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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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-juddied 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 Regis-

The principal statutes concerned are the Agricultural Marketing Act of 1340 ff U.SC. 1621 et say, the Agricultural Marketing Agreement Act of 1997 ff U.SC. 601 et say, the Adricultural Marketing Agreement Act of 1997 ff U.SC. 601 et say, the Animal Quarter and Ristated have GLUSC. 161 et say, the Animal Welfare U.SC. 601 et say), the Grain Standards Act ff U.SC. 182 et say, the Horser Protection Act (GLUSC. 1821 et say), the Packers and Stockyards Act, 1921 (f U.SC. 181 et say), the Perishable Agricultural Commodities Act, 1932 of U.SC. 610 et say), the Plant Quarter Commodities Act, 1932 of U.SC. 610 et say, the Plant Quarter Commodities Act, 1932 of U.SC. 610 et say, the Act ff U.SC. 151 et say), the Plant ff U.SC. 152 et say), the Plant ff U.SC. 153 et say), the Plant ff U.SC. 154 et say), the Act of U.SC. 154 et say), the Act of U.SC. 155 et say), the Plant ff U.SC. 155 et say)

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 peried. They may be cited by giving the volume and page, for Illustration, I.A.D. 472 (1942). It is unnecessary to cite the decist or decision number. Profer to 1942 the Secretary's decisions were identified by decist and decision numbers, for example, D-678, S. 1165. Such citation of published in Arrivature Decision for the control of the control of the published in Arrivature Decision from the control of the control o

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

TABLE OF CONTENTS

NOVEMBER-DECEMBER 1985

1	١,
LIST OF DECISIONS REPORTED	
NOVEMBER-DECEMBER 1985	
JANUARY-OCTOBER 1985	
ANIMAL QUARANTINE AND RELATED LAWS	5
ANIMAL WELFARE ACT	2
PEDERAL MEAT INSPECTION ACT	2
PACKERS AND STOCKYARDS ACT	
DISCIPLINARY DECISIONS	
REPARATION DECISIONS	2
PERISHABLE AGRICULTURAL COMMODITIES ACT	
DISCIPLINARY DECISIONS	:
REPARATION DECISIONS	9
REPARATION DEFAULT DECISIONS	v
PLANT QUARANTINE ACT	
POELTRY PRODUCTS INSPECTION ACT	
SUBJECT INDEX	
NOVEMBER-DECEMBER 1985	
JANUARY-OCTOBER 1886.	4

NOTE

A list of decisions reported and a subject index are published in each issue of Agriculture Decisions. A list of decisions reported and a subject lodex for the antire volume or colendar year are published in this (the Nevember-December) issue.

PAGE

NOVEMBER-DECEMBER 1985

ANIMAL QUARANTINE AND RELATED LAWS	
DISCIPLINARY DECISIONS:	
Barwer, Paru, Afrida Paru, Brown Cavitis Contrasev AQ Bodest. 202. Concent Devision. Concentration on the Contrastive AQ Bodest No. 93. Concent Devision. Contrastive Contrastive Dev. AQ Bodest No. 193. Order throating Blombad. Donated. Dev.	2714 2980 ef
FARMER, TRAVES E. AQ Docket No. 127, Decision and Order, Decision and Chebr.	2711 st
INC. AQ Backet No. 195. Default Decision and Olober as to Clause. H. Howe.	"
Dre. AQ Docket No. Dis. Default Decision and Order As To Sings	
Thurman, Gany, AQ Jacket No. 29, Decision and Order, Marrin, Curr. AQ Jacket No. 122 Convent Decision Micro, Jahan, and Bur. Woon. AQ Docket No. 123, Decision for James Mary	25000
Science Program of the analysis of the state of the State of the Al- Backet Na 28. Distributed of Complaint Since, Rature Al Daket No. 21. Homested of Complaint Tama, Mary Parama, Convention, Alpharket Na, 120. Distributed Order.	7590
Wilson, Mickel J. AQ Docket No. 177 Consent Decision	2960 a 2960 a
ANIMAL WELFARD ACT	269
DISCIPLINARY DECISIONS:	
Annu, Johnna L., Miles John Ringer, AWA Docket No. 266, Order Fixing Eller from Date.	
Biowene, Parmera, debra Windonson Kuringay, AWA Docket No. 347	2000
Bion William and SARAH AWA Dicket No. 225 Consent Devi-	2771
	7719 2719
800 Order	
STREET, HOMER AWA Decket No. 240 Order Granting Matrix To	2121

