Waiver of prompt payment by written agreement; disclosure requirements*

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) *Delay in payment or attempt to delay deemed unfair practice*

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

Subsection (a) of the statutory provision just quoted requires packers to promptly deliver or mail a check to a livestock seller or wire transfer funds unless there has been a waiver of the prompt payment requirements pursuant to subsection (b). In this case, there was no waiver of the prompt payment requirements. Since complainant concedes that respondent mailed the livestock checks in a timely fashion as required by subsection (a), we are concerned here only with subsection (c).

There are several possible interpretations of subsection (c). But under any reasonable interpretation of subsection (c), a packer's practice of writing a check on a remote bank (or on a local bank which, in effect, converts itself into a remote bank), thereby delaying the check clearing process, is an unfair practice.

To aid understanding, complainant interpolates bracketed numbers in subsection (c), and relies solely on the first bracketed

clause, *viz.* (Complainant's Reply to Respondent's Proposed Findings, etc., at 22):

> Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, [1] the collection of funds as herein provided, *or* [2] otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

Respondent contends that subsection (c) does not itself condemn any delaying practice, but merely states that failure to comply with subsection (a) is an unfair practice, unless the seller waives his right to prompt payment (which is permitted by subsection (b)). Respondent contends that if a check is timely mailed, it is immaterial whether it is written on a remote bank that would delay the check collection process by several days.

Specifically, respondent argues that the words "collection of funds" in the first bracketed clause of subsection (c) are synonymous with the word "payment," and that with respect to checks mailed by a packer, Congress was concerned only with whether the packer mailed the checks in a timely manner, as required by subsection (a). However, since Congress used the phrase "collection of funds" in the same sentence in which it used the word "payment," it is evident that Congress did not use the phrase "collection of funds" as synonymous with "payment." "Where the legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas." *Rex* v. *Great Bolton*, 8 B. & C. 71, 74 (1828), per Lord Tenderden.

When Congress said that any delay or attempt to delay by a packer the collection of funds as herein provided is an unfair practice, Congress obviously intended to include as an unfair practice under subsection (c) the writing of a check on a remote bank which would delay the collection of funds from a check timely mailed by a packer in accordance with subsection (a).

Furthermore, even though complainant relies only on the first bracketed clause, the same result would be reached under the language of the second bracketed clause. The second bracketed clause is preceded by the word "or," which indicates that the various members of the sentence are to be taken separately. "In statutory construction 'or' is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statue." *Gay Union Corp.* v. *Wal-*

lace, 112 F.2d 192, 197 n.15 (D.C. Cir.), *cert. denied,* 310 U.S. 647 (1940). *Accord United States* v. *Field,* 255 U.S. 257, 262 (1921).

Under the second bracketed clause, any delay or attempt to delay "otherwise," i.e., in any manner other than referred to in bracketed clause 1, "for the purpose of or resulting in extending the normal period of payment," is an unfair practice. Writing a check on a remote bank results in "extending the normal period of payment" for livestock. That is, when Congress was referring to a delay in "payment," Congress was referring to more than just putting a check in the mail. Putting a check in the mail is, of course, one element of "payment." (This is obvious from subsection (a), which refers to receiving "payment" by receiving a check.) But the legislative history shows that Congress used the word payment in a broader sense than merely mailing or delivering a check. The legislative history of the amendatory legislation shows that Congress recognized that writing a check on a distant bank is a device utilized by packers to delay *payment* for livestock purchased. Specifically, the House Report on the 1976 amendatory legislation states (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 8 (Apr. 14, 1976) (emphasis added)):

> The principal complaints from the producer and feeder representatives were the lack of protection from packer failures and from various *devices (such as use of* drafts or *checks drawn on distant banks)* utilized by packers to delay *payment* for livestock purchased.[18]

Hence when Congress made it an unfair practice to do any act "for the purpose of or resulting in extending the normal period of payment," Congress meant to include the use of checks drawn on distant banks.

A third possible interpretation of subsection (c) would be to add a comma after the word "otherwise," thereby making the phrase "for the purpose of or resulting in extending the normal period of payment" applicable to the first bracketed clause. But even if that were done, as shown above, when Congress referred to a delay in "payment," Congress had in mind delays caused by devices such as "checks drawn on distant banks . . . to delay payment for livestock purchased" (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 8 (Apr. 14, 1976)).

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[18] As shown below, this House Report relates to the version of the prompt payment legislation which had been divided into three subsections, and subsection (c) of that version (set forth in the House Report) and subsection (c) of the final version enacted into law are verbatim.

The plain language of subsection (c) so clearly prohibits packers from delaying the check collection process by writing checks on remote banks that an extended discussion of the legislative history of the amendatory language should not be necessary. But since respondent argues its absurd construction of the Act with such vigor, and since the issue is of such tremendous national importance, I will take the time to set out the legislative history at length. Since the prompt payment language went through several drafting stages, the legislative chronology is set forth first so that legislative discussion may be considered in the light of the language then being discussed.

The entire prompt payment section of H.R. 8410, 94th Cong., 1st Sess., originally contained only two sentences, *viz.*, the language that is now in subsection (c), with an insignificant change. Specifically, the entire prompt payment provision of H.R. 8410, 94th Cong., 1st Sess., as introduced on July 8, 1975, by Representative Thone (for himself and Representative Bergland) provided: [17]

> SEC. 8. Said Packers and Stockyards Act is further amended by adding after section 408 (7 U.S.C. 229) a new section 409 to read as follows:
>
> "SEC. 409. Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds through the mails, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of the Act. Nothing in this section shall be deemed to limit the meaning of the term 'unfair practice' as used in the Act."

That original language is identical to the present subsection (c), except that the phrase "through the mails" was changed to "as herein provided" (7 U.S.C. § 229b(c)) after additional provisions were added as subsections (a) and (b) (see note 21, *infra*, and accompanying text). (The fact that the original prompt payment language was ultimately enacted (with the insignificant change noted) is of particular importance since, as shown below, the orginal language was proposed for the express purpose of prohibiting packers from delaying the check collection process by writing checks on remote banks.)

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[17] *Amend Packers and Stockyards Act of 1921: Hearings on H.R. 8410 and Related Bills Before the Subcomm. on Livestock and Grains of the House Comm. on Agriculture*, 94th Cong., 1st Sess. 9-10 (July 12, 23 and 24, 1975) [hereinafter cited as *House Hearings*].

Following House Hearings on H.R. 8410 and Related Bills held in July 1975, Committee Print No. 2 of H.R. 8410 dated February 5, 1976, expanded the prompt payment proposal to read as follows: [18]

> SEC. 7. Said Packers and Stockyards Act is further amended by adding after section 408 (7 U.S.C. 229) a new section 409 to read as follows:
>
> "SEC 409. Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds through the mails, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of the Act. Nothing in this section shall be deemed to limit the meaning of the term 'unfair practice' as used in the Act."

After Business Meetings on H.R. 8410 were held by the House Subcommittee, a revised version of the bill was agreed to, which, for the first time, was divided into three subsections. The revised version, which was debated on the floor of the House on May 6, 1976, and is set forth in the May 6, 1976, Congressional Record (122 Cong. Rec. 12,872 (1976)), is also set forth in H.R. Rep. No. 1043, 94th Cong., 2d Sess. 2-3 (Apr. 14, 1976): [19]

> SEC. 7. Said Packers and Stockyards Act is further amended by adding after section 408 (7 U.S.C. 229) a new section 409 to read as follows:

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[18] *Comm. on Agriculture, U.S. House of Representatives*, 94th Cong., 2d Sess., *Business Meetings on Packers and Stockyards Act of 1921, As Amended* 18 (Comm. Print Dec. 1976) [hereinafter cited as *Business Meetings*].

[19] The revised version was the version proposed at the House Business Meetings by Representative Hightower on March 31, 1976, except for a few minor changes (*Business Meetings, supra* note 18, at 121-22).

"SEC. 409. (a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized agent [20] the full amount of the purchase price: *Provided, however*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or 'grade and yield' basis, purchaser shall make payment by check at the point of transfer or shall wire transfer funds to seller's account for the full amount of the purchase price not later than the close of the first business day following determination of purchase price.

"(b) Notwithstanding the provisions of paragraph (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to affect payment in a manner other than that required in paragraph (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

"(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of the Act. Nothing in this section shall be deemed to limit the meaning of the term 'unfair practice' as used in the Act."

Under the version just quoted, which was the version discussed in H.R. Rep. No. 1043, 94th Cong., 2d Sess. (Apr. 14, 1976), and debated in the House on May 6, 1976, mailing a check would have been prohibited unless the parties agreed to such payment under

[20] The word "egent" was eubeequently changed to "representative."

subsection (b).[21] However, during the House floor debate on May 1976, Representative Hightower offered an amendment to perr the mailing of a check if the seller was not present, which stat (122 Cong. Rec. 12,873 (1976)):

> Amendment offered by Mr. Hightower: Beginning at page 16, line 14, delete the period and insert the following ": *Provided further, however,* That if the seller or his duly authorized representative is not present to claim [22] payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the U.S. mail, for the full amount of the purchase price properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment."

The Hightower amendment passed the House, with the word "claim" changed to "demand" (122 Cong. Rec. 12,876 (May 6, 1976)). The version of the prompt payment provisions of H.R. 8410 debated by the House on May 6, 1976, with the Hightower amendment, was the version which was subsequently enacted, except that the word "agent" in subsection (a) was changed to "representative," and the word "demand" in subsection (c) was changed to "receive" by the Senate and House conferees (S. Conf. Rep. No. 1065, 94th Cong., 2d Sess. 5 (Aug. 4, 1976)).

In determining the congressional intention with respect to the prompt payment language, we should look to the historical events which prompted passage of the 1976 amendatory legislation. "The Act was the product of a period, and, 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' *United States* v. *Union Pacific R. Co.*, 91 U.S. 72, 79." *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 273 (1942). A "statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States* v. *Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951). Statutes "are construed by the courts with reference to the circumstances existing at the time of passage" (*United States* v. *Wise*, 370 U.S. 405, 411 (1962). A "page of history," when

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[21] Since payment by mail would not have been permitted by this version (except by special agreement), it was no longer appropriate to prohibit any delay "through the mails, or otherwise," which is the phrase used in the earlier versions of H.R. 8410. Hence the phrase "as herein provided, or otherwise" was substituted for "through the mails." (This version also prohibits payment by e dreft.)

[22] The word "claim" was ultimately changed to "receive."

statutory language is being interpreted, "is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

Turning to the "history of the times," the dominant event that was largely responsible for enactment of the 1976 amendatory legislation was the 1975 bankruptcy of American Beef Packers, Inc., which went bankrupt leaving producers in 13 States unpaid for a total of over $20 million in livestock sales. As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

> Between 1958 and early 1975 167 packers failed, leaving livestock producers unpaid for over $43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January, 1975, leaving producers in 13 states unpaid for a total of over $20 million in livestock sales. Of particular concern to the livestock producers in this instance was the fact that ABP's principal source of financing, General Electric Acceptance Corp., stood ahead of them among the bankrupt's creditors by virtue of its duly protected security interest in ABP's inventory, etc., i.e., livestock and derivative products which the producers had sold on a cash basis and for which they had not been paid.
>
> As of July 1, 1975, 23 States had responded to the ominous trend of packer failures by enacting laws requiring bonds of packers. In the wake of the ABP bankruptcy, several States, including Kansas, Oklahoma, and Texas, have enacted laws subjecting packers to strict prompt payment requirements.
>
> USDA figures show that in 1973 some $31 billion worth of livestock and $4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm income. Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While

> some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

The Senate Report on the 1976 amendatory legislation contains language practically verbatim to that just quoted (S. Rep. No. 932, 94th Cong., 2d Sess. 4-6 (June 4, 1976)), except that in place of the last two sentences just quoted, the Senate Report states (*id.* at 6):

> The meat packing industry is, of course, an integral part of our Nation's agricultural marketing system. What is needed to prevent future producer tragedies, as occurred following the ABP bankruptcy, is legislation that will afford a measure of protection to the livestock producer and feeder and yet not be so restrictive as to reduce competition in the livestock slaughtering business. H.R. 8410 accomplishes this dual objective.

Senator McGovern referred to the bankruptcy of American Beef Packers, Inc., as the "triggering mechanism" for the 1976 amendatory legislation. He stated (122 Cong. Rec. 18,837 (June 17, 1976)):

> As Senators know, the triggering mechanism, for this legislation was the 1975 bankruptcy of an Omaha based firm, the American Beef Packers, Inc.

The bankruptcy of American Beef Packers, Inc., was repeatedly referred to in the Senate (June 17, 1976) and House (May 6 and Aug. 30, 1976) debates on the 1976 amendatory legislation (122 Cong. Rec. 12,862, 12,863, 12,864, 12,868, 12,870, 12,875, 12,879, 12,884, 18,824, 18,827, 18,828, 18,832, 18,835, 18,836, 18,837, 28,314, 28,315). The bankruptcy of American Beef Packers, Inc., was also referred to by President Ford when he signed the 1976 amendatory legislation into law. He stated (Statement by the President on Signing H.R. 8410 Into Law, Weekly Comp. Pres. Doc. 1835 (Sept. 18, 1976)):

> Without this legislation, sales of livestock to meatpacking firms would have continued without adequate assurances of payment—as was the case last year when a major Midwestern meatpacker went bankrupt while many of our cattle producers were left holding over $20 million of

worthless checks. Producers will be protected against this kind of catastrophe in the future.

Moreover, the practice by American Beef Packers, Inc., of writing checks on distant banks was one of the specific evils sought to be corrected by the amendatory legislation. In the Senate debate on June 17, 1976, Senator Clark, speaking in support of H.R. 8410, stated (122 Cong. Rec. 18,828 (1976) (emphasis added)):

> Mr. CLARK. Mr. President, I rise in support of H.R. 8410, a bill to amend the Packers and Stockyards Act of 1921 to assure livestock producers that they will be paid for the animals they sell, in the event of packing-plant bankruptcies.
>
> In January 1975, a disaster of major proportions struck more than 950 producers in 13 States. Iowa and Nebraska were the hardest hit. The catastrophe cost people in those two States $12 million at a time when they were already besieged by bad weather and low prices. Like a blizzard or a drought, this disaster was sudden and devastating. The livestock producers and businesses it hit could do little more than try to pick up the pieces and start again. But this was not a natural disaster. It was the financial collapse of one of the Nation's 10 largest packers—American Beef Packers, Inc. of Omaha.
>
> The producers damaged by the failure of American Beef were not speculators. They had sold livestock for cash, expecting to be paid. More than 1 year later, many producers and others are still wondering how it could have happened. The full answer may never be known, but *the Packers and Stockyards Administration sent the Congress a report that provides some fascinating and disturbing conclusions.* "Deception and callous disregard for the livestock producers; *distant bank accounts;* special payments to friends; and improper accounting methods"—each *had a part in the collapse of American Beef and the $21 million loss to producers that followed it, according to the report,* and, to compound the disaster, it seems that the company continued to purchase livestock even though it knew the checks paid to livestock producers were worthless.
>
> The Congress cannot help those victims. Nor can it help the victims of more than 174 other packer failures that cost livestock producers another $25 million over the past

18 years. But Congress can and must do something to prevent this awful tragedy from happening again.

Official notice was taken by the Judicial Officer of the Packers and Stockyards Administration Report to Congress (July 8, 1975) referred to by Senator Clark. The report states (*id.* at 6):[23]

SUMMARY

The following [five] practices were engaged in by ABP and Beefland with the overall result of imposing a $20 million loss on the livestock community:

(1) The deliberate use of distant bank accounts to create an unreasonably large float which resulted in more livestock producers not being paid.

Senator Dole, who supported H.R. 8410 122 Cong. Rec. 18,832 (June 17, 1976)), also referred to American Beef Packers' "manipulation by using distant banks," stating (122 Cong. Rec. 18,834 (June 17, 1976)):

Because of this situation in recent years, packers have commenced mailing checks to sellers which take several days to arrive and to clear the bank, 3 to 5 days can hardly be considered a cash sale and with the mail service being what it is today, it may be longer than 3 or 5 days. That is not the fault of either party.

This extended interpretation of "cash sale," its manipulation by using distant banks, coupled with other particular circumstances surrounding the American beef packers

[23] Respondent complains that it was deprived of the right to cross-examine with respect to this report. But there is no right or need to cross-examine with respect to legislative facts, as distinguished from adjudicatory facts. *In re Speight*, 33 Agric. Dec. 280, 313 (1974). It is settled that opportunity for cross-examination is required "if but only if adjudicative facts are in dispute." Davis, *Administrative Law Treatise* § 7.04, at 323 (1970 Supp.). See also, Davis, *Administrative Law Treatise* §§ 15.02, .03, .05, .06, .10, .12, .14 (1958 and 1970 Supp.). The Packers and Stockyards Administration report is relevant here only to show what the Packers and Stockyards Administration told Congress—not to show that the report accurately presented the facts. In any event, however, the report is sufficiently described for our purposes here in the remarks by Senator Clark. In addition, the exact language quoted as paragraph (1) from the Summary of the Report is set forth in Representative Bedell's summary of the "recently released report from the Packers and Stockyards Administration" (*Livestock Marketing: Hearings on S. 1532 and S. 2034 Before the Subcomm. on Agricultural Production, Marketing, and Stabilization of Prices of the Senate Comm. on Agriculture & Forestry*, 94th Cong., 1st Sess. 29 (July 19 and 25, 1975) [hereinafter cited as *Senate Hearings*]).

bankruptcy, caused nearly 1,000 farmers to hold worthless checks amounting to over $20 million last year.

Representative Harkin also referred to American Beef Packers' distant bank accounts in stressing the need for prompt payment and the other amendatory legislation under discussion. He stated (122 Cong. Rec. 12,884 (May 6, 1976) (emphasis added)):

> Mr. Chairman, I rise in support of H.R. 8410 as reported from the Committee on Agriculture. I feel that this bill is a needed update in the Packers and Stockyards Act which reflects the shifts in marketing techniques over the past several decades.
>
> This need was brought to national attention in January 1975, by the bankruptcy of American Beef Packers, Inc., which left nearly 1,000 livestock producers holding close to $21 million in bad checks with only a hope of an equitable final settlement. . . .
>
> * * * * * * *
>
> The Packers and Stockyards Act was passed to insure the packer and producer conduct business in a fair and honest manner. The transgressions of American Beef Packers, Inc., have indicated that the packers can bend the law to serve their own interest at the expense and without the knowledge of the producer.
>
> *For example, American Beef maintained bank accounts in Seattle, Wash., and Salem, N.C., to increase the float time for clearing checks.* Obviously this float worked to enhance the credit position of ABP and resulted in the magnitude of the loss to producers.
>
> * * * * * * *
>
> Many critics of the bill have also pointed out that the prompt payment provision is unreasonable. However, according to my information, similar language has functioned quite well in Kansas, Oklahoma, and Texas. Such a provision is dsfinitely needed.

Representative Poage, Chairman of the Subcommittee on Livestock and Grains, and a proponent of H.R. 8410, in explaining the prompt payment provisions of the bill at the outset of the House debate, referred to the practice of packers writing drafts on distant banks. He stated (122 Cong. Rec. 12,862 (May 6, 1976)):

> Next, there is a provision in the bill, and I suppose it is the most controversial in the bill, about prompt payment. There have been great delays in the payment. Some of the packing companies have been paying by issuing drafts on a bank. If they are doing business down in Texas and Oklahoma, they give a draft on a bank in Walla Walla, Wash. I suppose, if they are doing business out there, they give a draft on a bank in Tallahassee, Fla. But, they have given drafts on distant points so that it took quite some time to get the payment through.

Similarly, Representative Hightower, a supporter of H.R. 8410 (122 Cong. Rec. 12,868 (May 6, 1976)), referred to the practice of packers writing checks on remote banks. He stated (122 Cong. Rec. 12,873 (May 6, 1976)):

> There was considerable abuse of the mail privilege under previous practice of purchasers using the mail by the use of a bank account perhaps 1,000 miles away from the point of purchase of livestock in order to pay, and they enjoyed the benefit of a considerable float time.

Although legislative history involving discussions at congressional hearings is not nearly as weighty, in construing a statute, as legislative reports and floor debates,[24] the congressional hearings and business meetings relating to the amendatory legislation were filled with references to checks and drafts drawn on remote banks, and the need to enact prompt payment provisions to remedy that abuse.

At the July 23, 1975, session of the House Subcommittee on Livestock and Grains hearings, Mr. B. H. Jones, then Executive Vice-President of the National Livestock Feeders Association (NLFA), who is presently the Administrator of the Packers and Stockyards Administration who signed the complaint in this case, testified and submitted a prepared statement on behalf of the NLFA setting forth its views concerning the several bills under consideration. NLFA indicated a clear preference for H.R. 8410, which was introduced at the request of the NLFA, and was ultimately enacted, with amendments.

Mr. Jones, on behalf of the NLFA, testified as to the original two-sentence version of the prompt payment provision (which is

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[24] *Mills v. United States*, 719 F.2d 1249, 1252-53 (7th Cir. 1983), *cert denied*, 104 S. Ct. 974 (1984); *Young v. TVA*, 606 F.2d 143, 147 (6th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980).

now subsection (c), with the trivial amendment discussed above) as follows (*House Hearings, supra* note 17, at 73, 75, 78, 80):

> Of the bills introduced, we prefer the structure and language of H.R. 8410, which was introduced at the request of the NLFA. . . .
>
> * * * * * * *
>
> [L]et us look at H.R. 8140, section by section, along with the provisions of the other bills, to show how the aforementioned objectives of giving livestock producers and feeders an equitable priority position and substantially reducing their risk in dealing with packers will be accomplished by the amendments to the P & S Act contained therein:
>
> * * * * * * *
>
> Section 8 [which is now subsection (c), with the trivial amendment discussed above]—Extending Float Time
>
> Intentionally extending the normal period of payment for livestock by delaying the collection of funds—such as drawing checks for livestock on distant banks—constitutes a flagrant violation and is a common practice among packers. Such a practice seriously jeopardizes the position of the livestock seller, as was vividly demonstrated in the case of American Beef.
>
> American Beef intentionally extended its float time by drawing checks on a Spokane, Washington bank in payment for cattle purchased and slaughtered in the Midwest; by drawing checks for cattle slaughtered at its Colorado plant on a bank in Greenville, North Carolina; and by other collection techniques tailored specifically for such purpose.
>
> Many of the checks returned to cattle and hog sellers would have been paid prior to the bankruptcy filing had the checks been drawn on banks in the proximity of the transaction locations. In fact, it was a matter of weeks before some producers and feeders found out their checks had not cleared.
>
> * * * * * * *

Prohibition Against Extending Float Time (Section 8, H.R. 8410)—The section would prohibit extending the normal period of payment for livestock by intentionally delaying the collection of funds—depositing money in a distant bank, etc. The language in H.R. 8410 is unique to that bill. The prohibition is contained in H.R. 8410 and H.R. 8234 only.

Hence the livestock organization (NLFA) that had the original prompt payment language introduced (which is now identical to subsection (c), with one trivial change) referred to the prompt payment section as a section directed against the practice of "Extending Float Time."[25]

Similarly, during one of the House Subcommittee's business meetings held on February 6, 1976, which was considering the identical language of the prompt payment provision discussed by Mr. Jones on behalf of the NLFA, Mr. Imhof, counsel to the House Subcommittee, explained that the provision "attempts to get at the problem of the float."[26] *Business Meetings, supra* note 18, at 38.

The NLFA was not alone in recognizing the need for prompt payment legislation to prevent livestock buyers from writing checks or drafts on remote banks. For example, Mr. William H. Webster, Chairman of the Feeder Advisory Council, American National Cattlemen's Association, also testified and submitted a prepared statement stating (*House Hearings, supra* note 17, at 149):

> The cattle industry and the financial community, among others, were stunned recently by the Chapter 11 Bankruptcy of ABP. But the real shocker came in the aftermath as more and more people became more and more aware of certain practices within the cattle and meat marketing

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[25] As shown above, the original two-sentence prompt payment provision referred to any delay or attempt to delay the "collection of funds through the mails, or otherwise" while the final version (now subsection (c)) refers to any delay or attempt to delay the "collection of funds as herein provided, or otherwise" (7 U.S.C. § 228b(c)). The words "as herein provided" were more appropriate for the final version than "through the mails" since various methods of payment were specifically provided for in subsections (a) and (b) of the final version. But it would be absurd to regard that insignificant change as completely emasculating the prohibition against "Extending Float Time," which was the major purpose of the original language.

[26] Mr. Imhof was discussing Committee Print No. 2 of H.R. 8410 dated February 5, 1976, which, as shown above, had the same concluding language as the original two-sentence proposal, but was preceded by other language requiring the buyer to tranamit or deliver payment by the next day, in the absence of an agreement to the contrary.

chain which allow, and in fact encourage, situations such as this to occur.

For example: Once a feeder sells his slaughter cattle to packer, several things happen: First, the trucks pull in, load the cattle, take them to the slaughterhouse, and three or four days or a week later, a check or draft is mailed. Assuming good mail service, the check may be received by the seller in three to four more days, and deposited in the seller's bank. Then the check (or draft) must go through the normal clearance process before collected funds are credited to the account of the seller. Since the check is transported by mail, it has become common practice for the packer to draw the checks on a bank branch in some remote location like Gila Bend, Arizona. Check clearance will take an average of seven days after the check is deposited.

This delay in payment to the seller of cattle directly causes a major inequity, and because of related inadequacies of commercial law, sets up a very dangerous situation.

As a result of this delay in collection of funds, if you assume that each seller of cattle receives collected funds after the sale, the cattle industry is losing some $9-10 thousand per day in interest. It is grossly unfair to have the seller of a raw commodity finance the next level of the marketing chain to that extent.

In addition, Glenn Deen, President of the Texas Cattle Feeders, testified (*House Hearings, supra* note 17, at 17):

2. All checks should be drawn on banks so located as not to artificially delay collection of funds. This too will reduce the float and give a quicker warning of nonpayment.

Similarly, hearings were held in July 1975 before the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices of the Senate Committee on Agriculture and Forestry on the problems uncovered as a result of the bankruptcy of American Beef Packers, Inc., and on proposed legislation to correct those problems. Numerous witnesses testified to the need for and desirability of stringent statutory requirements providing both for prompt payment by cash, check or wire transfer and a prohibition on the use by packers of banking practices calculated to delay the collection of funds (*Senate Hearings, supra* note 23), *viz.*, Senator Clark at 1; Representative Thone at 25; Representative Bedell at 29; Herb

Albers, Jr., President, Nebraska Livestock Feeders Association at 86-87; John K. Blythe, Kansas Farm Bureau at 101; Jack Eidel, Montana Stockgrowers Association at 112; Henry Kibler, Arizona Cattle Feeders Association at 122-23; B. H. Jones, National Livestock Feeders Association at 156. See, also, Robert Lounsberry, Secretary of Agriculture, Iowa Department of Agriculture at 41; John Greig, President, Iowa Cattlemen's Association at 85; Ronald Lorenz, Nebraska Farm Bureau at 120; Dale Gullickson, Marketing Director, South Dakota Department of Agriculture at 144; and William H. Webster, American National Cattlemen's Association at 152-53.

From the foregoing legislative history, it is clear that respondent's argument, i.e., that subsection (c) does not prohibit delaying tactics such as writing checks on remote banks, ignores the main thrust of the legislative concern (as revealed in the House Report, the Senate and House floor debates and hearings, and the House Business Meetings) that prompted enactment of the 1976 prompt payment legislation.

Additional legislative history not relating specifically to delay caused by checks written on remote banks also demonstrates that subsection (c) of the prompt payment legislation was enacted to impose additional requirements on buyers, and was not (as contended by respondent) merely intended to state that failure to comply with subsections (a) and (b) is unlawful.

For example, during the discussion of Representative Hightower's amendment, which is the amendment that permits the mailing of a check if the seller is not present, Representative Hightower stated that postdating a check would violate subsection (c) of the prompt payment provision. He stated (122 Cong. Rec. 12,874 (May 6, 1976)):

> Mr. MYERS of Indiana. . . .
>
> Mr. Chairman, I ask the gentleman from Texas, the author of this amendment, Mr. Hightower, a question. Since this amendment does amend section 409, if postdating a check would not be a violation of the intent of section 409(c).
>
> Mr. HIGHTOWER. Yes, paragraph (c) of that section says that any delay or attempt to delay by a market agency would be an unfair practice.
>
> Mr. MYERS of Indiana. Under this amendment, then, it is true that the postdating of a check would be in violation

of the provisions of paragraph (c) of section 409, is that a fact?

Mr. HIGHTOWER. It is.

Mr. MYERS of Indiana. And, therefore, would be an illegal act?

Mr. HIGHTOWER. That is correct.

Similarly, Senator Helms explained that if "the purchaser sends an insufficient funds check, he would be in violation of the prompt payment requirement, since the purpose or result of such action would be to extend the normal payment period" (122 Cong. Rec. 18,833 (June 17, 1976)). The language Senator Helms was referring to is the language of subsection (c) (clause 2 discussed above). In addition, Representative Hagedorn explained that the prompt payment section would "protect against instances where packers or market agencies have attempted to stall the collection of funds through a variety of delaying practices" (122 Cong. Rec. 12,870 (May 6, 1976)).

From the foregoing, it is clear that subsection (c) was intended to prohibit a variety of delaying tactics, such as postdating a check or writing an insufficient funds check. Under respondent's interpretation of subsection (c), neither of those practices would be prohibited, nor would any other delaying tactic be prohibited as long as the purchaser dropped a check in the mail within the time limit specified in subsections (a) and (b). Respondent's construction does violence not only to the plain language of subsection (c), but also to its legislative history.

Respondent argues that the primary purpose of the prompt payment legislation was to eliminate delay caused by the use of drafts. That certainly was one major purpose of the amendatory legislation. But, as shown above, there is an enormous amount of legislative history showing that Congress also intanded to aliminate delay caused by packers writing checks on remote banks.

Respondent relies on Senator Helms' fear that the prompt payment legislation "may smack a bit of legislative overkill." Senator Helms stated (122 Cong. Rec. 18,832 (June 17, 1976)):

> While I strongly support the bill, I am concerned that the prompt paymant provision, section 7, may smack a bit of legislative overkill. I do not question the necessity for a prompt payment provision. However, I do believe that such a provision should be commercially feasible and effective. If a requirement places such a heavy burden on the packing industry as to conflict with normal and realistic

> commercial practices, applicable to all other businesses in this country, its effectiveness will be greatly diminished and it is not unrealistic to envision packers buying only from producers who would agree to other methods of payment.

However, Senator Dole disagreed with Senator Helms, and stated that "I trust that in the operation and implementation and administration of this legislation, we do not have overkill" (122 Cong. Rec. 18,834 (June 17, 1976)). But, in any event, Senator Helms' comment is of no weight in interpreting the statute since he was speaking in favor of an amendment that he proposed (122 Cong. Rec. 18,832 (June 17, 1976)) that was rejected by a vote of 78 to 16 (122 Cong. Rec. 18,836 (June 17, 1976)).

Respondent also relies on Representative Poage's statement made in the House floor debate that "I hope that the membership will keep this a bill to protect the sellers of livestock rather than making it a banking bill" (122 Cong. Rec. 12,878 (May 6, 1976)). However, that statement is taken out of context, and its use by respondent is highly deceptive. Representative Poage's comment was made in the context of a discussion of a proposed amendment by Representative Richmond, which would have eliminated § 206 of the Act, the packer trust provision (7 U.S.C. § 196), because it would impair the collateral relied upon by banks in their financing of packers (122 Cong. Rec. 12,876 (May 6, 1976)). Representativs Poage, in opposing the proposed amendment, was exhorting his colleagues to keep in mind that the purpose of the bill was to protect the livestock sellers—not banks! Congress agreed, and enacted the packer trust provisions (7 U.S.C. § 196).

The packer trust provisions, just referred to, along with packer bonding, were intended to complement the prompt payment provisions so that livestock producers would be assured of payment for livestock. As stated by Senator Clark (122 Cong. Rec. 18,833 (June 17, 1976)):

> The prompt-pay section is one of the three basic foundations of the bill. This section, along with the trust section and the bonding section provides a unified set of basic protections needed by livestock producers to insure payment for livestock.

Similarly, Senator Huddleston, Chairman of the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices, after referring to the $20 million loss caused by the bankruptcy of American Beef Packers, stated (122 Cong. Rec. 18,824 (June 17, 1976)):

> This situation must be corrected. The risk livestock sellers now face in dealing with packers must be substantially reduced. No single provision of law can attain these objectives. However, the combination of provisions contained in H.R. 8410 is our best assurance that the past losses suffered by producers because of packer bankruptcies will not continue in the future.

Respondent also relies on the following brief explanation of subsection (c) of the prompt payment provision in the House Report (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 7 (Apr. 14, 1976) (emphasis added by respondent)):

> Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds *as provided pursuant to subsection (a) or (b)* or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of the Act.

Respondent argues (Respondent's Proposed Findings of Fact, etc., filed March 15, 1984, at 33):

> The underlined language shows beyond doubt that the phrase "as herein provided" refers to the actual physical delivery of a check as required in subsection (a) or such provisions for delivery as are agreed upon pursuant to subsection (b).

Of course, as explained above, the phrase "as herein provided" in subsection (c) refers to the payment methods referred to in subsections (a) and (b). The phrase "as herein provided" was first substituted for "through the mails" when the bill under discussion was amended to prohibit payment through the mails. But there is nothing in that change to suggest that Congress intended thereby to limit the meaning of "delay" in "the collection of funds," or "delay" "for the purpose of or resulting in extending the normal period of payment." In fact, on the next page of the same House Report relied on by respondent, it is stated that the "principal complaints from the producer and feeder representatives were the lack of protection from packer failures and from various devices (such as use of drafts or checks drawn on distant banks) utilized by packers to delay payment for livestock purchased" (*id.* at 8). As shown above, the legislative history shows that Congress intended in subsection (c) to address the producers' complaints about checks drawn on distant banks.

Respondent relies on a few other bits of legislative history which are not of sufficient weight to be worthy of discussion. In any event, however, respondent's arguments are fully discussed in complainant's briefs.

For the foregoing reasons, respondent's statutory interpretation argument is completely without merit.

The American Meat Institute filed a brief as amicus curiae in which it argues that a packer must intentionally delay the collection of funds in order to violate subsection (c). The American Meat Institute relies on legislative history in which various persons deplored intentional delay caused by practices such as checks written on remote banks. However, although the legislative history shows that intentional delay is prohibited, there is nothing in the legislative history to indicate that *only* intentional delay is prohibited.

Moreover, the statutory language enacted shows clearly that intent is not an element of the violation. The statute refers to "[a]ny delay or attempt to delay." Although an "attempt to delay" would have to be intentional, "[a]ny delay" would not have to be intentional. The word "any" is a broad and comprehensive term (*United States* v. *Rosenwasser*, 323 U.S. 360, 362-63 (1945); *FDIC* v. *Winton*, 131 F.2d 780, 782 (6th Cir. 1974); *Kuhlman* v. *W.A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927)) that includes *all* kinds of delay—intentional or unintentional.

In addition, the statute refers to delay "for the purpose of *or resulting in* extending the normal period of payment" (7 U.S.C. § 228b(c); emphasis added). This shows clearly that Congress did not mean for the prohibition in subsection (c) to apply only to intentional delays.[27]

For the foregoing reasons, the narrow construction of the prompt payment legislation contended for by the American Meat Institute is rejected. (It is axiomatic that the administrative construction of the Act is entitled to considerable weight, and that this remedial legislation should be liberally construed.)

Interpreting subsection (c) of the prompt payment provision in accordance with its plain language and legislative history, it is clear that respondent's use of Controlled Disbursement Account

[27] If it were necessary to find that respondent intentionally delayed the check collection process, I would find the requisite intent here. That is, a packer is presumed to intend the natural consequences of its conduct, and the natural consequence of respondent's use of Controlled Disbursement Account checks is delay (Findings 11-28). Respondent's President admittedly studied Omaha National Bank's "literature" relating to its Controlled Disbursement Account program, and that literature lists as one of the five advantages of the program the "Increased utilization of disbursement float inherent in the system" (Finding 20).

checks violates subsection (c). It causes a 1-day delay in most of respondent's livestock checks (Finding 23). Accordingly, respondent's use of Controlled Disbursement Account checks is unlawful.

Respondent argues that Controlled Disbursement Account checks are a lawful business practice used throughout the nation. Even if that were true, it would be irrelevant. Livestock purchasers subject to the Packers and Stockyards Act are subject to restrictions not applicable to other check writers. Congress decided that in view of the special circumstances relating to the livestock industry, livestock producers and sellers need the unique protection provided by the 1976 prompt payment provisions.

Although it is irrelevant whether Controlled Disbursement Account checks violate Federal Reserve Board policy or Federal Deposit Insurance Corporation policy, Controlled Disbursement Account checks present problems under the policies of both agencies (Findings 26-28).

As stated by the Regional Counsel of the Federal Deposit Insurance Corporation, "controlled disbursement accounts might be used to increase the amount of 'float' time of checks for bank customers. If this were the case, the FDIC might find that an unsafe and unsound banking practice existed" (Finding 26).

In addition, on January 11, 1979, the Federal Reserve Board issued a press release discouraging the use of remote disbursement checking accounts. The Vice-President of the Federal Reserve Bank of Kansas City did not know whether Omaha National Bank's Controlled Disbursement Account program violates that policy statement, and, therefore, the validity of Omaha National Bank's Controlled Disbursement Account program is at least questionable, under the Board's January 11, 1979, policy statement. (Finding 27).

Furthermore, Omaha National Bank's Controlled Disbursement Account program seems clearly contrary to the Federal Reserve Board's February 23, 1984, policy statement, which disapproves of delayed disbursement practices that increase "the collection time for checks by at least a day" (Finding 28). Omaha National Bank's Controlled Disbursement Account checks increase the collection time for respondent's checks by a full day in most instances (Finding 23). Hence Omaha National Bank's Controlled Disbursement Account program seems to be a delayed disbursement practice condemned by the Board's February 23, 1984, policy statement. But, as stated above, it is totally irrelevant in this case whether or not Omaha National Bank's Controlled Disbursement Account program violates the Federal Reserve Board policy. It is enough that respondent's use of the bank's Controlled Disbursement Account program violates the Packers and Stockyards Act.

Since subsection (c) prohibits *any* delay in "the collection of funds," it is irrelevant whether the delay caused by respondent's use of Controlled Disbursement Account checks is excessive or unreasonable.

The record here shows that Omaha National Bank's Controlled Disbursement Account program does not cause as much delay as would have been caused if it had selected a country bank located in an area where the check collection process takes even longer than in the case of Palmer State Bank. In addition, Omaha National Bank's Controlled Disbursement Account program is not designed solely for the purpose of delay, although delay is inherent in the program, and Omaha National Bank relied in its marketing of the program on the "Increased utilization of disbursement float inherent in the system," and pointed out that its Controlled Disbursement Account program "has a distinct advantage over U.S. National [a competitor] by providing an additional day of disbursing float to the customer" (Finding 20). But, in any event, we are not concerned here with whether Omaha National Bank's Controlled Disbursement Account program results in "excessive delay" or "unreasonable" delay. If it causes "[a]ny delay" (which it does (Findings 11–23)), its use by respondent is prohibited.

Respondent argues that the same result would follow if it opened an ordinary checking account at Palmer State Bank and wrote its checks directly on that account. Quite true! And that is why it would be just as unlawful as the use of Omaha National Bank's Controlled Disbursement Account program.

The ALJ raised the issue as to whether a packer would violate the prompt payment provision if it mailed a check on the day of purchase, rather than on the next day, but used a Controlled Disbursement Account check that resulted in a 1-day delay in the check processing system. The ALJ properly concluded that the use of a Controlled Disbursement Account check which delays the check collection process violates the Act irrespective of when the check is mailed.

During four sample periods, about half of respondent's livestock checks were dated the day of purchase and about half were dated the day after purchase (Finding 4). However, it is irrelevant under subsection (c) whether a check is mailed on the day of purchase or the day after purchase. Subsection (c) prohibits "[a]ny delay" in the "collection of funds," which, as shown above, prohibits any delay in the check collection process. That absolute prohibition against "[a]ny delay" does not depend on when the check was mailed. The requirement that a check be timely mailed pursuant to subsection (a) is an entirely different requirement than the prohibition

against "[a]ny delay" in subsection (c).[28] Irrespective of when a check is mailed, it is an unfair practice to write a check on a remote bank that delays the check collection process.

Respondent argues that even if a delay in the check collection process occurred because of its use of Omaha National Bank's Controlled Disbursement Account program, the delay is not necessarily harmful to livestock sellers since some banks give immediate credit as good as cash to a livestock seller on the day that he deposits his check in the bank. (The record shows that not all banks follow that practice (Finding 24)). Respondent also argues that because of its financial strength, an additional day of float could not impair its ability to ultimately pay all livestock sellers. However, both of those arguments should be addressed to the congressional forum rather than to this forum.

The legislative history shows that Congress was told that a delay in the check collection process is damaging to livestock sellers since (i) it increases the risk of loss to livestock sellers in the event of a packer's bankruptcy, and (ii) it denies livestock sellers of interest on their money for the period of the delay. If respondent can show

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[28] In addition, a packer has no absolute "right" under the Act to mail or deliver a check on the day after purchase. The legislative history of the prompt payment legislation shows that Congress intended for the seller, rather than the buyer, to have the option as to how payment should be made. When Representative Hightower introduced his amendment permitting payment by mail, he explained (122 Cong. Rec. 12,873 (May 6, 1976)):

> Mr. Chairman, first of all, we think it is important to emphasize that the seller, the producer, if he is there and wants cash payment, is entitled to cash payment.

Senator Huddleston, in opposing an amendment offered by Senator Helms (subsequently defeated) that would have given packers the absolute right to mail a check (122 Cong. Rec. 18,882 (June 17, 1976)), stated (122 Cong. Rec. 18,883 (1976)):

> However, I must oppose the amendment that is being offered by the Senator from North Carolina, basically on two points.
>
> First, it takes from the seller the option for making the decision as to how payment is made and transfers it to the buyer.
>
> Second, the amendment offered by the Senator from North Carolina loosens up the process in favor of the purchaser.

Senator Clark similarly opposed Senator Helms' amendment "because it would take the option of how payment should be made away from the seller and give it to the packer" (122 Cong. Rec. 18,884 (June 17, 1976)). Other Representatives and Senators similarly recognized that payment options under the prompt pay legislation rest with the seller (122 Cong. Rec. 12,829, 12,878-75, 18,882, 18,884, 18,886 (1976)). The record here shows that many of respondent's checks are "picked up either by the feeder, the seller, or by the driver" (Tr. 823-24; see Finding 4), which indicates that many of the sellers have chosen to have the check issued on the day of respondent's purchase.

that those legislative facts are not applicable to respondent, i should seek a congressional exemption from the prompt payman legislation. Wisely or unwisely (wisely, I believe), Congress prohibi ed "[a]ny delay" in "the collection of funds" (7 U.S.C. § 228b(c) and the legislative history shows that Congress intended by tha language to prohibit any delay in the check collection process. Ac cordingly, the issue is not open for consideration in an adjudicator proceeding as to whether a 1-ay delay in the check collection proc ess should be permitted where it is beneficial to packers, and th risk or loss to sellers is not great. (I would not favor such legisla tion, but the issue should be raised in Congress—not here.)

Respondent argues that complainant should have proceeded b formal rulemaking rather than by an adjudicatory proceeding. Bu it is primarily within the discretion of the administrative agency whether to determine policy through rulemaking proceedins or case by case.[29] (Robert M. Budd, Chief of Complainant's Livestock Procurement Branch, testified that the agency felt that the Act was sufficiently explicit without a rule, but that, in any event, the agency needed additional experience before it could draft a rule (Tr. 228-31)).

Respondent complains that it was denied discovery, but neither the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) nor the Rules of Practice (7 CFR §§ 1.130-.151) provides for discovery, and, therefore, discovery is not available to a respondent in a Packers and Stockyards Act disciplinary case. *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Machado*, 42 Agric. Dec. 820, 845 (1983) (decision as to respondent Cozzi), *aff'd*, No. 83-7950 (9th Cir. Oct. 22, 1984); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1600 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

Even if discovery were available under the Packers and Stockyards Act, it would not be appropriate here. This is a case in which respondent admittedly uses Controlled Disbursement Account checks to pay for its livestock. The only real issue in the case involves a question of statutory interpretation. Hence discovery would not have been appropriate here. In any event, however, before the hearing, respondent was furnished with virtually all of complainant's case, including copies of all exhibits, a list of wit-

[29] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 761-66 (1969); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 199-203 (1947); *Central Ark. Auction Sale, Inc.* v. *Bergland*, 570 F.2d 724, 727 (8th Cir.), *cert. denied*, 436 U.S. 957 (1978); *Giles Lowery Stockyards, Inc.* v. *USDA*, 565 F.2d 321, 325 (1977), *cert. denied*, 436 U.S. 957 (1978).

nesses to be called by complainant and a summary of their expected testimony.

For the foregoing reasons, the following order should be issued. (Respondent's Motion to Dismiss, in which respondent contends it was denied a fair hearing, is dismissed as frivolous.)

ORDER

Respondent Beef Nebraska, Inc., its officers, directors, agents and employees, directly or through any corporate or other device, in connection with its operations as a packer, shall cease and desist from issuing checks in payment for livestock drawn on remote, distant, or country accounts, including any account with State Bank of Palmer, Palmer, Nebraska, for the purpose of or resulting in extending the time necessary to collect such checks, or of causing or extending delay in the collection of funds thereon.

This order shall become effective on the 30th day after service hereof on respondent.

In re: EARL KEUNE d/b/a MOUNT AUBURN LIVESTOCK. P&S Docket No. 6609. Decided December 2, 1985.

Dealer—Market agency—Failure to pay or to pay when due—Insufficient funds checks—Suspension—Consent.

Allan Kahan, for complainant.
Wesley H. Huisings, Waterloo, Iowa, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the financial condition of the respondent does not meet the requirements of the Act and that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Earl Keune, hereinafter referred to as the respondent, is an individual doing business as Mount Auburn Livestock. Respondent's mailing address is First Street, Box 130, Mt. Auburn, Iowa 52313.

2. Respondent is, and at all times material herein was:

a) Engaged in the business of a dealer buying and selling livestock in commerce; and

b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his business as a dealer or market agency under the Act, shall cease and desist from:

1. Failing to pay or failing to pay, when due, for livestock; and

2. Issuing checks in purported payment for livestock without having and maintaining sufficient funds on deposit in the bank account upon which they are drawn to pay such checks when presented.

Respondent is suspended as a registrant under the Act for a period of three (3) months and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the three (3) month period.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

In re: LOUIE W. ARGOE. P&S Docket No. 6618. Decided December 10, 1985.

Dealer—Bonding requirements—Prohibited from operating subject to the Act—Civil penalty—Consent.

Stephen Luparello, for complainant.
William S. Robinson, Columbia, South Carolina, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Louie W. Argoe, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Orangeburg, South Carolina 29115.

2. The respondent is, and at all times material herein was:

(a) President of Argoe Livestock, Inc., a corporation organized and existing under the laws of the State of South Carolina. Said corporation, under the direction, management and control of respondent Argoe, is registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account, although such registration has been inactive since 1983.

(b) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(c) Not registered with the Secretary of Agriculture in an indi-

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is prohibited from operating subject to the Act until such time as he complies fully with the registration and bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such registration and bonding requirements, a supplemental order will be issued in this proceeding terminating this prohibition.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Three Hundred and Fifty Dollars ($350.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: DIRECT MEAT CO., INC. GERALD NAEHRING, and LAWRENCE J. AMANN. P&S Docket No. 6552. Decided December 11, 1985.

Packer—Insufficient funds checks—Failure to pay when due—Civil penalty—Consent.

Peter Train, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AS TO DIRECT MARKET MEAT CO., INC., AND GERALD NAEHRING

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. This decision is entered pursu-

ant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Direct Meat Co., Inc. and Gerald Naehring admit the jurisdictional allegations in paragraphs I and II of the Complaint and Notice of Hearing as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Direct Meat Co., Inc., hereinafter referred to as the corporate respondent, is a corporation whose business mailing address is 11564 Gondola Drive, Cincinnati, Ohio 45241.

2. The corporate respondent at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for the purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Gerald Naehring and Lawrence J. Amann, hereinafter referred to as the individual respondents, are individuals whose business mailing address is 11564 Gondola Drive, Cincinnati, Ohio 45241.

4. The individual respondents at all times materiel herein were:

(a) President and Vice-President, respectively, of the corporate respondent; and

(b) Jointly responsible for the direction, control and manegement of the corporate respondent.

5. The individual respondents at all times material herein were packers within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondents Direct Meat Co., Inc. and Gerald Naehring having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered,

ORDER

Respondent Direct Meat Co., Inc., its officers, directors, agents, and employees, and respondent Gerald Naehring, individually or as

an officer, agent or employee of respondent Direct Meat Co., Inc., directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Gerald Naehring is assessed a civil penalty in the amount of $500.00 (Five Hundred Dollars).

The provisions of this order shall become effective on the first day after service of this decision on the respondents.

Copies of this decision shall be served on the parties.

In re: JAMES McGUINNESS. P&S Docket No. 6564. Decided October 31, 1985.

Dealer—Market agency—Insufficient funds checks—Failure to pay when due—Suspension—Default.

Robert Swartzendruber, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated hereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) James McGuinness, doing business as McGuinness Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is 363 Emerald Hills Drive, P. O. Box 31175, Billings, Montana 59107.

(b) The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. (a) Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

(b) Respondent, on or about the dates and in the transactions specified above, purchased livestock and failed to pay, when due, for such livestock purchases.

(c) As of April 22, 1985, there remained unpaid by the respondent a total of $139,613.13 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

Respondent James McGuinness, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

Respondent is suspended as a registrant under the Act for a period of six (6) months.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final December 11, 1985.—Ed.]

In re: DUBUQUE PACKING COMPANY. P&S Docket No. 6529. Decided December 13, 1985.

Packer—Cease and desist from giving or offering money or any gift or gratuity to or for any customer to influence purchases—Cease and desist from soliciting or accepting favored treatment—Maintaining records that fully disclose details of all payments and gifts—Civil penalty—Consent.

Peter Train, for complainant.
James M. Kefauver, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act. The complaint was subsequently amended. Because an order had already been issued against the other initial respondent, the amended complaint named only Dubuque Packing Company as a respondent. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Dubuque Packing Company admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedurs, and consents and

agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dubuque Packing Company, hereinafter referred to as respondent Dubuque, is and at all times material herein was, a corporation with its principal place of business located at 7171 Mercy Road, Suite 200, Omaha, NE 68106.

2. Respondent Dubuque is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for the purposes of slaughter, and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

Respondent Dubuque Packing Company having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Dubuque Packing Company, its officers, directors, agents and employees, successors, and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Directly or indirectly giving or offering to give, or permitting or causing to be given, money or any gift or gratuity of more than nominal value to, or for the benefit of, any officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence such persons to purchase or promote the purchase of meat, meat food products, poultry or poultry products from respondent;

2. Soliciting or accepting favored treatment for respondent from any customer or prospective customer of respondent, through the offer or gift of money or any gift or gratuity of more than nominal value to, or for the benefit of, any officer, director, agent or employee of a customer, or prospective customer, in connection with the purchase by said persons of meat, meat food products, poultry or poultry products from respondent; and

3. Making or offering to make brokarage commission or merchandising service payments in connection with the sale and distribution of meat, meat food products, poultry or poultry products to any person unless such person actually rendered brokerage or merchandising services.

Respondent Dubuque Packing Company shall prepare and maintain records and memoranda sufficient to fully disclose the details of all brokerage commission or merchandising service payments and of all gifts and gratuities of more than nominal value given by respondent Dubuque in connection with the sale and distribution of meat, meat food products, poultry or poultry products including, but not limited to, the following:

1. Name and business affiliation of the recipient;
2. The date the payment, gift or gratuity was given;
3. The name of respondent's employee involved in the transaction;
4. A description of the gift or gratuity, including its value; and
5. The purpose of the payment, gift or gratuity.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Dubuque is hereby assessed a civil penalty of Thirty Thousand Dollars ($30,000.00).

The provisions of this order shall become effective on the first day after service of this decision on respondent Dubuque Packing Company.

Copies hereof shall be served on the parties.

In re: SIMPSON LIVESTOCK COMPANY. P&S Docket No. 6548. Decided October 30, 1985.

Dealer—Market agency—Bonding requirements—Cease and desist from business for which bonding is required under the Act—Civil penalty—Default.

Thomas Heinz, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder. (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was

informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Simpson Livestock Company, hereinafter referred to as the respondent, is a corportion whose business mailing address is Route 8, Box 58, McMinnville, Tennessee 37110.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for its own account, and a market agency buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy livestock in commerce on a commission basis.

2. The Packers and Stockyards Administration notified respondent on April 16, 1985, that the surety bond it maintained to secure the performance of its livestock obligations under the Act was inadequate, and that it was necessary to file a bond or bond equivalent in the amount of $15,000.00 before continuing in dealer or market agency operations. Respondent was further notified that if it continued its livestock operations without adequate bond coverage or its equivalent, it would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a dealer buying and selling livestock in commerce for its own account, and a market agency buying livestock in commerce on a commission basis, without maintaining adequate bond coverage or its equivalent, as required by the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondent Simpson Livestock Company, its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Inasmuch as respondent has demonstrated that it is in full compliance with the bonding requirements under the Act and the regulations, no suspension of registration is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service unless appealed within 30 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR § 1.130 *et seq.*).

[This decision and order became final December 13, 1985.—Ed.]

In re: ALLEN H. RIFFEE. P&S Docket No. 6477. Decided December 16, 1985.

Dealer—Market agency—Failure to properly weigh livestock—Paying on the basis of false or incorrect weights—Failure to maintain and operate scales to insure accuracy—Bonding requirements—Suspension—Consent.

Stephen Luparello, for complainant.
Arthur G. Canhiotte, Woodstock, Virginia, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Allen H. Riffee, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 470, Edinburg, Virginia 22824.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

(b) Engaged in the business of a market agency buying livestock in commerce on a commission basis.

3. Respondent is registered with the Secretary of Agriculture as a dealer to purchase livestock for slaughter only.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Allen H. Riffee, his agents or employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights;

2. Issuing scale tickets, purchase invoices or other accounts of sale on the basis of false or incorrect weights;

3. Paying the sellers or consignors of livestock on the basis of false or incorrect weights;

4. Failing to maintain and operate livestock scales owned or controlled by the respondent is such a manner as to insure accurate weights and otherwise in strict conformity with the requirements of section 201.73-1 of the regulations; and

5. Engaging in business in any capacity for which bonding is required under the Act and the regulations without having and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act for a period of four (4) months and thereafter until such time as he is in full compliance with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating the suspension after the expiration of the four (4) month period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: SEMO LIVESTOCK EXCHANGE, INC., and CHARLES W. POEPPELMEYER, JR. P&S Docket No. 6517. Decided December 19, 1985.

Market agency—Dealer—Bonding requirements—Suspension—Consent.

Stephen Luparello, for complainant.
Donald Rhodes, Bloomfield, Missouri, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. SEMO Livestock Exchange, Inc., hereinafter referred to as corporate respondent, is a corporation whose principal place of business is located in Charleston, Missouri. Corporate respondent's business mailing address is Route 2, Bloomfield, Missouri 63825.

2. Corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock on a commission basis in commerce; and

(b) Registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis in commerce, and as a dealer to buy and sell livestock in commerce for its own account.

3. William W. Poeppelmeyer, Jr., hereinafter referred to as the individual respondent, is an individual whose mailing address is Route 2, Bloomfield, Missouri 63825.

4. Individual respondent, at all times material herein, was:

(a) President of the corporate respondent; and

(b) Responsible for the direction, management and control of all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties haveing agreed to the entry of this decision, such decision will be entered.

ORDER

SEMO Livestock Exchange, Inc., its officers, directors, agents, successors and assigns, and Charles W. Poeppelmeyer, Jr., directly or through any corporate or other device, in connection with their business subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations without filling and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

The respondents are suspended as registrants under the Act for a period of sixty (60) days and thereafter until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the sixty (60) day period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: HARING MEATS AND DELICATESSEN, INC., and J. FRANK HARING. P&S Docket No. 6583. Decided December 19, 1985.

Packer—Failure to pay when due—Failure to pay full purchase price—Civil penalty—Consent.

Dennis Becker, for complainant.
Richard R. Fowler, Mansfield, Ohio, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragragh I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Haring Meats and Delicatessen, Inc., hereinafter referred to as the corporate respondent, is an Ohio corporation whose business mailing address is 1095 National Parkway, Mansfield, Ohio 44906.

2. Corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying meats and meat food products in commerce for purposes of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. J. Frank Haring, hereinafter referred to as the individual respondent, is an individual whose mailing address is 2089 Alta West Road, Mansfield, Ohio 44903.

4. The individual respondent is, and at all times material herein was:

(a) President and a director of the corporate respondent;

(b) Owner, in combination with his wife, of 100% of the outstanding stock of the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Haring Meats and Delicatessen, Inc., its successors, officers, directors, agents and employees, directly or through any corporate or other device, and respondent J. Frank Haring, his agents or employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price for meat and meat food products; and

2. Failing to pay the full purchase price for meat and meat food products.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent J. Frank Haring is assessed a civil penalty of Two Thousand Five Hundred Dollars ($2,500.00).

The provisions of this order shall become effective on the first day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

In re: LEE BREITSPRECHER. P&S Docket No. 6621. Decided December 19, 1985.

Dealer—Failure to pay when due—Insufficient full funds checks—Suspension—Consent.

Barbara Harris, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lee Breitsprecher, d/b/a Two B Cattle Co., hereinafter referred to as the respondent, is an individual whose mailing address is Box 1781, Billings, Montana 59103.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Lee Breitsprecher, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and

2. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to permit their payment upon presentation.

Respondent is suspended as a registrant under the Act for 21 days.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

In re: VAN DER GEEST & SONS, INC. P&S Docket No. 6484. Decided December 26, 1985.

Dealer—Drugs administered to livestock—Civil penalty—Consent.

Jory Hochberg, for complainant.
Keith Kostecker, Wausau, Wisconsin, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) Van Der Geest & Sons, Inc., hereinafter referred to as respondent Van Der Geest, is a corporation with its principal place of business located in Merrill, Wisconsin. Its business mailing address is N2224 Bus. 51 North, Merrill, Wisconsin 54452.

(b) Respondent Van Der Geest is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account;

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce.

CONCLUSIONS

Respondent Van Der Geest having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Van Der Geest, its officers, directors, agents, and employees, directly or through any corporate or other device, shall cease and desist from:

1. Preparing and issuing certifications or any other documents which state that drugs have not been administered to livestock, or that if drugs have been administered to livestock that the withdrawal period specified on the drug label has been followed, when such certifications or statements are incorrect; and

2. Representing in any manner to purchasers of livestock, to agents or employees of such purchasers, or to any other persons involved in the marketing or slaughter of livestock, that drugs have not been administered to livestock, or that if drugs have been administered to livestock the withdrawal periods specified on the drug labels have been followed, when such representations are incorrect.

Respondent shall deliver a copy of this order to all of its officers, employees and agents whose duties and responsibilities include, in whole or in part, administering drugs to livestock or marketing, selling, or consigning livestock.

In accordance with section 312(b) of the act (7 U.S.C. 213(b)), respondent Van Der Geest is assessed a civil penalty in the amount of Four Thousand Dollars ($4,000).

ORDER

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served upon the parties.

In re: LLOYD N. DAGLEY. P&S Docket No. 6633. Decided December 26, 1985.

Dealer—Failure to pay when due—Failure to pay full purchase price—Insufficient funds checks—Prohibited from engaging in business under the Act—Consent.

Thomas Heinz, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hersinafter "the Act," by a Complaint filed by the Administrator, Packers and Stockyards Administra-

tion, United States Department of Agriculture, alleging that the respondent willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

This respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Lloyd N. Dagley, hereinafter "the respondent," is an individual doing business as Lloyd's Meat Distributing with a business mailing address at 7900 West Lawn, Westchester, California 90045.

2. The respondent at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) A dealer within the meaning of and subject to the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, individually or through any corporate or other device, in connection with any business or operation subject to the Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2. Failing to pay the full purchase price of livestock; and

3. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented.

Respondent is prohibited from engaging in business as a market agency or dealer subject to the Act for a period of five years, provided, however, that a supplemental Order will be issued terminating this prohibition at any time after the expiration of 30 days upon demonstration by respondent that all unpaid livestock sellers have been paid in full, and provided further that this prohibition may be modified upon application to the Packers and Stockyards

Administration to permit respondent's salaried employment by a registrant after the expiration of the 30 day period of prohibition.

This order shall have the same force and effect as if entered after full hearing and shall be effective on the sixth day after service upon respondent.

Copies of this decision shall be served upon the parties.

In re: BUFORD "PETE" WATSON, JR. P&S Docket No. 6572. Decided December 27, 1985.

Dealer—Bonding requirements—Failure to pay when due—Prohibited from operating subject to the Act—Consent.

Peter Train, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the juriadictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Buford "Pete" Watson, Jr., doing business as B&W Cattle Company, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 1, Box 93-1A, Rutledge, Tennessee 37861.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) A dealer within the meaning of and subject to the provisions of the Act; and

(c) Not registered with the Secretary of Agriculture.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Watson, his agents, employees and assigns, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations; and

2. Failing to pay, when due, for livestock purchases.

Respondent is prohibited from operating subject to the Act for a period of 30 days and thereafter until he complies with the bonding requirements under the Act and the regulations. When he demonstrates his compliance with the bonding requirements, a supplemental order will be issued removing the prohibition after the expiration of the 30 day period.

The provisions of this order shall become effective on the sixth day after service of this decision on the respondent.

Copies of this decision shall be served on the parties.

In re: DAVID MULSO, DAVE MULSO CATTLE COMPANY, SIRLOIN, INC ELKTON LIVESTOCK, INC., and WESLEY VAN DYKE. P&S Docke No. 6487. Decided December 31, 1985.

Dealer—Market agency—Misrepresentation of purchase weights and prices—In sufficient funds checks—Failure to pay when due—Suspension—Consent.

Peter Train, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AS TO RESPONDENTS DAVID MULSO, DAVE MULSO CATTLE COMPANY, AND SIRLOIN, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondents David Mulso, Dave Mulso Cattle Company, and Sirloin, Inc. admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. David J. Mulso, hereinafter referred to as respondent Mulso, is an individual whose mailing address is 1328 Orchard Drive, Brookings, South Dakota 57006.

2. Respondent Mulso was, at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and

(b) Registsred as an individual with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for hie own account.

8. On September 29, 1981, a corporation, Dave Mulso Cattle Company, was formed as a South Dakota corporation and the successor to respondent Mulso's individual business.

4. Respondent Dave Mulso Cattle Company was engaged in the business of a dealer buying and selling livestock in commerce for its own account, and a market agency buying livestock in commerce on a commission basis.

5. Respondent Mulso was, at all times material herein:

(a) Owner, in combination with his wife, of all the corporate stock of respondent Dave Mulso Cattle Company; and

(b) Responsible for the direction, management and control of respondent Dave Mulso Cattle Company.

6. On May 17, 1982, respondent Mulso incorporated his business under the trade name of Sirloin, Inc., with his wife Susan K. Mulso as incorporator and sole owner of the corporate stock.

7. Sirloin, Inc., hereinafter referred to as respondent Sirloin, is a corporation whose mailing address is 1328 Orchard Drive, P.O. Box 542, Brookings, South Dakota 57006.

8. Respondent Sirloin was, at all times material herein:

(a) Engaged in the business of buying and selling livestock in commerce as the agent of respondent Elkton;

(b) A dealer within the meaning of that term as defined in the Act, and subject to the provisions of the Act; and

(c) Directed, managed and controlled by respondent Mulso.

CONCLUSIONS

Respondents David Mulso, Dave Mulso Cattle Company, and Sirloin, Inc., having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents David Mulso, Dave Mulso Cattle Company, and Sirloin, Inc., their agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Misrepresenting to their principals, or to other purchasers of livestock from respondents, the original purchase weights or the original purchase prices for such livestock;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate or misleading weight or price entries for such livestock;

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate, or misleading weight or price entries on accounts of purchase, invoices or billings;

4. Filling orders for their principals with livestock previously purchased for their own account without disclosing that they owned the livestock;

5. Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any entry, statement or information by reason of which insertion or omission a false or misleading record is made, in whole or in part, of such livestock purchase or sale transaction;

6. Issuing checks in payment for the purchase of livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented;

7. Failing to pay, when due, the full purchase price of livestock; and

8. Failing to pay for livestock.

Respondent David Mulso, individually, or through any corporate or other device, including Dave Mulso Cattle Company and Sirloin, Inc., is suspended as a registrant under the Act for a period of three (3) years.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

MISCELLANEOUS ORDERS

In re: WILLIAM E. BOYCE. P&S Docket No. 6612. Order issued November 6, 1985.

Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

The Complainant by Motion filed November 4, 1985, requests that the Complaint issued in this matter be dismissed with prejudice. *IT IS ORDERED*, that the Complaint filed in this matter on October 18, 1985, be, and hereby is, dismissed with prejudice.

In re: SAM SIMMONS. P&S Docket No. 5548. Order issued December 3, 1985.

Order issued by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On March 16, 1978, an order was issued in the above-captioned matter which, *inter alia,* suspended respondent as a registrant under the Act for seven (7) days and thereafter until he demonstrates that he is no longer insolvent.

Although respondent has not demonstrated that he is no longer insolvent, another registrant under the Act has agreed to be legally responsible for all respondent's purchases and has provided the necessary bond to secure those purchases. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 16, 1978, is amended to permit the respondent to operate as a dealer so long as he is cleared by a non-suspended registrant who has obtained the appropriate reasonable bond or its equivalent. Respondent Simmons shall clearly and explicitly inform all persons from whom he purchases livestock that his purchases are being cleared and that he is not legally responsible for the payment of his purchases, as well as providing them with the name and address of the person who is clearing his purchases. The order shall remain in full force and effect in all other respects.

In re: GERALD F. UPTON, d/b/a DEGRAFF LIVESTOCK SALES. P&S Docket No. 6196. Order issued December 4, 1985.

The Judicial Officer ruled on reconsidereion that ceoss and desist orders will be issued in P&S coses. The Eighth Circuit's opinion in *Farrow,* setting asids a 45-day suspension order as to two buyers who egreed not to compete, is erroneous and will not be followed in future cases. A violation is willful if a person intentionelly doee an act irrespective of evil motive or reliance on erroneoue edvice, or ects with careless dieregard of statutory requirements.

Order issued by Donald A. Campbell, Judicial Officer.

RULING ON RECONSIDERATION

On October 2, 1985, the Judicial Officer filed the Decision and Order in this proceeding in which a ceasa and desist order was not issued for the following reason (slip op. at 34):

> Although a ceasa and desist order has routinely been issued in cases of this nature, I believe that it should be omitted in this case and in future cases where it is now

worthless, in view of the 1976 amendments to the Act, i.e., where there is no reasonable likelihood that the Department would ever seek to collect the civil penalty imposed by the Act for violating a cease and desist order (7 U.S.C. § 215(a)). Since the 1976 amendments authorize the Secretary to assess a civil penalty of $10,000 for each violation, in an administrative proceeding (7 U.S.C. § 213(b)), it is not likely that the Secretary would seek to obtain a $500 penalty in a court proceeding authorized by 7 U.S.C. § 215(a) in a case of this nature.[15] Hence in cases such as this and *Farrow*, cited above, a worthless cease and desist order should not be issued.

On October 15, 1985, complainant filed a petition for reconsideraion, contending that cease and desist orders should not be omitted for the following reasons (Petition for Reconsideration at 1–3):

Complainant's request for a cease and desist order is not based on the administration's desire to seek to collect the civil penalty imposed by the Act for future violations of such cease and desist provisions. The 1976 amendments authorize the Secretary to assess a civil penalty of $10,000 for each violation of section 312(a) of the Act (7 U.S.C. § 213(a)), in an administrative proceeding. As the Judicial Officer correctly pointed out, the $10,000 penalty per violation is a more effective deterrent than the $500 penalty provided for in enforcement proceedings authorized by 7 U.S.C. § 215(a). However, the Administration does not bring enforcement actions under 7 U.S.C. § 215 solely for the imposition of the forfeiture which is provided. In all cases, the primary reason for bringing such enforcement action is to obtain permanent injunctive relief against the defendant so that, in the event of future violations of the cease and desist provisions of the order, the defendant would be in jeopardy of the criminal sanctions of a criminal contempt action. In that sense, the cease and desist provisions expand the options available to the Administration in enforcement of the provisions of the Act.

[15] In cases involving registrents where the Depsrtment might be involved in a court proceeding for other reasons, e.g., to obtain an injunction in e bond-violation case, a cease and desist order should continue to be iesued since the Department might wish to obtain e civil penalty in such e proceeding for violation of a prior cease end desist order.

The Administration has three options available to it when a respondent has violated a cease and desist order. It can proceed with a second administrative proceeding; it can seek to enforce the order through the district court; or it can proceed both administratively to assess administrative sanctions, including suspensions and civil penalties where warranted, as well as through the courts to obtain injunctive relief. The Administration has exercised all three options in the past where appropriate circumstances warranted it, and will continue this policy in the future. The availability of all three options constitutes an effective and important tool of the Administration in dealing with violations of the Act.

Although the imposition of a substantial civil penalty and suspension of registration as authorized by the Act constitutes an effective penalty for violations of the act, the order requiring respondent to cease and desist from particular practices also has deterrent effect. Long after payment of the civil penalty has been completed, the cease and desist order remains applicable. Both the respondent, as well as others within the industry similarly situated, are aware of the continuing effect of such orders in constraining respondent's behavior. Even in cases such as this, where respondent's actions were found to be careless rather than deliberate or wilful, the cease and desist order acts as a continuing deterrent to remind respondent of the need to continually assure himself that he is operating accurate equipment and using appropriate procedures to insure correct and accurate weights of livestock weighed on his scales.

Finally, an order requiring the respondent to cease and desist from certain practices provides specific notice to the respondent, as well as the industry, as to the kind of practices and business conduct the Administration considers to be in violation of the Act. Cease and desist orders are frequently broader than the specific violation which further provides the industry with the knowledge of what the Administration considers to be unfair, deceptive or unjustly discriminatory.

For the reasons set forth by complainant, cease and desist orders will be issued in all Packers and Stockyards Act cases where violations are found.

Perhaps a word of explsnation is appropriate as to why I decided to omit cease and desist orders in cases of serious trade practice violations where the Department would not likely seek to collect the modest civil penalty imposed by the Act for violating a cease and desist order. Although as stated in the original decision in this case, I believed that a cease and desist order was worthless in such cases, I was hoping to lessen the possibility of another catastrophic decision such as *Farrow* v. *USDA*, No. 83-2548 (8th Cir. Apr. 24, 1985), which affirmed the administrative decision as to the violation in *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), but set aside the 45-day suspension order, leaving only a cease and desist order in effect. I felt that where a court agreed that a violation occurred, it would be less likely to upset a suspension order if it knew that if it did, the violator would escape scot-free.

In *Farrow*, the two principal buyers of pound cows at the Algona stockyard, Knoke and Farrow, agreed not to compete against each other, and that one would purchase pound cows for the two of them, and they would split the profits.

The court agreed "with the JO that elimination of one of the principal buyers as an active bidder tended to reduce competition at the Algona sales and, as a result, created a likelihood that the prices at which the cows were purchased would be reduced" (slip op. at 7). Nonetheless, the court set aside the 45-day suspension order, leaving intact only a cease and desist order, because the court held that the "record contains no support for deeming the violations intentional, flagrant, or serious, or that petitioners were aware of unlawfulness" (slip op. at 13-14).

I disagree with the court's view. Based on my 36 years' experience with the United States Department of Agriculture, much of which has been devoted to Packers and Stockyards Act matters, including 8 years as administrator of the Packers and Stockyards Act Regulatory Program (December 1962-January 1971), I would have concluded that an agreement not to compete by the two principal purchasers of pound cows at an auction market was a serious and flagrant violation, warranting at least a 45-day suspension order, irrespective of any expert testimony in the record in that respect. In *Farrow*, however, the record does contain the expert opinion of a witness for the Packers and Stockyards Administration who testi-

[illegible] iditor representing the
[illegible] e a recommendation to
[illegible] nd the entire record in

this case, of what sanction that the Packers and Stockyards would impose for the violations herein alleged?

A. Yes. The Packers and Stockyards Administration is requesting a cease and desist order from the alleged violation, and suspension of respondents as registrants under the Packers and Stockyards Act for the period of 45 days.

Q. Is this for both respondents, each to receive 45 days?

A. Yes.

Q. Could you tell the Court on what basis you have reached this recommendation—or that the Packers and Stockyards Administration, who you are representing, reached this sanction?

A. This sanction was reached under policy that we consider the activity alleged here to be unfair and deceptive, and that we feel that the more buyers there are in the market, the more chance the farmer has of getting more money, because this is why it goes to an auction market rather than selling direct off the farm.

We consider this to be a serious violation, and in light of that, we have asked for a suspension that we feel is uniform.

Other cases which have gone to hearings—we look at the deterrent factor both as to the respondents and to others in the industry.

Q. And you've heard the testimony today about how crucial such a sanction would be to the respondents, and you've taken all this into consideration?

A. Yes. Our primary responsibility is to protect the producer.

Q. And you have taken into account that although a pound cow or a cull cow may be the bottom of the market, it is still an important part of that market?

A. Right. In the economic times which the farmers find themselves in now, I believe every dollar is important to them.

Although I inferred that Farrow and Knoke knew that their agreement not to compete was unlawful, I would have imposed the same 45-day suspension order irrespective of whether they knew

they were violating the law. As stated in *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983) (slip op. at 54-55):

> Respondents would have to be incredibly naive not to know that their agreement violated the comprehensive Packers and Stockyards Act regulatory program. I do not believe that they are incredibly naive.[21] But in any event, a violation is wilful, so that a suspension order can be issued (5 U.S.C. § 558(c)), if a person (i) intentionally does an act which is prohibited, irrespective of evil motive, or reliance on erroneous advice, or (ii) acts with careless disregard of statutory requirements. *In re Shatkin*, 34 Agric. Dec. 296, 298-314 (1975), and cases cited therein. And *see Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-87 (1973).

The Court stated in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973):

> The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent.

Suspension orders have routinely been upheld where a finding of willfulness was made by the Department without finding that the respondent knew that his conduct was unlawful. For example, in *Goodman* v. *Benson*, 286 F.2d 896, 900 (7th Cir. 1961), the court upheld a suspension order, stating:

> We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. v. Benson, 3 Cir., 278 F.2d 606, 609.

Similarly, in *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 609 (3d Cir. 1960), the court upheld a suspension order, stating:

> Nor can we subscribe to the proposition that the test of willfulness in this context is to be evil purpose or criminal intent, for this is not a criminal statute.

For the foregoing reasons, the court's decision in *Farrow* will no be followed by this Department in any future case, even in futur cases that will be reviewed by the Eighth Circuit. (Hopefully *Farrow* is a judicial aberration that will not be repeated.)

In view of the considerations advanced by complainant in its Pe tition for Reconsideration, the following order should be issued.

ORDER

Respondent Gerald F. Upton, his agents and employees, individ ually or through any corporate or other device, shall cease an desist from:

1. Weighing livestock at other than their true and correc weights;

2. Issuing scale tickets, purchase invoices or other accounts o sale on the basis of false and incorrect weights;

3. Paying the sellers or consignors of livestock on the basis o false and incorrect weights;

4. Collecting from purchasers of livestock on the basis of fals and incorrect weights; and

5. Failing to maintain and operate livestock scales owned o controlled by respondent in such manner as to insure accurat weights and otherwise in strict conformity with the requirement of § 201.73–1 of the regulations (9 CFR § 201.73–1).

Respondent is hereby assessed a civil penalty of $2,500 payabl not later than the 90th day after service of this order, to be paid b certified check made payable to the Treasurer of the United States and mailed to the Assistant General Counsel, Packers and Stock yards Division, Office of the General Counsel, Room 2446–South United States Department of Agriculture, Washington, D.C. 20250

Respondent is suspended as a registrant under the Act for a period of 28 days.

The suspension provisions of this order shall become effective o the 30th day after service of this order; *Provided,* however, that i by any means or device whatever, all or part of the suspensio period is not effectively served during the period indicated above the effective date of the beginning of the suspension period (or th part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate orde with respect thereto, or (ii) upon a showing made by complainan that it is not likely that such an order will be entered by any court the date subsequently fixed by the Judicial Officer (jurisdiction i

hereby retained by the Judicial Officer indefinitely for this limited purpose).

In re: JOHN BUCHHOLZ. P&S Docket No. 6593. Order issued December 4, 1985.

Order issued by Dorothea A. Baker, Administrative Law Judge.

DENIAL OF MOTION TO SET ASIDE CONSENT DECISION

Having considered the pleadings herein, including the Respondent's Motion to Set Aside Consent Decision, filed November 13, 1985, and the Complainant's Answer to Respondent's said Motion, filed November 29, 1985, the following Order is issued:

ORDER

The Respondent's Motion to Set Aside Consent Decision, filed November 13, 1985, is hereby DENIED.

Copies hereof shall be served upon the parties.

In re: STATE WIDE MARKETING, INC., a corporation, RUSTY THOMPSON, an individual, and LARRY ROSS, an individual. P&S Docket No. 6588. Order issued December 6, 1985.

Order issued by William J. Weber, Administrative Law Judge.

ORDER AMENDING DECISION

Complainant moves to amend the consent order, filed November 8, 1985, to exclude State Wide Marketing, Inc. from the purview of the consent order.

IT SHOULD BE AND HEREBY IS ORDERED that the complsinant's motion to amend is granted.

In re: SARGENT LIVESTOCK COMMISSION COMPANY, INC., LORRY MARSHALL and PAUL SWANSON. P&S Docket No. 6624. Order issued December 17, 1985.

Order issued by John A. Campbell, Administrative Law Judge.

ORDER DENYING MOTION FOR A STAY

On November 29, 1985, Respondent, Lorry Marshall, filed a "Suggestion In Bankruptcy", indicating that the instant proceeding is stayed by virtue of said respondent's filing of a voluntary bankruptcy petition. Complainant filed an opposition on December 12, 1985, to respondent's suggestion.

For the reasons stated in complainant's opposition, respondent Marshall's motion for a stay is denied.

Upon the filing of a motion for oral hearing, the matter will be assigned to a Judge to schedule an oral hearing.

REPARATION DECISIONS

URBAN "SHORTY" ARNZEN *v.* ELKTON LIVESTOCK, INC., WES VAN DYKE, DAVID MULSO, TRI-STATE LIVESTOCK AUCTION CO., INC., and PAUL DEN HERDER. P&S Docket No. 6129. JACK BROADBROOKS, BOYD BURTCH, SANDRA BRUTCH, DARRYL CRASCO, IRENE CRASCO, LUKE CRASCO, MAYNARD CRASCO, ORVILLE JAKE CRASCO, WILL CRASCO, DARCIE DONEY, WANDA DONEY, BEN FEWER, JAMES FEWER, LOREN FLADLAND, LARRY HAYNES, RAYMOND HEGLESON, CARL J. IVERSON, BRUCE KIRKALDIE, RAYMOND J. KNUDSON, MEISSNER RANCHES, INC., SHAWN MEISSNER, THE MILLER COLONY, INC., STEVEN PANKRATZ, JACK QUISNO, and GERALD J. "BUD" WALSH, Admr., Estate of Gerald M. Walsh *v.* SAME. P&S Docket No. 6167. NOEL CAPDEVILLE *v.* SAME. P&S Docket No. 6165. CORN EXCHANGE BANK *v.* TRI-STATE LIVESTOCK AUCTION CO., INC., ELKTON LIVESTOCK, INC., SIRLOIN, INC., DAVID MULSO, and PAUL DEN HERDER. P&S Docket No. 6166. Decided November 1, 1985.

Dealer—Insufficient funds checks—Dishonored checks—Order for the payment of money.

The complaints of all parties except Corn Exchange Bank alleged sales of livestock to Elkton Livestock, Inc., and receipt of checks dishonored for insufficient funds. Complainant Corn Exchange Bank alleged honor of check drawn on the Elkton account in reliance on items deposited therein but dishonored by Tri-State. Tri-State entered bankruptcy October 14, 1988. The four proceedings were consolidated for oral hearing. Respondents Elkton Livestock, Inc., Wea Ven Dyke, and David Mulso were ordered to pay various sums to the complainants, except complaint of Corn Exchenge Bank was dismissed. All complaints were dismissed aa to respondent Paul Den Herder.

John J. Casey, Presiding Officer.
David R. Crary and *Craig A. Raby,* Sioux City, Iowa.
Dean J. Miller, Caldwell, Idaho.
Michael F. Pieplow, Sioux Falls, South Dakota.
Steven W. Sanford, Sioux Falls, South Dakota.
Respondent David Mulso, *pro se.*
Respondent Sirloin, Inc., *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER AS TO ALL RESPONDENTS EXCEPT TRI-STATE LIVESTOCK AUCTION CO., INC.

PRELIMINARY STATEMENT

These are four reparation proceedings under the Packers and Stockyards Act, 1921, as amended, begun by written complaints received as follows: from Mr. Arnzen February 1, 1983; from Mr. Broadbrooks and others February 22; from Mr. Capdeville March 7; and from the Corn Exchange Bank March 7. The first three com-

plaints alleged in substance sales of livestock to respondent Elkton Livestock, Inc. (Elkton) and receipt of checks which were dishonored for insufficient funds because certain items deposited in the Elkton checking account were dishonored by respondent Tri-State Livestock Auction Co., Inc. (Tri-State). The complaint of the Corn Exchange Bank alleged in substance honor of checks drawn on the Elkton account in reliance on items deposited in that account which were dishonored by Tri-State, and that a certain transfer by Tri-State of proceeds of sale of livestock was unlawful. The amounts claimed were: for Mr. Arnzen $141,290.82; for Mr. Broadbrooks and others a total of $324,231.66; for Mr. Capdeville $28,427.25; and for the Corn Exchange Bank $1,190,281.80.

Copies of the complaint of Mr. Arnzen were served on all respondents named therein on February 25, 1983. Copies of the complaint of Mr. Broadbrooks and others, and the complaint of Mr. Capdeville, were served on Elkton and Wes Van Dyke on March 26, and on the other respondents named therein on March 28. Copies of the complaint of the Corn Exchange Bank were served on Elkton on March 26, and on the other respondents named therein on March 28.

All respondents except Sirloin, Inc. duly filed answers. No issue was raised about timeliness of any answer. Each answer was served on each party other than the one filing it. A reply was filed on behalf of complainant Arnzen on April 18, 1983, which was served on all respondents in that case. Requests were duly filed for oral hearings.

Tri-State entered bankruptcy on October 14, 1983, No. 83-04290, Northern District of Iowa. Accordingly under 11 U.S.C. 362(a)(1) all these proceedings were stayed as to that respondent. All went forward as to the other respondents.

Motions to dismiss for lack of jurisdiction were filed on behalf of respondent Paul Den Herder, which were denied on October 31, 1983 by order of the presiding officer, properly we find, for reasons stated therein.

The four proceedings were consolidated for oral hearing, the rights of the litigants turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur 2d *Actions* §§ 156 *et seq.* The hearing was held on November 16, 1983 in Great Falls, Montana and December 6, 7, and 8, 1983 in Sioux Falls, South Dakota, before John J. Casey of the Office of the General Counsel of this Department. Complainants Arnzen, Broadbrooks and others, and Capdeville were represented by Dean J. Miller, Esq., Caldwell, Idaho and Craig A. Raby, Esq., Sioux City, [illegible] Exchange Bank was represented by Mi-

chael F. Pieplow, Esq., Sioux Falls. Respondents Elkton and Van Dyke were represented by Steven W. Sanford, Esq., Sioux Falls. Respondent Den Herder was represented by George A. Bangs, Joseph M. Butler, and Mark F. Marshall, Esqs., Rapid City, South Dakota. Respondent Mulso appeared without counsel. Fifteen witnesses testified and three exhibits were received at Great Falls; seven witnesses testified and 32 exhibits were received at Sioux Falls. Briefs were later filed by or on behalf of all parties.

As this is written, another administrative proceeding is pending in the Department (P&S Docket 6487) involving some of the respondents in these reparation proceedings. This decision necessarily reflects the record in these reparation proceedings in which complainants were represented by private counsel of their own choosing. In that other proceeding, before an Administrative Law Judge of the Department, Department counsel will have the burden of proof, and the decision therein will necessarily be based only on the record therein. No finding in these reparation proceedings, on the basis of the record in these reparation proceedings, will be taken as establishing any fact or as closing any issue in that other proceeding.