STIMBO, BONALD, didd's Springer Paris, AWA the ket Secrete British.

al Ol Stay Older

NIMAL WEIGHDE ACT CO.

DISCIPLINARY DECISIONS—Cont.	PAG
University of Pennsylvania. AWA Docket No. 355. Decision an Order	
FEDERAL MEAT INSPECTION ACT	
DISCIPLINARY DECISIONS:	
FORT. PLAIN PAGRING Co., Inc. FREIA Docket No. 76. Decision an Order	- 274 I,
PACKERS AND STOCKYARDS ACT, 1921	
DISCIPLINARY DECISIONS:	
Argor, Lour W. P&S Docket No. 6818. Declaion	
No. 6901. Deteilon With Respect To Airtin Bartisla and Allen Bartals DECEMON WYRY RESPECT TO GAILER GAGE. BERF NERSLESSA, Jos. P&S Bocket No. 6004. Detailon and Order. BOYCE, WILLIAM E. P&S Docket No. 6012. Order Distribution and Order. BOYCE, WILLIAM E. P&S Docket No. 6022. Detailon and Order. BRATTERROGEN, LEE, P&S Docket No. 6022. Detailon. BRATTERROGEN, LEE, P&S Docket No. 6023. Detailon. BRATTERROGEN, LOWER P&S DOCKET NO. 6023. Detailon. BRATTERROGEN, LEE, P&S DOCKET NO. 6023. Detailon. BRATTERROGEN, LOWER P&S DOCKET NO. 6023. Detailon. BRATTERROGEN, LEE, LEE, LEE, LEE, LEE, LEE, LEE	277 217 278 286 286
Consent Decision	
SION	285
DURUNGUE PACHING COMPANY, P&S Docket No. 6529, Decision	2831 2841
JERRINS, LAVESINE. P&S Docket No. 6388. Decision and Order. KRONS, Ball. d/b/a Motory Avenue Louision and Order.	2850 2774
LANOY PACHING COMPANY, JAMES LANOY, and ALLEN BRIGHT. P&S Docket No. 5497, Decision and Order House	2835
MCGUINNER, JAMES PAS Dorbes No. 0004 P.	2768
MULSO, DAVID, DAVE MULSO CATTLE COMPARY, SCHLOIN, INC., ELETON LIVESTOCE, INC. and WESLEY VAN DYRE, P&S Docket No. 5487, Deci- sion As To Resconsents David Mulso, Dav. Mulso, Chem.	2840
and Siriote, Inc. PLUNKET, R.D. P&S Docket No. 8471. Decision REFER, ALLEN H. P&S Docket No. 6477. Decision	

PACKERS AND STOCKYARDS ACT, 1921-Cont.

DISCIPLINARY	DECISIONS—Cont.	

Sameart Livertock Commission Company, Inc., Lenny Mademall, and Paul Swarson, P&S Dorket No. 6621, Order Benying Motion	
Yer A Stuy	11968
SIMO LIVESTOCK EXCHANGE, DRY, and CHARLES W. PORTET MOVEL, Jr.	
P&S Dorket No. 6517, Decision	255.45
SIMMORO, NAM. 1988 Ducket No. 5518, Supplemental Order	25661
SHERRON LAVESTORIC COMPANY, P&N Dorket No. 6548, Decision and Order Upon Admission Of Facts By Reusen Of Default	
WATE WHIRE MARKETING, INC., RIGHT THOMPSON, and LARRY ROSE, PAN Bucket, No. 6588, Decision Conserming State Wide Absolution In	12944
and Larry Rose	2704
Order Amendmen Decision	CHEN
BYON, GERBALD P., d/b/n DIVIDARY LIVESHOEK SALES P&N Docket No.	
And A Deer Course & Married Course in the Course of the Co	2501
AN & DER GEFFE & SORG, DEC. PEN Docket No. 6384 Decision.	Dillet

REPARATION DECISIONS:

ABRZER, URBAN "NIGHTY," P. KINTON LIVESTOCK, INC., WES VAN Drug, Davin Music, Tel-State Liverness Accides Co., Inc., and PAUL DER HERBER, P&S Docket No. 6129 Jack BROADBROOKS, BOYR BURTOR, SANDRA BORTOR, DARRYL CRASCO, BRENE CRASCO, LURE CHARCO, MAYMARD CHARCO, ORVINER JAME CHARCO, WILL CHARCO, DARCHE DONKY, WANDA DONKS, HEN FEWER, JAMES FEWER, LORDS FLAMIAND, LARRY HAYNES, RAYMOND HARDESON, CARL J. LYRICHD. BROCK KRIKALOR, RAYMOND J. KNITESON, MEDSONER RANCHES, INC., SHAWN MEDBORE, THE MILLER COLORY, INC., STEVEN PARRIETY. JACK QUEENS, and GERALD J. "Bon" WALSE, Admir., Estate of Gerald M. Walsh r. Name P&N Darket No. 6167, Nort. Carpeville. E. BAME, PAN Dorket No. 5105; CORN EXCHANGE BANK C. THE STATE LIVERTOCK AUCTION Co., INC., Ecrow Livernew, Inc., Stations, Inc., DAVID MURRS, and PAGE DES HERRICE. PAS Docket No. 6166 Decid. 2570

ed November 1, 1986 AUGIN, J. MAISSICK, STEPHEN N. BERNAT, TERRY L. HUCKERS, JOHN P. CONWAY; THOMAS C. GRESCHY; SYLVED HERRIST, RICHARD MORROW. PATRICK T. PAYTERRON; PADI. A. SCHOMP and Dorman K. Schomp. HALPH G. SRABL; ALLDON G. SHELDON; RESSELL TAROLY, NELSON WI-BRICK; and ROBERT G. ZERR P. R.J. HOLMES SALES INTERNATIONAL INC. , GARY W. HUNT BORGE COASTAL CAPTER COMPANY, DAVID R. MORRELL d/h/g DAMONE SALES & SERVICE and LIGHT Wissigner du P&S Docket No. 6286 et seq Decision And Order As To Respond ents' Monell And Woodruff

PACKERS AND STOCKYARDS ACT, 1921-Cont.

REPARATION DECISIONS-Cont.

BORRADA, WILLIAM A., WILLIAM W. BERRADA, and DOVALLY R. BROCK APAR WALTER PERSON E. ORAN VIEW of PAR'S CASSET AS CALL CORRESAN, DAVID R. MORRADA (1974) DARSON SILER & SERVICE OLD, BROWNERS, DAVID B. MORRADA AND DARSON SILER & SERVICE SILER SILER

DURLE, ROMAND M., R. B.J. HOLMER SALES INTERNATIONAL, DR., G. W. HUNT d'Ab'A COATAL CAVILE CONDAINY, DAVID R. MONELL M. f. DANCORE BLAIS & SERVICE and Ascere Marce, P&S Docks T. M. G. C. O'der O' Dissuissand As TO Respondents Monell And Merk.

HUTHEROCKS. NORMAN, G. GARY W. HUTH d'Ab'A. GOMFAL CAVILE COM

NY and FRANE PRAYS. P&S Docket No. 6128. Order Of Dismissal To Respondent Prast.

JOHNSON, NORMS A., & UNION STOCKYARDS COMPANY OF PARCO. P

Decket No. 4297, Criser Of Dismissal.

LAPLEUR BROTTERIS CO., INC., II. COLUMBUS SALES PAVILIAN, INC. P. Decket No. 4561, Crider Df Dismissal.