FINDINGS OF FACT

1. Complainant Urban "Shorty" Arnzen at all times material herein was doing business as Cottonwood Sales Yard, engaged in business as a market agency selling livestock in commerce on commission, with a principal place of business at Cottonwood, Idaho, and so registered with the Secretary under the Act.

2. Complainants Jack Broadbrooks and others, and Noel Capdeville, (the Montana ranchers) at all times material herein engaged in business raising cattle at various locations in the State of Montana.

3. Complainant Corn Exchange Bank at all times material herein was a bank with its principal place of business at Elkton, South Dakota.

4. Respondent Elkton at all times material herein was a corporation organized and existing under the laws of the State of South Dakota, with a principal place of business at Elkton, South Dakota, engaged in business as a dealer buying and selling livestock in commerce for its own account and as the agent of others, and so registered with the Secretary under the Act.

5. Respondent Wes Van Dyke, Elkton, South Dakota, at all times material herein engaged in business as a dealer buying and selling livestock in commerce as the agent of Elkton of which he was President.

6. Respondent David Mulso, Brookings, South Dakota, at all times material herein engaged in business as a dealer buying and selling livestock in commerce either for his own account or as the agent of Elkton.

7. Respondent Paul Den Herder, Sioux Center, Iowa, at all times material herein engaged in business as a dealer buying and selling livestock in commerce as the agent of Tri-State of which he was President. That was a corporation engaged in business as a market agency selling livestock in commerce on commission and as a dealer buying and selling livestock in commerce for its own account, operating on a posted stockyard of the same name at Sioux Center, Iowa, and so registered with the Secretary under the Act.

8. All dates referred-to herein are in the year 1982 unless otherwise stated.

9. At all times material herein Elkton had current liabilities in excess of its current assets and, when livestock was obtained in its name and by issuing checks on the Elkton checking account, such checks were drawn on insufficient funds in the hope of covering them later. Respondent Wes Van Dyke knew these facts well. Respondent David Mulso knew well that, when he obtained livestock in Elkton's name and by issuing checks on the Elkton checking account, the checks were drawn on insufficient funds in the hope of covering them later.

10. On December 1 complainant The Miller Colony, Inc., a Montana corporation, sold and delivered livestock to Elkton for an agreed price of which $8,309.50 was not paid.

11. On December 3 complainant Urban "Shorty" Arnzen sold and delivered livestock in response to an order placed by phone by respondent David Mulso in the name of Elkton. In purported payment for them Mr. Mulso issued and mailed him three checks on the Elkton checking account dated December 6 for the agreed prices, respectively, of $48,633.12, $48,090.56, and $44,567.14, for a total of $141,290.82. All three checks were drawn on insufficient funds and were later returned unpaid.

12. On dates as follows, complainants sold and delivered livestock to respondent David Mulso acting in the name of Elkton, or to others under direction of Mr. Mulso acting in the name of Elkton, for agreed prices, and received checks in purported payment, issued on the Elkton checking account by Mr. Mulso, which checks were drawn on insufficient funds and were later returned unpaid, as follows:

December 6:		
Jack Broadbrooks		
Larry Haynes		$2,822.88
Raymond J. Knudson		8,682.01
		4,468.76
December 7:		
Noel Capdeville		
Ben Fewer		$28,427.26
(person for whom he ected)		10,322.06
James Fewer		
		7,176.66
December 8:		
Darryl Crasco		
Luke Crasco		$11,476.55
	$8,702.90	
	9,612.06	
(person for whom he acted)		18,214.96
Irene Crasco		
Orville Jake Crasco		5,630.06
(persons for whom he acted)		49,644.30
Maynard Crasco		
Darcis Doney		268.30
Wande Doney		1,928.85
Will Crasco		1,994.60
Raymond Helgeson		5,104.20
	31,683.90	
	6,597.80	
(portion remaining unpaid after successful reclametion of some cattle)	1,875.30	
(persons for whom he acted)		40,157.00
Boyd Burtch		
Sandra Burtch		672.60
Carl J. Ivarson (through Dannis Iverson)		672.60
Bruce Kirkaldie		28,007.00
Meissner Ranches, Inc. (through Joe Meissner)	$18,668.36	60,717.10
	183.88	
(person for whom Joe Meissner acted)		18,862.24
Shawn Meissner		
Jack Quisno		606.43
Gerald J. "Bud" Walsh, Admr., Estate of Gerald		24,921.30
M. Walsh		23,602.90
December 9:		
Loren Fladland		
Steven Pankratz		3,138.00
		3,974.00

13. Each complaint was filed within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

Elkton was founded early in the year when Mr. Wes Van Dyke approached Mr. David Mulso, then both of them met with Mr. Dennis Hart, Agricultural Representative of the Corn Exchange Bank, then all three of them met with Mr. Harold E. "Jack" Hegerfeld, President of that bank. Messrs. Van Dyke, Mulso and Hart knew each other and had done business with each other before; Mr. Hegerfeld had known Mr. Van Dyke "all his life." A checking account in that bank was opened in the name of Elkton (the Elkton checking account) on which Mr. Mulso and Mr. Van Dyke were authorized to draw checks.

With Mr. Hegerfeld's approval the Corn Exchange Bank granted a line of credit (the Elkton line of credit) which in August was raised to $170,000, at 17% interest. Mr. Hart described it (Sioux Falls Tr. 488) as a "revolving line of credit to Elkton Livestock which would be an in and out situation. If one day they needed funds on it, we would advance it. If deposits were in the following day, it would be applied back to the note." However this testimony and Complainants' Exhibit 5, the statement issued by that bank on the Elkton checking account for the period from December 9, 1982 to January 7, 1983 (the Elkton checking account statement), are not consistent as explained below.

We note as a fact, without any comment intended, that the Elkton checking account statement does not reflect return without payment of any item. That is, for an item deposited in that account but later returned to the Corn Exchange Bank by another, the statement contains a credit entry for the deposit but no offsetting debit entry for the return. Also, for an item drawn on that account but returned by that bank, the statement contains no entry.

Throughout the continuation in business of Elkton, less than a year, Mr. Van Dyke was its President, sole Director, and sole shareholder, and Messrs. Van Dyke and Hart were its only officers. Mr. Van Dyke went on one expedition to Montana in which he negotiated some purchases of cattle in the name of Elkton, and at that and other times he signed contracts and checks for a total of 20% of the cattle bought in the name of Elkton. Mr. Mulso had a checkbook on the Elkton checking account in the Corn Exchange Bank which he used to obtain cattle in the name of Elkton. His connection with Elkton was at first direct and was later through Sirloin, Inc. which was owned by his wife Mrs. Susan Mulso. He would report transactions to Mr. Hart, at that bank, who kept a second checkbook (called the "small checkbook") on the same checking account with which among other things he would act as

paymaster for Mr. Mulso and make repayments to that bank on the Elkton line of credit.

The business in which Elkton and Mr. Mulso actually engaged was buying and selling cattle as a dealer, both on speculation and as agent for others. As to whether Messrs. Van Dyke and Mulso represented to Messrs. Hart and Hegerfeld that the enterprise would be only an order buyer, buy only when it had orders from others so that its income would be commissions only and its risk would be limited, and not a speculator, hoping to profit from market price fluctuation and subjecting itself to the risk thereof the testimony was conflicting.

The following are undisputed. Nothing was ever paid into Elkton as capital. If there ever was a time when Elkton had current assets in excess of current liabilities, it was not at any time material herein. Further, all checks issued on the Elkton checking account to obtain livestock at the times material herein were drawn on it sufficient funds in the hope of covering them later.

In early October an advance of $150,000 was requested, by Mr. Mulso in the name of Elkton from Mr. Paul Den Herder as President of Tri-State, on 552 steers consigned in the name of Elkton to Tri-State and in the latter's yard waiting to be sold on commission. Mr. Mulso explained that he had a banker calling for money. The advance was paid on Friday, October 8. Tri-State sold the steers for net proceeds exceeding $150,000 the following week, and deducted the $150,000 when it remitted the net proceeds on Friday, October 15. Thereafter Tri-State paid a number of such advances against cattle consigned to it in the name of Elkton, and deducted the amount of each when it remitted the net proceeds the following Friday. In each of these instances, Mr. Hart or Mr. Hegerfeld of the Corn Exchange Bank in Elkton, South Dakota would phone the Mulso home in Brookings, South Dakota and tell Mrs. Mulso, or Mr. Mulso if he was there, an amount to be deposited in the Elkton checking account. Then Mr. Mulso would tell Mrs. Mulso that Tri-Stte was the place to go for money. (He sometimes told her other places but those are not involved in these proceedings.) Then Mr. Mulso would drive from Brookings, South Dakota to Tri-State's place of business in Sioux Center, Iowa to pick up a check. The was a round trip of more than 200 miles and had to be completed by 3:00 p.m. the same day to get the advance check to Mr. Hart or Mr. Hegerfeld at the Corn Exchange Bank before it closed.

Tri-State conducted a weekly auction on Friday, though it made private treaty (negotiated) sales through the week. Tri-State remitted timely, with some exceptions involving small amounts, issued its check payable to Elkton each Friday, after the auction, for the p

ceeds of sale of cattle consigned in the name of Elkton and sold since the previous Friday, less advances as well as customary deductions such as for yardage, commissions, etc.

On Friday, November 5, such a loss was sustained on certain cattle shipped to Tri-State by Mr. Mulso in the name of Elkton as to be, for the latter, a financial disaster. That evening Messrs. Den Herder and Mulso with their wives met for dinner at a restaurant in Sioux Falls, South Dakota, about equally distant from their respective homes. Mr. Den Herder gave Mr. Mulso a check for those animals. Then, to enable advances to be obtained from Tri-State on cattle consigned in the name of Elkton for sale, and to be deposited in the Elkton checking account in the Corn Exchange Bank, without Mrs. Mulso having to make over-200-mile round trips, they agreed upon issuance of a draft book.

From November 5 onward, if not at other times, Elkton had current liabilities in excess of its current assets and, when livestock were bought in its name and checks were issued on the Elkton checking account in purported payment, the checks would be issued on insufficient funds in the hope of covering them later. The Corn Exchange Bank would credit the Elkton checking account with the full amount of each such draft when deposited, and pay checks drawn on the account, without waiting for collection of the funds covered by the draft. So far as the record shows Mr. Den Herder did not know that, but he admitted to what he called an "operating assumption" to that effect.

Tri-State's bookkeeper told Mrs. Mulso that he would send her the book of blank forms with the first blank form in it filled out as a sample to guide her in filling out the others. The sample contained handwritten entries showing Elkton as payee and "Tri-State Livestock by David Mulso" in the place for signature. The book was mailed to her.

All those instruments were made payable to Elkton, and all were deposited in the Corn Exchange Bank. They were on printed forms, so printed as to show them as addressed to the Northwestern State Bank, Orange City, Iowa, where Tri-State had its checking accounts, not addressed to Tri-State with an instruction to "present through" that bank. Thus the forms were of the sort usual for checks drawn on the latter bank. They were of the size customary for checks issued by a business firm. With no other information, anyone seeing one would call it a "check," and anyone seeing the book of blank ones would call it a "checkbook," although one might notice that they were "business" size but not imprinted with the name of any business firm other than the Northwestern State Bank. The only identification of Tri-State on each one was the

handwritten signature, "Tri-State Livestock by David Mulso." Most were executed by Mrs. Mulso, signing Mr. Mulso's name; a few were executed by Mr. Mulso.

Mr. Den Herder, on examination by opposing counsel who called him as an adverse witness, testifed (Sioux Falls Tr. 110 et seq.):

> A. I initiated the conversation. I told David [Mulso], I said, well, I think it is ridiculous for Susan [Mulso] to be traveling this approximately 300 mile round trip back and forth to Sioux Center [Iowa, the Tri-State place of business] to pick up these advances, and we had used draft books in many other instances prior to this, and I said why don't I issue a draft book to you, and that way she doesn't have to make the trip. You can call us and tell us you are going to draw a draft on us, and when that thing hits my bank I will, they will call me and I will approve it, and we will just handle it that way. I said it is real simple, we can handle it this way.
>
> * * * * * * *
>
> A. * * * [T]his money was going only to Elkton Livestock as advances on the cattle that were on our premises.
>
> * * * * * * *
>
> Q. Apparently the distinction between whether this contemplated book was a book of drafts or a book of checks is something that has come up between some of you folks in the past. What can you tell me about your understanding of the nature of the instruments that came in that book?
>
> A. Well, I instructed my bookkeeper to contact our bank, and I said now make sure you have got the right ones, because with the computers and so on coming in, I did have a draft book which was embarrassing to me, that was out with a good client of mine, and it had the wrong coding on the bottom and it got kicked back, like I had turned it down, which I had no intent of doing. So I said make sure he gets a new one so that it is proper, so that we aren't embarrassed in that kind of a situation. I said you get a draft book, and if Susan comes down, you give it to her or mail it up, whichever, and I told him how it was going to work, that they were to call us each time they drew a draft, and that when the bank called, of course, I have always approved ths drafts when the bank calls. This was

my impression of how it was to work. I did not see the draft book quote checkbook, whatever we are calling it now, I did not see it until after the fact, physically, myself.

Q. The preparation of the book was done at your direction, delivered to Mrs. Mulso at your direction?

A. Yes, I was responsible for it, but I did not see it. I gave the instructions, but I did not see it myself.

* * * * * * *

Q. As each of these various instruments was issued and then presented at Northwestern State Bank for payment, did you in fact receive telephone calls from the bank in connection with each of these, to your recollection?

A. Yes.

* * * * * * *

[Sioux Falls Tr. 135 et seq.] Q. We have had this confusion over terms, whether it is a draft book or a checkbook, and I understand that in the early going you and David Mulso talked about it as a draft book?

A. This is correct.

Q. Although you have been advised by your banker and your counsel that it is in fact a check book?

A. Yes.

* * * * * * *

Q. You were aware from the start, that is the start of this checkbook, that it would be Mrs. Mulso that would be actually signing the checks, even though it would be David Mulso's name that would appear?

A. Yes.

Q. So she was authorized signatory on that checkbook for David?

A. Well, there was no signature card, but she was, it was just a verbal understanding.

Mr. Mulso, on examination by opposing counsel who called him as an adverse witness, testified (Sioux Falls Tr. 310):

Q. And it was at that meeting [November 5] then that Mr. Den Herder initiated the suggestion that he'd give you or your wife a checkbook?

A. Yes. At that time we referred to it as a draft book but it's been proven it is a checkbook, yes.

Thus the record shows that Mr. Den Herder agreed to issue, and directed the issuance of, a draft book, not a check book, and at the times material herein believed that the instruments were drafts, not checks. It also shows that the arrangement with the Northwestern State Bank, where Tri-State had its checking accounts, was such that each instrument required specific authorization from Mr. Den Herder before that bank would pay it, and there was no arrangement with that bank for payment without further approval when they reached it if covered by deposits. Who made the decision to issue printed forms of the sort usual for checks, or the decision that the instruments were to be signed "Tri-State Livestock by David Mulso," or whether it was someone in Tri-State or someone in that bank, or whether this was done thoughtlessly or for a reason, the record does not show.

About what Mr. Mulso told the Corn Exchange Bank personnel about the arrangement with Tri-State in early November, Mr. Mulso did not, and was not asked to, testify. Mr. Hegerfeld, on examination by counsel for that bank who called him as a witness, testified (Sioux Falls Tr. 391–2):

Q. What was it that was told to you?

A. Well, that it was, he [Mr. Mulso] could write checks for immediate credit and go through the normal channels.

On cross-examination he testified (Sioux Falls Tr. 421):

Q. And what was it you learned about it [the book of blank forms]?

A. That Dave or Sue were supposed to write checks on it and deposit them in the normal course of business.

Mr Hart, on examination by counsel for the Corn Exchange Bank who called him as a witness, testified (Sioux Falls Tr. 494):

Q. As best you can recall, would you relate the substance of that conversation?

A. He told me that Mr. Den Herder was going to give him a checkbook that they could issue checks on for depos-

it at our bank to eliminate the travel of Susan to Sioux Center every other day or whatever it may have been.

Q. Was there any discussion as to how it would be handled * * * ?

A. That it would be a check that could be run through normal banking channels.

Whatever the instruments appeared to be, whatever Mr. Mulso told the Corn Exchange Bank personnel about them, and whatever the latter personnel believed them to be, it is not necessary for our purposes to decide whether they were drafts or checks. For that reason, and since every one of them was executed by one of the Mulsos, we will call them "Mulso instruments." The first was dated Tuesday, November 9, for $401,294.38.

As before, on each such occasion, Mr. Hart or Mr. Hegerfeld would phone the Mulso home and tell Mrs. Mulso, or Mr. Mulso if he was there, an amount to be deposited. Then such an instrument would be filled out for that amount and delivered to Mr. Hart or Mr. Hegerfeld the same day, usually by Mrs. Mulso, but occasionally by Mr. Mulso. Mr. Hart, on examination by counsel for the Corn Exchange Bank who called him as a witness, testified (Sioux Falls Tr. 492–3):

Q. * * * When checks came in to the [Corn Exchange] bank from Montana ranchers, why don't you just explain to the hearing examiner how procedurally that is handled or was handled for the Elkton account?

A. The checks would come in with our regular cash letter of the morning, and after they were pre-sorted in our machines, we'd take a look at them to see the volume of the checks, to see if Elkton had enough on deposit to cover them. If not, I would give Susan Mulso a call and say you need so many dollars to cover the amount of checks you have.

Q. The figure you would give her would be just a tally of the checks that were presented for payment that day?

A. Yes.

However this testimony and the Elkton checking account statement are not consistent as explained below.

As to whether someone at Tri-State would be phoned and told about a Mulso instrument when it was executed the testimony was conflicting.

Some Mulso instruments were executed and deposited in the Corn Exchange Bank at times when there were not sufficient animals consigned in the name of Elkton to Tri-State and in the latter's yard to cover them. However, such animals had arrived to cover the instruments by the time they reached the Northwestern State Bank and Mr. Den Herder directed that bank to pay them, in all instances except, Mr. Den Herder, on examination by opposing counsel who called him as a witness, testified (Sioux Falls Tr. 129), "Possibly once, but then I knew they were on the road." See also Mr. Mulso's testimony on cross examination (Sioux Falls Tr. 345-9).

On Wednesday, December 1, it was alleged on behalf of The Miller Colony, Inc., that complainant sold and delivered livestock to Elkton for an agreed price of which $8,309.50 was unpaid. The allegations of that complainant's sale, delivery and failure of payment were not established by evidence, were denied by Mr. Mulso, but were admitted by Elkton and Mr. Van Dyke, in their answers.

On Friday, December 3 complainant Arnzen sold and delivered livestock for agreed prices and received checks as detailed above in the Findings of Fact. Mr. Mulso in the name of Elkton ordered those animals in a phone call with Mr. Arnzen at the latter's place of business in Cottonwood, Idaho. After the animals were shipped, Mr. Arnzen told the weights and prices per cwt. to Mr. Mulso in another phone call, and Mr. Mulso then mailed him three checks for the agreed prices, dated Monday, December 6. All three checks were drawn by Mr. Mulso on the Elkton checking account in the Corn Exchange Bank, showed on their faces that they were issued for livestock, and were returned unpaid.

In the week ending Friday, December 3, four Mulso instruments:

Number	*Date of Execution*	*Amount*
13	Wednesday, November 24	$12,500.00
(not numbered)	Saturday, November 27	$793,430.67
14	Tuesday, November 30	$107,094.20
15	Friday, December 3	$104,709.78

for a total of $1,017,734.55, reached the Northwestern State Bank for payment. Tri-State had to borrow to honor them, which required Mr. Den Herder to go to that bank. This was done. Tri-State paid the interest on that loan. This was the first time Tri-State had to borrow to honor such instruments. Mr. Den Herder told Mr. Mulso in substance that he objected to such borrowing, and that the consignments by Mr. Mulso in the name of Elkton were exceeding what Tri-State could handle.

On Monday, Tuesday, Wednesday and Thursday, December 6, 7, 8 and 9, the Montana ranchers other than The Miller Colony, Inc. sold livestock for agreed prices and received checks as detailed above in the Findings of Fact. All those checks were issued by Mr. Mulso, were drawn on the Elkton checking account in the Corn Exchange Bank, showed on their faces that they were issued for livestock, and were returned unpaid. For Messrs. Broadbrooks, Haynes, Knudson, Capdeville, and Helgeson, and Boyd and Sandra Burtch for whom Mr. Helgeson acted, the places where delivery was taken in the name of Elkton are not shown in the record. For all the others, the record shows clearly the places where delivery was taken in the name of Elkton; all those places were in Montana.

The record contains some testimony of Mr. Mulso (Sioux Falls Tr. 324, 326) that enough cattle were shipped to Tri-State to cover the Mulso instruments. However, as to what was done with those particular animals obtained from those Montana ranchers, that is, whether all of them, some of them, or none of them, were shipped to Tri-State, the record is inconclusive.

On Friday, December 10, complainant Arnzen sold and delivered livestock to Elkton other than the ones mentioned above. However on Mr. Arnzen's behalf Mike donaldson successfully reclaimed those animals at Tri-State where they had been consigned in the name of Elkton but before they had been sold, as further discussed below.

In the week ending Friday, December 10, three Mulso instruments:

Number	*Date of Execution*	*Amount*
16	Saturday, December 4	$600,000.00
17	Monday, December 6	$464,809.21
18	Tuesday, December 7	$158,022.06

for a total of $1,222,831.27, reached the Northwestern State Bank for payment. Tri-State had to borrow again to honor them, which required Mr. Den Herder to go to that bank again. This was done. This time Tri-State deducted the interest on the loan from the net proceeds of sale of cattle consigned in the name of Elkton as further discussed below.

On Friday, December 10, Mulso instrument number 19, dated Wednesday, December 8, for $159,463.82, reached the Northwestern State Bank for payment. To honor it would have required Mr. Den Herder to go to that bank to borrow for the third time in two weeks. As previously stated, he had told Mr. Mulso that he objected

to such borrowing and that the consignments by Mr. Mulso in the name of Elkton were exceeding what Tri-State could handle. As President of and on behalf of Tri-State he directed that bank to dishonor that instrument number 19. It was marked "uncollected funds." Who made the decision to mark that instrument "uncollected funds," or whether it was someone in Tri-State or someone in that bank, or whether that marking was done thoughtlessly or for a reason, the record does not show.

Friday as previously stated was the day Tri-State routinely settled accounts and issued a check for the net proceeds of sale of livestock consigned in the name of Elkton and sold since the previous Friday. That week Tri-State sold 5,222 animals which had been consigned to it in the name of Elkton. After deduction for Mulso instruments numbered 16, 17 and 18, and interest on the loan taken out to honor them earlier that week, as well as customary deductions, the net proceeds were $589,310.93.

On Saturday, December 11, Mr. Mulso went to Tri-State's place of business in Sioux Center, Iowa and met with Mr. Don Herder there. They reviewed the accounts of the sales by Tri-State the previous week of cattle consigned in the name of Elkton and, since Mulso instrument number 19 for $159,463.82 had been dishonored the day before and Mr. Mulso could not have gotten a check for the $589,310.93 net proceeds to the Corn Exchange Bank before noon which was its closing time that day, Mr. Don Herder phoned Mrs. Mulso who was in Brookings, South Dakota and directed her to execute an instrument for $589,310.93 and take it to that bank. She did so. That was such instrument number 20. It was deposited in the Elkton checking account and was honored as usual.

On that day, Saturday, December 11, at the opening of business the Corn Exchange Bank records showed the Elkton checking account as having a $102.10 credit balance and the Elkton line of credit as having a $170,000.00 debit balance. After credit of the $589,310.93 deposit and debit of the "checks and other debits" shown for that day on the Elkton checking account statement, the statement shows the checking account as having a $206,372.07 credit balance. As above that statement does not contain any entry to reflect the return of Mulso instrument number 19 for $159,463.82, or the return without payment of any item.

After those entries that bank made a $169,900.00 entry in its records debiting the Elkton checking account and crediting the principal balance due on the Elkton line of credit. This reduced the figure for the credit balance in the checking account from $206,372.07 to $36,472.07, and reduced the figure for the debit balance in the line of credit from $170,000.00 to $100.00. This in effect

would have been a transfer by that bank of $169,900.00 from the Elkton checking account to the Elkton line of credit if the credit balance figure for the checking account had represented only collected funds, which it did not.

Also on Saturday, December 11, in the meeting at Tri-State's place of business, Mr. Mulso agreed that the volume of cattle consignments to Tri-State in the name of Elkton would be reduced to a weekly limit of 2,500 head, which would amount to about $1,000,000.00.

On Monday, December 13, when Mr. Den Herder arrived at Tri-State's place of business, he found 10 loads of cattle consigned in the name of Elkton. He was surprised since he had been telling Mr. Mulso that such consignments were exceeding what Tri-State could handle, he had met with Mr. Mulso at that place of business in Sioux Center, Iowa on Saturday, and he figured that Mr. Mulso would have been en route home on Friday. Mr. Mulso had had others buying in the name of Elkton but Mr. Den Herder did not learn this until later.

On that day, Monday, December 13, Mulso instrument number 21 was deposited in the Corn Exchange Bank. At the opening of business that bank's records showed the Elkton checking account as having a $36,472.07 credit balance and the Elkton line of credit as having a $100.00 debit balance, which would leave $169,900.00 available on the line of credit. "Deposits and other credits" of a total of $26,948.61 (not counting that instrument number 21), and "checks and other debits" of a total of $935,939.65, are shown for that day on the Elkton checking account statement. Adding $36,472.07 and $26,948.61 then subtracting $935,939.65 would leave a shortage of $872,518.97. No advance was paid under the line of credit; if the full amount shown on the records as available, $169,900.00, had been advanced, the shortage would have been $702,618.97. The amount of that instrument number 21 was $882,939.10. How that amount was figured the record does not show.

Mr. Mulso testified that, when he went to Tri-State's place of business on Saturday, December 11, he did so at the request of Mr. Hart because of the dishonor the day before of Mulso instrument number 19 for $159,463.82, to collect the money and straighten the matter out, and that after that meeting he (Mr. Mulso) phoned Mr. Hart and assured him that the matter had been straightened out. Mr. Hart, on examination by counsel for the Corn Exchange Bank who called him as a witness, testified (Sioux Falls Tr. 601 et seq.):

A. The first notice of dishonor I received on the $159,000 check was Monday, December 13.

Q. Why do you say that?

A. The reason I specifically recall it is because Jack [Hegerfeld] had been out of town on business the previous week, and Jack was in the bank on Monday, and he was in the bank at the time I received the call and the notice of the return on the 159,000.

Q. * * * Can you relate that call about the 159,000 in terms of time to the deposit of the $882,000 item?

A. I received that call before we got the deposit of the 882,000. After I received the call, I called Susan Mulso and informed her I received that call, and that they also had $882,000 worth of checks presented to us that day for payment and asked her to please contact Dave [Mulso] and have him get ahold of me.

Q. Then were you subsequently assured the check would be made good?

A. Yes, I was. I was later contacted by Dave. He said he talked to Mr. Den Herder and that the 159,000 was taken care of and that they on—could issue the 882,000.

That night, Monday, December 13, at about midnight, Mr. Mulso phoned Mr. Den Herder and reported on cattle loaded and sent in the name of Elkton to Tri-State's place of business. Exactly what he reported the record does not show. They frequently talked on the phone several times a day during the times material herein. Mr. Mulso on cross examination testified (Sioux Falls Tr. 349-51) credibly in substance that he was calling from Montana, he had just gotten into town, that was the first phone call he made that day so he did not yet know about Mulso instrument number 21 for $882,939.10, and so he could not have discussed it with Mr. Don Herder then.

The time when the Corn Exchange Bank first learned of the return of Mulso instrument number 19 for $159,463.82 cannot be figured from the Elkton checking account statement since as previously stated it does not contain any entry to reflect the return of any of those instruments. As shown above it is clear that Mr. Hart knew about the return of number 19 for $159,463.82 before the deposit of number 21 for $882,939.10. However number 19 was in the form of a check and marked "uncollected funds." At what time Mr. Hart physically received number 19 after its return from the

Northwestern State Bank so that he could read that marking, what if anything he was told about it by phone before he physically received it from that bank, and whether he was told at that time that the reason for its return was uncollected funds, or was told that the reason was dishonor by Tri-State or Mr. Den Herder, which would be inconsistent with a belief that that and the later such instruments were checks, the record does not show.

The following is not shown clearly in the record but is apparent from the above. Mr. Hart knew on Saturday, December 11, that Mulso instrument number 19 for $159,463.82 was being returned unpaid to the Corn Exchange Bank for whatever explanation he received. Mr. Mulso phoned him after meeting with Mr. Den Herder that day to tell him that the matter had been straightened out. The instrument to which Mr. Mulso referred in that phone call was not number 21 for $882,939.10, but number 20 for $589,310.93. Whatever Mr. Mulso told Mr. Hart, for some reason the latter did not understand that all the funds which would have been remitted by number 19 were remitted by number 20, as well as other funds, so that number 19 would not be honored notwithstanding that the matter had been straightened out to Mr. Mulso's satisfaction. Whatever the phone call Mr. Hart received about number 19 on Monday the 13th, it was not the first he heard about that instrument being returned unpaid, but it was when he first understood that it would be unpaid notwithstanding Mr. Mulso's meeting with Mr. Den Herder on Saturday the 11th.

On Wednesday, December 15, Mulso instrument number 22 was deposited in the Corn Exchange Bank. At the opening of business that bank's records showed the Elkton checking account as having a $1,391.38 credit balance and the Elkton line of credit as having a $16,100.00 debit balance, which would leave $153,900.00 available on the line of credit. "Checks and other debits" of a total of $132,850.21 are shown for that day on the Elkton checking account statement. Subtracting $132,850.21 from $1,391.38 would leave a shortage of $131,458.83. No advance was paid under the line of credit; the full amount shown on the records as available, $153,900.00, exceeds the shortage. The amount of that instrument number 22 was $147,878.96. How that amount was figured the record does not show.

On that day, Wednesday, December 15, Mulso instrument number 21 for $882,939.10 reached the Northwestern State Bank for payment. Mr. Den Herder as President of and on behalf of Tri-State directed that bank to dishonor that instrument. On examination by his own counsel, he testified (Sioux Falls Tr. 563 et seq.):

A. * * * With the volume of cattle we were handling, we were stepping on the toes of local competition. In other words, we had expanded our operation so that we were probably selling some cattle that my next door competitor probably sold to his good friends and relatives. So there was some internal strife amongst the order buyers and sales people and dealers all around. Everybody was in a little bit of a turmoil, because suddenly we were selling more cattle than, quote, our share. So there was back door stuff coming in. My own banker had inquiry about the validity of what was going on. So naturally as you get these things, you get the gut feeling maybe there's something in the wood pile. But yet I had no justification for this. So I continued on in what I thought was good faith. But when the draft come in on Wednesday for 882,000, having known that I was absolutely settled up on Saturday the 11th, owing no money, I knew it was physically impossible, knowing where Dave [Mulso] was, that he could have possibly paid for $882,000 worth of cattle by Monday morning, because he was in Eastern South Dakota and in Iowa on Friday, Saturday and most of Sunday. He didn't get to town, he testified he didn't get to town, in Montana until midnight that night, and you cannot pay for cattle until you have them weighed. So I knew it was physically impossible for $882,000 worth of cattle, even if it had been wire transfers, to be paid for. It's at that point that my light went on and I said, hey, I am not paying advances, I'm paying for something else, and that was not the intent.

Q. Then so you didn't pay the draft?

A. Right. I did not honor it.

Q. What happened the next day on Thursday?

A. On Thursday I was getting calls. Already on Wednesday Mr. Donaldson was in town representing himself and Mr. Arnzen, and he shed some additional light on the situation saying that he laid claim to the cattle for himself, Mike Donaldson, and for Mr. Arnzen, and I was receiving innumerable calls from ranchers and bankers and lawyers, mainly out of Montana, stating claim to the livestock that was either on our premises or en route. It's at that time, and the telephone records will reflect, when I called Corn Exchange Bank and talked to Mr. Hart, and as Mr. Hart testified, did talk to him about whether or not Elkton Live-

stock or the Corn Exchange Bank would honor Elkton Livestock's checks, and I spelled it out to him, I felt quite clearly, that I would not sell livestock that I did not know to whom it belonged. * * * I said I'm not going to make the decision who owns the livestock. If it belongs to Elkton Livestock, if it belongs to Corn Exchange Bank, or if it belongs to all the ranchers in Montana, I said I don't know anymore. I said I'm not going to sell this livestock. He assured me that all livestock that was loaded was paid for. I said okay, so I'll proceed.

I think I sold cattle on Tuesday. I don't know if I sold any cattle on Wednesday. I think I quit. I don't believe I sold any cattle on Wednesday private treaty. I had an opportunity to and I turned it down. Naturally I didn't sell any on Thursday, it was hot at our place of business.

I had, like I said, I had the ranchers calling, I had the lawyers calling, and then on Friday they engulfed me. I had a big audience Friday. I had truckers demanding payment from me for trucking, ranchers claiming ownership to livestock, etc.

Mr. Hart, on examination by counsel for the Corn Exchange Bank who called him as a witness, testified (Sioux Falls Tr. 498 et seq.):

Q. Mr. Den Herder, I believe, has already testified that he believes he called you in the afternoon of Wednesday, December 15. Do you have that recollection?

A. It's possible. * * * It would have been after banking hours.

Q. Whether it was Wednesday or Thursday of that week, tell us as best you recall the substance of Mr. Den Herder's conversation with you.

A. Well, I can recall when he called he was wondering about—he heard we weren't paying checks drawn on Elkton Livestock account for cattle purchased in Montana or wherever. I assured him we had been paying checks on everything that we had deposits. I don't recall just what all went on in that conversation. At that time I don't think we discussed anything about the 882,000 or the 147,000. I had a discussion later on with Paul [Den Herder] that same day.

Q. Two calls the same day?

A. Yes.

* * * * * * *

Q. Up to the time of his telephone call, had you dishonored any checks on the Elkton account to Montana ranchers?

A. Not up to the time of his first call.

Q. Tell us the substance of his second call then.

A. I believe from the time I talked to him the first time and the second time, that we had had some calls from Montana or something, and I told the people then that we didn't want any more cattle shipped out of there, that we thought there might be a problem, that we were going to shut everything down until we got it resolved.

Q. When you first heard of this situation, did you attempt to get ahold of Mr. Mulso?

A. I did.

Q. For what purpose?

A. Tell him to discontinue business for the present and come home so we could straighten out and see what was happening.

About their first phone call on Wednesday, December 15, Mr. Den Herder testified (Sioux Falls Tr. 124) that he called Mr. Hart because of "rumors * * * that the Corn Exchange Bank was not honoring checks out in Montana, and I wanted to know whose cattle I was selling." The record shows that in that first call they did not discuss either the $882,939.10 Mulso instrument number 21 which Mr. Den Herder directed to be dishonored that day, or the $147,878.96 instrument number 22 which was deposited in the Corn Exchange Bank that day. On cross examination about the times of day of those actions and that first phone call, thus whether either of those actions had been taken before that first phone call, Mr. Den Herder (Sioux Falls Tr. 579-81) suggested checking telephone records, which are not in the record. Then he was asked and he testified:

Q. So there was a period of hours after you dishonored that $882,000 item, and during which time you had been in

contact with the Corn Exchange Bank, that you failed to notify them of that dishonor, true?

A. Yes.

Notwithstanding Mr. Hart's above-quoted testimony, the record shows clearly that some checks drawn on the Elkton checking account were dishonored by the Corn Exchange Bank before Wednesday, December 15. Mr. Arnzen testified (Sioux Falls Tr. 64) that he learned in Idaho of the return of his December 6 Elkton checks "around the 12th, 15th, somewhere in that area." As quoted above Mr. Den Herder testified that Mr. Donaldson, on Mr. Arnzen's behalf, seeking to reclaim the above-mentioned cattle which Mr. Arnzen had sold on Friday the 10th, appeared at Tri-State's place of business on Wednesday the 15th. Mr. Darryl Crasco testified (Great Falls Tr. 11-12) that he learned in Montana of the dishonor of his Elkton check on the Monday following December 8, which would be Monday the 13th. Also Mr. Helgeson testified (Great Falls Tr. 73) that he learned in Montana of the dishonor of his Elkton checks on the next Wednesday after December 8, which would be the 15th.

On Thursday, December 16, in a meeting at the Corn Exchange Bank Messrs. Hart and Hegerfeld informed Messrs. Mulso and Van Dyke that Elkton was out of business.

On Friday, December 17, Mulso instrument number 22 for $147,878.96 reached the Northwestern State Bank for payment. Mr. Den Herder as President of and on behalf of Tri-State directed that bank to dishonor that instrument. There were cattle consigned in the name of Elkton to Tri-State and in the latter's yard but clearly by then there were adverse claims to them.

On Friday, December 17, officers and counsel for the Corn Exchange Bank demanded the proceeds of sale of the cattle consigned in the name of Elkton and in Tri-State's yard, in a meeting with officers and counsel for the Northwestern State Bank and counsel for Tri-State. On behalf of Tri-State a commitment was made that, pending resolution of the question of who was entitled to them, the proceeds would be escrowed.

On Friday, December 17, Tri-State sold the cattle consigned in the name of Elkton and not specifically identified as their own and reclaimed by unpaid sellers, and escrowed the net proceeds, $789,615.06, in a special account in the Northwestern State Bank. All such cattle were from Montana according to their brands and the following Tuesday, December 21, Mr. Den Herder as President of and on behalf of Tri-State transferred the proceeds to the Montana Department of Livestock Brand Enforcement Division.

Respondents Mulso, Van Dyke and Den Herder were each within the definition of a "dealer" in section 301 of the Act, 7 U.S.C. 201, at the times material herein, on the basis that, as the record clearly shows, each was regularly engaged in buying, selling, or both, livestock in commerce either on his own account or as the agent of the respective corporation with which he was affiliated. The definition refers to the business in which a person is engaged, not to the capacity in which he is registered. Section 309 of the Act provides for reparation orders against dealers for violation of certain provisions including section 307 which contains a prohibition of unjust practices, discussed below. Reparation orders we have issued against dealers under the Act have been upheld in *Rice* v. *Wilcox*, 630 F.2d 586, 39 Ag. Dec. 883 (8 C. 1980) and *Thomas E. Lane et. al.* v. *Gail F. Sohler etc.*, CV-81-86-Bu, U.S.D.C., D. Mont., 1983, 42 Ag. Dec. ____.

The purchases from Mr. Arnzen and the Montana ranchers in these cases constituted violations of the Act by Elkton and Mr. Mulso, and so did any other purchases of livestock, by Mr. Mulso in the name of Elkton, or by Mr. Mulso through others in the name of Elkton, while the latter was insolvent or by use of checks on the Elkton checking account drawn on insufficient funds without disclosing such facts to such sellers. The Act is so drawn as to prohibit unfair or unjust practices by livestock dealers and we have interpreted such prohibitions to include such actions. *Mid-States Livestock*, 37 Ag. Dec. 547, *aff'd., Dale Van Wyk* v. *Bergland*, 570 F.2d 701, 37 Ag. Dec. 171 (8 C. 1978). See also section 409 of the Act, 7 U.S.C. 228b (which was added to the Act by P.L. 94-410 after the events involved in *Mid-States, supra*), and *Vance* v. *Reed*, 495 F. Supp. 852, 39 Ag. Dec. 1117 (M.D. Tenn., Nashville Div., 1980). Note that 7 U.S.C. 204 provides for suspending registrants, which includes livestock dealers, for insolvency. See also *Rowse* v. *Platte Valley Livestock, Inc.*, ____ Ag. Dec. ____ (Feb. 3, 1984), *aff'd.*, 597 F. Supp. 1055, 604 F. Supp. 1463, ____ Ag. Dec. ____ (D. Nebr. 1985).

This is not inconsistent with other authority. "Deception is established by the obtaining of something of value through the use of a check which the perpetrator knows is worthless. * * * This guilty knowledge is the mens rea of the offense. Specific intent to defraud is not an essential element." *State* v. *Smith*, 300 N.W.2d 90, 92-3 (Iowa 1981). See also *Hi-Pro Fish Products, Inc.* v. *McClure*, 346 F.2d 497 (8 C. 1965); *United States* v. *Western Contracting Corporation*, 341 F.2d 383, 388-90 (8 C. 1965); *Colbern* v. *Freeman*, 98 Idaho 427, 566 P.2d 376 (1977); *State* v. *Storrs*, 351 N.W.2d 520 (Iowa 1984); *State* v. *McHugh*, 697 P.2d 466 (Mont. 1985); *State* v. *Wood*, 666 P.2d

753 (Mont. 1983); *Curtis* v. *Vlotho*, 313 N.W.2d 469, 471, fn. 5 (S.D. 1981); and C.J.S. *False Pretenses* § 21.

As above, the prohibitions in section 307 and certain other sections of the Act were written as prohibitions of unfair or unjust practices. In so writing those prohibitions, Congress had in mind the futility, in regulating a dynamic and changing industry, of specifying every act which should be prohibited, and intended, by those prohibitions and the provisions for administrative proceedings, to delegate broad discretion to the Secretary, subject to judicial review to prevent abuse, to determine from time to time what specific acts would be prohibited. This is clear in the following remarks in the debates on the Act, as 61 Cong. Rec. 1887:

> Mr. ANDERSON. * * *
>
> It was asserted by the gentlemen who preceded me, to whom I have referred, that if there was to be a regulation of this industry it should be in direct prohibitions of law. We have been trying direct prohibitions of law for more than 100 years. They have proven absolutely inadequate for the regulation of industries as large and as industrially powerful as these with which we are now dealing.
>
> Industry is progressive. The methods of industry and of manufacture and distribution change from day to day, and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of industry. So we have not sought to write into this bill arbitrary and iron-clad rules of law. We have rather chosen to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes of methods in distribution and manufacture and in industry in the country. * * *

See discussion, *Chevron, U.S.A., Inc.* v. *Natural Resources Defense*, ___ U.S. ___, 104 S. Ct. 2778, 2781 *et seq., reh. den.*, ___ U.S. ___, 105 S. Ct. 28 (1984).

Our reasoning for interprating the prohibitions on unfair or unjust practices to include daalers' buying livestock while insolvent, or by use of checks drawn on insufficient funds, without disclosing such facts to sellers, should be obvious from what happened in this case. Such a buyer, whatever his high hopes and good intentions, subjects sellers to the risk of failure of the buyer's venture. That risk ought to be borne by the buyar, and by others if they can be found to undertake that risk willingly and without being de-

ceived for whatever their prospects of a profit from the venture if it succeeds. If such a buyer does not have and cannot assemble resources sufficient to pay for livestock, and a seller does not, willingly and without being deceived, undertake that risk, such as by agreeing upon a credit sale, that buyer should not buy them. To impose that risk on unsuspecting sellers is an injustice to such sellers.

Solvency or insolvency of a person subject to the Act is a question of that person's current liabilities and current assets. *W.I. Bowman*, 23 Ag. Dec. 1074, *aff'd., Bowman* v. *United States Department of Agriculture*, 363 F.2d 81, 25 Ag. Dec. 958 (5 C. 1966). See also *Cargill, Inc.* v. *American Pork Producers, Inc.*, 426 F. Supp. 499, 504 (D. S.D. 1977). An otherwise insolvent buyer is not made solvent by a line of credit under which advances of funds and repayments are under the control of the lender. This is a matter of fact, not law; note that checks drawn on the Elkton checking account were returned to Mr. Arnzen and the Montana ranchers at a time when the Corn Exchange Bank records showed a large undisbursed balance under the Elkton line of credit, shortly after that bank had made an entry to transfer $169,900 from the Elkton checking account to make a repayment on that line of credit. Also an otherwise insolvent buyer is not made solvent by an arrangement to use the proceeds of resale of goods on consignment, or advances against such proceeds, to cover NSF checks used to obtain them. This also is a matter of fact, not law; prices fluctuate in a free market so when goods remain to be resold in such a market there is no assurance that they can be resold for enough to cover their purchase.

Mr. Mulso contended in substance that he was acting as agent for Elkton in all the transactions involved in these proceedings. His personal liability to Mr. Arnzen and the Montana ranchers would be the same whether he was acting for himself alone, as a joint venturer with Elkton, or as an agent for Elkton, because that liability is based on violation of the Act, tort, or wrongdoing on his part acting either directly or through others. See Restatement, Agency 2d §§ 343, 344, and 348, reading in pertinent part as follows:

> [§ 343.] An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal * * *
>
> [§ 344.] An agent is subject to liability, as he would be for his own personal conduct, for the consequences of an-

> other's conduct which results from his directions if, with knowledge of the circumstances, he intends the conduct, or its consequences * * * *
>
> [§ 348.] An agent who * * * knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person although the fraud or duress occurs in a transaction on behalf of the principal.

See also *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1012 (8 C. 1984); *Bechtel* v. *Liberty Nat. Bank*, 534 F.2d 1335, 1339, fn. 6 (9 C. 1976); *McAlvain* v. *General Ins. Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976); *Haafke* v. *Mitchell*, 347 N.W.2d 381 (Iowa 1984); *McCarty* v. *Lincoln Green, Inc.*, 620 P.2d 1221 (Mont. 1980); and *Bettelyoun* v. *Sanders*, 90 S.D. 559, 243 N.W.2d 790 (1976). If Mr. Mulso did not know that Elkton was insolvent, he certainly knew that he was obtaining livestock by issuing NSF checks in the hope of covering them later, and that the sellers who received those checks did not know this or consent to it.

Mr. Mulso will not be held liable to The Miller Colony, Inc. since the allegations of its sale and failure of payment were denied by him in his answer and not established by evidence.

Mr. Van Dyke is also personally liable to Mr. Arnzen and the Montana ranchers for the wrong that was done to them by persons acting in the name of Elkton and by use of NSF checks drawn on the Elkton checking account. He was President of that firm and (Sioux Falls Tr. 165-6, 171) he knew that livestock was being bought in the name of that firm while it was insolvent, and with checks on the Elkton checking account which were drawn on insufficient funds in the hope of covering them later, and did nothing to stop it. "As a major corporate officer [he] could not avoid liability by emulating the three fabled monkeys, hearing, seeing and speaking no evil." *Briggs Transp. Co.* v. *Starr Sales Co., Inc.*, 262 N.W.2d 805, 811-2 (Iowa 1978). See also *Kizzier* v. *United States*, 598 F.2d 1128, 1131-3 (8 C. 1979); *Smith* v. *Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299, 1311-2 (1977); *Poulsen* v. *Treasure State Industries, Inc.*, 626 P.2d 822, 829 (Mont. 1981); *Bettelyoun, supra*; and AmJur2d *Corporations* §§ 1382 *et seq.*

The issue of liability to the Corn Exchange Bank of Elkton, Mr. Mulso, Sirloin, Inc., or any combination thereof (that bank did not claim against Mr. Van Dyke herein), so far as is shown in the record, is not sufficiently related to the business of buying and selling livestock to be properly the concern of the Secretary of Agriculture under the reparation provisions of the Act. Elkton was only a

depositor and a borrower as to that bank, and its livestock business was purely incidental to its business with that bank. Mr. Mulso and Sirloin, Inc. were only acting in the name of Elkton, a depositor and borrower, as to that bank. However the issue of liability to that bank of Mr. Den Herder is a question of market agency disposition of proceeds of sale of consigned livestock, which is very clearly a matter regulated under the Act. *United States* v. *Donahue Bros.*, 59 F.2d 1019 (8 C. 1932). Section 309 of the Act provides for filing of a reparation complaint by "Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer * * * in violation of the provisions of sections * * * 307 * * * *" The phrase "any person" clearly includes a bank. In summary we have jurisdiction over a reparation claim filed by a bank, against a person subject to the reparation provisions of the Act, as to matters regulated under the Act.

All complainants' claims against Mr. Den Herder personally are based on his direction to issue the book of blank forms which were used for the Mulso instruments, his later refraining from recalling that book, his orders to dishonor such instruments numbered 19, 21, and 22, and his transfer of the net proceeds, of the sales in the week ending December 17, of livestock consigned to Tri-States in the name of Elkton and not specifically identified as their own and reclaimed by unpaid sellers, from the special account in the Northwestern State Bank to the Montana Department of Livestock Brand Enforcement Division. All those actions were taken by him as President of and on behalf of Tri-State but, as shown above in the discussion of liability of Mr. Van Dyke, this does not immunize him from liability in and of itself.

In Civil No. 82-2647, Circuit Court of the Second Judicial Circuit, State of South Dakota, Tri-State was held liable to the Corn Exchange Bank. We do not have the record of that court proceeding but, from what we have, it appears that the basis for that liability was that that bank was a holder in due course of the three dishonored Mulso instruments, and that the transfer of proceeds was a conversion of funds belonging to that bank. We do not express any opinion about the issue of liability of Tri-State to anyone, it being in bankruptcy and thus these proceedings being stayed under 11 U.S.C. 362(a)(1) as to it. Nor do we express any opinion about that court decision. However see *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Iowa Beef Processors* v. *Ill. Central Gulf R. Co.*, 685 F.2d 255 (8 C. 1982); and *Northwestern Bell Tel. Co.* v. *Chicago & N.W. Transp. Co.*, 245 N.W.2d 639 (S.D. 1976). Also, the Court did not have before it the record of these administrative proceedings,

Mr. Arnzen, or the Montana ranchers. What we hold is that, whatever the liability of Tri-State on the basis of the record of that court proceeding, personal liability of Mr. Den Herder is not established by the record of these administrative proceedings.

As above the record shows the following. Mr. Den Herder as President of and on behalf of Tri-State agreed to issue a draft book to facilitate advances against consigned livestock. What he directed to be issued was a draft book, not a checkbook, and what he believed at the times material herein had been issued was a draft book, not a checkbook. Such printed forms were issued, and such instructions were given to Mrs. Mulso for signing them, as were inconsistent with his direction to issue a draft book. Also "uncollected funds" was marked on Mulso instrument number 19. These latter actions were taken, not by wrongdoing of Mr. Den Herder, but by miatakes of others about which he learned only after December 17. (We note that "uncollected funds" was also marked on such instrument number 21, and that "payment stopped" was marked on number 22, we know not by whom or why.) As explained hereinafter, so far as is shown in the record of these administrative proceedings, Mr. Den Herder's order to issue a draft book waa not unlawful, his orders to dishonor such instruments 19, 21 and 22 were issued without reason to doubt that they were lawful, and his transfer of proceeds to the Brand Enforcement Division was entirely lawful.

Issuance of a draft book to facilitate advances against consigned livestock ia a common practice among livestock market agencies selling on commission. We take official notice of this; aee also the *Maly* decisions, *infra*. The record shows that Tri-State in this connection was receiving animals on consignment, making advances against them through what Mr. Den Herder thought was a draft book of a sort commonly used in the industry, selling them, and remitting the net proceeds; in themselves none of such actions would be unusual for such enterprises as Tri-State, livestock market agencies selling on commission. As above the record shows that the book of blank forms was used as part of a program violative of the Act, buying livestock without the funds to pay for them and isauing NSF checks in the hope of covering them with the proceeds, or advances against the proceeds, of sale of the livestock on consignment. From that misuse of the book of blank forms, a conclusion that Mr. Den Herder directed the issuance of the book for the purpose of such misuse does not follow. Mr. Den Herder admitted to an "operating assumption" of such misuse. However, the only baaie for that assumption shown in the record would be loasea which he knew had been sustained on "forward contracts" with Tri-State,

the repeated obtaining of advances against consignments, and Mr. Mulso's appearance of youth and inexperience. Mr. Mulso's statement when he requested an advance that he had a banker calling for money would be as consistent with a loan payment due as with NSF checks to be covered. Mr. Den Herder did not have access to information about Elkton's financial condition so far as the record shows. We hold that, before a person in Mr. Den Herder's position, head of a market agency, could be found, on the basis of such misuse of a book of blank forms issued by that market agency, to have committed an unfair or unjust practice within the meaning of the Act in directing the issuance of a draft book and later refraining from recalling it, he would have to have more information about such misuse than Mr. Den Herder had so far as the record shows.

Each of the three times Mr. Den Herder issued an order to dishonor a Mulso instrument, he was acting as President of and on behalf of Tri-State and he thought it was a draft. That alone is sufficient basis for a finding that he is not personally liable for such orders, but the record contains additional support for such a finding.

When Mr. Den Herder issued his order to dishonor Mulso instrument number 19 for $159,463.82 on Friday, December 10, there were animals consigned in the name of Elkton in the Tri-State yard sufficient to cover such an advance, but a market agency is not generally obliged to make an advance against consigned livestock as such. C.J.S. *Factors* § 36. Also, as previously explained, that was the day of the week when Tri-State routinely settled accounts with Mr. Mulso and Elkton, their established routine called for the net proceeds of sales since the previous Friday to be remitted that day or the next, and he saw to it that this was done the next day by phoning Mrs. Mulso and directing the execution of an instrument for the full amount of such proceeds, $589,810.93, number 20, which was honored as usual. Every cent of such proceeds which would have been deposited in the Elkton checking account in the Corn Exchange Bank under number 19, if it had been honored, was deposited in that account under number 20 the next day. Also, just as the amounts of instruments numbered 16, 17 and 18 were deducted from the proceeds of sales that week, in figuring the amount to be remitted, the amount of number 20 would have been reduced by the amount of number 19 if the latter had been honored. Thus the losses of Mr. Arnzen and the Montana ranchers were not caused by the dishonor of number 19. Also, the Corn Exchange Bank did not sustain any loss on account of honoring checks drawn on the Elkton checking account in reliance on

number 19 since, as shown on the Elkton checking account statement, after the credit of the amount of number 20, which was paid in full, and the debit of all checks then presented for payment, the checking account credit balance was over $200,000, or well in excess of the amount of number 19. What reduced the credit balance in that checking account thereafter that day was the above-mentioned $169,900 entry made by that bank in its records.

When Mr. Den Herder issued his order to dishonor Mulso instrument number 21 for $882,939.10 on Wednesday, December 15, he testified credibly, there were not sufficient cattle consigned in the name of Elkton and in the Tri-State yard to cover it. If Mr. Mulso had reported to him, or "turned in" in his phrase, in a phone call after the instrument was deposited in the Corn Exchange Bank on Monday the 13th, cattle on the road sufficient to cover it, this would not make any difference in the liability for dishonoring it because, as above, a market agency is not generally obliged to make an advance against consigned livestock as such. Also, as above, Wednesday the 15th was the day he first heard from others that that bank had dishonored Elkton checks which had been issued for livestock. The record does not show the times of day when he heard this and when he issued the order to dishonor the instrument; if he heard this before he issued that order, no one could expect him to rely on cattle reported as on the road but not yet there to cover an advance.

When Mr. Den Herder issued his order to dishonor Mulso instrument number 22 for $147,878.96 on Friday, December 17, the cattle then consigned in the name of Elkton and in the Tri-State yard were clearly subject to adverse claims which remained to be resolved so they could not cover an advance.

In these proceedings much was made of Mr. Den Herder's "operating assumption" that Elkton was obtaining livestock with NSF checks in the hope of covering them later and that the Corn Exchange Bank was paying such checks on the uncollected funds represented by the Mulso instruments. On the basis of that "operating assumption" it was urged that he must have known that his three orders to dishonor such instruments would cause failures of payment for livestock consigned in the name of Elkton to Tri-State for sale, and against which those instruments were drawn, and would cause that bank to lose the amounts of such checks paid. To urge this is to disregard the fact that Tri-State did not retain the net proceeds of sale of such livestock. Through instrument 20 for $589,310.93, the net proceeds of the sales of such livestock in the week ending December 10, against which instrument 19 for $159,463.82 was drawn, were paid into the Elkton checking account

in that bank. The next week, the net proceeds of the sales of such livestock in the week ending December 17, against which instruments 21 for $882,939.10 and 22 for $147,878.96 were drawn, were escrowed. Thus, for concluding that Mr. Den Herder should have known that his orders to dishonor the three instruments would cause such failures of payment for livestock and such losses, the "operating assumption" is not a basis.

The transfer of the $789,615.06 net proceeds, of the sales in the week ending December 17, of livestock consigned to Tri-State in the name of Elkton and not specifically identified as their own and reclaimed by unpaid sellers, from the special account in the Northwestern State Bank to the Montana Department of Livestock Brand Enforcement Division, was entirely lawful on the basis of what is shown in the record, and is not found to be an unfair or unjust practice within the meaning of the Act, as explained hereinafter.

Mr. Den Herder testified credibly that all these animals came from Montana according to their brands, and this is corroborated by other evidence, as shown above, that Mr. Mulso had been buying cattle in Montana the previous week, including the cattle of the Montana ranchers. The record does not show any reason for Mr. Den Herder on December 21 to believe that the Brand Enforcement Division would retain these proceeds for its own use, or to doubt that it would use these proceeds first to pay the Montana residents who had sold these particular animals to persons acting in the name of Elkton, and were unpaid, once they were identified.

Such payment to sellers would be, not only entirely lawful and appropriate, but subject to being compelled by order of a court even if the funds had remained in the Northwestern State Bank. On the basis, as explained above, that the animals in question were obtained by violation of the Act, unpaid persons from whom the animals were so obtained were entitled to a constructive trust of the animals so obtained from them and, after those animals were sold to bona fide purchasers, the proceeds of sale of those animals. *McMerty* v. *Herzog*, 702 F.2d 127, 710 F.2d 429 (8 C. 1983); *Hilton* v. *Mumaw*, 522 F.2d 588, 598 (9 C. 1975); *Brown* v. *New York Life Ins. Co.*, 152 F.2d 246 (9 C. 1945); *Andre* v. *Morrow*, 106 Idaho 455, 680 P.2d 1355, 1363 (1984); *Regal Ins. Co.* v. *Summit Guar. Corp.*, 324 N.W.2d 697, 704-5 (Iowa 1982); M.C.A. § 72-20-111; S.D.C.L. § 55-1-8; and *Temple* v. *Temple*, 365 N.W.2d 561 (S.D. 1985). See also U.C.C. §§ 2-507(2), 2-511(3), and 1-103; V Scott on Trusts, 3d ed. §§ 468, 508.2; Bogert, Trusts and Trustees, 2d ed. § 471; and Palmer, The Law of Restitution §§ 1.3, 2.14, 3.4, 3.16, and 4.16.

This is not to interpret the Act by its own force alone as providing a trust of such funds as against a secured creditor of Elkton. Such a holding, in *In re Samuels & Co., Inc.*, 483 F.2d 557 (5 C. 1973), in which that Court referred to "a trust imposed by remedial statute," was reversed in *Mahon* v. *Stowers*, 416 U.S. 100 (1974). That was private litigation to which the Secretary and the United States were not parties. The published decisions in that litigation (see also 510 F.2d 139 and 526 F.2d 1238) show that the parties did not raise and the courts did not consider the issue whether, when a person subject to the Act obtains animals by violation of the Act, a constructive trust is provided by other authority outside the Act.

If those proceeds had fallen into the possession of a person who gave value, without notice of the wrong done to such sellers, it would have been a different matter. However that did not happen and neither the Corn Exchange Bank nor Elkton ever obtained possession of those proceeds so far as the record shows. As previously stated, as to what was done with the particular animals obtained from Mr. Arnzen and the Montana ranchers, the record is inconclusive. Also it does not show the sources of the animals sold by Tri-State for the account of Elkton in the week ending December 17, except that they all had come from Montana. Mr. Hegerfeld on cross examination testified (Sioux Falls Tr. 425):

> Q. Now, when you demanded it [on December 17], the proceeds, were you told by somebody that the purported owners of these cattle were also demanding the proceeds?
>
> A. Yes.
>
> Q. So that you then knew that there were unpaid seller producers of livestock looking for the same proceeds?
>
> A. Yes.
>
> * * * * * * *
>
> Q. If you got the proceeds, you were going to keep them, weren't you?
>
> A. Yes.
>
> Q. You weren't going to pay the guys that owned the cattle?
>
> A. No.

Also, as above, that bank dishonored, just before December 17, checks drawn on the Elkton checking account which showed on

their faces that they had been issued for livestock. Thus, concer ing whether in fact all those animals had been paid for by Elkt and there was no adverse interest in any of them, or this was b lieved or asserted by that bank erroneously but in good faith, t record does not support any such finding.

Also, if any balance of those proceeds remained after such pa ment to unpaid residents of Montana, the record does not show a reason for Mr. Den Herder on December 21 to doubt that t Brand Enforcement Division would apply the balance in accor with law. Also, while the record shows a commitment by Tri-Sta to escrow those proceeds, it does not show that that commitme referred to any particular escrowee.

In view of all of the above, the transfer of those proceeds fro the special account in the Northwestern State Bank to the Bran Enforcement Division was only a move from one escrowee to an other which was just as good.

As previously stated, we do not have the record of the above mentioned South Dakota court proceeding between the Corn Ex change Bank and Tri-State. From what we have, it appears to have been concluded therein that those proceeds were entirely the prop erty of, or subject to a valid lien in favor of, that bank. It appears that the Court or jury was persuaded that that bank had paid for all those cattle by honoring NSF checks drawn on the Elkton checking account, or perhaps that that bank had a mistaken but good faith belief to this effect. We know that the Court did not have before it Mr. Arnzen or the Montana ranchers. Whether the parties who were before the Court informed it that on December 17 there were unpaid sellers of livestock to Elkton and that bank knew it full well, or briefed the Court on the applicability of the Packers and Stockyards Act, as amended, to the transactions in dispute, is not shown in the record of these administrative proceed ings. It is not for us to review the Court's or jury's decision about the liability of Tri-State. However, about any conclusion that those proceeds were entirely the property of, or subject to a valid lien in favor of, that bank, we hold that we cannot predicate personal li ability of Mr. Den Herder on it because it is not supported by the record of these administrative proceedings.

Complainants in support of their claims against Mr. Don Herder relied heavily on *Hays Livestk. Com'n Co., Inc.* v. *Maly Livestk. Com'n. Co., Inc.*, 498 F.2d 925, 33 Ag. Dec. 1122 (10 C. 1974) and *Rice* v. *Wilcox, supra*. Those decisions contain language which sup ports the complainants' claims based on the dishonor of the three Mulso instruments when that language is taken out of its context. However that language must be understood in the light of the facts

of those cases, which contain some important differences from the facts of these ones. See for the facts our administrative decisions which were affirmed in those court decisions, *Hays Livestock* v. *Maly Livestock*, 29 Ag. Dec. 216, 423, 788 (1970); *Rush County Sale Co.* v. *Maly Livestock*, 29 Ag. Dec. 386, 553, 922 (1970); *Plainville Livestock* v. *Maly Livestock*, 29 Ag. Dec. 393, 552, 920 (1970); and *Rice* v. *Wilcox*, 34 Ag. Dec. 1651, 35 Ag. Dec. 212 (1976). Those cases, like these ones, involved livestock bought by dealers and sold on consignment by market agencies. The market agencies were held liable to the unpaid sellers. However the market agencies retained the proceeds which, in the events in dispute in these cases, Tri-State did not.

In *Hays* the dealer purchased livestock from the complainant-sellers and gave in payment drafts drawn on the market agency, which sold the livestock, dishonored the drafts, and kept the proceeds. We held the market agency liable, not on the basis of issuance of a draft book, but on the basis of other actions of its officers, advice given directly to a complainant that such drafts would be honored, a promise given directly to a complainant to phone back if such drafts would not be honored and failure to do so, and appearances in person with the dealer at complainants' sales when the dealer used such drafts to make purchases. These actions, not issuance of a draft book, were what we held to have induced the complainant-sellers to rely on the market agency and clothed the dealer with apparent authority to purchase cattle and draft on it. We added in the *Hays* decision, 29 Ag. Dec. at 222, "Furthermore, [market agency] knew that the livestock had not been paid for when it retained the proceeds of resale," and similar findings in the other decisions, 29 Ag. Dec. at 392 and 399. The Tenth Circuit affirmed our result. It wrote, 498 F.2d at 932, 33 Ag. Dec. at 1131:

> * * * The Secretary in our case relied upon an estoppel theory in much the same way [a reference to *Branscome, infra*]. And [market agency] argues that there can be no estoppel here for want of the requisite reliance on the representations incident to the drafting practice. The Secretary also held, however, that it was unjust and unreasonable for [market agency] to retain the proceeds from the resale of livestock with knowledge that the shippers of the livestock had not been paid. We are persuaded by this reasoning and hence do not reach the issue of estoppel.'

Such action other than issuance of the book of blank forms, to induce the complainants to rely on Tri-State and to clothe Elkton or Mr. Mulso with apparent authority to act for Tri-State, and such

retention of proceeds by Tri-State, are not shown in the record of these proceedings.

Rice, contrary to some language in the Eighth Circuit decision, did not involve dishonor of any instrument. In that case the dealer had been buying livestock from complainants and paying for them a week later with checks issued by the market agency. For the two purchases in dispute, there was no check issued. The market agency was held liable to the complainant-sellers on account of the cattle purchased in one of the transactions but not the other. The transaction in which the market agency was held liable was the one in which he retained the proceeds of sale of the animals. The *Rice* administrative decision contains the following, 34 Ag. Dec. at 1662 et seq.:

> On September 5, 1973, when [market agency] and [dealer] settled their account and [market agency] retained the proceeds of sale of the cattle which [dealer] had consigned to him for sale that day, [market agency] knew that a substantial proportion of [dealer's] purchases, for approximately six months, had been paid for by checks drawn on [market agency's] cattle account. Therefore, if [market agency] did not have actual knowledge that some or all of the cattle, which he had sold that day on consignment from [dealer], had been bought by [dealer] in cash sales and were not paid-for, [market agency] at least had timely notice of sufficient facts to cause a reasonably prudent person to make a further investigation to ascertain whether there was an adverse interest in the cattle. * * *
>
> * * * * * * *
>
> We find that it was an unjust practice in violation of section 307 of the Act (7 U.S.C. 208) for [market agency] to retain the proceeds of sale of cattle consigned to him by [dealer], even if he did so on account of debts previously owed by [dealer] to him, with either knowledge that the cattle were bought by [dealer] in one or more cash sales and unpaid-for, or with timely notice of sufficient facts to cause a reasonably prudent person to make a further investigation to ascertain whether there was an adverse interest in the cattle.

The Eighth Circuit affirmed our result. It wrote, 630 F.2d at 589, 39 Ag. Dec. at 884:

> The hearing officer concluded that [market agency] knew or should have known that the cattle had not been paid for by [dealer], that he had not notified [complainant-sellers] prior to the sale of his intention to not loan money to [dealer] for the purchase, and that he nevertheless retained the proceeds of the sale.

As above, such retention of proceeds by Tri-State is not shown in the record of these proceedings.

It should be understood in reading those appellate decisions that each of them involved an issue whether we have jurisdiction to order payment of reparation on account of a single transaction. On this see discussion in *Mid-South Order Buyers, Inc.* v. *Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W.2d 229, 41 Ag. Dec. 48 (1982). See also *Neugebauer* v. *Ryken*, Civ. 74-4018, U.S.D.C., D. So. Dak., So. Div., 1975, 34 Ag. Dec. 1712. That issue has not arisen in these proceedings.

The Corn Exchange Bank also relied on *Branscome* v. *Schoneweis*, 361 F.2d 717 (7 C. 1966). See also the administrative decision which was affirmed therein, *Grenada Livestock Exchange* v. *Schoneweis*, 21 Ag. Dec. 1105 (1962). That case involved cattle ordered by one Woodrum to be shipped to a market agency where they were sold in Woodrum's name. It was undisputed that respondents Woodrum and Schoneweis were partners in the market agency. Schoneweis contended that the purchase in question had been made by Woodrum for his own account and not for the partnership. Schoneweis was held jointly liable with Woodrum to complainant-sellers for the price of the cattle ordered by Woodrum on the basis of remarks Schoneweis had made directly to complainants, and checks on the partnership bank account which Schoneweis had previously written to complainants for livestock ordered by Woodrum, creating a partnership by estoppel. There are no such facts about Tri-State in the record of these proceedings.

The Corn Exchange Bank also relied on *Lewis* v. *Butz*, 512 F.2d 681 (8 C. 1975). See also the administrative decision which was affirmed therein, *Lewis and DeJong*, 33 Ag. Dec. 1294 (1974). That case involved livestock purchased by one DeJong and shipped to one Lewis. The evidence showed clearly that DeJong and Lewis had entered into a joint venture agreement to purchase livestock and divide the profits equally. Lewis contended that DeJong had made the purchase after termination of the venture. DeJong testified that he made the purchase pursuant to the joint venture. Certain actions of Lewis were held to be consistent only with this and in-

consistent with Lewis' contention. There are no such facts about Tri-State in the record of these proceedings.

On behalf of Mr. Den Herder certain other defenses were raised and certain evidence was presented, referring to matters other than those discussed herein, which were objected-to on grounds of res judicata and collateral estoppel. That evidence was received on the understanding that the issue of its admissibility would be taken up at the time for preparation of this decision. We do not decide those issues because of the result reached on other grounds.

As above, the Corn Exchange Bank, through Messrs. Hart and Hegerfeld, had not only notice but intimate knowledge that Elkton never had any paid-in capital and that, at the times material herein, Elkton had current liabilities in excess of its current assets, and checks were being issued on the Elkton checking account amounting to hundreds of thousands of dollars per week on insufficient funds in the hope of covering them later. Notwithstanding that knowledge those bankers repeatedly phoned the Mulso home upon arrival of such NSF checks to get them covered by deposits, the Mulso instruments, and then paid them on uncollected funds. Mr. Hart testified (Sioux Falls Tr. 494) that it was a common practice for bankers in that area to pay checks on uncollected funds. Neither he nor anyone else testified that it was such a common practice to contact a particular depositor to get NSF checks covered and then pay them on uncollected funds repeatedly under such circumstances. We could not base any findings about matters subject to the Act on any premise that those bankers' above-mentioned activities were proper or customary, because we simply do not believe it.

As above the record clearly shows that some checks drawn on the Elkton checking account were dishonored by the Corn Exchange Bank before Wednesday, December 15, the day Mr. Den Herder ordered dishonor of Mulso instrument number 21 for $882,939.10. The time of this is not shown clearly but appears to have been on Monday the 13th when Mr. Hart first understood that instrument number 19 for $159,463.82 would not be paid notwithstanding the meeting of Messrs. Mulso and Den Herder on Saturday the 11th. Also as above every cent which would have been deposited in the Elkton checking account in that bank under number 19 was so deposited under number 20 the next day. The lack of understanding of that bank that number 19 would not be paid notwithstanding that meeting was due to a failure of communication with its depositor, that is, between Mr. Hart and Mr. Mulso. Also that bank's above-mentioned $169,900 entry on Saturday the 11th to its records of the Elkton checking account and the

Elkton line of credit was an attempt, based on that lack of understanding, due to that failure of communication, to transfer funds which were not there. As above, on Monday the 13th that bank understood that number 19 would not be paid after all, so that the Elkton checking account had $159,463.82 less than the bank's records showed it to have, so that the $169,900 entry involved funds which were not there, but it failed to reverse any part of that $169,900 entry. For that failure the record contains no explanation other than the obvious incentive to secure its $169,900 repayment, if not from its depositor and borrower, then from the latter's other creditors.

It further appears that the action of the Corn Exchange Bank before Wednesday, December 15, dishonoring checks drawn on the Elkton checking account, was what induced some of the unpaid persons from whom cattle had been obtained in the name of Elkton to stop cattle in transit to Tri-State, and to reclaim cattle consigned to Tri-State, and thus burst the bubble which that bank had helped to inflate.

Of course, any amount ordered herein to be paid on account of animals obtained in the name of Elkton should be considered paid to whatever extent the particular claimant receives payment for the same animals from the proceeds paid to the Montana Department of Livestock Brand Enforcement Division or any other source.

Prejudgment interest is included in the language of section 309(e) of the Act, 7 U.S.C. 210(e), "pay to the complainant the sum to which he is entitled." Our orders to pay prejudgment interest were affirmed in *Hays* and *Rice, supra*. See also discussion in *Rowse, supra*. Recently, in *General Motors Corporation* v. *Devex Corp.*, 461 U.S. 648, 651-3 (1983), the Supreme Court noted that prejudgment interest was awarded in successful patent infringement actions before the applicable legislation specified a right to it. See also *Bergkamp* v. *Carrico*, 700 P.2d 98 (Idaho App. 1985); Iowa Code § 535.3; M.C.A. § 27-1-211; and S.D.C.L. § 21-1-11. The rate of such interest is taken from the notice published at 45 F.R. 37872, June 5, 1980.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., appendix pg. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 201.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426 (1949). On a respondent's right to judicial review of such an order, see *Moh Livestock Commission* v. *Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. 106 (8 C. 1971) and *Fort Scott Sale Co., Inc.* v. *Hardy*, 570 F. Supp. 1144 ___ Ag. Dec. ___ (D. Kan. 1983).

This order constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such orders by court action.

It is requested that copies of all pleadings filed by any party, in any subsequent litigation involving this decision and order, be filed with the Packers and Stockyards Division, Office of the General Counsel of this Department. It is further requested that, if the construction of the Act or the jurisdiction to issue this order becomes an issue in any such litigation, prompt notice of such fact be given to that Division, so that the question can be taken up whether the United States will participate as intervenor or amicus curiae in support of our construction of the Act and our jurisdiction.

ORDER

Within 30 days of the date of this order, respondents Elkton Livestock, Inc., Wes Van Dyke, and David Mulso shall, jointly and severally, pay to complainants, with interest at the rate of 13% per annum from February 1, 1983, until paid, as follows:

Urban "Shorty" Arnzen:	$141,290.82
Jack Broadbrooks:	2,822.88
Boyd Burtch:	672.60
Sendra Burtch:	672.60
Noel Capdeville:	28,427.25
Darryl Crasco:	11,476.55
Irene Cresco:	5,590.05
Luke Crasco:	18,214.95
Maynerd Crasco:	258.30
Orville Jake Crasco:	49,644.30
Will Crasco:	5,104.20
Darcie Doney:	1,928.85
Wanda Doney:	1,994.60
Ben Fewer:	10,322.05
James Fewer:	7,176.65
Loren Fladlend:	8,188.00
Larry Haynes:	8,082.01
Raymond Helgeson:	40,157.00
Carl J. Iverson:	28,007.00
Bruce Kirkaldie:	50,717.10
Raymond J. Knudson:	4,468.75
Meissner Ranches, Inc.:	18,852.24
Shawn Meissner:	606.48

Steven Pankratz:	3,974.00
Jack Quisno:	24,921.80
Gerald J. "Bud" Walsh, Admr., Estate of Gerold M. Walsh:	23,602.90

In addition to the above, respondents Elkton Livestock, Inc. and Wes Van Dyke shall jointly and severally pay to complainant The Miller Colony, Inc., with interest thereon at the rate of 13% per annum from February 1, 1983 until paid, $8,309.50.

All complaints are hereby dismissed as to respondent Paul Den Herder.

The complaint of the Corn Exchange Bank is hereby dismissed as to respondents Elkton Livestock, Inc., David Mulso, and Sirloin, Inc.

Copies hereof shall be served on the parties.

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16 CASES (See List at End of the Decision) Against B. J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, DAVID R. MONELL d/b/a DAMONE SALES & SERVICE, and LLOYD WOODRUFF. P&S Docket No. 6286. et. seq. Decided November 8, 1985.

Dealer—Failure to pay—Order for the payment of money—Default.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER AS TO RESPONDENTS MONELL AND WOODRUFF

PRELIMINARY STATEMENT

These are reparation proceedings under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by complaints received on various dates in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of each complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in each proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the respective investigation report was duly served on each complainant.

Respondent Woodruff at the time of service of each complaint and investigation report was informed that an answer thereto was

required to be filed within 20 days, that failure to file an answer within that time would be deemed an admission of all the allegations contained in the complaint, and that upon such failure the file would be forwarded to the Office of the Secretary for issuance of a default order. No answer was received from Mr. Woodruff. Accordingly under Rule 6 of the Rules of Practice, 9 CFR § 202.106, a default order may be issued against him in each proceeding based on all evidence in the record including information contained in the investigation report and evidence received at the oral hearing.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly these proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. Cross claims of the Holmes firm are in abeyance. The proceedings went forward only as to claims of the complainants against Messrs. Monell and Woodruff.

A total of 65 related cases including these were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified. No exhibit was received. No brief was received.

FINDINGS OF FACT

1. Respondent Lloyd Woodruff at all times material herein engaged in business as a dealer buying and selling livestock for his own account in commerce.

2. Respondent Lloyd Woodruff on December 22, 1982 purchased livestock from complainants as follows, for agreed prices, and failed to pay for such livestock amounts as follows:

Complainant	*Amount*	*Complainant*	*Amount*
Aubin	$1,550	Bernat	$2,500
Buckley	1,100	Conway	000
Oillette	550	Hebert	550
Miller	2,200	Mitchell	2,200
Morrow	1,000	Patterson	1,650
Schomp	500	Searl	1,350
Sheldon	1,650	Widrick	550
Zehr	550		

3. Each complaint of an above-named complainant was received within 90 days of accrual of the cause of action alleged therein.

CONCLUSIONS

At the hearing complainants in these proceedings, although duly notified, did not appear in person or by counsel or other representative, and no evidence was offered or received in support of their claims, with one exception, Mrs. Searl, who appeared and testified. Respondent Woodruff also, although duly notified, did not appear in person or by counsel or other representative. The findings of fact are based on the allegations in the complaints deemed to be admitted by Mr. Woodruff as previously stated, the investigation reports, and the testimony received at the hearing.

Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability of Mr. Monell in court under his surety bond see *United States Fid. & G. Co.* v. *Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc.* v. *Pearson*, 383 F. Supp. 1319 (D. Nebr. 1974).

Mr. Monell testified that in all the transactions involved in these proceedings, respondent Woodruff purchased the livestock for resale to Mr. Hunt. Mr. Monell's testimony was credible and the record does not contain any evidence to the contrary.

Mr. Woodruff as a dealer violated the Act, committing an unfair or unjust practice within the meaning of the Act, in buying livestock and failing to pay for it. Section 409 of the Act, 7 U.S.C. 228b and *Vance* v. *Reed*, 495 F. Supp. 852, 39 Ag. Dec. 1117 (M.D. Tenn., Nashville Div. 1980).

The complaint of Mr. Tabolt was received on March 23, 1983, more than 90 days after December 22, 1982, the date of the transaction alleged in it. The Act at section 309, 7 U.S.C. 210 requires such a complaint to be filed within 90 days after the cause of action accrues. We have no basis for a finding that we have jurisdiction in Mr. Tabolt's case.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426. On a respondent's right to judicial review of such an order see *Maly Livestock Commission* v. *Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. 1063 (8 C. 1971) and *Fort Scott Sale Co., Inc.* v. *Hardy*, 570 F. Supp. 1144, ... Ag. Dec. ____ (D. Kan. 1983).

This order constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such orders by court action.

It is requested that copies of all pleadings filed by any party, in any subsequent litigation involving this decision and order, be filed with the Packers and Stockyards Division, Office of the General Counsel of this Department. It is further requested that, if the construction of the Act or the jurisdiction to issue this order becomes an issue in any such litigation, prompt notice of such fact be given to that Division, so that the question can be taken up whether the United States will participate as intervenor or amicus curiae in support of our construction of the Act and our jurisdiction.

ORDER

The complaint of Mr. Tabolt is hereby dismissed.

All other complaints of the complainants in the proceedings identified in the attached list are dismissed as to respondent David R. Monell d/b/a Damone Sales and Service.

Within 30 days of the date of this order, respondent Lloyd Woodruff shall pay to complainants as follows, together with interest thereon at the rate of 13% per annum from February 1, 1983 until paid:

Complainant	*Amount*	*Complainant*	*Amount*
Aubin	$1,550	Bernat	$2,500
Buckley	1,100	Conway	900
Gillette	550	Hebert	550
Miller	2,200	Mitchell	2,200
Morrow	1,000	Patterson	1,650
Schomp	500	Searl	1,350
Sheldon	1,650	Widrick	550
Zehr	550		

Copies hereof shall be served on the complainants and Messrs. Monell and Woodruff.

LIST OF CASES

P&S Docket No. 6295

J. Maurice Aubin v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6343
Stephen N. Bernat v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6344
Terry L. Buckley v.*B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6347
John P. Conway v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6294
Thomas C. Gillette v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6293
Sylvio Hebert v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6345
Richard L. Miller v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6319
H. Ben Mitchell v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6317
Richard Morrow v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6286
Patrick T. Patterson v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6375

Paul A. Schomp and Douglas K. Schomp v. *B. J. Holmes Sa International, Inc., Gary W. Hunt d/b/a Coastal Cattle Compa David R. Monell d/b/a Damone Sales & Service, and Lloyd Wo ruff Jr.*

P&S Docket No. 6289

Ralph G. Searl v. *B. J. Holmes Sales International, Inc., Gary Hunt d/b/a Coastal Cattle Company, David R. Monell d/b Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6291

Allison G. Sheldon v. *B. J. Holmes Sales International, Inc., Ga W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6346

Russell Tabolt v. *B. J. Holmes Sales International, Inc., Gary W Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/ Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6356

Nelson Widrick v. *B. J. Holmes Sales International, Inc., Gary W Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/ Damone Sales & Service, and Lloyd Woodruff Jr.*

P&S Docket No. 6339

Robert G. Zehr v. *B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.*

MISCELLANEOUS REPARATION DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

GENE VOGTS *v.* GARDEN CITY LIVESTOCK MARKET, INC. P&S Docket No. 6246. Order issued November 1, 1985.

Complainant, *pro se.*
Respondent, *pro se.*

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.) begun by a complaint received on February 24, 1983, alleging in substance sale of consigned livestock and failure to honor a guaranty of price and to start bidding at a particular price. The amount claimed was $500.24.

Copies of the complaint, and of an investigation report prepsared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on September 23, 1983. A copy of the investigation report was served on complainant on September 24. An answer and request for oral hearing was received from respondent on October 17. A copy thereof was served on complainant on December 5. No issue was raised about timeliness of the answer.

An oral hearing as requested was held on April 6, 1984 in Pratt, Kansas before John J. Casey of the Office of the General Counsel of this Department. Complainant appeared without counsel. Respondent appeared by David G. Daniel, Manager, without counsel. Four witnesses testified. No exhibits were received. No brief was filed.

It is undisputed that on December 6, 1982, of certsin sheep which complainant had consigned to respondent for ssle, some were sold at auction and some were bought by respondent in market support transactions.

Complainsnt contended that respondent, through its employee Dwayne West, guaranteed before the sale that he, complainant, would "clear" $25.00 per head net sfter expenses of sale. We have for many years forbidden a market agency to guaranty the price at which consigned livestock will be sold. 9 CFR § 201.64. Thus we will not order reparation to be paid on the baais of any such guaranty if given.

Complainant testified that respondent through Mr. West promised to start bidding at $27.50. It is undisputed that respondent did not do so. Witnesses for respondent testified that market conditions were such at the time and place of sale that no bid would have been obtained for the sheep at $27.50, and that the custom of the industry is such that, if an auctioneer starts bidding at a particular price, and receives no bid at that price, he "backs down" until a bid is received. That testimony was credible and of course there is no assurance that a bid will be received at a particular stsrting price. Complsinant obtained the highest price obtainable at auction at the time and place at which his sheep were sold, so far as the record shows.

A finding that respondent agreed to buy the sheep from complainant, rather than sell them as agent for complainant, is not supported by the record.

Complainant could have set a minimum hold price below which the sheep were not to be sold but were to be returned to him. However, so far as the record shows, he did not.

This order is the same as an order issued by the Secretary of Agriculture, being iasued pursuant to delegated authority, 7 CFR

§ 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

NORRIS A. JOHNSON *v.* UNION STOCKYARDS COMPANY OF FARGO. P&S Docket No. 6257. Order issued November 1, 1985.

Complainant, *pro se.*
Respondent, *pro se.*

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by a complaint received on March 12, 1983. An amended complaint was received on March 17. It was alleged in substance that 15 animals were delivered to the stockyards company but only 14 were delivered by that company to the market agency to which they were consigned for sale. The amount claimed was $550.80.

Copies of the complaint and attachments, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on October 11, 1983. A copy of the investigation report was served on complainant on October 7. An answer and request for oral hearing was received on October 25 and served on complainant on November 23. A reply was received on December 7 and served on respondent on January 24, 1984.

An oral hearing as requested was held on May 23, 1984 in Fargo, North Dakota before John J. Casey of the Office of the General Counsel of this Department. Complainant appeared without counsel. Respondent appeared by Jewel E. Roningen, its President and General Managar, without counsel. Five witnesses testified. Seven exhibits were received. No brief was filed.