SOUTHWORTH, MARE, U. B.J. HOLMES SALES INTERRATIONAL, INC. GA W. HONT d/b/s COAPTAL CAPTAL COMPANY, DAVID R. MORRELL d/ a DAMONE SALES ÉSERVOY, CAROLYN ISERE AND GAS SERVOYO PAS Decket No. 7288. Order Of Dismissal As To Heapender Morell, ishler, and Snowder.

Voctes, Gene, G. Cargen City Levertoce Market, Inc. P&S Doc)
No. 6246. Order Of Discrissel.
Woocszupt, LLOYG Ja., D. B.J. Holmes Sales International In
Gary W. Hung d/b/a Compact Cattle Company and Daylo

MORRIL d'b's DAMONE SALES & SERVICE. P&S Docket No. 734 Order Of Dismissed As To Respondent Monel! PERISHABLE AGRICULTURAL COMMODITIES ACT. 1809

DISCIPLINARY DECISIONS.

BENCHMARK BROKERAGE, INC. PACA Dooket No. 2-7005. Decision as

Order Oranteno Motion To Change Effective Date
Central WV Wiscerale Product, Inc. PACA Decket No. 2-6858, D.

Cision and Order.

Sindhow, Chustrophes R., d/b/s Greater American Propure Co

Vao-Mix, Inc. PACA Docket No. 2-6612. Stay Order.....

PERISHABLE ACRICULTURAL COMMODITIES ACT. 1930-Cont.

REPARATION DECISIONS:

AL HARRISON COMPANY DISTRIBUTORS 8/1/a HARRISON MELON CO. OF ARIZONA S. GROUGE VILLALOGGS d/b/S TERRIUN BRANG INTERNATION-B.G. HARMON FRUIT COMPANY, INC. B. BUMGARNER PRODUCE, INC. BATTAGLIA PRODUCE SALER, INC. U. EMERSON H. RIJAGY d/b/s EMERSON

ELLIOTY PRODUCE. PACA Docket No. 2-6747. Decision and Order....... 2980 BEEFSTARE TOMATO GROWING INC. U. CORGAN & SONS, INC. PACA

CAL-MER DISTRIBUTORS, INC. B. GROROW VILLALOROS d/b/n TERREDA BEAND INTERNATIONAL PACA Docket No. 2-8688. Decision And Order.... CALMER DISTRIBUTORS, INC., & MINE PRILLIPS ENTERPRISES, INC.

CHAPARRAL FRUIT SALER, INC. D. CORDAN & SON, INC. PACA Docket COMMINENTAL SALES CO. 8: FLYING FORES INTERNATIONAL INC. PACA

DELSO, ANNE G., d/b/n ANNE DELSE BROKERAGE II. COEGAN & SOM. FURUMAWA SALES CO. INC. IL LUCKY SEVEN PRODUCE COMPANY B/E/R

TEXAS & POROBUCE COMPANY and/or BENCHMARK BROKERAGE INC. PACA Docket No. 2-8919. Order Of Dismissal And Default Order 3000 GADREEN TOMATO CO. S. CORGAN & SON INC. PACA Docket No. 2-0750. Decision And Order 2043

GARDIN STATE FARMS, INC., and PROCACCI BROTHERS SALES CORFORA-TION IL JOHN LIVACION PROBUCE INC., 8/4/R RANGHO PACKING CO., and/or Valu Pax Inc. PACA Docket No. 2-4847. Order Reopening

GLOBAL TRADENC INC., S. LIMPERT BROS., INC. PAGA Docket No. 2-

GOLDEN STATE DISTRIBUTORS, D. WILSMAN BROS. & ELLIOT, INC. PACA

HOMESTEAD TOMATO PACKING CO., INC. D. GULF LAKE PRODUCE CO. HUMPHRITE, JACK T., d/b/s HALLMARK PRODUCE COMPANY & THAUDS-

US J. SORIECE d/b/s Teo SOCIECIE. PACA Docket No. 2-6757, Decinion And Order..... 2008 JAMES MATRO & SON IL FEINSERO & COMPANY, INC. PACA Desket No.

2-6728. Order Denying Patition For Reconsideration And Reopen-KITAHARA FARMS, INC., 8/1/8 KIYAHARA PACKING CO., 8. UNION FRUIT

COMPANY, PACA Dockst No. 2-9884. Order On Reconsideration....... 3603 LIEBY'S FRESH FOOD COMPANY, INC. B. EMERSON H. ELLIOTT d/b/a EM-

ESSON ELLIOTY PRODUCE, PACA Docket No. 2-6716. Decision And

Martinour, More, v. Kerry Connell, Inc. PACA Docket No. 2-8637. Order Upon Reconsideration.....

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont.

REPARATION DECISIONS—Cont.	
REPARATION DECISIONS—Cont.	AGE
Memorature States Cu., n. O'Der Parterer Co., P.A.O. Donier, No. 1078 Order Bergeira Payment Co. (Hospitzel Annuar Co.) House Contavar, Doc. to Pasterer Deventrante, lie., n. A/16 Factor. House Contavar, Doc. to Pasterer Deventrante, lie., n. A/16 Factor. Oo Co. P. Monter Paroseco Co., lie., A/16 Of, Montere N. Contava & Son, Inc. PAGA Doniel No. 5-ffst. Design And Order. Contava & Son, Inc. PAGA Doniel No. 5-ffst. Design And Order. No. 5-ffst Design And Order. Doners Maxamon Contavar v., Joseph St. Harrack, App. Roscocc Co. Bracer Factor, Jose C. Olicea & Son Co. PAGA Doniel No. 5-ffst. Bracer Factor, Jose C. Olicea & Son C. PAGA Doniel No. 5-ffst. Bracer Factor, Jose C. Olicea & Son Co. PAGA Doniel No. 5-ffst.	2945 3106 2952 2566 2968 2941 2965 3103 3006 2976
Docket No. 2-6038. Ruling On Reconsideration	2008
REPARATION DEFAULT DECISIONS:	
A.E. ALBERT & SONE INC. P. WOODSTOCK POTATO CO. LTO. PACA Docket.	
No. RD-86-46 A.G. Shore Company o. Gulf Lake Produce Co. PACA Docket No.	2016
RD-85-303. Order Reopening After Default. AL FINER Co. u. FREE STATE PROPURE INC. PACA Docket No. RD-86-	1024
ANTIGO POTATO GROWERE INC. 8. DICKEY CHEW d/b/A CREW TRUCKING	
PACA Docket No. RD-86-71	3020
AVILA PROGUCE DISTRIBUTORS INC. 6. CROWN PROGUCE CO. PACA Docket No. RD-98-70	3000
PRODUCE CO. INC. PACA Docket RD-36-6	
BIANCES & SONS PACKING CO. II. LEIBMAN'S WHOLESALE TOMATOUR	
PACA Docket No. RD-85-41. Blue Goor Growers Inc. s/l/s Dole Citeur, u. National Produce	1014

Distributions like, at/16 Chemial Produce PACA Decket No. RD-86-86.