Complainant Norris A. Johnson claimed on behalf of Robert E. Reynolds Sr. with the latter's writtan authorization. The case involves cattle loaded onto Mr. Johnson's truck at Mr. Reynolds'

farm, taken to the Union Stockyards, consigned to a market agency there, and sold the next day, December 14, 1982. Mr. Reynolds Sr. and Jr. both testified credibly that there were 15 loaded onto the truck at the farm. They did not go with them to the stockyard.

Mr. Johnson did not count the animals either at the farm or upon unloading at the stockyard. He unloaded the animals into the chute there, filled out a printed form issued by the stockyard company so as to show 15, and left the form in the clip provided for it. The chute was not locked or attended. He then departed.

Mr. Keith Jorgenson, a stockyard employee, testified credibly that he counted 14 when he removed the animals from the chute where Mr. Johnson had left them, and noted this on the same form. Since his count was different from what Mr. Johnson had written on the form, he counted them again when he penned them, and wrote "14-rechecked" on the form.

Mr. Johnson contended that one animal must have been stolen from the chute between the time when he departed and the time when Mr. Jorgenson moved them from there to the pens. As an explanation for the difference in the head counts of the consignor and the stockyard company, this of course is reasonable, but it was not established by evidence. The only thing certain is that there was a difference in the head counts.

On the above-mentioned form which the stockyard company provided and Mr. Johnson used, there was a legend printed that a receipt would be furnished if requested. Witnesses for the stockyard company testified credibly that this was true, that a receipt would have been furnished if requested. Also, Mr. Johnson was the one who made the choice to depart instead of remaining until a stockyard company employee counted the animals. In view of this it seems fair to conclude that the possibility that there would be a difference in the head counts was a matter in which Mr. Johnson decided to take a chance.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702–3 and *United States* v. *I.C.C.*, 337 U.S. 426.

Copies hereof shall be served on the parties.

LAFLEUR BROTHERS CO., INC. *v.* COLUMBUS SALES PAVILION, INC.
P&S Docket No. 6651. Order issued November 1, 1985.

Ronald W. Banks, Rapid City, South Dakota, for complainant.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921 as amended (7 U.S.C. 181 *et seq.*) A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $34,134.45 in connection with a transaction involving the shipment of livestock in interstate commerce.

A copy of the formal complaint was served on respondent. Complainant, in its letter of October 8, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MARK SOUTHWORTH *v.* B. J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, DAVID R. MONELL d/b/a DAMONE SALES & SERVICE, CAROLYN ISHLER and GAIL SNOWDEN. P&S Docket No. 6298. Order issued November 8, 1985.

Complainant, *pro se.*
Paul S. Boylan, for respondent Gail Snowden.
Other respondents, *pro se.*

ORDER OF DISMISSAL AS TO RESPONDENTS MONELL, ISHLER, AND SNOWDEN

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by a complaint received in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in the proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the investigation report was duly served on complainant.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly the proceeding is stayed under 11 U.S.C. 362(a)(1) as to

them. The cross claims of the Holmes firm are in abeyance. The proceeding went forwrd only as to the Southworth claim against respondents Monell, Ishler and Snowden, and the Snowden claim against Mr. Monell.

A total of 65 related cases including this one were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified. No exhibits were received. No brief was received.

At the hearing complainant Southworth and respondents Ishler and Snowden although duly notified did not appear in person or by counsel or other representative, and no evidence was offered or received in support of the claim of Mr. Southworth or the cross claim of Ms. Snowden.

The evidence in the record, that is, the investigation report, is not sufficient to support the Southworth claim against Ms. Ishler or Ms. Snowden. What is in the investigation report about those two respondents reflects at most the allegations of Mr. Southworth.

The record contains no evidence whatever in support of the Snowden claim against Mr. Monell.

At the hearing Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

The claim of Mr. Southworth is dismissed aa to respondents Monell, Ishler and Snowden. The cross claim of Ms. Snowden is dismissed as to Mr. Monell.

Copies hereof shall be served on the complainant, Mr. Monell, Ms. Ishler and Ms. Snowden.

NORMAN HITCHCOCK *v.* GARY W. HUNT d/b/a COASTAL CATTLE COMPANY and FRANK PRATT. P&S Docket No. 6326. Order issued November 8, 1985.

John J. Casey, Presiding Officer.
Richard E. McLenithan, Glens Falls, New York, for complainant.
Respondent, *pro se*.

ORDER OF DISMISSAL AS TO RESPONDENT PRATT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by a complaint received in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in the proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the investigation report was duly served on complainant.

Respondent Hunt subsequently entered bankruptcy. Accordingly the proceeding is stayed under 11 U.S.C. 362(a)(1) as to him. The proceeding went forward only as to the claim against Mr. Pratt.

A total of 65 related caaes including this one were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing waa held on May 20, 1985 in Syracuse, New York before John J. Caaey of the Office of the General Counael of this Department. No party was represented by counael. Six witnesses teatified. No exhibits were received. No brief was received.

At the hearing complainant Hitchcock and respondent Pratt although duly notified did not appear in peraon or by counsel or other representative, and no evidence waa offered or received in support of Mr. Hitchcock's claim.

The evidence in the record, that is, the investigation report, is not sufficient to support the Hitchcock claim against Mr. Pratt. What is in the investigation report about Mr. Pratt reflects at most the allegation of Mr. Hitchcock.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702–3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The claim of Mr. Hitchcock is dismissed as to Mr. Pratt.

Copies hereof shall be served on Mr. Hitchcock and Mr. Pratt.

WILLIAM A. BOSSARD, WILLIAM W. BOSSARD, and DONALD R. BOSSARD d/b/a WILL-TRI FARMS *v.* GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, DAVID R. MONELL d/b/a DAMONE SALES & SERVICE, and GAIL SNOWDEN. DAVID R. MONELL d/b/a DAMONE SALES & SERVICE *v.* B. J. HOLMES SALES INTERNATIONAL, INC. GAIL SNOWDEN *v.* SAME. B. J. HOLMES SALES INTERNATIONAL, INC. *v.* H. PETER SINCLAIR. P&S Docket No. 6377. DONALD TIEDE *v.* B. J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, DAVID R. MONELL d/b/a DAMONE SALES & SERVICE, and GAIL SNOWDEN. P&S Docket No. 6335. Order Issued November 8, 1985.

Complainant, *pro se.*
Respondent, *pro se.*

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

These are reparation proceedings under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by complaints received in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of each complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in each proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the respective investigation report was duly served on each complainant.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly these proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. The cross-claims of the Holmes firm are in abeyance. The proceedings went forward only as to the claims against Mr. Monell.

A total of 65 related cases including these were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified. No exhibits were received. No brief was received.

At the hearing complainants Bossard and Tiede and Respondent Snowden although duly notified did not appear in person or by counsel or other representative, and no evidence was offered or received in support of their claims.

The record contains no evidence whatever in support of the Snowden claims against Mr. Monell.

At the hearing Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability in court under his surety bond see *United States Fid. & G. Co.* v. *Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc.* v. *Pearson*, 383 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The Bossard and Tiede complaints, and the Snowden cross-claims, are dismissed as to respondent David R. Monell d/b/a Damone Sales and Service.

Copies hereof shall be served on the complainants. Mr. Monell and Ms. Snowden.

LLOYD WOODRUFF, JR. *v.* B. J. HOLMES SALES INTERNATIONAL, INC., GARY W. HUNT d/b/a COASTAL CATTLE COMPANY, and DAVID R. MONELL d/b/a DAMONE SALES & SERVICE. P&S Docket No. 6342. Order issued November 8, 1985.

Complainant, *pro se.*
Respondent, *pro se.*

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by a complaint received in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in the proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the investigation report was duly served on complainant.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly these proceedings are stayed under 11 U.S.C. 362(a)(1) as to them. The cross claims of the Holmes firm are in abeyance. The proceeding went forward only as to the claim of Mr. Woodruff against Mr. Monell.

A total of 65 related cases including this one were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Six witnesses testified. No exhibit was received. No brief was received.

At the hearing complainant Woodruff, although duly notified, did not appear in person or by counsel or other representative, and no evidence was offered or received in support of his claim.

Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability of Mr. Monell in court under his surety bond see *United States Fid. & G. Co.* v. *Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc.* v. *Pearson*, 388 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 ed., app. p. 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702-3 and *United States* v. *I.C.C.*, 337 U.S. 426.

The complaint of Mr. Woodruff is dismissed as to Mr. David R. Monell.

Copies hereof shall be served on Messrs. Monell and Woodruff.

RICHARD M. DUELL *v.* B. J. HOLMES SALES INTERNATIONAL, INC., GARV W. HUNT d/b/a COASTAL CATTLE COMPANY, and DAVID R. MONELL d/b/a DAMONE SALES & SERVICE, and ARCHIE MEEK.
P&S Docket No. 6352. Order issued November 8, 1985.

Complainant, *pro se.*
Stratton, Sullivan, Monaco & Smith, Oxford, New York, for respondent Archie Meek.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL AND MEEK

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 U.S.C. 181 et seq., begun by a complaint received in early 1983, alleging in substance failure to pay for livestock purchased.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in the proceeding pursuant to the Rules of Practice, were duly served on each respondent. A copy of the investigation report was duly served on complainant.

Respondents Holmes and Hunt subsequently entered bankruptcy. Accordingly the proceeding is stayed under 11 U.S.C. 362(a)(1) as to them. The proceeding went forward only as to the claims against Messrs. Monell and Meek.

A total of 65 related cases including this one were consolidated for hearing, the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint trial. AmJur2d *Actions* §§ 156 et seq. The oral hearing was held on May 20, 1985 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No party was

represented by counsel. Six witnesses testified. No exhibits were received. No brief was received.

At the hearing complainant Duell and respondent Meek although duly notified did not appear in person or by counsel or other representative, and no evidence was offered or received in support of their claims.

The evidence in the record, that is, the investigation report, is not sufficient to support the Duell claim against Mr. Meek. What is in the investigation report about Mr. Meek reflects at most the allegation of Mr. Duell.

The record contains no evidence whatever in support of the Meek claim against Mr. Monell.

At the hearing Mr. Monell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was acting as agent for Mr. Hunt and he disclosed this to the sellers. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpaid price of any of such livestock on that basis. *Sweeney* v. *Herman Management, Inc.*, 85 App. Div. 2d 34, 447 N.Y.S. 2d 164 (2 Dept. 1982).

On possible liability in court under his surety bond see *United States Fid. & G. Co.* v. *Clover Creek Cattle Co.*, 92 Idaho 889, 452 P. 2d 993 (1969) and *Arnold Livestock Sales Company, Inc.* v. *Pearson*, 383 F. Supp. 1319 (D. Nebr. 1974).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 91, 7 U.S.C. 450c–450g. See also Reorganization Plan No. 2
1976 ed., app. p. 764.

DISCIPLINARY DECISIONS

In re: STOOPS AND WILSON, INC. PACA Docket No. 2-6875. Decided October 15, 1985.

Failure to pay promptly—Publication of the facts—Default.

Edward M. Silverstein, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 8, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period April through September 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from 57 sellers, 502 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $1,691,863.10.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Stoops & Wilson, Inc., is a Missouri corporation whose address is 11800 West 63rd Street, Shawnee, Kansas 66203

2. Pursuant to the licensing provisions of the Act, license number 137820 was issued to respondent on January 29, 1952. This license was renewed annually, but terminated on January 29, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint during the period April through September 1984, respondent purchased, received, and accepted in interstate and foreign commerce from 57 sellers, 502 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment

promptly of the agreed purchase prices, in the total amount of $1,691,863.10.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 502 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

It is noted that although respondent did not file an answer to the complaint served upon it and therefore is deemed to have admitted all of the material allegations of the complaint, 7 CFR § 1.136(c), answers were filed by two persons, Messrs. Charles Blevin and Steven Flosi, each of whom had been notified that he was considered to be responsibly connected with the corporate respondent. It is clear that it is the determination that each was responsibly connected with the respondent and not the merits of the complaint against respondent which Messrs. Blevin and Flosi seek to challenge. Such challenges must be brought pursuant to the rules of practice governing such matters which rules of practice are found at 7 CFR § 47.47. This forum has no jurisdiction to hear the challenges by Messrs. Blevin and Flosi to the determination that they were responsibly connected with the corporate respondent. See 7 CFR § 1.131. Accordingly, the complainant's motion to strike the answers of Messrs. Blevin and Flosi is granted.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

Complainant's motion to strike the answers of Messrs. Charles Blevin and Steven Flosi is granted.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final November 28, 1985.—Ed.]

In re: CENTRAL WV WHOLESALE PRODUCE, INC. PACA Docket No. 2-6838. Decided October 21, 1985.

Failure to pay promptly—Publication of the facts—Default.

Andrew Stanton, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on June 3, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1983 through January 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from 10 sellers, 33 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $112,962.28.

Upon the motion of the complainant * for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Central WV Produce, Inc., is a corporation, whose address is 106 West Main Street, Sutton, West Virginia 26601.

2. Pursuant to the licensing provisions of the Act, license number 830202 was issued to respondent on November 8, 1982. This license was renewed annually, but terminated on November 8, 1984, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1983 through January 1984, respondent purchased, received, and accepted in interstate and foreign commerce, from 10 sellers, 33 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full pay-

* Complainant attaches a letter from an officer of respondent corporation stating that respondent does "not wish to contest the issues" and "expressly consent[s] to disciplinary actions . . . ".

ment promptly of the agreed purchase prices, in the total amount of $112,962.28.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 33 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499h), and the facts and circumstances set forth above, shall be published.

Thia order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, thia Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rulea of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be aerved upon parties.

[This decision and order became final November 30, 1985.—Ed.]

In re: CHRISTOPHER R. SIMMONS d/b/a GREATER AMERICAN PRODUCE CO. PACA Docket No. 2-6620. Decided December 4, 1985.

Failure to pay promptly—Publication of the facts.

Edward M. Silverstein, for complainant.
Leonard A. Goldman, Los Angeles, California, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Periahable Agricultural Commoditiea Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), inatituted by a complaint filed on August 20, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1983 through April 1984, Respondent failed to make full payment promptly to 49 sellers, of the agreed purchase prices, or balances thereof, in the total amount of $1,189,877.64 for 384 lots of perishable agricultural commodities, purchased, received, and accepted in interstate and foreign commerce. A copy of the complaint was served upon Respondent. Respondent filed an Answer to the complaint denying certain allegations. Respondent has now filed an amended answer admitting all the factual allegations set forth in the complaint, and has agreed with complainant to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.*

FINDINGS OF FACT

1. Christopher R. Simmons (hereinafter "Respondent"), is an individual, doing business as Greater American Produce Co., whose mailing address is P. O. Box 6356, Anaheim, California 92806.

2. Pursuant to the licensing provisions of the Act, license number 780927 was issued to Respondent on March 20, 1978. This license was renewed annually, but terminated on March 20, 1984, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As detailed in paragraph 5 of the Complaint and as admitted by Respondent, during the period November 1983 through April 1984, Respondent, failed to make full payment promptly to 49 sellers of the agreed purchase prices or balances thereof, in the total amount of $1,189,877.64, for 384 lots of perishable agricultural commodities, purchased, received, and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

* Addendum added by Administrative Law Judge: An oral hearing in this matter did take place on June 19, 1985, in Los Angeles, California. The Complainant submitted its Brief on July 22, 1985, and the Respondent submitted a Response thereto on September 18, 1985. An Amended Answer was filed December 2, 1985.

ORDER

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall become effective on December 9, 1985.

Copies hereof shall be served upon the parties.

In re: BENCHMARK BROKERAGE, INC. PACA Docket No. 2-7005. Decided December 4, 1985.

Failure to pay promptly—Publication of the facts.

Edward M. Silverstein, for complainant.
Respondent, *pro se.*

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on November 14, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

2. Pursuant to the licensing provisions of the Act, license number 780849 was issued to Respondent on March 1, 1978. This license terminated on March 1, 1985, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)), when Respondent failed to pay the required annual license fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As more fully detailed in paragraph 5 of the Complaint and as admitted by Respondent, during the period March 1984 through October 1984, Respondent failed to make full payment promptly to six sellers of the agreed purchase prices or balances thereof, in the total amount of $320,046.53, for 39 lots of fruits and vegetables, all being perishable agricultural commodities, purchased, received, and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall become effective on December 2, 1985.

Copies hereof shall be served upon the parties.

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: VEG-MIX, INC. PACA Docket No. 2-6612. Order issued November 26, 1985.

Order issued by Donald A. Campbell, Judicial Law Judge.

STAY ORDER

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

In re: BENCHMARK BROKERAGE, INC. PACA Docket No. 2-7005. Order issued December 9, 1985.

Order issued by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO CHANGE EFFECTIVE DATE

A Decision and Order in the above-captioned matter was issued upon consent of the parties, on December 4, 1985. In the Decision and Order, it was noted that the effective date thereof was to be December 2, 1985. Complainant, by Motion filed December 9, 1985, moves that the effective date be changed to December 4, 1985, to coincide with the date of issuance of the Decision and Order. For good cause shown, complainant's Motion is granted, and it is ordered that the December 4, 1985, Decision and Order is hereby amended to provide that its effective date is December 4, 1985.

REPARATION DECISIONS

HOMESTEAD TOMATO PACKING CO., INC. *v.* GULF LAKE PRODUCE CO.
PACA Docket No. 2-6697. Decided November 7, 1985.

Contract terms—Price adjustment—Dismissed.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,315.90 in connection with the sale of three shipments of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACTS

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, Gulf Lake Produce Co., is a partnership composed of Frank L. Kelsoe, Glenn D. Perry and Stephen Tavilla, whose address is P.O. Box 697, Belle Glade, Florida. At the times of the transactions involved herein, the respondent was licensed under the Act.

3. On approximately January 9, 1984, complainant sold to respondent 814 cartons of 6×6 tomatoes at $14.00 per carton, or $11,396.00, and 792 cartons of 6×7 tomatoes at $12.00 per carton, or $9,504.00, plus $240.90 palletizing, for a total of $21,140.90, f.o.b.

4. The tomatoes sold on January 9, 1984, were shipped in interstate commerce to respondent's customer on about January 13,

1984, and were received and accepted. On January 23, 1984, 528 cartons were federally inspected. On February 1, 1984, respondent prepared and sent to complainant a "problem report" stuting the inspection results.

5. On approximately January 26, 1984, complainant sold to respondent 176 cartons of 6×7 tomatoes at $5.00, or $880.00, plus $26.40 pallatizing for a total of $906.40, f.o.b.

6. The tomatoes sold on January 26, 1984, were shipped in interstate commerce to respondent's customer, and were received and accepted.

7. On approximately February 1, 1984, complainant sold to respondent 206 cartons of 5×6 tomatoes at $14.00 per carton, or $2,884.00, 432 cartons of 5×6 tomatoes at $16.00 per carton, or $6,912.00, 611 cartons of 6×6 tomatoes at $13.00 per carton, or $7,943.00, and 216 cartons of 6 ×7 tomatoes at $10.00 per carton, or $2,160.00, plus $219.75 pallatizing, for a total of $20,118.75, f.o.b.

8. The tomatoes sold on February 1, 1984, were shipped in interstate commerce to respondent's customer, and were received and accepted. On February 9, 1984, 1,249 cartons out of the 1,465 originally shipped were federally inspected. On February 11, 1984, respondent prepared and sent to complainant a "problem report" relating the inspection results.

9. After receiving the problem reports for the January 9, 1984, and February 1, 1984, shipments, complainant's salesman, Tom Banks, called respondent's salesman, Glenn Thomason, and asked what they were about. After Thomason explained what the reports represented, Banks stated that he would pay no attention to them and advised respondent to send federal inspections on the loads involved. Respondent sent the applicable inspection reports to complainant on February 16, 1984.

10. On or about March 8, 1984, Thomason spoke with Banks over the telephone, and they agreed to price adjustments of $1.50 per carton for the January 9, 1984, load, and $2.00 per carton for the February 1, 1984, load. Thomason confirmed these price adjustments in a March 8, 1984, letter to Banks, which states as follows, in relevant part:

> As per phone conversation regarding allowances on tomatoes that showed problems, we are taking the following adjustments per you on these invoices:
>
> Gulf Lake #8708, your #0505, adjusting $1.50 per case on all 1,465 cases.

Gulf Lake #3389, your #0305, adjusting $2.00 per case on all 1,606 cases.

* * * * * * *

These are based on inspections forwarded to you under separate cover, and I assume that you don't need another copy. If so, just let me know.

Thank you for your consideration in finally getting these resolved.

11. Respondent eventually paid complainant $17,928.90 for the January 9, 1984, shipment, and $17,921.25 for the February 1, 1984, shipment. Respondent paid complainant an additional $38,988.45 by check, including $906.40 for full payment of the January 26, 1984, shipment, with the remainder constituting payment for another transaction not included in the complaint.

12. Respondent has failed to pay complainant any additional sum for the January 9, 1984, and February 1, 1984, shipments.

13. A formal complaint was filed on September 19, 1984, which was within nine months from when the alleged causes of action herein accrued.

however, as there is strong evidence in the record supporting respondent's claim of mutually agreed upon price adjustments. In a March 8, 1984, letter to complainant's Tom Banks, contained in the report of investigation, respondent's Glenn Thomason refers to price adjustments arrived at with Mr. Banks of $1.50 per carton for each of the 1,465 cartons of the January 9, 1984, shipment and $2.00 per carton for each of the 1,606 cartons of the February 1, 1984, shipment. Complainant does not deny receiving this letter, nor does complainant dispute the existence of these adjustments. It is respondent's burden to prove the existence of an agreement to alter the original contract terms (*American Banana Co. Inc.* v. *Marvin Gray,* 41 Agric. Dec. 539 (1982)), and it is clear that respondent has sustained such burden.

Complainant has been paid all to which it is entitled, and its complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BEEFSTAKE TOMATO GROWERS INC. *v.* CORGAN & SON, INC. PACA Docket No. 2-6734. Decided November 7, 1985.

Burden of proof—Breach of warranty.

Where respondent failed to provide any evidence to sustain its burden of proving a breach of warranty, respondent is liable for the contract price of the tomatoes it purchased, received, and accepted from complainant.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

plaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Beefstake Tomato Growers Inc., is a corporation whose address is Rt. 2, Box 1700, Naples, Florida.

2. Respondent, Corgan & Son Inc., is a corporation whose address is 161–162 N.Y.C. Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 2, 1984, complainant sold to respondent a truckload of tomatoes consisting of 1,584 cartons of 6×6 tomatoes, at a price of $6.00 per carton, plus $237.60 for pallets and $950.40 for degreening, for a total price of $10,692.00, f.o.b.

4. The truckload of tomatoes was shipped in interstate commerce to respondent, which accepted it upon arrival.

5. Respondent has, to date, paid complainant $7,524.00 for the truckload of tomatoes, leaving $3,168.00 allegedly due and owing to complainant.

6. A formal complaint was filed on November 26, 1984, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

It is agreed that complainant sold and shipped to respondent a truckload of tomatoes for a contract price of $10,692.00, f.o.b. Respondent does not deny receiving and accepting the tomatoes, but alleges in its unsworn answer that the tomatoes arrived with condition problems and, therefore, the $7,524.00 it paid is all to which complainant is entitled.

As respondent admittedly accepted the tomatoes, it became liable for the agreed upon contract price, less damages resulting from any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc.*, 42 Agric. Dec. 429 (1983). Respondent has submitted absolutely no evidence, such as a

federal inspection report, to substantiate its claim that the truckload of tomatoes was abnormally deteriorated upon arrival. Therefore, respondent is liable for the entire contract price of $10,692.00, less the $7,524.00 already paid, or $3,168.00.

Respondent's failure to pay complainant the sum of $3,168.00 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $3,168.00, with interest thereon at the rate of 13 percent per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

BATTAGLIA PRODUCE SALES, INC. v. EMERSON H. ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE. PACA Docket No. 2-6747. Decided November 7, 1985.

Burden of proof—Breach of warranty—Liability limited to produce shipped.

Where respondent failed to provide evidence that the peppers were improperly packed, and that the small peppers were in breach of warranty because of their condition, respondent is liable for the agreed upon contract price. However, respondent's liability is limited to the peppers actually shipped, which differed for those that had been ordered.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,384.55 in connection with the sale and shipment of a quantity of peppers in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of

Practice (7 CFR 47.20) is applicable. Pursuant to such pr the report of investigation is considered to be part of the e as are the verified complaint and answer. The parties wer an opportunity to submit additional evidence in the form fied statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Battaglia Produce Sales, Inc., is a corp whose address is 1705 Weeksville Road, Elizabeth City, Nort lina.

2. Respondent, Emerson H. Elliott d/b/a Emerson Produce, is an individual whose address is P.O. Box 745, berry, Florida. At the time of the transaction involved here spondent was licensed under the Act.

3. On July 12, 1984, complainant sold to respondent a truc of peppers consisting of 253 cartons of extra large at $6.1 carton, or $1,543.30, 697 cartons of medium large at $5.1 carton, or $3,554.70, and 275 cartons of small medium at $4.8 carton, or $1,333.75, plus $22.50 for a temperature recorder, total contract price of $6,454.25, f.o.b. The contract price fo medium large peppers was subsequently reduced to $5.0(carton pursuant to an agreement by the parties.

4. On July 12, 1984, complainant loaded onto a truck for ment to respondent's customer in Canada, 253 cartons of large peppers, 497 cartons of medium large peppers, and 400 tons of small peppers. A bill of lading was prepared by complai reflecting the number of cartons loaded on board the truck.

5. The truckload of peppers was received and accepted by spondent's customer. Respondent has failed to pay any part of agreed upon contract price.

6. A formal complaint was filed on December 7, 1984, which within nine months from when the cause of action herein accr

CONCLUSIONS

Respondent claims that it ordered 253 cartons of extra large pers, 697 cartons of large peppers, and 273 cartons of medium pers, but the peppers received by its customer were improp loaded in cartons marked, respectively, large, medium, and sm Therefore, claims respondent, there were fewer peppers per car than if the peppers had been packed in the proper cartons. spondent claims further that the small peppers had to be dump

Respondent's allegations are not supported by the evidence. spondent's customer received and accepted the truckload of p pers, and there is no evidence in the record that it ever made a

complaint concerning the way the peppers were packed, or the condition of the small peppers. As the peppers were accepted, respondent became liable for the contract price, less damages resulting from any breach of warranty. It is respondent's burden to prove the breach and damages by a preponderance of the evidence (*Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983)), and respondent has not provided any evidence to support its allegations. Therefore, respondent is liable for the contract price of the accepted peppers. However, complainant's bill of lading makes it clear that the quantities of medium large and small medium peppers that were shipped differed from the quantities sold. Therefore, respondent's liability is limited to the peppers actually shipped, which consisted of 253 cartons of extra large, 497 cartons of medium large, and 400 cartons of small, for a total contract price of $5,890.80. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, aa reparation, $5,890.80, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

SHANE FARMS, INC. *v.* CORGAN & SON, INC. PACA Docket No. 2-6754. Decided November 7, 1985.

F.O.B. sale—Reparation awarded.

Stanley K. Brunn, Mount Vernon, Washington, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $16,414.78 in connection with the shipment in interstate commerce of four trucklots of asparagus.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an unverified answer thereto denying liability to complainant. Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered part of the evidence in the case, as is the Department's report of investigation. The answer, since it is not verified, is not in evidence. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Shane Farms, Inc., is a corporation whose address is 1803 Bradshaw Road, Mount Vernon, Washington.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is Row A–No. 161, New York City Terminal Market, Bronx, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 19, 23, 29, and June 21, 1984, complainant sold to respondent, and shipped from loading points in the State of Washington to respondent in Bronx, New York, four trucklots of fresh asparagus at a total price of $64,122.20, f.o.b.

4. Respondent accepted the four trucklots of asparagus on arrival, and has paid complainant a total amount of $47,707.47, leaving a balance still due and owing to complainant of $16,414.73.

5. The formal complaint was filed on December 26, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Respondent's answer to the formal complaint was in the form of an unverified letter from its president. This letter has no evidentiary value in this proceeding, but does serve to join the issues between the parties. See *Perell, Inc.* v. *Anthony Abbate Fruit Distributors*, 32 Agric. Dec. 1900 (1973).

In its letter respondent alleges that all of the asparagus was received from complainant on a commission basis. There is no evidance in the record to support this contention by respondent, and complainant has submitted as its opening statement two affidavits, one from its president and the other from its marketing director, denying that the four shipments of asparagus were on a consign-

ment basis. Both affidavits affirm that the four shipments were sold at the f.o.b. prices stated in the complaint. We conclude on the basis of all of the evidence that respondent purchased the asparagus at the prices set forth in the complaint, totaling $64,122.20, and accepted such asparagus upon arrival. Respondent has not proved any defense to complainant's claim. Accordingly, we conclude that respondent's failure to pay complainant the balance of $16,414.73 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $16,414.73, with interest thereon at the rate of 13 percent per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

GADSDEN TOMATO CO. v. CORGAN & SON, INC. PACA Docket No. 2-6750. Decided November 8, 1985.

Liability for contract price of accepted produce—Payment not for produce alleged in the complaint.

Respondent found liable for the contract price of a load of tomatoes which the complaint alleged had been purchased, received, and accepted, where respondent alleged that it had made payment for tomatoes, and complainant provided evidence that such payment was for a load of tomatoes not included in the complaint.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $7,524.00 in connection with the sale and shipment to respondent of a truckload of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served on respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Gadsden Tomato Co., is a corporation whose address is P.O. Box 1018, Quincy, Florida.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-163 N.Y.C. Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately June 30, 1984, complainant sold to respondent a truckload of tomatoes consisting of 1,584 boxes at $4.00 per box, plus $237.60 for palletizing and $950.40 for processing, for a total sales price of $7,524.00, f.o.b.

4. On June 30, 1984, complainant loaded the 1,584 boxes of tomatoes onto a truck bearing license number S33996 Fla., with respondent's place of business as its destination. The driver was instructed to refrigerate the load at 54°F. A bill of lading wns prepared reflecting this information, and signed by the driver.

5. On June 30, 1984, the truckload of tomatoes was shipped, in interstate commerce, to respondent, who received and accepted it upon arrival.

6. On July 2, 1984, complainant sent respondent an invoice reflecting the contract terms, including the sales price of $7,524.00. Respondent never made any objection upon receipt of this invoice.

7. Respondent has failed to make any payment for the truckload of tomatoes at issue.

8. A formal complaint was filed on December 3, 1984, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

$7,524.00. The June 29, 1984, load is obviously the one to which respondent refers to in its answer. Respondent thus does not allege payment for the June 30, 1984, load which is the subject of the complaint herein.

Complainant has presented a bill of lading which indicates that it loaded 1,584 boxes of tomatoes on a truck for shipment to respondent. Complainant has also included a copy of its invoice to respondent, showing the date of billing as July 2, 1984. There is nothing in the record showing that respondent did not receive and accept the truckload of tomatoes. In addition, there is no evidence that respondent objected upon receipt of complainsnt's invoice. Therefore, it is clear that by accepting the tomatoes without objection, respondent became liable for the agreed contract price therefor. *Farm Market Service, Inc.* v. *Albertson's, Inc.*, 42 Agric. Dec. 429 (1983).

Respondent's failure to pay complainsnt the sgreed contract price of $7,524.00 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation $7,524.00, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO. *v.* OTAY PACKING CO. PACA Docket No. 2-6978. Decided November 20, 1985.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed on February 18, 1985, and a formal complaint was filed on July 1, 1985. Complainant seeks to recover $25,023.00, which amount is alleged to be the total purchase price for tomatoes sold to and accepted by respondent in transactions occurring between October 4 and 16, 1984. Respondent filed an answer to the formal complaint on September 16, 1985, admitting that $23,970.00 of the amount claimed by complainant was

due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) provides, in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $23,970.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from November 1, 1984.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6683. Decided November 21, 1985.

F.O.B. sale—Inspection—Accountings—Reparation awarded.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

served upon respondent who filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief which has not been considered, since it was not filed within the time allowed.

FINDINGS OF FACT

1. Complainant, Cal-Mex Diatributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Viata, California.

2. Respondent, George Villalobos, is an individual doing business as Tekaun Brand International, whose address is 1865 Decatur Drive, San Jose, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about the dates set forth below complainant sold and shipped to respondent perishable produce in the following quantities and sizes, and at the following prices:

IN-VOICE	SHIP-PING DATE	QUANTI-TY	DESCRIP-TION	SIZE	EACH	TOTAL AMOUNT
6480	3/9/84	396 Flts.	Pink Tomatoes	5×6	7.00	2,772.00
		1320 Flts.	Pink Tomatoes	6×6	6.00	7,920.00
			P&C		.50	858.00
						11,550.00
6481	8/12/84	695 Flts.	Pink Tomatoes	5×6	6.00	3,954.00
		756 Lgs.	Pink Tomatoes	6×7	6.00	3,780.00
		64 Lgs.	Pink Tomatoes	7×7	4.00	216.00
		108 Lgs.	Pink Tomatoes	6×7	5.00	540.00
			P&C		.50	858.00
						9,278.00

IN-VOICE	SHIP-PING DATE	QUANTI-TY		DESCRIP-TION	SIZE	EACH	TOTAL AMOUNT
6482	3/14/84	269	Lgs.	Pink Tomatoes	6×6	5.00	1,345.00
		711	Lgs.	Pink Tomatoes	6×7	5.00	3,555.00
		420	Lgs.	Pink Tomatoes	7×7	4.00	1,680.00
			P&C			.50	700.00
							7,280.00
6501	3/10/84	132	Flts.	Pink Tomatoes	6×6	6.00	792.00
		1295	Lgs.	Pink Tomatoes	6×6	4.50	5,827.50
			P&C	Pink Tomatoes		.50	713.50
							7,333.00
6524	3/19/85	264	Flts.	Pink Tomatoes	5×6	7.00	1,848.00
		1134	Lgs.	Pink Tomatoes	6×7	4.50	6,103.00
			P&C			.50	699.00
							7,650.00
6542	3/24/84	66	Flts.	Pink Tomatoes	4×5	6.00	396.00
		330	Flts.	Pink Tomatoes	5×5	6.00	1,980.00
		324	Lgs.	Pink Tomatoes	6×6	5.00	1,620.00
		1055	Flts.	Pink Tomatoes	5×6	5.00	6,275.00
			P&C			.50	887.50
							10,158.50
6554	3/27/84	396	Flts.	Pink Tomatoes	5×6	6.00	2,876.00
		1452	Flts.	Pink Tomatoes	5×6	6.00	7,260.00
			P&C			.50	924.00
							10,560.00
A 6580	3/30/84	264	Flts.	Pink Tomatoes	4×6	6.00	1,584.00
		594	Flts.	Pink Tomatoes	5×6	6.00	3,564.00

IN-VOICE	SHIP-PING DATE	QUANTI-TY		DESCRIP-TION	SIZE	EACH	TOTAL AMOUNT
		107	Lgs.	Pink Tomatoes	6×6	6.00	642.00
		54	Lgs.	Pink Tomatoes	6×7	5.00	270.00
			P&C			.50	509.50
							6,569.50
B 6580		25	To-matollo			5.00	125.00
			P&C			.50	12.50
							137.50
							6,707.00
6586	4/2/84	528	Flts.	Pink Tomatoes	5×5	7.00	3,696.00
		729	Flts.	Pink Tomatoes	5×6	6.00	4,752.00
		216	Lgs.	Pink Tomatoes	6×6	7.00	1,512.00
		216	Lgs.	Pink Tomatoes	6×7	6.00	1,296.00
			P&C			.50	876.00
							12,132.00
							$82,649.00

4. All of the produce listed above originated in Mexico and was shipped by complainant from its place of business in Chula Vista, California to respondent in San Jose, California. Respondent received and accepted all of the above produce on arrival, and has not paid complainant any part of the purchase price thereof.

5. The formal complaint was filed on May 14, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant alleges that the produce referred to in Finding of Fact 3 was sold to respondent on a f.o.b. basis, and that such produce was accepted by respondent at destination, but that respondent has failed to pay any part of the purchase price thereof. Respondent admits that the produce was received on approximate-

ly the dates of shipment set forth in Finding of Fact 3, but denies that such produce was sold on a f.o.b. basis, but rather alleges that "[c]omplainant asked respondent for assistance in selling the product on an 'open basis' and to report sales, less cost of freight and commission." In addition respondent alleges that complainant shipped the product over respondent's objection, and that when complainant was asked if respondent should get a federal inspection respondent was told, in effect, that such was not necessary. However, respondent submitted copies of five federal inspection certificates in an effort to show that the tomatoes arrived in bad condition. Respondent also alleges that complainant held the tomatoes too long, and at too low a temperature, and knowingly shipped tomatoes to respondent which complainant could not sell to anyone else. Respondent complains that complainant failed to submit documentation of inspections admittedly made of the tomatoes when they crossed the boarder from Mexico into California, and alleges that in so failing complainant violated section 47.3(3) of the Rules of Practice (7 CFR § 47.3(3)). Respondent alleges that complainant failed to submit the inspections because if submitted they would have shown that complainant held the tomatoes in its warehouse too long.

The first issue to be decided is whether the tomatoes were sold to respondent on a f.o.b. basis for the prices set forth in the complaint, or whether the tomatoes were on an open basis as contended by respondent. Complainant attached to its formal complaint copies of invoices and bills of lading for each of the shipments. Both of these documents show the tomatoes sold at the prices set forth in Finding of Fact 3. Respondent alleged in its answering statement that it returned each of the invoices with notations thereon. Complainant admits receiving only three of those invoices (Nos. 6481, 6482, and 6586) back from respondent, and respondent did not offer testimony concerning the time or fact of mailing as to any of the invoices. See *Fowler Packing Co.* v. *Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87 (1977). Respondent attached copies of the invoices to the answering statement. Each has a handwritten note, and also shows the prices marked out with an "X". Complainant submitted as attachments to its statement in reply the three invoices which it admits were returned by respondent to complainant. These contained the original notes written by respondent which are the same as the notes shown on the copies submitted by respondent. However, complainant's originals show that respondent did not cross out the prices on the actual invoices which it returned to complainant. Had complainant not submitted these invoices we would have been led to believe by respondent's

submissions that respondent had returned invoices to complainant which constituted a, protest against the prices set forth on the invoice. The notes which respondent wrote on the invoices admittedly returned do not constitute such a protest standing alone. The note at the bottom of invoice no. 6481 stated: "I have not finished this load I will call you when I do. O.K. SIR G.V.". The note at the bottom of invoice no. 6482 stated merely: "We are working on them will call you. O.K. SIR G.V." and the note at the bottom of invoice no. 6586 stated: "Under Federal Inspection". We conclude on the basis of all of the evidence that respondent has failed to prove its contention that the tomatoes were sold on an open basis. Respondent has also failed to prove by a preponderance of the evidence that there was an agreement between the parties after arrival and acceptance that the tomatoes be sold on a consignment basis.

Respondent submitted copies of five federal inspection certificates purporting to cover the subject tomatoes. However, all of these certificates are dated either April 4, or April 5, 1984, which is from 5 to 26 days after arrival of all but the last load of tomatoes. Consequently these inspection certificates cannot be accepted as an indication of the condition of any of the tomatoes included on the first eight loads. See *Max Feldbaum & Sons* v. *Alderiso,* 27 Agric. Dec. 763 (1968); *Heitzman Produce* .v. *Palella,* 26 Agric. Dec. 921 (1967); and *Pan-American Fruit Company* v. *Halem Hazzouri,* 25 Agric. Dec. 681 (1966). In addition some of respondent's statements, reported on the inspection certificates, as to which tomatoes were covered by the certificates are obviously incorrect. For instance on certificate G-008553 it is reported under "remarks" that "Applicant states above lot is remainder of 396-2 layer and 540-3 layer cartons originally received on March 24, 1984." However, under "products inspected" the inspector disclosed that some of the tomatoes inspected were size 6×7. The March 24, 1984, shipment of tomatoes included no size 6×7 tomatoes, but some of the earlier shipments did include 6×7 tomatoes. Apparently this inspection certificate covered some tomatoes that were received even earlier than the March 24, 1984, date stated by respondent. As there are similar problems with some of the other certificates we are unable to say that the certificates which purport to cover the tomatoes shipped in the last load, April 2, 1984, actually do cover such tomatoes.

Respondent submitted a "report of sales" covering the last eight shipments of tomatoes. The report does not claim to cover the first shipment. This "report of sales" is not adequate as an accounting in that it nowhere discloses the dates on which the sales were made, and gives only an average sale price for each of the sizes of tomatoes out of each shipment, rather than a break down of all of

the sales for each shipment. In addition the "report of sales" shows a substantial number of cartons of tomatoes dumped, but it is nowhere disclosed on what date the dumping took place, nor was the report of sales accompanied by timely dumping certificates. The five federal inspection certificates dated April 4, and April 5, 1984, although they show in some cases very large amounts of decay, are not adequate as dumping certificates, since there is no way to know how long the tomatoes covered by such certificates were held prior to the inspections.

Respondent has complained throughout this proceeding that complainant violated section 47.3(3) of the Rules of Practice by failing to submit copies of inspection reports made of the tomatoes when they crossed into this country from Mexico. The section of the Rules of Practice cited by respondent states as follows:

> The informal complaint should, so far as practicable, be accompanied by true copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices, manifests, inspection certificates, accounts sales, and any special contracts or agreements."

Respondent has interpreted this section as though it were a mandatory requirement. Such is not the case. This section of the Rules of Practice is advisory in nature, and intended merely to aid a complainant in the proof of its case. There is no requirement that a complainant or respondent submit any evidence whatsoever in a proceeding under the Act. A party merely runs the risk of losing

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $82,649.00, with interest thereon at the rate of 13 percent per annum from May 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PIONEER MARKETING COMPANY v. JOHN R. HOFFMAN, JR., PRODUCE Co. PACA Docket No. 2-6711. Decided November 21, 1985.

F.O.B. sale—Acceptance—Payment to wrong party—Failure to pay—Reparation awarded.

Where reapondent purchased, received, and accepted load of lettuce, it is liable to seller for full purchase price even if it made payment to wrong party.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $2,904.00 in connection with a transaction, in interstate commerce, involving lettuce, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements, but neither of them did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Pioneer Marketing Company, is a corporation whose mailing address is P.O. Box 2034, Yuma, Arizona 85364.

2. Respondent, John R. Hoffman, Jr., Produce Co., is a corporation whose mailing address is Units 21-23-25, Louisville Produce Terminal, Louisville, Kentucky 40218. At all material times, the respondent was licensed under the Act.