Blue Key Geowras like, a Darrey Hawkins and Tomay Hawkins d/b/4 Hawkins & Hawkins Produce Company. PACA Decket No.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1991—Cont.	
REPARATION DEFAULT DECISIONS—Cont.	PAGE
BLUE KW GROWERS INC. A. JERRY K. POLH PRODUCE. PACA Docket No. RD-68-73. BORLLI PRODUCE DEPTEMENTORS at It's VALU-PESSII FRUIPE & VEIDER- RIES LTO. A. RONALD G. MIGHO dib's. MUSTO PRODUCE COMPANY. PACA Docket No. RD-68-1.	3020
BOSTON TOMATO Co. INC. a. CARON FEUIT Co. INC. PACA Docket RD-88-18.	
Bringing, Leslie J., d/h/s L.B. Enterprises v. Negales Tesminal Dis- vitativos Inc. PACA Decket No. RD-88-48.	
BRUCE CHURCH INC. II. EMANUELLA L. PERAING d/b/a THE TOMATO OUVLEY. PAA Docket No. RD-86-12	
BUS ANTLE INC. II. SEVEN SEAS TRACENC CO. INC. 8/4/E VALLEY VIEW FASHS. PACA Docket No. RD-84-37	
BUSHMANS' INC. 8. WOODSTOCK POTATO CO. LTD. PACA Docket No. RD- 86-8	
C.A. CIRULI BRORERAGE INC. S. A. PELLEGRINO & SON INC. PACA Dorket No. RD-98-32	
CAL-MEX DISTRIBUTORS INC. II. CARALLERO PRODUCE INC. PACA Decket No. RD-86-67	3019
CASCADIAN FRUIT SHIPPERS INC. U. T & M MARRET SERVICES INC. a/t/a GET FRESH PRODUCE Co. PACA Decket No. RD-86-64	
CHAVEZ GEORGE E. and PARCO A. CHAVEZ d/b/a P & G DOPHRIBUTING S. MARTIN MONTES d/b/a M&M PROSUCE BROXERAGE. PACA Docket No. RD-88-48	
CHIQUIYA BRANDS, INC. S. Al. NAGRLEBERG & Co., INC. PACA Docket No. RD-88-28. Default Order	
STAY ORDER	3029
GRY PREBU PROBUCE CO. PACA Docket No. RD-86-24 COLORAGO POTATO GROWERS EXCHANGE B. GELETOT GRUSSA 4/3/a	
COLORADO POTATO GROWESS EXCHANGE II. J.D.C. RATESPRINES INC. d./	
b/s Rogers Produce Conpany. PACA Docket RD-86-81	
ANGLE PRODUCE PACA Decket No. RD-96-47 COLORADO POTATO GEOWERS EXCHANGE IL TEM MARKET SERVICEE INC.	
a/t/a Get Freen Produce Co. PACA Docket No. RD-86-4 COMMUNITY-SUFFOLK INC. II. TORKI INC. a/t/a Ben Steinman & Sons. PACA Docket No. RD-88-6	3007
CROSSET COMPANY INC. 10. KEVIN J. RE d/b/a JMJ PRODUCE. PACA Docket No. RD-86-46	
CULIAGAN PROBUCE COMPANY INC. B. TRIFLE B PROBUCE DISTRIBUTIONS INC. PACA Docket No. RD-88-40	
Dogains and Ramage Inc. u. Tommy Hawkins and Danny Hawkins d/b/a Hawkins and Hawkins Produce Company. PACA Dockat	3021

PERISHABLE AGRICULTURAL COMMODITIES ACT. 1936-Cont.

REPARATION DEFAULT DECISIONS Cont.	P/
RIMOO II. RENESSY G. ANERSON d/b/a ANOY'S PROGUES CO. PAC	
Docket No. RD-86-22	1
FARMERS EXCHANGE INC. 11. BENCHMARK BROKKRAGE INC. PACA Docket No. RD-88-17. Order Of Dismissal	A
Parmers' Marketing Strivice v. A. Pielegrino & Son Inc. PACs Dorket No. RD-88-84	Α,
Florita Sales Co. Inc. s. A. Pellegeino & Son Inc. PACA Docks No. RD-86-38.	38
FURURAWA SALES Co., INC. B. BENCHMARK BROKERAGE, INC. and/o CAMINO PROGUCE To., INC. PACA Docket No. RD-85-364. Order Re- opening After Default.	r •-
GAC PRODUCE CO. INC. 4: A. PELARDRINO & SON INC. PACA Docket No.	۵.
RD-98-31	L.
VALLEY PRODUCE CO. PACA Docket No. RD-86-53	٨
Docket No. RD-86-67. Gree Greek No. RD-86-67. Greek No. RD-86-67. Greek No. RD-86-67. Greek No. RD-86-67.	L
PRODUCE PACA Docket No. RD-86-49 H & H PRODUCT SALES INC. II. DANNY G. SCUREY d/b/s RALESON BRO	
REBADE & DETRICUTING CO. PACA DORSES No. RD-86-75	
No. RD-93-65	. 8
PACA Dorket No. RD-80-13 HENRY ANNENY Co. a. A.D.C. ENTERPRISED INC. d/b/g ROOMS PRODUC	8
COMPANY PACA Docket No. RD-88-82 HOLLAS & GEENE PRODUCE CO. INC. D. NATIONAL PRODUCE DISTRIBUTE	8
TORE INC. PAA Docket No. RD-56-68	. :
STATE PRODUCE INC. PACA DORSET NO. RD-86-44 INTERSTATE PACKING CO. II. PRN PAULT & VECKTABLE BROXERS INC.	. :
PAA Docket No. RD-85-79	. 3
IRIS, JAMES D. d/b/a STATE WIGE BROKERAGE CO. II. GEORGE HOWARD d/b/a The Produce Co. PACA Dorket No. RD-88-85	a
ITO PACRING CO. INC. II. A. LEVY DISTRIBUTING CO. INC. PACA Dockst No. RD-85-460, Order.	. 3
J.A. Sherwood Potavo Co. u. Mountain View Produce Inc. PACA Docket No. RD-86-62	. 8
JETOO PRODUCE COMPANY INCORPORATED II. CHOWN PRODUCE CO. PACA Docket No. RD-86-19	. 8
MKA MARRETING INC. 8. HORIZON TRADING CO. PACA Dorket No RD-86-10	
Malena Produce Inc. o. A. Pellegrino & Son Inc. PACA Docket No RD-96-93	. ,

RD-85-83 3012

Mann Paching Co. Ino. n. A. Lavy Diffeseuting Co. Ino. PACA

Docket No. RD-85-358. Order. 3025

Mixes Family Dec., c. Tosory Hawning and Danny Hawking delica-MINARIO, FRANK M., D. TORY KASINER & NOOS PRODUCE CO. INC. Massa Bay Crimis Co. Inc. v. Thursan Indemnational Inc. PACA

PAGE

30010

201111

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 - Cont. MARYLAND FROM TOMATO CO. INC. IS INCREASED PRODUCE INC. PACA Dacket No. RD 86 38

REPARATION DEFAULT DECISIONS....Conf.

Docket No. RD 86 74

MURGHAY, WHADAM Y., d/b/n NATIVE AMERICAN PARMER PRINT FRUIT & VEGETABLE BROKERS PACA The ket No. 181 26 26	501
Notemenoso Kener W. deluta Notemenoso Disaministras e. Circura	
Phonores Co. PACA Darket No. RD 86-61	2011
Nichert & Schapange Chemano e. Fason Manueracturism Co. PACA Dorbet No. RD 86-3	2000
Osuma Inc. c. Wayne H. Haranaka d/len W. H. Disorderana PACA	
Dicket No. RO 26 76. OTAY PACKING Co. et al. N. PROBING CORE. PACA Dicket No. RO 35.	(000)
333. Onler Respensing After Default	0029
PRM Inc. 6/1/a Pancipus, Company p. Wayne M. Hayanaka d/b/a W.H. Dechoucerno, PACA Dicket No. 101-86-86	3000
PELISHIN FORE, Inc. P. ADA PROBLET INC. PACA Desket No. RD 80 31.	20021
Pro-Visa Inc. r. A. Licey Disconnection Co. Inc. PACA Docket No. RD	
Pour Coun live r. Wayne M. Haranaya d'Ida W.H. Daganayana	2,04704
R.J. Distribution Co. Inc. r. Percount Brook Fairs Inc. PACA	100,53
Banque Front Sanso Inc. v. Chown Proposit Fo. PAUA Docket No.	(101)

RALPH SAMBER, CO. OF EL CREERO F. NATIONAL PROBERT DISCUSSIONE LOSS Inc. PACA Dacket No. RH 86 93 BEYNOLIS PACKING COMPANY SOUR MER COMPANY & WEST COAST PRODUCE NAMES INC. PACA Docket No. RD 86, 21.