3. On or about February 20, 1984, in the course of interstate commerce, complainant, by oral contract, sold to the respondent a partial truckload of lettuce, consisting of 480 cartons, at an agreed price of $5.00 per carton plus 80 cents cooling, and 25 cents brokerage, for a total f.o.b. price of $2,904.00. The contract was negotiated by Taylor-Byers Co., Inc., ("Taylor-Byers"), P.O. Box 819, Sharpsburg, North Carolina 27878. Taylor-Byers issued a broker's memorandum on February 20, 1984, #14355, confirming the above agreement. The lettuce was received and accepted by the respondent. The respondent has not paid complainant for the shipment.

4. On or about April 4, 1984, respondent issued a check to Taylor-Byers in the amount of $1,947.00. This check was negotiated by the latter company.

5. The complaint was filed on October 18, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case concerns whether or not the parties entered into an agreement whereby the complainant would sell and the respondent would buy a partial truckload of lettuce consisting of 480 cartons. This is the position asserted by the complainant. The complainant's position is consistent with its invoices, and with the broker's memorandum issued by Taylor-Byers. The

Taylor-Byers. Respondent has offered no probative evidence to counter these documents. We must conclude that complainant has satisfied its burden of proving that it had a contractual relationshp with respondent with respect to the 480 cartons of lettuce, that respondent received and accepted them, and that respondent has failed to pay for them.[1]

Therefore, on the basis of all of the evidence, we conclude that the respondent is obligated to the complainant in the amount of the contract price of $2,904.00. The respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days of the date of this order, respondent shall pay complainant $2,904.00 plus interest in the amount of 13% per annum from April 1, 1984, until paid.

Copies of this order shall be served upon the parties.

SIX L'S PACKING COMPANY, INC. *v.* EMERSON-ELLIOTT PRODUCE. PACA Docket No. 2-6727. Decided November 21, 1985.

Probative value of inspection—Suitable shipping condition warranty applicable only at—Contract destination.

Where respondent accepted tomatoes contract destination in Florida and then shipped them to his customer in Puerto Rico, inspection in Puerto Rico, which included undetermined proportion of tomatoes from another shipment, was insufficient to show breach at contract destination in Florida. Reparation awarded to complainant for balance of purchase price.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A

[1] We note that, on April 4, 1984, respondent issued a check to Taylor-Byers for $1,947.00 which it claims was payment for 330 cartons of lattuca at $5.90 per carton. There is no proof of this. In fact, the contract price for the lettuca was $6.05 par carton. Also, in any avent, even if respondant paid Taylor-Byers $1,947.00 for tha lettuce, Taylor-Byers was not the proper payee, and respondent still ramains obligated to complainant. *Adam* v. *Perna*, 31 Agric. Dec. 431 (1972).

timely complsint was filed in which complainant sought an award of reparation agsinst respondent in the amount of $16,704.00 in connection with two shipments of tomatoes in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer therete admitting lisbility te complsinant for the entire amennt of the September 7, 1984, shipment of tomatoes, or $8,784.90, and for $5,042.50 of the amount due on the August 17, 1984, lead of tomatoes, or a total admitted lisbility of $13,827.40. Respondent denied liability to complsinant for a bslsnce of $2,876.60 in connection with the August 17, 1984, lead of tomatoes. On March 26, 1985, an order was issued in favor of complainsnt against respondent requiring the payment of $13,827.40 as an undisputed amount. Respondent's liability for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Although the amount claimed in the formal complaint exceeded $15,000.00, the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainsnt did not file an opening statement. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complsinsnt, Six L's Packing Company, Inc., is a corporation whose address is P.O. Box 1987, Hollywood, Florida.

2. Respondent, Emerson Elliott, is an individual doing business as Emerson-Elliott, whose address is P.O. Box 745, Casselberry, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 17, 1984, complsinant sold to respondent one truckload consisting of 1284 packages of extra large Shickshinny Pride brand tomatoes at $6.00 per package, plus 15 cents per package for palletizing, and $22.50 for a temperature recorder, for a total price of $7,919.10.

4. On August 17, 1984, complainant shipped the tomatoes from loading point in Shickshinny, Pennsylvania to respondent at contract destination in Casselberry, Florida. The tomatoes were accept-

ed by respondent on arrival in Casselberry, Florida, and subsequently shipped by respondent to Puerto Rico.

5. The formal complaint was filed on November 2, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

In its answer respondent asserted that he owed complainant only $5,042.50 for the load of tomatoes shipped on August 17, 1984, because "the customer did not pay the full amount." Respondent then referenced attachments to the answer which consisted of a federal inspection certificate, and its invoice to its customer which showed the original invoice amount crossed out with $5,800.50 written in. Respondent's answering statement merely consisted of the resubmission of its answer. Consequently the federal inspection certificate attached to the answer is the only possible justification for respondent's failure to pay the balance of the purchase price on the August 17, 1984, shipment of tomatoes. This inspection report discloses that the tomatoes were inspected on August 23, 1984, at 3:00 p.m. in Puerto Rico. There is no showing as to when the tomatoes arrived at contract destination in Florida. The suitable shipping condition warranty provided in the regulations in connection with a f.o.b. sale assures delivery without abnormal deterioration only "at the contract destination agreed upon between the parties." (See 7 CFR 46.43(j). See also *B & L Produce* v. *Florance Distb. Co.*, 37 Agric. Dec. 78 (1978). In addition the inspection report covered 1400 cartons of tomatoes stacked at the cooler belonging to respondent's customer. The remarks at the close of the inspection certificate state that according to the applicant the tomatoes were unloaded from a trailer bearing the same number as that shown by complainant's invoice to have been the trailer on which the tomatoes were shipped, and also from an additional trailer. There is no showing as to what portion of the 1400 cartons came from which trailer. Although the inspection report shows all of the tomatoes as bearing the "Shickshinny Pride" brand, it is obvious that an undetermined portion of the tomatoes came from another shipment. It is also obvious that this could not have been the second shipment, as to which respondent admitted complete liability, since such shipment of tomatoes was not shipped until September 7, 1984. We conclude that respondent has failed to show the condition of the tomatoes on arrival at contract destination in Casselberry, Florida, and consequently has failed to show any breach of contract on the part of complainant.

Since respondent accepted the tomatoes, and has not proven any breach of contract on the part of complainant, respondent is liable

to complainant for the full purchase price thereof, or $7,119.10. Complainant was previously awarded $5,042.50 of this amount by our order of March 26, 1985. Consequently respondent's remaining liability to complainant is for $2,876.60. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,876.60, with interest thereon at the rate of 13% per annum from September 1, 1984, until paid.

Copies of this order shall be served upon the parties.

JACK T. HUMPHREYS d/b/a HALLMARK PRODUCE COMPANY *v.* THADDEUS J. SOBIECH d/b/a TED SOBIECH. PACA Docket No. 2-0757. Decided November 22, 1985.

Waiver of oral hearing—Failure to raise specific defense in answer—Jurisdiction to award freight charge.

Where respondent failed to raise specific defense to complainant's for purchase price of produce received by respondent, complainant awarded reparation. Respondent was found to have waived oral hearing by not objecting to inadvertent use of shortened procedure. Secretary was found to have jurisdiction over alleged freight charge which were a component of the contract between the parties.

Complainant, *pro se.*
Michael R. Gottlieb, Middletown, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of $45,335.75, in connection with the shipment in interstate commerce of eight trucklots of onions.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint exceeds $15,000.00, and respondent requested an oral hearing in his answer. However,

the proceeding was inadvertently set down as a non oral hearing case to be heard under the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20). On March 28, 1985, the presiding officer wrote a letter to complainant giving complainant 20 days from the date of receipt of the letter in which to file an opening statement under the shortened method of procedure. A copy of this letter was sent to respondent's attorney. In this letter the presiding officer stated in relevant part as follows:

> Although the amount involved herein exceeds $15,000.00, the parties have waived oral hearing. Accordingly, the shortened method of procedure will be followed as provided in section 47.20 of the Rules of Practice.

Respondent's attorney made no objection to this letter, and on May 10, 1985, a letter was addressed directly to respondent's attorney giving respondent opportunity to file an answering statement pursuant to the shortened method of procedure. There also was no objection as a consequence of this letter. Since respondent was made aware of the fact that the shortened method of procedure would be followed, and has at no point in this proceeding voiced any objection to the following of such procedure we conclude that respondent has waived oral hearing.

Neither party filed any evidence under the shortened procedure. Both parties were given opportunity to file a brief, and complainant submitted a letter in which he stated the respondent had paid in full for all of the invoices which formed the basis of the complaint with the exception of one. Complainant stated that the only amount remaining due on this one invoice was freight in the amount of $2,070.00.

FINDINGS OF FACT

1. Complainant, Jack T. Humphreys, is an individual doing business as Hallmark Produce Co. whose address is P.O. Box 1267, Edinburg, Texas.

2. Respondent, Thaddeus J. Sobiech, is an individual doing business as Ted Sobiech whose address is P.O. Box 158, Pine Island, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 23, 1984, complainant sold and shipped to respondent 900 fifty pound sacks of Pre-Pak Yellow Onions at $7.80 per sack, or a total price of $7,020.00 delivered. Respondent received and accepted the onions at its place of business in Pine Island, New York, and has paid complainant $4,950.00, leaving a balance still due and owing of $2,070.00.

4. The formal complaint was filed on November 23, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

As set forth in the preliminary ststement complainant, by an admission in his brief, admitted receiving payment for all of the transactions set forth in the formal complaint except one. That transaction is the one which is the subject of finding of fact 3 above. Respondent's answer admitted arrival of all of the commodities at destination but denied, in general terms, any liability to complainant. A letter from respondent's attorney which accompanied the answer stated in relevant part that "In sum and substance, the respondent claims that he has paid to the complainant substantially all of the sums due and owing for any perishable agricultural commodities received." It appears from the admission in complainant's brief that this statement is "substantially" correct. However, respondent's failure in his answer to specify the nature of any defense in regard to the May 23, 1984, shipment of onions leaves us with no alternative but to find that respondent is liable to complainant for the remainder of the purchase price of such onions.

On August 2, 1985, after being served with complainant's brief, respondent's attorney filed a letter with the hearing clerk alleging that the remaining disputed amount of $2,070.00 was for freight on the shipment which is the subject of finding of fact 3, and that consequently the Department has no jurisdiction to adjudicate the dispute. Respondent's determination that the amount of $2,070.00 concerns freight is based upon documents of an evidentary nature which were submitted along with complainant's brief. These documents indicate that the shipment was originally billed to [illegible]

commodity, then the liability between the parties for such freight charges arises out of the transaction, and the Secretary does have jurisdiction.

We conclude that respondent is liable to complainant for the balance of the purchase price of the onions shipped on May 23, 1984, or $2,070.00. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from date of this order, respondent shall pay to complainant, as reparation, $2,070.00, with interest thereon at the rate of 13 percent per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

GOLDEN STATE DISTRIBUTORS *v.* WILEMAN BROS. & ELLIOT, INC.
PACA Docket No. 2-6676. Decided November 26, 1985.

Brokerage—Counterclaim—Burden of proof.

Where respondent fails to sustain its burden of proving that broker/complainant failed to carry out its duties as a broker, broker/complainant awarded brokerage earned.

Edward M. Silverstein, Presiding Officer.
Steve Williams, Visalia, California, for complainant.
Philip T. Hornburg, Visalia, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,272.00 in connection with six transactions, in interstate commerce, involving perishable agricultural commodities.

A copy of the Department's report of investigation, as well as a copy of the supplemental report of investigation, were served on both parties. Respondent also was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. Respondent also filed a counterclaim against complainant in which it seeks a reparation award against complainant in the amount of $7,013.85 in connection with one of the six trans-

actions which were made the subject of the complaint. Complainant filed a reply to the counterclaim denying any liability to respondent.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleading of the parties are considered a part of the evidence of the case, as is the Department's reports of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements, but neither party did so.[1] Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Golden State Distributors, is a corporation whose mailing address is 1212 E. Brandywine Lane, Fresno, California 93710.

2. Respondent, Wileman Bros. & Elliot, Inc., is a corporation whose mailing address is P.O. Box 308, Cutler, California 93615.

3. At all material times, both parties were licensed under the Act.

4. During the period May 26, 1983, through June 10, 1983, complainant performed services as a broker on behalf of respondent with regard to five transactions involving various shipments of fruits, all being perishable agricultural commodities, in interstate commerce. The total brokerage earned by complainant with regard to these five shipments is $960.00. As to each of these transactions, complainant issued brokers memoranda of sale. Although it received copies thereof, respondent did not object to any terms contained therein.

5. In addition to the five transactions mentioned in ¶4 above, on June 11, 1983, complainant negotiated a transaction between respondent and A. Cancelmo, Paoli, Pennsylvania, whereby respondent agreed to sell the latter 1,560 cartons of V.F. Red Beaut plums, "Mr. Plum" brand, at an f.o.b. price of $12.00 per carton, plus 70¢ per carton for cooling, and $22.50 for a Ryan recorder, for a total agreed f.o.b. price of $19,834.50. On June 13, 1983, complainant issued a brokers memorandum, No. 5142, confirming the above terms. Complainant was to receive a brokerage of 20¢ per carton ($312.00) for its brokerage services. Respondent was sent a copy of

[1] On October 11, 1984, the Department received a deposition from respondent's counsel. Such deposition was not taken pursuant to the Rules of Practice, *see* 7 CFR § 47.16, and was not offered into evidence in accordance with the Rules of Practice, *see* 7 CFR § 47.20. Accordingly, it is not considered to be in evidence in this proceeding.

the brokers' memorandum, and did not object to any of the terms contained therein.

6. Respondent invoiced A. Cancelmo for the 1,560 cartons of plums. The terms on the respondent's invoice no. 1-218-11, which it sent to A. Cancelmo on June 11, 1983, were the same as those on complainant's June 13, 1983, brokers' memorandum, *i.e.*, respondent billed A. Cancelmo for the 1,560 cartons of plums at $12.00 per carton, plus 70¢ per carton for cooling, and $22.50 for a Ryan recorder, for a total f.o.b. price of $19,834.50.

7. Respondent, on June 11, 1983, shipped the 1,560 cartons of plums to A. Cancelmo. Before the shipment arrived, respondent became aware that A. Cancelmo had had problems with two loads of plums which it had shipped to A. Cancelmo on June 4 and 10, 1983.[2] As a consequence of the problems with these two loads, respondent diverted the 1,560 cartons of plums shipped on June 11, 1983, to Chas. H. Elkins, Inc. ("Elkins"), in New York City, New York. On June 15, 1983, the 1,560 cartons of plums, without having been inspected, were sold by Elkins at auction for respondent's account of $12.25 per carton, or $19,110.00. Other loads of Red Beauts, the same variety of plum as involved herein, sold on that day for $21.00 and $15.00 per carton.

8. On August 9, 1983, respondent filed an informal complaint with the Department regarding the load of 1,560 Red Beauts. This was within nine months after its cause of action accrued. Although given the opportunity, respondent declined to file a formal complaint.

9. On October 14, 1983, complainant filed an informal complaint regarding the brokerage on the six transactions made the subject of the complaint. This was within nine months after its cause of action accrued.

CONCLUSIONS

Complainant alleges that it provided respondent brokerage services on six transactions and that respondent has failed to pay it the $1,272.00 owed it for these services. All of the evidence in the record has been reviewed and such evidence conclusively establishes that complainant did act as a broker on respondent's behalf on these six transactions, and that respondent does indeed owe complainant the $1,272.00 claimed by the latter for these services. Respondent's failure to pay complainant this amount is a violation

[2] These loads were among the five transactions noted in ¶4 above which also were brokered by complainant. Complainant issued brokers' memorandum nos. 5134 a[illegible] rejected by A. Cancelmo because of condition defects.

of section 2 of the Act for which reparation plus interest should be awarded.

Respondent's counterclaim deals with one of these six transactions. It alleged, but has failed to prove, that respondent lied to it about having sold that load of 1,560 cartons of Red Beauts to A. Cancelmo. The evidence submitted by the parties establishes that this load was sold to A. Cancelmo, but that, because of problems encountered by A. Cancelmo on two previous loads, respondent diverted the plums to a New York City dealer for auction sale.[3] Respondent has failed to prove its counterclaim by a preponderance of the evidence. The counterclaim must therefore be dismissed. *Bushwick Comm'n Co.* v. *Maloney*, 18 Agric. Dec. 1029 (1959).

ORDER

Within 30 days of the date of this order, respondent shall pay to complainant $1,272.00, as reparation, with interest thereon at the rate of 13% per annum from July 1, 1983, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

ABBY'S FRESH FOOD COMPANY, INC. *v.* EMERSON H. ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE. PACA Docket No. 2-6716. Decided November 26, 1985.

Collecting agent—Failure to remit to principal—Failure to submit evidence—Liability for full amount of claim.

Where respondent submitted an unverified answer and no evidence, his contentions cannot be credited and complainant's verified claims are given full credit.

Thomas C. Heinz, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $16,772.99 in con-

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[3] Respondent has alleged that the plums were sold to this dealer for a price of $12,820.65. The evidence irrefutably shows that the dealer had the load auctioned for respondent's account, and that the proceeds on auction were $19,110.00.

nection with the sale and shipment of four truckloads of watermelons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon the respondent, who filed an answer admitting liability in the amount of $15,380.84, and, in effect, denying liability as to the remainder of complainant's claim. On March 11, 1985, respondent was ordered to pay complainant the undisputed amount pursuant to section 7(a) of the Act (7 U.S.C. § 499g(a)), leaving $1,392.15 in dispute.

Since the parties have waived oral hearing, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The parties were given opportunities to submit additional evidence in the form of verified statements, and to file briefs. Complainant submitted a verified opening statement but no brief, and respondent submitted neither an answering statement nor a brief.

FINDINGS OF FACT

1. Complainant, Libby's Fresh Food Company, Inc., is a corporation with a mailing address at P. O. Box 577, Groveland, Florida 32736.

2. Respondent, Emerson H. Elliott, is an individual doing business as Emerson Elliott Produce, with a mailing address at P. O. Box 745, Casselberry, Florida 32707. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about June 19, 1984, complainant sold and shipped one trucklot of watermelons weighing 47,390 pounds to Cruce Produce, Salina, Kansas. Respondent negotiated the contract of sale as complainant's agent and agreed to invoice and collect the sale amount from the buyer and to remit $4,620.53 to complainant.

4. On or about June 19, 1984, complainant sold and shipped one half of a trucklot of watermelons weighing 45,350 pounds to Scheid Produce, Millersville, Pennsylvania, and the remaining half of the trucklot to Four Seasons, Denver, Pennsylvania. Respondent negotiated the contracts of sale as complainant's agent and agreed to invoice and collect the sales amounts from the buyers and to remit a total of $4,462.62 to complainant.

5. On or about June 24, 1984, complainant sold and shipped one trucklot of watermelons to Alsum Produce, Friesland, Wisconsin. Respondent negotiated the contract of sale as complainant's agent

and agreed to invoice and collect the sale amount from the buyer and to remit $3,949.62 to complainant.

6. On or about July 7, 1984, complainant sold and shipped one trucklot of watermelons to Four Seasons, Denver, Pennsylvania. Respondent negotiated the contract of sale as complainant's agent, and agreed to invoice and collect the sale amount from the buyer and to remit $3,756.22 to complainant.

7. Respondent has not remitted to complainant any part of the amounts he had agreed to remit to complainant in the sales of watermelons he negotiated on behalf of complainant on June 19, 1984, June 24, 1984, and July 7, 1984.

8. A formal complaint was filed on November 7, 1984, which was within nine months of the time the causes of action herein accrued.

CONCLUSIONS

In his answer, respondent in effect concedes he brokered the sale of four trucklots of complainant's watermelons and agreed to collect and remit the sales proceeds to complainant as alleged in the complaint. Further, respondent effectively admits he received payment from the buyers, but failed to remit the proceeds to complainant. Such failure constitutes a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation may be awarded.

Respondent previously has been ordered to pay the $15,380.84 which he admits he owes to complainant. As to the remaining $1,392.15 claimed by complainant, since respondent's answer was not made under oath, and he submitted no evidence to support his position, his contention in that answer that he does not owe this amount to complainant cannot be credited, unlike complainant's verified complaint and opening statement to the contrary. *Prillwitz v. Sheehan Produce,* 19 Agric. Dec. 1213, 1215 (1960). Respondent therefore will be ordered to pay $1,392.15 plus interest as reparation to complainant.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation $1,392.15, with interest thereon, at the rate of 13% per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

GLOBAL TRADING INC. *v.* LIMPERT BROS., INC. PACA Docket No. 2-6679. Decided December 11, 1985.

Rejection, partial unloading precludes, reasonable time for, notice must be in clear and unmistakeable terms—Sale by sample, failure to have sample federally inspected—Substandard U.S. Grade not necessarily evidence of unmerchantable quality—Failure to submit evidence of damages.

Where complainant contracted to sell frozen pineapple to respondent which would conform to a previously submitted sample, respondent was found to have accepted the pineapple and to have failed to prove that the pineapple did not to the sample. Although the pineapple was found to be U.S. Grade D or Substandard this was held not to be in itself evidence of unmerchantable quality. Complainant was awarded reparation in the amount of the full purchase price of the pineapple.

George S. Whitten, Presiding Officer.
David B. Ward, Greenville, South Carolina, for complainant.
Mitchell H. Kizner, Vineland, New Jersey, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $8,227.10 in connection with two shipments of frozen pineapple in interstate commerce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which defaulted in the filing of an answer. Subsequently the proceeding was reopened, and respondent filed an answer denying liability to complainant.

Since the amount claimed in the formal complaint does not exceed $15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant did not file a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Global Trading, Inc., is a corporation whose address is P.O. Box 6645, Greenville, South Carolina.

2. Respondent, Limpert Bros., Inc., is a corporation whose address is P.O. Box 520, Vineland, New Jersey. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about July 8, 1983, a broker, Dick Westfall of Connell & Co., Westfield, New Jersey, contacted both parties to this proceeding concerning the possible sale by complainant to respondent of diced and crushed frozen pineapple. Mr. Westfall contacted Arthur Price of complainant and informed him that respondent needed diced pineapple, approximately ½ inch in size, and also coarse crushed pineapple. Mr. Price replied that he might not be able to supply pineapple that measured exactly ½ inch, but would send a sample of the product which he could supply. Subsequently a sample was sent to respondent, and approved by respondent.

4. On or about July 26, through July 28, 1983, the parties entered into a contract calling for complainant to sell to respondent 750 40 pound containers of pineapple cubes, ½ inch diced (equivalent or better than sample) at 46 cents per pound, and 250 40 pound containers of crushed pineapple at 42 cents per pound, f.o.b. Laredo, Texas, for delivery to Safeway freezer, 97 N. Mill Rd., Vineland, New Jersey.

5. Pursuant to telephonic communication a partial shipment was made on October 4, 1983, consisting of 311 cases of cubed frozen pineapple weighing 35 pounds each, for a total price of $5,007.10, and on October 7, 1983, of 200 cases of frozen cubed pineapple in 35 pound containers for a total price of $3,220.00. Prior to shipment the parties agreed that exact weight per carton would be determined after packing.

6. The product was shipped by truck and arrived on October 10, and October 12, 1983. On October 20, 1983, respondent notified the broker that the product was "not acceptable and that product was low on brix and the cuts were excessive in size." The broker asked respondent if the product could be used in another form in any of their other products. Respondent's purchasing agent replied that she would have to "check with their lab representative."

7. On or about October 20, or October 21, 1983, the broker notified complainant that "the product was not acceptable for use in [respondent's] products since brix were low and sizes were too large." The broker also stated "Limpert would check to see if it could be used in another form in any other products."

8. On November 21, 1983, complainant communicated with the broker by telegram inquiring as to why its two invoices had not been paid and requesting that they be paid immediately. On November 29, 1983, the broker forwarded the telegram to respondent.

The letter accompanying the telegram stated in relevant part as follows:

> It was understood that the dices were not acceptable for use in the designated product which Limpert is manufacturing because of irregular sizes and large chunks. We had discussed the possibility of using it as an ingredient in one of the other products which your company manufacturers.
>
> Please advise at your earliest convenience so that Connell and Co. can notify the supplier.

On December 1, 1983, the broker wrote the following letter to complainant:

> Limpert Brothers has informed Connell and Company that the diced pineapple shipped from your company is not acceptable for use in their products. They had agreed to purchase the pineapple on approval of sample and with the product shipped to be equivalent to the approved sample. The pineapple shipped was irregular in size and contains very large chunks which were not in the sample.
>
> Limpert has also investigated the possibility of using the product in another form for other products but has determined that this is also not feasible.

9. Upon receipt of the broker's letter of December 1, 1983, complainant, on December 5, 1983, sent the following telegram, in relevant part, to respondent:

> YOUR REFUSAL TO HONOR THESE INVOICES FOR PAYMENT LEAVES US NO OTHER CHOICE BUT TO FILE FOR IMMEDIATE ACTION A PACA ACTION AGAINST LIMPERT BROS.

10. On January 19, 1984, the broker wrote the following letter to Robert Limpert of respondent corporation:

> Dear Bob:
>
> This letter is written to your company to document my findings on the frozen diced pineapple shipped to Limpert Brothers from Global Trading Company.
>
> On November 3, 1983, in the absence of Bob Green, I met with Charlie Licaretz at your facility to examine the contents of a carton of Global Trading pineapple. The product contained segments up to three inches in length, some fruit core, appeared to be very light or white in color,

had a brix measurement of approximately 7° and very little or no pineapple flavor. Mr. Licaretz tried to find the sample but could not locate it in the freezer where it was placed by Mr. Green.

On December 16, 1983 I met at the Limpert facility to inspect the sample submitted to your company by Global Trading. The product consisted of cuts fairly uniform in size and shape (approximately ½" to ⅝"), contained little or no fruit core, was yellow in color, had a brix measurement of approximately 14°, and a distinct pineapple flavor.

If we can be of further assistance to you, please let us know.

Sincerely,

Dick Westfall

11. On January 26, 1984, a federal inspection was made of the subject pineapple with the following results in relevant part:

Style—Chunks

Brix (liquid media only)—6.8 to 8.7 degrees

GRADE:

U.S. GRADE D or SUBSTANDARD, account "Defects" and "Character" (core material).

12. The formal complaint was filed on March 1, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

The basic terms of the contract between the parties are not in dispute. Furthermore the parties agree that a sample was sent to respondent by complainant and accepted by respondent. The parties also agree that 511 cases of product were shipped by complainant and received by respondent.

In defense to complainant's action for the purchase price of the 511 cases of pineapple respondent alleges that such pineapple was rejected by means of its communication to the broker on October 20, 1983, and the broker's subsequent communication to complainant. Respondent also forcefully argues that the federal inspection of the pineapple showing U.S. Grade D, or Substandard is in itself evidence of complainant's breach of the contract of sale. Respondent maintains that the substandard grade is "conclusive evidence that this fruit could not be used for any reasonable commercial

purpose." Respondent also alleges that the pineapple which was shipped by complainant did not correspond to the sample previously sent by complainant.

The first issue for determination here is whether the fruit was accepted by respondent. We have consistently held on many occasions that even a partial unloading of a shipment of produce is an exercise of sufficient control over the goods to constitute an acceptance thereof. See *Crown Orchard Co.* v. *Mid-Valley Produce Corporation*, 34 Agric. Dec. 1381 at 1385 (1975) and cases there cited; See also *Conn & Scalise Co.* v. *Frank J. Crivella & Co.*, 20 Agric. Dec. 415 (1961). In addition it is conclusive under the regulations issued by the Secretary governing the produce industry, that an acceptance occurs when there is a "failure of the consignee to give notice of rejection to the consignor within a reasonable time", and "reasonable time" is specifically defined for frozen fruits and vegetables shipped by truck as "not to exceed 12 hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection". See 7 CFR § 46.2(cc)(1) and (dd)(3). It should also be noted that we have held that notice of rejection must be given in clear and unmistakable terms and that the terminology "not acceptable" could be construed as merely an expression of displeasure and not as expressive of an intention to reject. This, of course, would be doubly true in the context of the present case where respondent professed to be exploring the possibility of alternative uses for the product at the same time that it was stating that the produce was "not acceptable". See *Beamon Brothers* v. *Cal. Sweet Potato Growers*, 38 Agric. Dec. 71 (1979). We conclude that respondent accepted the pineapple, and thus became liable to complainant for the full purchase price thereof less any damages proved to have resulted from any breach of contract on the part of the complainant. The burden of proving both a breach and damages flowing therefrom rests upon respondent. *The Grower-Shipper Potato Co.* v. *Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969); see also UCC § 2-607(4).

Respondent maintains that the federal inspection of the 511 cases of pineapple which resulted in a grade of D or Substandard is in itself evidence of complainant's breach of contract. In addition, respondent maintains that the substandard grade is conclusive proof that the fruit could not be used for any reasonable commercial purpose. Respondent is wrong on both counts. The federal inspection made on January 26, 1984, did not disclose the score points for color, uniformity of size and symmetry, absence of defects, and character. The inspection states that the pineapple was given U.S. Grade D or Substandard "account 'defects' and 'charac-

ter' (core material)". The United States standards for grades of frozen pineapple (7 CFR § 52.1741 *et seq.*) provide in relevant part that a Substandard classification as to absence of defects is to be given to "whole slices, crushed, tidbits, and chunks of pineapple that fail to meet paragraph (c) of this section;". Paragraph (c) provides in relevant part that "frozen pineapple that is reasonably free from defects may be given a score of 24 to 26 points. Frozen pineapple that falls into this classification shall not be graded above 'U.S. Grade B' or 'U.S. Choice' . . ." Thus, we see that the subject pineapple could have had a score, as to absence of defects, of 23 and still have graded Substandard as to absence of defects.

The regulations further provide as to character (7 CFR § 52.1749(e)) that a Substandard classification is to be given to "whole slices, crushed, tidbits, and chunks of pineapple that fail to meet paragraph (c) of this section." Paragraph (c) provides in relevant part that "frozen pineapple that possesses a reasonably good character may be given a score of 24 to 26 points. Frozen pineapple which falls into this classification shall not be graded above "U.S. Grade B" or "U.S. Choice . . ." Thus, it is again apparent that the pineapple could have had a score of 23 points as to character and still have graded substandard as to character. It is clear from the regulations (7 CFR § 52.1751) that the subject pineapple could have had an overall score of 86 and still have graded U.S. Grade D or Substandard. Substandard frozen product is commonly traded in the industry, and it was judicially determined many years ago that a substandard grade does not render a product unmerchantable. See *Ecco Pack Co.* v. *Brighton Co. & Ries Corp.*, 11 Agric. Dec. 106 (1952). The subject pineapple was not sold with any specification as to a U.S. Grade. We find that the fact that the pineapple graded U.S. Grade D or Substandard is not, in itself, proof of a breach of contract on the part of the complainant. In view of the foregoing discussion, it is also clear that the respondent has failed to show that the pineapple could not be used for any reasonable commercial purpose.

Respondent asserts that the 511 cases of pineapple did not conform to the sample previously sent by complainant. While the testimonial evidence supports respondent's contention, respondent failed to have the sample federally inspected, and to request that such inspection, as well as the federal inspection which eventually was made of the 511 cases, disclose the score points for color, uniformity of size and symmetry, absence of defects, and character. Such an inspection of the sample and the products shipped would have disclosed any substantial dissimilarity, and would have furnished adequate proof of a breach of contract. See *Mutual Vegeta-*

ble Sales v. *Select Distributors*, 38 Agric. Dec. 1359 (1979). However, we do not deem it necessary to decide whether complainant breached the contract by failing to ship product conforming to sample, because respondent totally failed to submit any evidence which would form a basis for computing damages in this proceeding. Without such accounting covering the resale of the 511 cases of pineapple or some other way of determining the value of such product at time of delivery, we cannot award damages resulting from any breach. See *Anthony Brokerage, Inc.* v. *The Auster Company, Inc.* 38 Agric. Dec. 1643 (1979).

As we earlier found, respondent accepted the 511 cases of frozen pineapple, and thus became liable to complainant for the full purchase price thereof less any damages shown to have resulted from any breach by complainant. Since respondent failed to prove damages respondent is liable to complainant for the full purchase price of the 511 cases of pineapple, for a total of $8,227.10. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days of the date of this order, respondent shall pay to complainant, as reparation, $8,227.10, with interest thereon at the rate of 13% per annum from November 1, 1983, until paid.

Copies of this order shall be served upon the parties.

B. G. HARMON FRUIT COMPANY, INC. *v.* BUMGARNER PRODUCE, INC.
PACA Docket No. 2-6748. Decided December 11, 1985.

Consignment—Damages—Failure to account.

Where respondent has failed to submit an account of sales to complainant, complainant is entitled to reasonable value of citrus fruit handled on consignment.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $8,337.70 in connection with the shipment in interstate commerce of a truckload of mixed citrus fruit.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, but neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, B. G. Harmon Fruit Company, Inc., is a corporation whose address is P.O. Box 945, Clermont, Florida.

2. Respondent, Bumgarner Produce, Inc., is a corporation whose address is 730 West Trade Street, Charlotte, North Carolina. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about December 10, 1983, complainant consigned to respondent one truckload of mixed citrus fruit. The truckload of fruit was originally sold to a high school in Edneyville, North Carolina, but arrived late and was rejected by the school.

4. Respondent received and resold the fruit but has not rendered an accounting to complainant. Respondent has paid complainant a total of $960.00 for the fruit.

5. An informal complaint was filed on June 4, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent admits that the fruit was consigned to it by complainant and that respondent received such fruit. Respondent alleges in its answer that following the rejection of the fruit by a high school it was contacted by complainant, which requested that it take the fruit and resell it on a consignment basis. Respondent states that it asked complainant whether the fruit had been shipped on a refrigerated trailer and was given an affirmative reply. Respondent further states that when the fruit arrived it was not on a refrigerated trailer and that respondent discovered that a

substantial amount of the fruit had spoiled. Respondent contends that the amount of the produce that could be salvaged and sold was negligible.

Complainant did not make any reply to the allegations of respondent's answer, and accordingly we must conclude that respondent's allegation in regard to having been told by complainant that the truck was refrigerated, whereas in fact it was not refrigerated, is true. However, while under the circumstances the lack of refrigeration on the truck would have been adequate grounds for respondent to have rejected the truck, respondent instead accepted the truckload of citrus. In addition, respondent has not demonstrated how it was damaged by the failure of the truck to be refrigerated.

Complainant specifically alleges in the formal complaint that respondent has failed, neglected and refused to render an account of sales relative to the truckload of citrus. While respondent denied this allegation in its answer, respondent has nowhere in this proceeding submitted a copy of any accounting to complainant. Neither has respondent offered any proof, in the form of a neutral inspection, that the citrus was in poor condition on arrival. We conclude that respondent's defenses fail, and respondent is liable to complainant for the reasonable value of the citrus fruit at the time when it was received by respondent.

Respondent's failure to account presents us with a difficult situation in regard to assessing the reasonable value of the fruit. We addressed a very similar situation in *Meyer Tomatoes* v. *Hardcastle Produce Co.*, 40 Agric. Dec. 1172 (1981), where we stated:

> Although complainant agreed that the shipment of February 2, 1980, could be handled on a consignment basis by respondent, respondent has not furnished us with an accounting as to this shipment of tomatoes. We also note that such tomatoes were not inspected by a neutral party after arrival and the only evidence that such tomatoes were abnormally deteriorated is the allegation of respondent to that effect. See *Mutual Vegetable Sales* v. *Select Distributors*, 38 A. D. 1359, 1362 (1979). Respondent's failure to account to complainant for the tomatoes is a violation of the Act and regulations. Under the consignment agreement respondent is liable to complainant for the value of the tomatoes at time of delivery less expenses of a prompt and proper resale. Respondent's failure to account necessitates our estimating the amount for which respondent is liable. In arriving at an equitable figure we take into con-

Andrew Y. Stanton, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $7,524.00 in connection with the sale and shipment to respondent of two truckloads of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Triple M Packing Inc., is a corporation whose address is P.O. Box 1358, Quincy, Florida.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. On June 21, 1984, complainant sold to respondent a truckload of tomatoes consisting of 1,584 cartons at a price of $3.00 per carton, plus $.60 per carton for degreening, and $.15 per carton for palletizing, for a total of $5,940.00, f.o.b. The contract did not specify any grade. The truckload of tomatoes was inspected at shipping point and found to consist of matura green U.S. number three tomatoes with no decay. The tomatoes were then shipped to respondent, which received and accepted them without objection.

4. On June 22, 1984, complainant prepared an invoice reflecting the agreed upon contract terms as set forth in Finding of Fact 3,

and sent a copy to respondent. Respondent returned the invoice, upon which it had made handwritten alterations changing the price from $3.00 per carton to $2.50, resulting in a total of $5,148.00. Respondent paid this sum to complainant, but has failed to make any additional payments for this load.

5. On approximately July 9, 1984, complainant sold to respondent a truckload of tomatoes consisting of 1,584 cartons at $3.50 per carton, plus $.60 per carton for degreening, and $.15 per carton for palletizing, for a total contract price of $6,732.00, f.o.b. The contract did not specify any grade. The truckload of tomatoes was inspected at shipping point and found to consist of U.S. number three tomatoes with no decay. The tomatoes were shipped to respondent, which received and accepted them, without objection.

6. Complainant prepared an invoice on July 10, 1984, reflecting the agreed upon contract terms as set forth in Finding of Fact 5, and sent a copy of the invoice to respondent, which received it without objection. Respondent has failed to make any payment for this load of tomatoes.

7. The contracts for the two loads of tomatoes were negotiated by Robert C. Elliott, an employee of Gargiulo Inc., Naples, Florida, acting as the agent for complainant, and Doc Case, an employee of Bonita Brokerage, Lehigh Acres, Florida, acting as the agent for respondent. Bonita Brokerage prepared and sent to the parties confirmations of sale for each load, reflecting the agreed upon contract terms. Neither confirmation contained any language concerning the grade of the tomatoes sold.

8. A formal complaint was filed on October 19, 1984, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent's only defense, contained in its unsworn answer, is that it received an inferior grade of tomatoes on both loads. Respondent contends that it has been accustomed to receiving U.S. number one grade, unless otherwise stated in the confirmation, and the tomatoes shipped by complainant were U.S. number three.

Respondent does not deny having accepted the two loads. Therefore, respondent became liable for the agreed upon contract prices, less damages resulting from any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's Inc.*, 42 Agric. Dec. 429 (1983). Reapondent's claim that complainant breached an express warranty that the tomatoes would be U.S. number one is contained only in its unverified answer, which is not considered part of the evidence. Further, the

broker's confirmations of sale do not mention the grade of the tomatoes. In addition, although respondent made written alterations upon one of the invoices returned to complainant, it never indicated any dissatisfaction with the grade of tomatoes received. Therefore, it is abundantly clear that respondent has failed to sustain its burden of proving that complainant expresaly warranted the tomatoes as U.S. number one, and that complainant breached such warranty. *See H. C. R. Corporation* v. *Sacks Bros.*, 16 Agric. Dec. 761 (1957). Respondent is, therefore, liable for the contract price of the two loads less what it has already paid, or $7,524.00. Respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $7,524.00, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CHAPARRAL FRUIT SALES, INC. *v.* CORGAN & SON, INC. PACA Docket No. 2-6751. Decided December 16, 1985.

F.O.B. terms—Freight faced by the buyer.

Where the preponderance of the evidence showed that respondant deducted a sum of money for freight, from the amount owed complainant for the purchase of produce, and it was agreed that F.O.B. terms were in affect under which the buyer pays tha freight, respondent was liable for the unpaid contract price.

plaint was served upon respondent, which filed an answer, denying liability.

Since the amount claimed as damagea does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to aubmit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening atatement. Respondent elected not to submit any additional evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Chaparral Fruit Sales, Inc., is a corporation whose address is P.O. Box 7352, San Antonio, Texas.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately April 25, 1984, complainant sold to respondent a truckload of cabbage for $4,636.95, f.o.b.

4. The truckload of cabbage was shipped in interstate commerce to respondent, which received and accepted it upon its arrival.

5. Complainant sent to respondent an invoice reflecting the contract terms. Respondent returned the invoice and wrote thereon that it was deducting $1,672.20 for freight, leaving $2,964.75, which ıdent paid to complainant.

formal complaint was filed on December 14, 1984, which was ıine months from when the cause of action herein accrued.

CONCLUSIONS

were f.o.b., respondent was liable for freight. 7 CFR 46.43(i). Respondent's deduction was, therefore, improper.

Respondent's failure to pay to complainant $1,672.20 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,672.20, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

Copies of this order shall be served upon the partiea.

ANNE G. DeLEO d/b/a ANNE DeLEO BROKERAGE *v.* CORGAN & SON, INC. PACA Docket No. 2-6779. Decided December 16, 1985.

Burden of proof upon respondent—Breach af warranty—Change in cantract terms.

Where respondent admittedly purchased and accepted the produce from complainant, but failed to provide evidence to sustain its burden of proving a breach of warranty, and also failed to prove that complainent authorized any change in the contract terms from a sale to a consignment, respondent is liable for the unpaid contract price.

Andrew Y. Stanton, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $59,495.75 in connection with the sale and shipment to respondent of 15 truckloads of tomatoes in foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Although the amount claimed as damages exceeds $15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is

applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement. Respondent elected not to submit any evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Anne G. DeLeo d/b/a Anne DeLeo Brokerage, is an individual whose address is 43 Linden Road, Albany, New York.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. From July 21, 1984, through October 1, 1984, in the course of foreign commerce, complainant sold to respondent 15 truckloads of produce totaling $60,695.75, delivered, as follows:

Date of Sale	Complainant's Invoice No.	Amount
7/21/84	673	$8,200.00
7/30/84	697	3,600.00
8/1/84	706	250.00
8/3/84	705	5,400.00
8/21/84	747	4,650.00
8/29/84	762	6,283.25
8/31/84	768	475.00
9/4/84	769	1,598.00
9/5/84	775	5,525.00
9/8/84	784	5,300.00
9/10/84	785	5,128.50
9/11/84	790	5,900.00
9/12/84	791	7,146.00
9/21/84	807	3,500.00
10/1/84	823	2,700.00

4. The sales were negotiated by Henry Jacobs, Bronx, New York, who acted as the broker.

5. The 15 truckloads of produce were shipped in foreign commerce from a Canadian shipper, to respondent. Upon arrival of the truckloads, respondent stamped on the shipper's invoices included with such truckloads, "RECEIVED UNDER PROTEST."

6. Respondent has paid complainant a total of $1,200.00 for the 15 truckloads, but has failed to pay the remaining contract prices of $59,495.75.

7. A formal complaint was filed on December 6, 1984, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent admits receiving and accepting the 15 truckloads, but alleges in its unsworn answer that 10 of these truckloads contained produce that was in very poor condition. Respondent claims that it received these truckloads under protest and obtained permission from the broker to handle many of them on consignment.

Having admittedly received and accepted the 15 truckloads of produce, respondent became liable for the agreed upon contract prices, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service Inc.* v. *Albertson's, Inc.*, 42 Agric. Dec. 429 (1983). Respondent has failed to sustain its burden of proof. Respondent's alleged defenses are contained only in its answer, which is unverified and thus without evidentiary value. However, even if the answer were verified, respondent has presented no evidence, such as federal inspections, showing the poor condition of the produce. Further, although respondent contends that it was permitted by the broker to handle many of the loads on consignment, it has not provided any evidence to sustain its burden of proving that the alleged change in the contract terms from a sale to a consignment was authorized by complainant. *American Banana Co. Inc.* v. *Marvin Gray*, 41 Agric. Dec. 539 (1982). Respondent is, therefore, liable for the contract prices for the 15 truckloads of produce, less the $1,200.00 it has already paid, for a total of $59,495.75.

Respondent's failure to pay to complainant $59,495.75 is a violation of section 2 of the Act, for which reperation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $59,495.75, with interest thereon at the rate of 18 percent per annum from November 1, 1984, until paid.

Copies of this order shall be served upon the parties.

CONTINENTAL SALES CO. *v.* FLYING FOODS INTERNATIONAL, INC.
PACA Docket No. 2-6724. Decided December 17, 1985.

Burden of proof upon respondent.

Where respondent failed to prove that complainant had authorized credits, it is responsible for full contract price.

George S. Whitten, Presiding Officer.
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $2,281.74 in connection with the shipment in interstate commerce of 20 lots of mixed perishable produce. A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given opportunity to file evidence in the form of sworn statements. However, neither party did so. Neither party filed a brief.

Texas, or Houston, Texas, twenty lots of mixed perishable produce having a total invoice price of $23,310.18, delivered.

4. Respondent received and accepted all the produce referred to in Finding of Fact 3, and has paid complainant $21,014.44. Complainant has admitted that respondent overpaid on one invoice in the amount of $64.00. The balance due and owing from respondent to complainant is $2,231.74.

5. The formal complaint was filed on June 29, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant brings this action to recover the alleged balance due on twenty air shipments of mixed produce to respondent. Respondent admits receiving and accepting the bulk of the produce in each of the twenty air shipments, but alleges that as to some of the shipments certain items were not received, were received in less than the quantity ordered, or were received in damaged condition. Respondent states in its answer that complainant has been paid in full by three checks totalling $21,014.44, with the exception of $97.50 which respondent admits it failed to pay complainant due to an addition error by respondent. Although respondent claims it made full payment, with the exception of $97.50, respondent proceeded in its answer to set forth specifically by invoice the amounts in dispute between complainant and respondent, and the specific reasons as to why respondent claims a lower amount is due on each invoice. Respondent lists nine invoices out of the twenty as to which it claims there is a dispute in amounts ranging from $19.00 to $298.50, and totalling $908.74. Thus respondent raises specific defenses which total only $908.74 out of the total $2,231.74 which complainant alleges to be due.

In analyzing the specific defenses raised by respondent we note that they all amount to a claim that an oral authorization of credit was granted to respondent by one of complainant's salesmen for shortages of product, or for damaged product. Respondent attached documentation in an effort to substantiate the authorizations of credit. However, the documentation for the most part consists of self-serving notes made on its own purchase order copies or on complainant's invoices. The only exceptions to this are two "debit memorandums" which state that they are from Flying Foods Inc and to be charged to Continental Sales Co. Apparently these debit memorandums were issued by respondent and sent to complainant They are dated January 24, and January 25, 1984 respectively These memorandums do not constitute adequate notice to com

plainant of the alleged allowances due to the late dates on which they were sent.

In reviewing all of the evidence of record we find that complainant has proven by a preponderance of the evidence that there is a balance still due and owing from respondent to complainant of $2,231.74. Respondent's failure to pay this amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,231.74, with interest thereon at the rate of 13% per annum from February 1, 1984, until paid.

Copies of this order shall be served upon the parties.

PIONEER MARKETING COMPANY *v.* CORGAN & SON, INC. PACA Docket No. 2-6749. Decided December 17, 1985.

Unverified answer—Breach of warranty—Resale not alleged—Accord and satisfaction.

Where respondent's answer, with attached documents, respondent failed to establish any breach of warranty or other defense to liability for the seven loads of lettuce which it admittedly purchased, received, and accepted from complainant. Even if the documentation supporting respondent's alleged defenses of breach of warranty with resulting damages and accord and satisfaction were considered as evidence, it would not provide the degree of proof necessary to reduce respondent's liability.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $29,176.50, in connection with the sale and shipment of seven truckloads of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Although the amount claimed as damages is greater than $15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Pioneer Marketing Company, is a corporation whose address is P.O. Box 2034, Yuma, Arizona.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronx, New York. At the times of the transactions involved herein, respondent was licensed under the Act.

3. From July 20, 1984, through September 13, 1984, complainant sold to respondent seven truckloads of lettuce at the following f.o.b. prices:

Date of Sale	Complainant's Invoice No.	Price
July 20, 1984	C0545	$4,018.50
August 7, 1984	C0557	$6,545.00
August 10, 1984	C0564	$7,423.30
August 11, 1984	C0568	$7,502.50
August 14, 1984	C0573	$4,102.50
September 12, 1984	C0636	$5,717.50
September 13, 1984	C0638	$5,717.50
	Total	$41,025.80

Complainant prepared invoices reflecting the contract terms and sent them to respondent, which received them without objection.

4. Complainant shipped the lettuce reflected by complainant's invoice number C0545 in interstate commerce to respondent, which received and accepted it. Respondent has paid $3,168.50, leaving $850.00 allegedly due and owing complainant.

5. Complainant shipped the lettuce reflected by complainant's i voice number C0557 in interstate commerce to respondent, whic received and accepted it. Respondent has paid $3,995.00 to con plainant, leaving $2,550.00 allegedly due and owing. This paymen was not intended to be payment in full for the lettuce.

6. Complainant shipped the lettuce reflected by complainant's in voice number C0564 in interstate commerce to respondent, whic received and accepted it. Respondent has paid complainan $3,218.30, leaving $4,205.00 allegedly due and owing.

7. Complainant shipped the lettuce reflected complainant's in- voice number C0568 in interstate commerce to respondent, which received and accepted it.

8. On August 15, 1984, respondent secured a federal inspection of the lettuce of invoice number C0568, which reads as follows, in relevant part:

VARIOUS CONTAINERS	Range 42° To 43°F.
. . .	
Applicant States:	850 cartons.
Condition:	Head leaves: 1 to 2 heads in most cartons, none in some, average 6% dsmage by Rib Discoloration. 1 to 4 decayed heads in most cartons, none in some, average 10% Bacterinl Soft Rot in various stages effecting 1 to 3 leaves.
Remarks:	Restricted to 150 cartons being unloaded snd upper 4 leyors of 3 complete stacks neareat rear door in that portion of losd remaining at time of inspection.

9. Respondent has failed to pay complainant any part of tho contract price for invoice number C0568.

10. Complainant shipped the lettuce reflected by complainant's invoice number C0573 in interstate commerece to respondent, which received and accepted it. Respondent has failed to pay complainant any part of the contract price of $4,102.50.

Complainant shipped the lettuce reflected in complainant's invoice number C0636 in interstate commerce to reapondent, which received and accepted it.

12. On September 18, 1984, respondent secured a federal inapection of the lettuce of invoice number C0636, which reads as follows, in relevant part:

VARIOUS CONTAINERS	Range 41° To 43°F.
. . .	
Applicant States:	850 cartons.
Condition:	Average 3% damage by Russet Spotting. 1 to 4 heads per carton average 11% damage by Tipburn. 1 to 3 decayed heads per carton average 9% Bacterial Soft Rot in various states affecting 1 to 3 leavea.

13. Respondent did not provide any evidence that it reaold the lettuce of invoice number C0636. Respondent haa paid $1,467.50 for the lettuce, leaving $4,250.00 allegedly due and owing to complainant.

14. Complainant shipped the lettuce reflected by complainant's invoice number C0638 in interstate commerce to respondent, which received and accepted it.

15. On September 18, 1984, respondent secured a federal inapection of the lettuce of invoice number C0638, which found aa follows, in relevant part:

VARIOUS CONTAINERS	Range 40° To 41°F.
. . .	
Applicant States:	850 cartons.
Condition:	Head leaves: 1 to 3 heads per carton avarage 8% damage by discoloration following bruising scattered throughout pack. Average 3% decay.

16. Reapondent has failed to pay complainant any part of the agreed contract price of $5,717.50 for tha lettuce of invoice number C0638.

17. A formal complaint was filed on December 7, 1984, which waa within nine months from when the causes of action herein accrued.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the seven loads of lettuce at issue. Respondent has submitted an unverified answer in which it alleges that some of the loads were abnormally deteriorated upon arrival at its place of business, and has included inspection reports to support these allegations. However, as the answer is not verified, neither the answer nor the proffered inspection reports have any evidentiary value. Therefore, having admittedly accepted the seven loads, and failed to provide any evidence of breach of warranty by complainant, respondent is liable for the contract prices. *Magic Valley Produce, Inc.* v. *Art Kramer's Produce Buying Service, Inc.*, 39 Agric. Dec. 464 (1980).

However, even if we were to consider as evidence respondent's answer and the inspection reports enclosed therewith, we would still conclude that respondent's defenses to the complaint are completely without merit.

With respect to the truckload bearing complainant's invoice number C0545, respondent merely states in its answer that it paid complainant $3,168.50, and provides no defense as to its failure to pay the balance of the $4,018.50 contract price. Therefore, respondent is liable for such amount, or $850.00.

Regarding the truckload bearing complainant's invoice number C0557, respondent asserts that it paid $3,995.00, its check was cashed, and no mention was ever made that such amount was not the agreed upon price. However, complainant has submitted as evidence a copy of its invoice sent to respondent which shows clearly that the contract price was $6,545.00. Respondent has presented no evidence that it ever objected upon receipt of this invoice. In addition, if respondent is attempting to claim that its payment of $3,995.00 constituted an accord and satisfaction, such claim is completely without merit, as there is no evidence in the record that respondent's payment was tendered or accepted in full settlement of a bona fide dispute. *Ernest Voisine* v. *Acadian Acres, Inc.*, 39 Agric. Dec. 763 (1980). Respondent is liable for the $6,545.00 less its $3,995.00 payment, or $2,550.00.

Respondent alleges that the lettuce contained in the truckload bearing complainant's invoice number C0564 arrived in extremely poor condition. Respondent has submitted absolutely no evidence, such as a fedsral inspection, to substantiate this claim, and it cannot be given any credibility. Respondent is liable for the difference between the $3,218.30 paid and the contract price of $7,423.30, or $4,205.00.

Respondent claims that the truckload bearing complainant's invoice number C0568 also arrived in very poor condition, and has

presented an inspection report which purportedly supports this allegation (Finding of Fact 8). However, the inspection was taken on only 150 of the 850 cartons in the load and it therefore, will be given no weight. Respondent is liable for the full contract price on this load of $7,502.50.

Respondent has submitted no evidence whatsoever to support its claim that the lettuce in the load bearing complainant's invoice number C0573 arrived in very poor condition, and is thus liable for the full contract price of $4,102.50.

With respect to the load of lettuce bearing complainant's invoice number C0636, the inspection report pertaining to that shipment (Finding of Fact 12) does indicate a breach of complainant's suitable shipping condition warranty given in this f.o.b. sale (7 CFR 46.43(j)). However, no damages can be awarded for this breach of warranty, as respondent is only entitled as damages to the difference between the actual value of the lettuce and the value it would have if it had been as warranted. The actual value of the lettuce is determined by the results of a prompt and proper resale, but respondent has not submitted any evidence of resales made on this load. See *Green Valley Produce Co-op.* v. *Nicholas J. Zerillo, Inc.*, 41 Agric. Dec. 519 (1982). As there is no other method to determine the actual value of the lettuce in this case, respondent is liable for the contract price of $5,717.50, less the $1,467.50 it has already paid, leaving $4,250.00 due and owing to complainant.

Regarding the final shipment, bearing complainant's invoice number C0638, respondent's defense is that the load arrived with severe condition problems. However, the federal inspection report respondent has submitted along with its unsworn answer shows eight percent damage by discoloration following bruising and three percent decay (Finding of Fact 15). This does not violate the good delivery standards for lettuce set forth in 7 CFR 46.44(a)(2), which states that if the contract does not specify a particular grade, as is the case here, the lettuce at destination may contain a maximum of 15 percent damage by condition defects, including not more than nine percent serious damage of which no more than five percent may be decay. In this case, there was only three percent decay, and the eight percent damage by discoloration following bruising does not constitute serious damage. Therefore, respondent is liable for the agreed upon contract price of $5,717.50.

We have determined that respondent is liable to complainant for $850.00 for invoice number C0545, $2,550.00 for invoice number C0557, $4,205.50 for invoice number C0564, $7,502.50 for invoice number C0568, $4,102.50 for invoice number C0573, $4,250.00 for invoice number C0636, and $5,717.50 for invoice number C0638. Re-

spondent's liability to complainant, therefore, totals $29,176.50, and respondent's failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $29,176.50, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

O. P. MURPHY PRODUCE CO., INC. d/b/a O. P. MURPHY & SONS v. CORGAN & SON, INC. PACA Docket No. 2-6781. Decided December 17, 1985.

Unverified answer not in evidence.

Where respondent fails to austain burden of sharing breach by complainant, it is liable for full contract price.

George S. Whitten, Presiding Officer.
Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $6,014.00 in connection with tha shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened mathod of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in tha case, as is the Department's report of investigation. The answer, since it was not verified, is not in evi-

dence. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent did not file an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, O. P. Murphy Produce Co., Inc., is a corporation doing business as O. P. Murphy & Sons whose address is P. O. Box 548, Soledad, California.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 161–162 New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 10, 1984, comlainant sold to respondent, and shipped from loading point in California to respondent in Bronx, New York, one truckload containing 1,620 25 pound cartons of size large and larger green "Just Ripe" brand tomatoes at $3.50 per carton, plus 20 cents per carton for palletization, and $20 for a temperature recorder, for a total invoice price of $6,014.00.

4. Respondent accepted the tomatoes upon arrival, but has not paid complainant any part of the purchase price thereof. The sum of $6,014.00 is presently due and owing from respondent to complainant.

5. The formal complaint was filed on December 3, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent admitted receipt of the tomatoes in its answer, but alleged that they arrived with 3% decay and 4% serious damage by sunken discolored areas. Respondent further alleged that they arrived mostly green or "just turning" color with very little red color, and as they ripened up began to show more and more decay. Respondent's answer was not verified, and consequently is not in evidence in this proceeding. Also, respondent did not submit any reply to the inquiries made by this Department during the informal stages of this proceeding. Consequently, there is no evidence in the record to support any of the allegations made by respondent. The record does not contain any copy of an inspection report on the tomatoes.

We conclude from all of the evidence that respondent accepted the tomatoes. Since respondent has not proven any breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price of the tomatoes. *Half Moon Fruit & Produce Company* v. *V.F. Lanasa, Inc.*, 39 Agric. Dec. 1520 (1980).

Respondent's failure to pay complainant the sum of $6,014.00 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $6,014.00, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

AL HARRISON COMPANY DISTRIBUTORS a/t/a HARRISON MELON CO. OF ARIZONA *v.* GEORGE VILLALOBOS d/b/a TEKSUN BRAND INTERNATIONAL. PACA Docket No. 2-6805. Decided December 17, 1985.

Partial admission of liability—Contract price—Partial payment—Unloading expenses.

Where respondent admitted partial liability for the purchase of eight loads of watermelons for which an (Order Requiring Peyment of Undisputed Amount was issued), admitted the contract terms for seven loads, and complainant's version of the contract price for one of the loads found to be proven by a preponderance of the evidence, respondent is liable for the difference between the contract price of the eight loads, less its partial payment, and the amount it properly deducted for unloading expenses.

Complainant, *pro se.*
Respondent, *pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $28,819.42 in connection with the sale and shipment of eight loads of watermelons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting liability for $11,944.72, and denying liability for the remainder.

Although the amount involved exceeds $15,000.00, the parties waived oral hearing. The shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is, therefore, applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Al Harrison Company Distributors a/t/a Harrison Melon Co., of Arizona, is a corporation whose address is P.O. Box 699, Nogales, Arizona.

2. Respondent, George Villalobos d/b/a Teksun Brand International, ia an individual whose address is 1865 Decatur Drive, San Jose, California. At the times of the transactions involved herein, respondent was licensed under the Act.

3. From June 19, 1984, through July 5, 1984, complainant sold and shipped in interstate commerce to respondent eight loads of watermelons on a delivered basis. The sales were made through a broker, Central Produce Co., Inc., San Jose, California. The agreed upon contract prices were as follows:

Date Shipped	Complainant's Invoice Number	Sales Price
June 19, 1984	83	$4,581.99
June 20, 1984	118B	$1,414.21
June 22, 1984	179	$4,531.19
June 24, 1984	214	$4,579.00
June 30, 1984	490	$4,445.00
July 2, 1984	565B	$2,570.48
July 3, 1984	609	$3,516.75
July 5, 1984	659	$2,581.38
		Total $28,319.42

4. The broker iasued memorandums of sale reflecting the agreed upon contract terms. For invoice 609, the memorandum of sale showed a sales price of $.075 per pound for 46,890 pounds.

5. Shortly after the watermelons were shipped to respondent, complainant prepared and sent to respondent invoices for all eight loads showing the agreed upon contract terms, except for invoice 609, where the invoice mistakenly showed a contract price of $.045 per pound, or $2,010.05 for all 46,890 pounds. A corrected invoice was later prepared and sent showing the actual contract price of $.075 per pound, or $3,516.75.

6. Respondent returned the invoices to complainant, making handwritten alterations showing the following deductions for unloading: For invoice number 83, a deduction of $80.00; for invoice number 118B, a deduction of $40.00; for invoice number 179, a deduction of $36.00; for invoice number 490, a deduction of $33.00; for invoice number 565B, a deduction of $28.00; for invoice number 609, a deduction of $80.00; and for invoice number 650, a deduction of $80.00.

7. Respondent has made the following payments to complainant for the eight loads of watermelons at issue, which complainant has accepted as partial payment:

Form of Payment	Date	Amount
Check	August 6, 1984	$4,412.00
International Draft	August 17, 1984	$4,679.00
Check	October 3, 1984	$2,500.00
Check	October 22, 1984	$1,000.00
Check	November 6, 1984	$1,000.00
Check	December 11, 1984	$1,000.00
	Total	$14,561.00

8. Complainant filed a formal complaint on November 19, 1984, which was within nine months from when the causes of action herein accrued.

9. Respondent filed an answer on March 27, 1985, admitting liability for $11,944.72. On July 2, 1985, an Order Requiring Payment of Undisputed Amount was issued, ordering respondent to pay complainant, as the undisputed amount, $11,944.72.

CONCLUSIONS

In respondent's answer, which is the only evidence filed by respondent in this proceeding, it admits owing a balance of $11,944.72 for the eight loads of watermelons. An Order Requiring Payment of Undisputed Amount was thus issued on July 2, 1985, directing respondent to pay this sum. Respondent denies any further liability. Respondent asserts that the contract price for complainant's invoice 609 was $2,110.05, not the $3,516.75 alleged in the complaint. Respondent also asserts that from August 6, 1984, through December 11, 1984, it paid complainant a total of $14,591.00 by virtue of four checks and an international draft. Respondent contends further that it incurred expenses for unloading totaling $377.00, which should be deducted from the contract price.

With respect to the contract price for complainant's invoice 609, complainant has submitted into evidence a corrected invoice dated August 13, 1984, for $3,516.75. The original invoice sent to respondent, dated July 9, 1984, was for $2,110.05. Complainant's contention that the corrected invoice reflects the actual contract price is supported by the broker's July 5, 1984, memorandum of sale, which shows a price of $.075 per pound for 46,890 pounds, or $3,516.75. We thus conclude that the preponderance of the evidence establishes that complainant's invoice 609 had an agreed upon contract price of $3,516.75.

Respondent's claim of payment is not denied by complainant. Further, respondent has produced documentation, copies of an international draft and four canceled checks, which show that payment was indeed made in the amount of $14,591.00.

We now turn to respondent's allegation that it incurred unloading expenses of $377.00, which are deductible from the contract price. Complainant does not deny this allegation. In addition, the record contains evidence supporting respondent, as respondent wrote the deductions for unloading expenses on complainant's invoices when it returned them to complainant. As the watermelons at issue were sold on a delivered basis, it was complainant's obligation to deliver the watermelons to respondent free of any and all charges for transportation. 7 CFR 46.43(p). Unloading expenses, a transportation charge, are thus properly deductible.

Therefore, respondent's liability consists of the contract price for the eight loads of $28,319.42, less $377.00 in deductions for unloading and the $14,591.00 already paid, or $13,351.42. As an order already has been issued for $11,944.72, respondent is liable for an additional $1,406.70. Respondent's failure to pay such sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complsinant, as reparation, $1,406.70, within interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid. Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

YAKIMA FRUIT & COLD STORAGE CO. *v.* AG WEST GROWERS, INC. PACA Docket No. 2-6593. Order issued November 5, 1985.

RULING ON RECONSIDERATION

This is s reparation proceeding under the Perishable Agricultursl Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A Decision and Order was issued on June 28, 1985, awarding reparation to complsinant in the amount of $13,898.60 plus interest, and dismissing respondent's counterclaim. Respondent filed a timely petition for reconsideration, and a stay order was issued on September 25, 1985.

In its petition, respondent makes numerous allegations of error. Most of these allegations were extensively discussed in the Decision snd Order, where they were found to be completely without merit. Therefore, they do not require any further discuasion. Only three of respondent's allegations of error need be considered herein.

Reapondent contends in paragraph 1 of its petition that its contract with complainant was for the purchase of Smart Apple and Appletown brand apples only, and that it did not order the 1,065 cartons of Autumn Fresh and 100 cartons of Larson brand apples shipped by complainant. However, respondent failed in any of its pleadings to make a specific denial of complainant's allegation that the contract of ssle included the Autumn Fresh and Larson apples. Further, respondent stated in paragraph C of its brief that complainant's substitution of the Larson apples was acceptable to respondent. In any event, even if respondent did not order the Autumn Fresh and Larson applea, it certainly accepted them, as the Decision and Order makes clear. Respondent, therefore, was liabla for the contract price for these spples, as concluded by the Decision and Order.

In paragraph 11 of its petition, respondent claims that the Autumn Fresh lot was found by a federal inspection to contnin excessive defects, and argues that this lot ahould not hava baen aver-

aged with the rest of the load, resulting in a determination by the Decision and Order that the load was not abnormally deteriorated. However, as made clear in the Decision and Order, the evidence establishes that the inspection covered only the 200 cartons of size 80 Autumn Fresh apples, and not the 865 cartons of size 100 Autumn Fresh apples. Further, such inspection was restricted, therefore detracting from its credibility. Even if the 200 cartons of apples were abnormally deteriorated, the Decision and Order correctly averaged them with the other 1,765 cartons in the load in determining the overall degree of deterioration, as the entire load of apples was considered to be a single commercial unit, subject to acceptance or rejection in its entirety. This is in conformance with a provision of the Department's regulations (7 CFR 46.43(ii)), which states that a commercial unit "means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract, [and] such commercial unit must be accepted or rejected in its entirety."

Finally, respondent claims in paragraph 12 of its petition that there was insufficient evidence to justify the conclusion of the Decision and Order that complainant consigned the load to W. W. Rogers, Dallas, Texas. This claim is wholly without foundation, as evidence supporting the existence of such a consignment is contained in complainant's sworn statement in reply, where complainant's vice-president asserted that W. W. Rogers was handling the fruit for the account of whom it may concern. In addition, complainant has submitted into evidence an invoice it issued to W. W. Rogers reflecting W. W. Rogers' remittance in connection with the consigned apples. Respondent has offered nothing to dispute complainant's evidence. The conclusion made in the Decision and Order was thus fully warranted.

For the reasons set forth above, there is no merit to respondent's petition for reconsideration, and it should be dismissed. Therefore, the September 25, 1985, stay order is hereby vacated, and the June 28, 1985, Decision and Order is hereby reinstated. The reparation awarded in the June 28, 1985, Decision and Order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

GARDEN STATE FARMS, INC., and PROCACCI BROTHERS SALES CORPORATION *v.* LIVACICH PRODUCE INC., a/t/a RANCHO PACKING CO., and/or VALU PAK INC. PACA Docket No. 2-6847. Order issued November 5, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), respondent Valu Pak Inc. failed to file a timely answer. However, prior to the issuance of a Default Order, respondent Valu Pak Inc. filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent Valu Pak Inc.'s default in the filing of an answer is set aside and it is hereby given 10 days from its receipt of this order to file an answer.

Copies of this order shall be served upon the parties.

FURUKAWA SALES CO. INC. *v.* LUCKY SEVEN PRODUCE COMPANY a/t/a TEXAS PRODUCE COMPANY and/or BENCHMARK BROKERAGE INC. PACA Docket No. 2-6919. Order issued November 5, 1985.

ORDER OF DISMISSAL AND DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondents, in the alternative, in the amount of $1,843.20 in connection with shipments of strawberries in interstate commerce. A copy of the formal complaint was served upon each respondent. Respondent Lucky Seven Produce Company filed an answer, denying liability. Respondent Benchmark Brokerage Inc. failed to file an answer and is in default.

In a letter dated October 2, 1985, complainant authorized dismissal of its complaint against respondent Lucky Seven Produce Company, but not against respondent Benchmark Brokerage Inc. Accordingly, the complaint is hereby dismissed against respondent Lucky Seven Produce Company.

As respondent Benchmark Brokerage Inc. has failed to file an answer and is in default, an order without further procedure is appropriate pursuant to 7 CFR 47.8(d).

Complainant, Furukawa Sales Co. Inc., is a corporation whose address is 865 Black Road, Santa Maria, California. Respondent, Benchmark Brokerage Inc., is a corporation whose address is 3100 Produce Row, Houston, Texas. At the times of the transactions involved herein, respondent Benchmark Brokerage Inc. was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent Benchmark Brokerage Inc. are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $1,843.20. Accordingly, within 30 days from the date of this order, respondent Benchmark Brokerage Inc. shall pay to complainant, as reparation, $1,843.20, with interest thereon at the rate of 13 percent per annum from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

VEGCO INC. *v.* MOORE MARKETING INTERNATIONAL INC. PACA Docket No. 2-6890. Decided November 8, 1985.

Bankruptcy—Stay order.

Complainant, *pro se.*
Bertran H. Ross, Los Angeles, Calfornie, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $3,886.00 against respondent in connection with transactions in interstate commerce involving shipments of mixed vegetables. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Vegco Inc., is a corporation whose address is P.O. Box 4487, Salinas, California. Respondent, Moore Marketing International Inc., is a corporation whose address is P.O. Box 3317, Salinas, California. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Eastern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

JAMES MATRO & SON *v.* FEINBERG & COMPANY, INC. PACA Docket No. 2-6726. Order issued November 20, 1985.

ORDER DENYING PETITION FOR RECONSIDERATION AND REOPENING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on September 27, 1985, awarding reparation to the complainant in the amount of $462.00. By motion received October 15, 1985, respondent has moved that this matter be reconsidered and reopened for the introduction of new evidence.

Respondent asserts that the Decision and Order concluded erroneously that the contract between the parties was f.o.b., and not delivered. Respondent claims that it can establish that the sweet potatoes at issue were sold on a delivered basis, and wishes to introduce evidence to do so.

The Rules of Practice provide that a petition to reopen to introduce evidence may be filed only before the issuance of the final order. 7 CFR 47.24(b). Therefore, as respondent's petition to reopen was filed after the Decision and Order was issued, it is untimely and must be denied.

The evidence in the record fully supports the Decision and Order and, therefore, the petition for reconsideration is without merit and is hereby denied. The reparation awarded in the September 27, 1985, order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

KITAHARA FARMS, INC., a/t/a KITAHARA PACKING CO. *v.* UNION FRUIT COMPANY. PACA Docket No. 2-6664. Order issued November 25, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 1, 1985, awarding reparation to complainant against respondent in the amount of $10,324.33. On July 10, 1985, respondent filed a petition for reconsideration. On August 12, 1985, the order of July 1, 1985, was stayed, and complainant was granted fifteen days from date of receipt of the stay order in which to file an answer to the petition. No answer was filed by complainant.

Respondent's objections to the decision and order of July 1, 1985, were fully answered therein, and upon reconsideration we find that the order of July 1, 1985, is supported by the evidence and the law applicable thereto. Accordingly the stay of August 12, 1985, is vacated, and our order of July 1, 1985, is hereby reinstated except that the reparation awarded therein shall be paid within thirty (30) days from the date of this order.

Copies of this order shall be served upon the parties.

SOL SALINS, INC. *v.* FRESH AS CAN BE, INC. PACA Docket No. 6877. Order issued November 25, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $219,471.17 in connection with numerous transactions involving the shipment of miscellaneous produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 23, 1985, complainant notified the Department that it wanted to withdraw its complaint.

Accordingly, the complaint is hereby dismissed without prejudicing complainant's right to proceed in another forum.

Copies of this order shall be served upon the parties.

CAL-MEX DISTRIBUTORS, INC. *v.* MIKE PHILLIPS ENTERPRISES, INC. PACA Docket No. 2-6589. Order issued December 10, 1985.

ORDER UPON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued July 1, 1985, awarding reparation to complainant against respondent. On July 30, 1985, respondent filed a petition for reconsideration, and on September 17, 1985, the order of July 1, 1985, was stayed and complainant was given fifteen days from date of receipt of the stay order in which to file an answer to the petition for reconsideration. Complainant's answer was filed October 8, 1985.

In its petition respondent contends that the order of July 1, 1985, is in error in several respects. We have reconsidered the order and find that respondent's contentions are without merit. The matters raised by respondent were considered in arriving at our order of July 1, 1985, and upon reconsideration we find that such order is supported by the evidence and by the law applicable thereto. Accordingly respondent's petition should be and hereby is dismissed. The stay of September 17, 1985, is vacated and the order of July 1, 1985, is hereby reinstated. The reparation awarded to complainant in that order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the partles.

MOSE MARTINOUS *v.* KEITH CONNELL, INC. PACA Docket No. 2-6637. Order issued December 16, 1985.

ORDER UPON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued July 2, 1985, awarding reparation to complainant against respondent. On July 11, 1985, respondent filed a petition for reconsideration of the order of July 2, 1985. On August 12, 1985, an order was issued staying the order of July 2, 1985, and complainant was granted fifteen (15) days from date of receipt of the stay order in which to file an answer to the petition to reconsider.

Complainant's answer was filed on August 27, 1985, and subsequently served upon respondent. Although respondent was not granted an opportunity to reply to complainant's answer, respondent did file a reply on September 13, 1985.

We have carefully considered the matters raised in respondent's petition, and have reconsidered our order of July 2, 1985, in the light of a reexamination of the entire record in this matter. We conclude that the questions raised by the petition were sufficiently considered in arriving at our order of July 2, 1985, and that such order is supported by the evidence and the law applicable thereto. Accordingly, the petition is dismissed, the stay of August 12, 1985, is vacated, and the order of July 2, 1985, is reinstated, except that the time for payment shall be within thirty (30) days from the date of this order.

Copies of this order shall be served upon the parties.

SPADA DISTRIBUTING COMPANY, INC. *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-6933. Order issued December 16, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,516.50 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated September 25, 1985, respondent notified the Department that it tendered to complainant a check in full settlement of complainant's claim. Complainant was notified, by letter dated October 28, 1985, that we assumed that the matter has been amicably resolved between the parties. It also was notified that unless we heard from it by November 5, 1985, the complaint would be dismissed. Complainant did not respond to this letter.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

THE NUNES COMPANY, INC. *v.* PLASKETT ENTERPRISES, INC., a/t/a PACIFIC VALLEY PRODUCE CO. PACA Docket No. 2-6950. Order issued December 16, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,690.00 in connection with a transaction involving the shipment of cauliflower in interstate commerce.

A copy of the formal complaint was served on respondent which filed an answer thereto denying any liability to complainant. On November 12, 1985, complainant notified the Department that it was withdrawing its complaint.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

BORELLI PRODUCE DISTRIBUTORS a/t/a VALU-FRESH FRUITS & VEGETABLES LTD. *v.* RONALD G. MUSTO PRODUCE Co. PACA Docket No. RD-86-1. Decided November 4, 1985.

Respondent was ordered to pay complainant, as reparation, $31,961.48 plus 13 percent interest per annum from March 1, 1985, until paid.

FRANK M. MINARDO *v.* TONY KASTNER & SONS PRODUCE CO. INC. PACA Docket No. RD-86-2. Decided November 4, 1985.

Respondent was ordered to pay complainant, as reparation, $7,886.75 plus 13 percent interest per annum from October 1, 1984, until paid.

NUGENT & SCHAPANSKI ORCHARD *v.* FICOR MANUFACTURING CO. PACA Docket No. RD-86-3. Decided November 4, 1985.

Respondent was ordered to pay complainant, as reparation, $7,886.75 plus 13 percent interest per annum from October 1, 1984, until paid.

COLORADO POTATO GROWERS EXCHANGE *v.* T & M MARKET SERVICES INC. a/t/a GET FRESH PRODUCE Co. PACA Docket No. RD-86-4. Decided November 4, 1985.

Respondent was ordered to pay complainant, as raparation, $497.50 plus 13 percent interest per annum from May 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $4,259.25 plus 13 percent interest per annum from December 1, 1984, until paid.

GAILIAN D. BAGLEY, JR. d/b/a BAGLEY PRODUCE COMPANY *v.* HOLLY PRODUCE CO. INC. PACA Docket No. RD-86-6. Decided November 6, 1985.

Respondent was ordered to pay complainant, as reparation, $3,215.01 plus 13 percent interest per annum from April 1, 1985, until paid.

SALINAS MARKETING COOPERATIVE *v.* WAYNE M. HATANAKA d/b/a W.H. DISTRIBUTING. PACA Docket No. RD-86-7. Decided November 6, 1985.

Respondent was ordered to pay complainant, as reparation, $3,493.45 plus 13 percent interest per annum from May 1, 1985, until paid.

MECCA FARMS INC. *v.* TOMMY HAWKINS and DANNY HAWKINS d/b/a HAWKINS & HAWKINS PRODUCE CO. PACA Docket No. RD-86-8. Decided November 8, 1985.

Respondent was ordered to pay complainant, as reparation, $80,572.20 plus 13 percent interest per annum from March 1, 1985, until paid.

BUSHMANS' INC. *v.* WOODSTOCK POTATO CO. LTD. PACA Docket No. RD-86-9. Decided November 8, 1985.

Respondent was ordered to pay complainant, as reparation, $6,596.80 plus 13 percent interest per annum from August 1, 1984, until paid.

MKA MARKETING INC. *v.* HORIZON TRADING CO. PACA Docket No. RD-86-10. Decided November 8, 1985.

Respondent was ordered to pay complainant, as reparation, $4,303.30 plus 13 percent interest per annum from June 1, 1984, until paid.

SEQUOIA ENTERPRISES INC. *v.* GILBERT GUERRA d/b/a GILO'S PRODUCE CO. PACA Docket No. RD-86-11. Decided November 12, 1985.

Respondent was ordered to pay complainant, as reparation, $3,622.50 plus 13 percent interest per annum from February 1, 1985, until paid.

BRUCE CHURCH INC. *v.* EMANUELLA L. PERAINO d/b/a THE TOMATO OUTLET. PACA Docket No. RD-86-12. Decided November 12, 1985.

Respondent was ordered to pay complainant, as reparation, $847.50 plus 13 percent interest per annum from December 1, 1985, until paid.

HELLE TOMATO CO. INC. *v.* GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-13. Decided November 12, 1985.

Respondent was ordered to pay complainant, as reparation, $5,653.98 plus 13 percent interest per annum from June 1, 1985, until paid.

OLIVER P. WOLFE III d/b/a M & T PRODUCE DISTRIBUTORS *v.* GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD 86-14. Decided November 13, 1985.

Respondent was ordered to pay complainant, as reparation, $5,653.98 plus 13 percent interest per annum from June 1, 1985, until paid.

OLIVER P. WOLFE, JR. d/b/a WOLVERINE FRUIT CO. *v.* GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-15. Decided November 13, 1985.

Respondent was ordered to pay complainant, as reparation, $5,958.00 plus 13 percent interest per annum from July 1, 1985, until paid.

ROGER SALES INC. *v.* THE PRODUCE CO. PACA Docket No. RD-86-16. Decided November 13, 1985.

Respondent was ordered to pay complainant, as reparation, $3,248.00 plus 13 percent interest per annum from November 1, 1984, until paid.

BOSTON TOMATO CO. INC. *v.* CARON FRUIT CO. INC. PACA Docket No. RD-86-18. Decided November 13, 1985.

Respondent was ordered to pay complainant, as reparation, $6,271.20 plus 13 percent interest per annum from November 1, 1984, until paid.

JEYCO PRODUCE COMPANY INCORPORATED *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-19. Decided November 13, 1985.

Respondent was ordered to pay complainant, as reparation, $21,144.30 plus 13 percent interest per annum from June 1, 1985, until paid.

HARLOFF PACKING INC. *v.* CROWN PRODUCE CO. PACA No. RD-86-20. Decided November 14, 1985.

[illegible]was ordered to pay complainant, as reparation, [illegible] 13 percent interest per annum from June 1, 1985,

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[illegible]EYNOLDS PACKING COMPANY a/t/a M & R COMPANY *v.* WEST COAST PRODUCE SALES INC. PACA Docket No. RD-86-21. Decided November 14, 1985.

Respondent was ordered to pay complainant, as reparation, $103,353.00 plus 13 percent interest per annum from June 1, 1985, until paid.

ELMCO *v.* ERNEST G. ANDERSON d/b/a ANDY'S PRODUCE CO. PACA Docket No. RD-86-22. Decided November 14, 1985.

Respondent was ordered to pay complainant, as reparation, $1,732.50, plus 13 percent interest per annum from December 1, 1984, until paid.

BLUE KEY GROWERS INC. *v.* DANNY HAWKINS and TOMMY HAWKINS d/b/a HAWKINS & HAWKINS PRODUCE COMPANY. PACA Docket No. RD-86-23. Decided November 14, 1985.

Respondent was ordered to pay complainant, as reparation, $30,478.40, plus 13 percent interest per annum from January 1, 1985, until paid.

COEXPORT INTERNATIONAL INC. *v.* T & M MARKET SERVICES INC. a/t/a GET FRESH PRODUCE CO. PACA Docket No. RD-86-24. Decided November 14, 1985.

Respondent was ordered to pay complainant, as reparation, $12,515.25, plus 13 percent interest per annum from May 1, 1985, until paid.

SCHELSKE & SONS INC. *v.* CAL-KERN DEHYDRATORS LTD. PACA Docket No. RD-86-25. Decided November 15, 1985.

Respondent was ordered to pay complainant, as reparation, $12,515.25, plus 13 percent interest per annum from May 1, 1985, until paid.

S. KATZMAN PRODUCE INC. *v.* TOM PANNO, JR., INC. PACA Docket

Respondent was ordered to pay complainant, as reparation, $4,676.25, plus 13 percent interest per annum from January 1, 1985, until paid.

STANDARD FRUIT AND STEAMSHIP COMPANY *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-27. Decided November 15, 1985.

Respondent was ordered to pay complainant, as reparation, $456,818.49, plus 13 percent interest per annum from January 1, 1985, until paid.

CHIQUITA BRANDS INC. *v.* AL NAGELBERT & CO. INC. PACA Docket No. RD-86-28. Decided November 15, 1985.

Respondent was ordered to pay complainant, as reparation, $61,325.47, plus 13 percent interest per annum from April 1, 1985, until paid.

SARAS INC. *v.* A. PELLEGRINO & SON INC. PACA Docket No. RD-86-29. Decided November 15, 1985.

Respondent was ordered to pay complainant, as reparation, $61,325.47, plus 13 percent interest per annum from April 1, 1985, until paid.

MALENA PRODUCE INC. *v.* A. PELLEGRINO & SON INC. PACA Docket No. RD-86-30. Decided November 18, 1985.

Respondent was ordered to pay complainant, as reparation, $28,062.03, plus 13 percent interest per annum from May 1, 1985, until paid.

GAC PRODUCE CO. INC. *v.* A. PELLEGRINO & SON INC. PACA Docket No. RD-86-31. Decided November 18, 1985.

Reapondent was ordered to pay complainant, as reparation, $169,286.75, plus 13 percent interest per annum from April 1, 1985, until paid.

C. A. CIRULI BROKERAGE INC. *v.* A. PELLEGRINO & SON INC. PACA Docket No. RD-86-32. Decided November 18, 1985.

Respondent was ordered to pay complainant, as reparation, $5,038.30, plue 13 percent interest per annum from April 1, 1985, until paid.

FLORIDA SALES CO. INC. *v.* AL PELLEGRINO & SON INC. PACA Docket No. RD-86-33. Decided November 18, 1985.

Respondent was ordered to pay complainant, as reparation, $4,722.90, plue 13 percent interest per annum from May 1, 1985, until paid.

FARMERS' MARKETING SERVICE *v.* A. PELLEGRINO & SON INC. PACA Docket No. RD-86-34. Decided November 18, 1985.

Respondent was ordered to pay complainant, as reparation, $16,632.75, plus 13 percent interest per annum from April 1, 1985, until paid.

R-J DISTRIBUTING CO. *v.* PONTIOUS BERRY FARM INC. PACA Docket No. RD-86-35. Decided November 27, 1985.

Respondent was ordered to pay complainant, as reparation, $6,928.45, plua 13 percent interest per annum from April 1, 1985, until paid.

BUD ANTLE INC. *v.* SEVEN SEAS TRADING CO. INC. a/t/a VALLEY VIEW FARMS. PACA Docket No. RD-86-37. Decided November 27, 1985.

Respondent was ordered to pay complainant, as reparation, $749.80, plus 13 percent interest per annum from January 1, 1985, until paid.

MARYLAND FRESH TOMATO CO. INC. *v.* INTERSTATE PRODUCE INC. PACA Docket No. RD-86-38. Decided November 27, 1985.

Respondent was ordered to pay complainant, as reparation, $4,011.00, plus 13 percent interest per annum from June 1, 1985, until paid.

COLORADO POTATO GROWERS EXCHANGE *v.* GILBERT GUERRA d/b/a GILO'S PRODUCE CO. PACA Docket No. RD-86-39. Decided November 27, 1985.

Respondent was ordered to pay complainant, as reparation, $2,619.20, plus 13 percent interest per annum from December 1, 1984, until paid.

CULIACAN PRODUCE COMPANY INC. *v.* TRIPLE B PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-40. Decided November 27, 1985.

Respondent was ordered to pay complainant, as reparation, $102,243.85, plus 13 percent interest per annum from March 1, 1985, until paid.

BIANCHI & SONS PACKING CO. *v.* LEIBMAN'S WHOLESALE TOMATOES. PACA Docket No. RD-86-41. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparation, $4,765.30, plus 13 percent interest per annum from December 1, 1984, until paid.

THE WOODS COMPANY INCORPORATED *v.* ERNEST G. ANDERSON d/b/a ANDY'S PRODUCE CO. PACA Docket No. RD-86-42. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparation, $778.75, plus 13 percent interest per annum from February 1, 1985, until paid.

WESTERN COLD STORAGE CO. INC. *v.* BENCHMARK BROKERAGE INC. PACA Docket No. RD-86-43. Decided November 19, 1985.

Respondent was ordered to pay complainant, as reparation, $49,084.50, plus 13 percent interest per annum from December 1, 1984, until paid.

HUNT OIL COMPANY a/t/a PLANTATION PRODUCE COMPANY *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-44. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparation, $7,650.00, plus 13 percent interest par annum from November 29, 1985, until paid.

THE A.E. ALBERT & SONS INC. *v.* WOODSTOCK POTATO CO. LTD. PACA Docket No. RD-86-45. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparation, $23,527.40, plus 13 percent interest per annum from October 1 1984, until paid.

THE CROSSET COMPANY v. KEVIN J. RE d/b/a J M J PRODUCE. PACA Docket No. RD-86-46. Decided December 8, 1985.

Respondent was ordered to pay complainant, as reparation, $4,825.25, plus 13 percent interest per annum from July 1, 1985, until paid.

COLORADO POTATO GROWERS EXCHANGE *v.* MIKE D. PERKINS d/b/a TRIANGLE PRODUCE. PACA Docket No. RD-86-47. Decided December 3, 1985.

Respondent was ordered to pay complainant, as reparation, $4,660.00 plus 13 percent interest per annum from April 1, 1985, until paid.

GEORGE E. CHAVEZ and PABLO A. CHAVEZ d/b/a P & G DISTRIBUTING. PACA Docket No. RD-86-48. Decided December 3, 1985.

Respondent was ordered to pay complainant, as reparation, $6,298.65 plus 13 percent interest per annum from April 1, 1985, until paid.

SOUTH TEXAS CITRUS ASSOCIATION *v.* MORNINGSIDE PRODUCE INC. PACA Docket No. RD-86-49. Decided December 3, 1985.

Respondent was ordered to pay complainant, as reparation, $1,052.00 plus 13 percent interest per annum from September 1, 1984, until paid.

THE WOODS COMPANY INCORPORATED *v.* MARTIN MONTES d/b/a M & M PRODUCE BROKERAGE. PACA Docket No. RD-86-50. Decided December 4, 1985.

Respondent was ordered to pay complainant, as reparation, $2,740.00 plus 13 percent interest per annum from April 1, 1985, until paid.

TEXAS TOMATOES INC. *v.* TRIANGLE PRODUCE. PACA Docket No. RD-86-51. Decided December 4, 1985.

Respondent was ordered to pay complainant, as reparation, $4,685.00 plus 13 percent interest per annum from February 1, 1985, until paid.

GIRAZIAN FRUIT CO. INC. *v.* JEFFREY L. HEMPHILL d/b/a CENTRAL VELLEY PRODUCE CO. PACA Docket No. RD-86-53. Decided December 4, 1985.

Respondent was ordered to pay complainant, as reparation, $5,619.20 plus 13 percent interest per annum from October 1, 1985, until paid.

ROGERS SALES INC. *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-85-54. Decided December 4, 1985.

Respondent was ordered to pay complainant, as reparation, $8,262.36 plus 13 percent interest per annum from October 1, 1985, until paid.

RIVERBEND FARMS INC. *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-55. Decided December 5, 1985.

Respondent was ordered to pay complainant, as reparation, $2,475.00 plus 13 percent interest per annum from May 1, 1985, until paid.

HARVEST TIME SALES INC. *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-56. December 5, 1985.

Respondent was ordered to pay complainant, as reparation, $2,430.50 plus 13 percent interest per annum from May 1, 1985, until paid.

GIRAZIAN FRUIT CO. INC. *v.* WEST COAST PRODUCE SALES INC. PACA Docket No. RD-86-57. Decided December 5, 1985.

Respondent was ordered to pay complainant, as reparation $8,911.50 plus 13 percant interest per annum from October 1, 1984, until paid.

TERRES NOIRES SHERRINGTON LTD *v.* J. P. DANIEL PRODUCE INC. PACA Docket No. RD-86-58. Decidad December 5, 1985.

Respondent was ordered to pay complainant, as reparation, $1,750.00 plus 13 percent interest per annum from March 1, 1984, until paid.

GREG ORCHARDS & PRODUCE INC. *v.* J.A. HOWEL d/b/a J.A. HOWELL PRODUCE. PACA Docket No. RD-86-59. Decided December 6, 1985.

Respondent was ordered to pay complainant, as reparation, $7,061.00 plus 13 percent interest per annum from May 1, 1985, until paid.

VAL-MEX FRUIT COMPANY INC. *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-60. Decided December 6, 1985.

Respondent was ordered to pay complainant, as reparation, $2,513.12 plus 13 percent interest per annum from December 1, 1984, until paid.

NORTHCROSS, KENT W. d/b/a NORTHCROSS DISTRIBUTING *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-61. Decided December 6, 1985.

Respondent was ordered to pay complainant, as reparation, $1,061.10 plus 13 percent interest per annum from May 1, 1985, until paid.

LESLIE J. BRINGINO d/b/a L. B. ENTERPRISES *v.* NOGALES TERMINAL DISTRIBUTORS INC. PACA Docket No. RD-86-63. Decided December 18, 1985.

Respondent was ordered to pay complainant, as reparation, $264.00 plus 13 percent interest per annum from January 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $1,554.00 plus 13 percent interest per annum from May 1, 1985, until paid.

WILLIAM Y. MURPHEY d/b/a NATIVE AMERICAN FARMS *v.* PRN FRUIT & VEGETABLE BROKERS. PACA Docket No. RD-86-65. Decided December 18, 1985.

Respondent was ordered to pay complainant, as reparation, $17,725.00 plus 13 percent interest per annum from July 1, 1985, until paid.

BLUE GOOSE GROWERS INC. a/t/a DOLE CITRUS *v.* NATIONAL PRODUCE DISTRIBUTORS INC. a/t/a CENTRAL PRODUCE. PACA Docket No. RD-86-66. Decided December 18, 1985.

Respondent was ordered to pay complainant, as reparation, $79,177.50 plus 13 percent interest per annum from June 1, 1985, until paid.

CAL-MEX DISTRIBUTORS INC. *v.* CABALLERO PRODUCE INC. PACA Docket No. RD-86-67. Decided December 18, 1985.

Respondent was ordered to pay complainant, as reparation, $11,769.68 plus 13 percent interest per annum from April 1, 1985, until paid.

HOLLAR & GREENE PRODUCE CO. INC. *v.* NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-68. Decided December 18, 1985.

Respondent was ordered to pay complainant, as reparation, $39,285.00 plus 13 percent interest per annum from June 1, 1985, until paid.

RAINIER FRUIT SALES INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-69. Decided December 19, 1985.

Respondent was ordered to pay complainant, as reparation $3,244.00 plue 13 percent interest per annum from June 1, 1985 until paid.

A. VILA PRODUCE DISTRIBUTORS INC. *v.* CROWN PRODUCE CO. PACA Docket No. RD-86-70. Decided December 19, 1985.

Respondent was ordered to pay complainant, as reparation, $21,890.45 plus 13 percent interest per annum from June 1, 1985, until paid.

ANTIGO POTATO GROWERS INC. *v.* DICKEY CREW d/b/a CREW TRUCKING. PACA Docket No. RD-86-71. Decided December 19, 1985.

Respondent was ordered to pay complainant, as reparation, $1,126.87 plus 13 percent interest per annum from May 1, 1985, until paid.

BLUE KEY GROWERS INC. *v.* JERRY K. POLK PRODUCE. PACA Docket No. RD-86-73. Decided December 19, 1985.

Respondent was ordered to pay complainant, as reparation, $3,267.00 plus 13 percent interest per annum from January 1, 1985, until paid.

MISSA BAY CITRUS CO. INC. *v.* TRISTAR INTERNATIONAL INC. PACA Docket No. RD-86-74. Decided December 19, 1985.

Respondent was ordered to pay complainant, as reparation, $22,793.28 plus 13 percent interest per annum from January 1, 1985, until paid.

Respondent was ordered to pay complainant, as reparation, $679.50 plus 13 percent interest per annum from December 1, 1984, until paid.

OSHITA INC. *v.* WAYNE H. HATANAKA d/b/a W. H. DISTRIBUTING. PACA Docket No. RD-86-76. Decided December 20, 1985.

Reapondent was ordered to pay complainant, as reparation, $18,369.35 plua 13 percent interest per annum from May 1, 1985, until paid.

VAL-MEX FRUIT COMPANY INC. *v.* GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-77. Decided December 20, 1985.

Respondent was ordered to pay complainant, as reparation, $49,308.69 plua 13 percent interest per annum from June 1, 1985, until paid.

DOBBINS AND RAMAGE INC. *v.* TOMMY HAWKINS and DANNY HAWKINS d/b/a HAWKINS AND HAWKINS PRODUCE COMPANY. PACA Docket No. RD-86-78. Decided December 20, 1985.

Reapondent was ordered to pay complainant, as reparation, $3,307.50 plua 13 percent interest per annum from March 1, 1985, until paid.

INTERSTATE PACKING CO. *v.* PRN FRUIT & VEGETABLE BROKERS INC. PACA Docket No. RD-86-79. Decided December 20, 1985.

Reapondent was ordered to pay complainant, as reparation, $4,420.70 plua 13 percent interest per annum from July 1, 1985, until paid.

SUNFRESH INC. *v.* MOUNTAIN VIEW PRODUCE INC. PACA Docket No. RD-86-80. Declded December 27, 1985.

Respondent was ordered to pay complainant, as repalainant, as reparation, $2,131.94 plus 13 percent interest per annum from Novemium from November 1, 1984, until paid.

COLORADO POTATO GROWERS EXCHANGE *v.* J.D.C. ENTERPRISES.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PAA Docket No. RD-86-8ket No. RD-86-81. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparainant, as reparation, $5,350.00 plus 13 percent interest per annum from May 1, im from May 1, 1985, until paid.

HENRY ANKENY Co. *v.* J.D.C. ENTERPRISES INC. d/b/a Roe INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-86-82. Decided Dec6-82. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparainant, as reparation, $4,301.50 plus 13 percent interest per annum from Februarym from February 1, 1985, until paid.

SEABOARD PRODUCE DISTRIBUTORS INC. *v.* J.D.C. ENTERPRI J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-8 Docket No. RD-86-83. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparatiant, as reparation, $4,627.05 plus 13 percent interest per annum from April 1, 19 from April 1, 1985, until paid.

TRICAR SALES INC. *v.* CHINO'S PRODUCE INC. PACA Docket No. RICA Docket No. RD-86-84. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparationt, as reparation, $6,152.70 plus 13 percent interest per annum from May 1, 19 from May 1, 1985, until paid.

JAMES D. IRIS d/b/a STATE WIDE BROKERAGE CO. *v.* GEORGE HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-85. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparation, $6,503.75 plus 13 percent interest per annum from June 1, 1985, until paid.

P K M INC. a/t/a FANCIFUL COMPANY *v.* WAYNE M. HATANAKA d/b/a W.H. DISTRIBUTING. PACA Docket No. RD-86-86. Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, $11,308.74 plus 13 percent intereat per annum from May 1, 1985, until paid.

RICHARD S. BROWN INC. *v.* WAYNE M. HATANAKA d/b/a W.H. DISTRIBUTING. PACA Docket No. RD-86-87. Decided December 30, 1985.

Respondent waa ordered to pay complainant, as reparation, $1,200.00 plus 13 percent intereat per annum from May 1, 1985, until paid.

PURE GOLD INC. *v.* WAYNE M. HATANAKA d/b/a W.H. DISTRIBUTING. PACA Docket No. RD-86-88. Decided December 30, 1985.

Respondent waa ordered to pay complainant, as reparation, $24,454.60 plus 13 percent interest per annum from May 1, 1985, until paid.

SEABOARD PRODUCE DISTRIBUTORS INC. *v.* CHINO'S PRODUCE INC. PACA Docket No. RD-86-89. Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, $2,381.30 plus 13 percent intereat per annum from June 1, 1985, until paid.

AL FINER CO. *v.* FREE STATE PRODUCE INC. PACA Docket No. RD-86-90. Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, $730.00 plus 13 percent interest per annum from May 1, 1985, until paid.

PELLERITO FOODS, INC. *v.* ALEX PRODUCE INC. PACA Docket No. RD-86-91. Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, $1,990.00 plus 13 percent interest per annum from May 1, 1985, until paid.

J. A. SHERWOOD POTATO CO. *v.* MOUNTAIN VIEW PRODUCE INC. PACA Docket No. RD-86-92. Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, $23,771.50 plus 13 percent interest per annum from October 1, 1984, until paid.

RALPH SAMSEL CO. OF EL CENTRO *v.* NATIONAL PRODUCE DISTRIBUTORS INC. PACA Docket No. RD-86-93. Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, $5,173.00 plus 13 percent interest per annum from May 1, 1985, until paid.

after default and allow the filing of an answer purauant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen waa filed within a reasonable time, and that good reason has been ahown why the relief requested in the motion ahould be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is aet aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

MANN PACKING CO. INC. *v.* A. LEVY DISTRIBUTING CO. INC. PACA Docket No. RD-85-359. Order issued November 12, 1985.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $7,730.75 againat respondent in connection with transactiona in interatate commerce involving shipments of mixed vegetables. A copy of the formal complaint was served upon reapondent, and reapondent haa filed an answer thereto.

Complainant, Mann Packing Co. Inc., ia a corporation whose address ia P.O. Box 908, Salinas, California. Respondent, A. Levy Distributing Co. Inc., ia a corporation whose address is 1559 W. Shaw Avenue, Fresno, California. Respondent was licensed under the Act at the time of the tranaactions involved herein.

Prior to the issuance of a Decision and Order in thia proceeding the Department was advised that respondent had filed in the United States Bankruptcy Court, Eastern Diatrict of California, a voluntary petition for reorganization pursuant to Chaper XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also waa advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic atay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the Unlted States Bankruptcy Court haa been closed, dismissed, or converted to straight bankruptcy, or that the

debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

ITO PACKING CO. INC. *v.* A. LEVY DISTRIBUTING CO., INC. PACA Docket No. RD-85-360. Order issued November 12, 1985.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $12,429.85 against respondent in connection with transactions in interstate commerce involving shipments of peaches and plums. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Ito Packing Co. Inc., is a corporation whose address is P.O. Box 707, Reedley, California. Respondent, A. Levy Distributing Co. Inc., is a corporation whose address is 1559 W. Shaw Avenue, Fresno, California. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Eastern District of Californis, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department

FURUKAWA SALES CO., INC. *v.* BENCHMARK BROKERAGE, INC. and/or CANINO PRODUCE CO., INC. PACA Docket No. RD-85-364. Order issued November 20, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondents failed to file a timely answer. A Default Order was issued on September 17, 1985. Respondent Canino Produce Co., Inc. filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). A Stay Order was issued on October 1, 1985, staying the Default Order with respect to Canino Produce Co., Inc. only.

The record has been carefully considered and it is concluded tha the motion to reopen was filed within a reasonable time, and tha good reason has been shown why the relief requested in the motio should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors,* 16 A.D. 790 (1957). Accordingly, the default in the filing of a answer of respondent Canino Produce Co., Inc. is set aside and it proposed answer is hereby ordered filed.

Copies of this order shall be served upon the parties.

[NEW DOCKET NO. IS PACA 2-7007.—Ed.]

SARAS INC. *v.* MACK DEMPSEY CO. PACA Docket No. RD-85-370 Order issued November 25, 1985.

ORDER DENYING MOTION TO REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. A Default Order was issued on September 20, 1985. On October 28, 1985, respondent filed a proposed answer, in effect moving to reopen after default.

Respondent's proposed answer will not be accepted for filing. The Rules of Practice state that a default will not be reopened unless the respondent presents a good reason why an answer was not timely filed (7 CFR 47.25(e)), and respondent has not presented any such reason. In any event, the Department lost jurisdiction at the expiration of 30 days from the date of the Default Order, or October 20, 1985. *American Fruit Growers* v. *Lewis D. Goldstein F & Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948); *Southland Produce Co. Caamano Brothers Wholesale,* 39 Agric. Dec. 789 (1980).

Copies of this order shall be served upon the parties.

OTAY PACKING CO. *v.* J & S PRODUCE CORP. PACA Docket No. RD-85-333. Order issued December 10, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the September 4, 1985, issuance of a Default Order, respondent requested an extension of time to file a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). On October 16, 1985, the Default Order was stayed to give respondent the opportunity to file a motion to reopen. Such a motion was filed on October 17, 1985, and complainant has filed an opposition thereto.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co.* v. *United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent shall file an answer within 10 days of service of this order. No extensions of time will be granted, and the failure to file a timely answer will result in the reissuance of a default order against respondent.

Copies of this order shall be served upon the parties.

Respondent's motion must be denied. The October 2, 1985, Default Order ordered respondent to pay reparation "within 30 days from the date of this order." Therefore, payment was due on or before November 1, 1985. The envelope in which respondent's motion was mailed contains a postmark which shows that the letter was mailed from San Jose, California on October 31, 1985, p.m. It is obvious that unless respondent elected to use express mail, which he did not, his motion could not have been received by the Department by November 1, 1985. In fact, the envelope shows that it was received on November 4, 1985, three days after it was due. Therefore, the Secretary is without jurisdiction to consider respondent's motion, as the Default Order became final due to the expiration of the time allowed for filing a petition for review. *Lasky* v. *Commissioner of Internal Revenue*, 235 F.2d 97 (9th Cir. 1956), aff'd per curiam 352 U.S. 1027 (1956); *Southland Produce Co., a/t/a Keystone Produce Co.* v. *Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

Respondent's motion to reopen after default is denied.

Copies of this order shall be served upon the parties.

CHIQUITA BRANDS, INC. *v.* AL NAGELBERG & CO., INC. PACA Docket No. RD-86-28. Order issued December 10, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on November 15, 1985, awarding reparation to the complainant in the amount of $61,825.47. By motion, respondent has moved that this matter be reopened.

Accordingly, the order of November 15, 1985, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

PRO-VEG INC. *v.* LEVY DISTRIBUTING CO. INC. PACA Docket No. RD-85-346. Order issued December 11, 1985.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $6,958.15 against respondent in connection with transactions in interstate commerce involving shipments of onions. A copy of the formal complaint was served upon respondent, and respondent has failed to file an answer thereto.

Complainant, Pro-Veg Inc., is a corporation whose address is P.O. Box 727, Lamont, California. Respondent, A. Levy Distributing Co. Inc., is a corporation whose address is 1559 W. Shaw Avenue, Fresno, California. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Default Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, Eastern District of California, a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§ 1101-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or converted to straight bankruptcy, or that the debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

FARMERS EXCHANGE INC. *v.* BENCHMARK BROKERAGE INC. PACA Docket No. RD-86-17. Order issued December 23, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A complaint was filed in which complainant seeks reparation against

respondent in the amount of $16,803.00 in connection with transactions involving the shipment of vegetables in interstate commerce.

A copy of the formal complaint was served on respondent, which failed to file an answer. Prior to the issuance of a Default Order, a review of the record revealed that the date the informal complaint had been filed with the Department, May 16, 1985, was in excess of nine months from when the causes of action alleged in the complaint had accrued.

Complainant contended in its informal complaint that respondent was liable for two loads of produce shipped on July 21 and 25, 1984. Although the record does not indicate when the produce arrived at respondent's place of business in Houston, Texas, we can assume that the transit time from complainant's place of business in Onley, Virginia, was no more than four days. Therefore, the produce must have arrived not later then July 25 and 29, 1984, respectively. Where there is no probative evidence as to when payment was due, it is presumed that such period was 10 days after the date of acceptance. See 7 CFR 46.2(aa)(5). Although the informal complaint did not allege any specific period for payment, the formal complaint alleged that payment was not due until 90 days after acceptance. However, this contention is contradicted by complainant's own invoices, attached to the formal complaint, where the space under the heading "terms" is left blank. We, therefore, conclude that the 10 day period for payment was in effect, and the causes of action accrued on August 4 and August 8, 1984.

The Department lost jurisdiction after nine months from when the causes of action accrued on August 4 and August 8, 1984, or May 4 and May 8, 1985, respectively, which preceded the filing of the informal complaint on May 16, 1985. 7 CFR 47.3(a). Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

In re: AMIGO FOOD CORPORATION P.Q. Docket No. 130. Decided November 5, 1985.

Civil penalty—Consent.

Joseph Pembroke, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-154a and § 167) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Amigo Food Corporation, respondent violated the Act and regulation promulgated thereunder (7 CFR § 301.75). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegation in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;I13(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;I13(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; andI122. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred respondent in connection with this proceeding.

FINDINGS OF

CONCLUSIONS

Respondent having admitting the jurisdictional facts and having reed to the provisions set forth in the following order in disposi- n of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred dol- s ($300) which shall be payable to the "Treasurer of the United ates" by certified check or money order, and which shall be for- rded to Joseph P. Pembroke, Office of the General Counsel, om 2422 South Building, United States Department of Agricul- e, Washington, D.C. 20250-1400, within thirty (30) days from the ective date of this order.

This order shall become effective on the day upon which ssrvics this order is made upon respondent.

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re: DELTA AIR LINES, INC. P.Q. Docket No. 144. Order issued November 15, 1985.

cision by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in Complainant's Motion, filed November 1985, the Complaint issued in this matter is dismissed. *IT IS DERED*, that the Complaint issued in this matter on October 1985, be, and hereby is, dismissed.

In re: NATIONAL AIRLINES P.Q. Docket No. 118 and 135. Decided November 19, 1985.

Garbage unloaded in violation of regulations—Civil penalty—Consent.

Joseph Pembroke, for complainant.
Eilleen Gleimer, Washington, D.C., for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

These proceedings,* hereinafter "proceeding", were instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq.*) and the Act of August 20, 1912, as amended, (7 U.S.C. § 161 and § 162), by complaints filed by the Adminietrator of the Animal and Plant Health Inspection Service alleging that National Airlines, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 94.5 *et seq.*) and (7 CFR § 330.400 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decieion set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent epecifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegation in the complaints, admits, to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

* There were two diffarent Complaints filed, and the Judge has made conforming changes to the Consent Decision, which is applicable to both.

FINDINGS OF FACT

1. National Airlines, respondent, ia a corporation whose address is 3333 New Hyde Park Road, New Hyde Park, New York 11042.

2. On or about January 21, 23, and 24, February 7, and June 10, and 14, 1985, respondent removed foreign origin garbage from flights arriving at J. F. Kennedy International Airport, Jamaica, New York.

CONCLUSIONS

The reapondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order will be issued.

ORDER

1. National Airlines, respondent, is assessed a total civil penalty of ($1,500) payable in four equal installments of $375. Such installments shall be made payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250. The firat inatallment shall be made thirty (30) days from the effective date of thia order.

2. National Airlines Compliance Agreement for J. F. Kennedy International Airport (Agreement number 23) dated November 6, 1984, is suapended until January 1, 1986.

3. On or after January 1, 1986, National Airlines Compliance Agreement shall be reinatated, if and only if, the following liated criteria are aatisfactorily met.

4. The local Plant Protection and Quarantine (PPQ) people assigned to J. F. Kennedy International Airport, Jamaica, New York, will make the initial determination as to whether or not the listed criteria have been met.

5. Any and all disputea arising between National Airlines and PPQ officials at J. F. Kennedy International Airport, New York, regarding the completion of the following criteria will be arbitrated and aettled by Doctor Ronald Caffy, Assistant to the Deputy Administrator, Animal Plant Inapection Service, Room 656 Federal Building, 6506 Belcreat Road, Hyattsville, Maryland 20782.

6. National Airlinea agreea to implement and continue a training and orientation program for all employeas who handle or dispose of foreign-origin garbage. National Airlines shall assure that only such trained employeea handle foreign-origin garbage. Such training shall include a minimum of one hour of initial instruction by a PPQ approved instructor. In addition, auch trained employees shall

be provided at least one hour of review training annually. The training and orientation program shall inform such employees of the content and purpose of the regulations and the compliance agreement, to assure proper handling of foreign-origin garbage in accordance with 7 CFR § 330.400 and 9 CFR § 94.5. Particular emphasis shall be placed on the consequences to U.S. agriculture if foreign-origin plant or animal pests are introduced into the United States. National Airlines agrees to maintain records of employee participation in the training program.

7. National Airlines, agrees to appoint a "crew supervisor" who will be responsible for all foreign-origin garbage handled by each particular cleaning crew. The crew supervisor will assure that all foreign-origin garbage will be handled in accordance with 7 CFR § 330.400 and 9 CFR § 94.5.

8. National Airlines will appoint Curtis Griffin, Vice President of Sales and Services, as a direct representative, to whom PPQ Inspectors can contact, concerning any of the above stated matters.

This order shall become effective on the day upon which service of this order is made upon respondent.

In re: DJARKTA LLOYD LINES. P.Q. Docket No. 77. Order issued November 20, 1985.

Decision by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT

For good cause shown by complainant, the complaint that was filed herein against Djarkta Lloyd Lines on March 28, 1985, is herewith dismissed.

In re: JAMES KANDA, and WORLD AIRWAYS, INC. P.Q. Docket No. 71. Order issued November 26, 1985.

Decision by Edward H. McGrail, Administrative Law Judge.

DISMISSAL OF COMPLAINT AGAINST JAMES KANDA

For good cause shown in complainant's motion, filed November 25, 1985, the complaint in this matter is dismissed with prejudice.

IT IS ORDERED, that the complaint issued in this proceeding on

March 26, 1985, against James Kanda be, and hereby is, dismissed with prejudice.

In re: STATE'S SHIPPING AGENCY, INC. P.Q. Docket No. 129. Decided November 26, 1985.

Garbage not in proper receptacles—Civil penalty—Consent.

Joseph Pembroke, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq.*) and the Act of August 20, 1912, as amended, (7 U.S.C. §§ 161 and 162), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that State's Shipping Agency, Inc., respondent has violated the Acts and regulations promulgated thereunder (9 CFR § 94.5 *et seq.*) and (7 CFR § 330.400 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. State's Shipping Agency, Inc., respondent, is a shipping
whose address is 909 Wirt Road, Suite 300, Houston, Texas 77
2. On or about June 10, 1985, the respondent on its ship the M
Achilles arrived in Duluth, Minnesota, with foreign origin garb
which was not contained in tight leak-proof covered receptacles.

CONCLUSIONS

The respondent having admitted the jurisdictional facts a
having agreed to the provisions set forth in the following order
disposition of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of two hundred a
fifty dollars ($250) which shall be payable to the "Treasurer of t
United States" by certified check or money order, and which sh
be forwarded to Joseph P. Pembroke, Office of the General Cou
sel, Room 2422 South Building, United States Department of Ag
culture, Washington, D.C. 20250, within thirty (30) days from t
effective date of this order.

This order shall become effective on the day upon which servi
of this order is made upon respondent.

In re: DELTA AIR LINES, INC. P.Q. Docket No. 136. Decided Decem
ber 2, 1985.

Consent—Civil penalty.

Kris H. Ikejiri, for complainant.
Jason R. Archambeau, Atlanta, Georgia, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act, as amended (Act) (7 U.S.C. § 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Delta Air Lines, Inc., violated the Act and regulations promulgated thereunder (7 CFR § 318.13 *et seq.*). Respondent Delta Air Lines, Inc., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Delta Air Lines, Inc., admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Delta Air Lines, Inc., waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

1. Delta Air Lines, Inc., respondent herein, is a corporation doing business as a common carrier in the United States, whose principal office is at Hartsfield International Airport, Atlanta, Georgia 30320.

2. On or about August 20, 1985, at Honolulu International Airport, Honolulu, Hawaii, the respondent received for transportation, for its flight number 24, three (3) pieces of baggage.

CONCLUSION

Respondent Delta Air Lines, Inc., having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Delta Air Lines, Inc., is assessed a civil penalty of five hundred dollars ($500.00), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Order.

This order shall become effective on the day this Order is served upon the respondent.

In re: PAN AMERICAN WORLD AIRWAYS. P.Q. Docket No. 94. Decided December 4, 1985.

Straw imported for Central African Republic—Civil penalty—Consent.

Mark Dopp, for complainant.
Carl A. Haberbusch, New York, New York, for respondent.

Decision by Dorothea Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR § 95.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents specifically admit that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent and complainant stipulate and agree that neither party is the "prevailing party" in the proceeding and respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pan American World Airways, respondent, is a corporation doing business at O'Hare International Airport, Chicago, Illinois, with a business address of Post Office Box 66094, O'Hare Airport Station, Chicago, Illinois 60666.

2. On or about August 31, 1984, the respondent had in its possession, straw imported from the Central African Republic.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of the proceeding, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand dollars ($1,000). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall become effective on the day this order is served upon the respondent.

In re: MARITIME OVERSEAS CORPORATION. P.Q. Docket No. 148. Decided December 16, 1985.

Storage of regulated garbage aboard vessel—Civil penalty—Consent.

Jane Ruley, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Maritime Overseas Corporation, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 95.4 and 7 CFR § 330.400). The parties have

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: CHARLES R. WATER. P.Q. Docket No. 110. Decided September 11, 1985.

Fruit imported without accompanying permit—Civil penalty.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: CHARLES R. WATER. P.Q. Docket No. 110. Decided September 11, 1985.

Fruit imported without penalty permit—Civil penalty.

Respondent was alleged to have imported two pounds of limes from Mexico into the United States without a permit accompanying the fruit. Respondent's failure to file any answer to the allegations constitutes admittance of the allegations. Respondent was assessed a civil penalty of $250.00.

Wonda Woods, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated section 319.56-2(e) of the regulations promulgated thereunder (7 CFR § 319.56-2(e)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed within twenty days after service of the complaint, and that failure to file an answer would constitute an admission of the allegations of the complaint, under 7 CFR § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Charles R. Waters, respondent, is an individual whose address is 4937 Tetons, El Paso, Texas 79904.

2. On or about October 22, 1984, at El Paso, Texas, respondent imported two pounds of limes from Mexico into the United States in violation of 7 CFR § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Charles R. Waters is hereby assessed a civil penalty of two hundred fifty dollars ($250), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days ater service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 11, 1985.—Ed.]

In re: FLOTA BANENARA. P.Q. Docket No. 115. Decided November 1, 1985.

Foreign origin garbage aboard ship not in proper receptacles—Civil penalty.

Joseph Pembroke, for complainant.
Respondent, *pro se*.

Decision by Edward McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120, and 122), The Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 161 and 162) (Acts) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and sections 94.5 and 330.400 of the regulations promulgated thereunder (9 CFR § 94.5) and (7 CFR 330.400).

Copies of the complaint of the Rules of Practice governing proceedings under the Act were served upon respondent's agent for service by certified mail on July 29, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Flota Banenara, respondent, is a business or in the alternative, a corporation, whose mailing address is Ecuatoriana, S.C., Calle P. Icaza, #437 Edificio Atahualpa, 90 Piase, P.O. Box 6883, Guayaquil, Ecuador.

2. Respondent's agent for service in the United States is Radix Group International, Incorporated whose mailing address is the Administration Building, Port of Albany, Albany, New York 12202.

3. On or about October 17, 1984, the respondent on its ship the M/V Rio Esmeraldas, which arrived in New York, from Honduras, violated 330.400(b)(1) of the regulations (7 CFR § 330.400(b)(1)) and section 94.5(b)(1) of the regulations (9 CFR § 94.5(b)(1)), because it had foreign origin garbage on board, which was not contained in tight, leak-proof covered receptacles, as required.

4. On or about December 17, 1984, the respondent on its ship the M/V Rio Esmeraldas, which arrived in New York from Ecuador violated section 330.400(b)(1) of the regulations (7 CFR § 330.400(b)(1)) and section 94.5(b)(1) of the regulations (9 CFR § 94.5(b)(1)), because it had foreign origin garbage on board, which was not contained in tight, leak-proof covered receptacles as required.

5. On or about December 18, 1984, the respondent on its ship the M/V Rio Esmeraldas, which arrived in New York from Ecuador violated section 330.400(b)(1) of the regulations (7 CFR 330.400(b)(1) and section 94.5(b)(1) of the regulations (9 CFR § 94.5(b)(1)), because it had foreign origin garbage on board, which was not contained in tight, leak-proof covered receptacles, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Acts and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is heraby assessed civil penalty to two thousand five hundred dollars ($2500) which shall be payable to the "Treasurer of the United States" by certified check and money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days (7 CFR 1.142(c)) after service of this Decision and Order upon respondent,

unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 12, 1985.—Ed.]

In re: PAULA DURAN. P.Q. Docket No. 84. Decided October 8, 1985.

Imported pork tamales without certificate—Civil penalty.

Respondant imported pork tameles from Mexico without a required certificate. Respondent neither denied the allegations nor requested a hearing. Respondent was assessed a civil penelty of $250.00.

Mark Dopp, for complainant.
Respondant, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of Februa 1903, as amended, (Act) (21 U.S.C. §§ 111, and 120) by a comp filed by the Administrator of the Animal and Plant Health Ins tion Service, United States Department of Agriculture. Tha co plaint alleged that the respondent violated sections 94.9(b)(3) of th regulations promulgated thereunder (9 CFR § 94.9(b)(3)). Copies o the complaint and the Rules of Practice Governing Proceedings Under tha Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in tha complaint would constitute an admission of such allegation pursuant to section 1.141 of tha Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondant that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing.

Respondent filed a letter which was received in the Office of the Hearing Clerk 22 days after the time to answer had passed and which purported to explain her letter's tardiness. Respondent's letter did not deny the allegations in the complaint nor did the re-

spondent request a hearing. Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Paula Duran, herein referred to as respondent, is an individual whose address is 1231 Franklin Avenue, New Orleans, Louisiana 70117.

2. On or about December 12, 1984, the respondent violated section 94.9(b)(3) of the regulations (9 CFR § 94.9(b)(3)) in the respondent imported pork tamales from Mexico into Houston, Texas, without a certificate, as required.

CONCLUSION

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Paula Duran, is hereby assessed a civil penalty of two hundred fifty dollars ($250). The respondent shall send, payable to the "Treasurer of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[Decision and order became final December 13, 1985.—Ed.]

In re: FRANCISCO CARRIZALES. P.Q. Docket No. 107. Decided November 1, 1985.

Fruit imported without permit—Civil penalty—Default.

Joseph Pembroke, for complainant.
Respondent, *pro se.*

Decision by William J. Weber, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act August 20, 1912, as amended (7 U.S.C. §§ 151–164 and 167) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and section 319.56–2(e) of the regulations promulgated thereunder (7 CFR § 319.56–2(e)).

Copies of the complaint of the Rules of Practice governing proceedings under the Act were served upon respondent by certified mail on July 29, 1985.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Francisco Carrizales, raspondent, is an individual, whose mailing address is 2677 Lima Street, Brownsville, Texas 78520.

2. On or about June 19, 1984, the respondant imported one kilogram of limes from Mexico into the United States at Brownsville, Texaa, in violation of section 319.56–2(e) of the regulations (7 CFR §§ 319.56–2(e)), because the fruit was not accompanied by a permit, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Acts and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent is hereby assessed civil penalty of two hundred and fifty dollars ($250) which shall be payable to the "Treasurer of the United States" by certified check and money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days (7 CFR 1.142(c)) after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This decision and order became final December 13, 1985.—Ed.]

In re: IMPERIAL NURSERIES. P.Q. Docket No. 139. Decided December 16, 1985.

Transportation of regulated articles from gypsy moth high risk area through non-regulated areas—Civil penalty—Consent.

Kevin B. Thiemann, for complainant.
A. Ross Allen, New York, New York, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151-164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Imperial Nurseries, respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*) The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the

Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Imperial Nurseries, respondent, is a business whose address is 90 Salmon Brook Street, Granby, Connecticut 06035.

2. On or about April 17, 1985, respondent moved interstate, through gypsy moth non-regulated areas, regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Wyandotte, Michigan.

3. On or about April 18, 1985, respondent moved interstate, through gypsy moth non-regulated areas, regulated articles from Granby, Connecticut, a gypsy moth high risk area, to East Detroit, Michigan.

4. On or about April 18, 1985, respondent moved interstate, through gypsy moth non-regulated areas, regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Elgin, Illinois.

5. On or about April 18, 1985, respondent moved interstate, through gypsy moth non-regulated areas, regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Wood Dale, Illinois.

6. On or about April 18, 1985, respondent moved interstate, through gypsy moth non-regulated areas, regulated articles from Granby, Connecticut, a gypsy moth high risk area to Lake Zurich, Illinois.

7. On or about April 18, 1985, respondent moved interstate regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Morrison, Tennessee, a gypsy moth non-regulated area.

8. On or about April 24, 1985, respondent moved interstate regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Greensboro, North Carolina, a gypsy moth non-regulated area.

9. On or about April 24, 1985, respondent moved interstate regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Winston-Salem, North Carolina, a gypsy moth non-regulated area.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following order in disposition of this proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of one thousand one hundred twenty five dollars ($1,125.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, 12th and Independence Avenue, S.W., Washington, D.C. 20250-1400, within (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

In re: ALMA ROMERO ESTRADA. P.Q. Docket No. 87. Decided November 8, 1985.

Fruit imported without permit/fumugation—Respondent failed to answer complaint—Civil penalty—Default.

Mark Dopp, for complainant.
Respondent, *pro se.*

Decision by John A. Campbell, Administrative Law Judge.

DEFAULT DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The com-

plaint alleged that the respondent violated sections 319.56-2 and 319.56-2j of the regulations promulgated thereunder (7 CFR § 319.56-2 and § 319.56-2j). Copies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon respondant.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.141 of the Rules of Practice (7 CFR § 1.141), and a waiver of such hearing. The letter also advised the respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver, on his part, of oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and respondent has not requested an oral hearing.

Respondent's failure to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations, pursuant to section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to request a hearing constitutes a waiver of such hearing. There being no basis for a hearing, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Alma Romero Estrada, herein referred to as respondent, is an individual whose address is 7134 London Lane, Apartment C, Lemon Grove, California 92045.

2. On or about September 18, 1984, the respondent violated sections 319.56-2 and 319.56-2j of the regulations (7 CFR § 319.56-2 and 319.56-2j) in the respondent attempted to import two limes from Mexico which are prohibited entry without a permit, and mangoes and plum from Mexico which are prohibited entry without fumigation and a permit for entry.

CONCLUSION

Respondent has failed to respond in any manner to the allegations of the complaint. By reason of the Findings of Fact set forth above the respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

ORDER

Respondent Alma Romero Estrada is hereby assessed a civil penalty of two hundred fifty dollars ($250). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This default decision and order became final December 17, 1985.—Ed.]

In re: TRANS WORLD AIRLINES. P.Q. Docket No. 122. Decided November 1, 1985.

Foreign origin garbage not removed to approved facility—Civil penalty.

Fronda Woods, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111 and 120), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), and the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-164a and 167) (Acts), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that the respondent violated sections 330.400(b)(1) and 94.5(b)(1) of the regulations promulgated thereunder (7 CFR § 330.400(b)(1) and 9 CFR § 94.5(b)(1)). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed

within twenty days after service of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Trans World Airlines, Inc., respondent, is a corporation whose address is Building 60, JFK International Airport, Jamaica, New York 11430.

2. On or about January 28, 1985, at John F. Kennedy International Airport, the respondent violated 7 CFR § 330.400(b)(1) and 9 CFR § 95.4(b)(1), because it removed, from its flight TWA 741, which had arrived in New York from West Germany, foreign origin garbage which was not removed to an approved facility, as required.

CONCLUSION

The respondent has failed to file an answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following order is therefore issued.

ORDER

Respondent Trans World Airlines, Inc, is hereby assessed a civil penalty of seven hundred fifty dollars ($750), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, [illegible] from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This default decision and order became final December 17, 1985.—Ed.]

In re: CARGO SHIPS MARITIME CORPORATION. P.Q. Docket No. 134. Decided December 18, 1985.

Storage of regulated garbage aboard vessel—Civil penalty—Consent.

Jaru Ruley, for complainant.
Respondent, *pro se.*

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) and the Federal Plant Pest Act, as amended (Act) (7 U.S.C. §§ 150aa *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Cargo Ships Maritime Corporation, respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 95.4 and 7 CFR § 330.400). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act

of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Cargo Ships Maritime Corporation, respondent, has as its agent International Great Lakes Shipping Company, located at 9402 South Ewing Avenue, Chicago, Illinois 60617.

2. On or about May 24, 1985, the respondent stored regulated garbage aboard the vessel M/V Peonia, which was docked at the Port of Chicago, Chicago, Illinois.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Cargo Ships Maritime Corporation, such order and decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars ($500.00). The respondent shall send a certified check or money order for $500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, not later than thirty (30) days from the effective date of this order.

This order shall become effective on the day upon which service of this order is made upon the respondent.

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ERRATUM: Under the Perishable Agricultural Commodities Act, Reparation Default Decision listed above, the decision that are found on pages 1084 through the top of page 1096 were inadvertently omitted when this list of decisions reported was compiled. Please refer to those pages for this information. Editor.

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