REMAIN S. BROWN DO: A. WAYNE M. HARAMANA ALDEA W.H. DISTRICT DING PACA Booket No. RD 86 87 ROYSESSEN FARMS INC. P. PRICE STATE PRODUCE INC. PACA Docket No.

ROSER HARROFF PACRISO INC. P. CROWN PRODUCE US. PACA Disket

ROBBRE BALBO INC. v. FREE STAYS PRODUCE INC. PASTA Decket No. 1805. ROSERR SALSO INC. C. THE PROBES & Co. PACA 14, ket No. 101 (et al. S. KATZMAN PROBER INC. o. Tom Panco, Jr., Inc. PAUA Decket No.

BARDINAN MARKEDON CONTRRATIVE & WAYNS M. HAVANADA A bin W.H. Distributions: PAUA Decket No. 1014 Sci. 7.

HD 80 00

RD 86-56.....

No. RD 86-28

MT1-86-26

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont.

REPARATION DEFAULT DECISIONS—Cent.	AGE
SARAB INC. U. A. PELLEGRINO & SON, INC. PACA Darket No. RD-86-29 . SARAB INC. U. MAON DEMPKEY CO. PACA Darket No. RD-85-570. Order	3012
Denying Motion To Respon After Default. Schreiger & Sone Inc. z. Cal-Keen Denyeranoss Lee. PACA Docket	8027
No. RD-36-25. SEADOARD PRODUCE DISTRIBUTORS INC. 2. CHINO'S PRODUCE INC. PACA	3011
Docket No. RD-95-89 Seasoard Pacouse Distributors Inc. u. J.D.C. Enterprises Inc.	3023
d/b/a RODERS PROPUES COMPANY, PACA Decist RD-86-88	3022
CO. PACA Docket No. RD-88-11 SOUTH TEXAS CITIES ASSOCIATION II MOZNINOSIDE PRODUCE INC.	
PACA Docket No. RD-86-46	
PACA Decket No. RD-86-27 SUNFFIRM INC., S. MOUNTAIN VIEW PRODUCE INC. PACA Decket No.	
RD-86-80. Terres Noeres Herrington Ltd. v. J.P. Daniel Procude Inc. PACA	
Decket No. RD-85-58 TEXAS TOMATORS INC. II. TRIANGLE PRODUCE, PACA Docket No. RD-	
7 TRICAR SALES INC. S. CHINO'S PRODUCE INC. PACA Decket No. RD-86-	
84 VALMEX FRUIT COMPANY INC. D. CHIRO'S PRODUCE INC. PACA Docks No. RD-86-68.	t
No. RD-66-90. VALMEX FRUIT COMPANY INC. 8. OEGEGE HOWARD d/b/s The PRODUC Co. PACA Docket No. RD-69-77.	6
VILIALOBOS, George, d/h/a Terrion Bark International & Ben N Grimeo d/h/a B&G Produce, PACA Decket No. RD-85-378. Orde	
Danying Motion To Reopen After Default	8028
PACA Docket No. RD-88-43	8016 E
HOWARD d/b/a THE PRODUCE CO. PACA Docket No. RD-86-14 Walfe, Oliver P. Jr. d/b/a Groude Howard d/b/a The Produce Co.	8000
PACA Decket No. RD-86-15. WOODS COMPANY INCORPORATED S. ERNEST G. ANGERSON d/b/s AMDY	'a
PERSONNE CO. PACA Dorbet No. RD-89-42 WOOSE COMPART INCORPORATION O. MARTIN MONTES d/b/a M&B PROPUGE BROKERAGE PACA DOCOM No. RD-86-40	d .
PRODUCE BROKERAGE, PACA DECEMBER OF REP-60-00	

	PLANT QUARANTIN
MUCIDIANARY	DECISIONS:

LINARY DECISIONS:	
AMISO FOOD CORPORATION, PQ DOCKSE No. 135, Compete Decision and Order	3032 3045
CARDO SHIFE MARITME CORPORATION PQ Decket No. 145. Consent Deci-	3066

DI ANT OHARANTINE ACT...Cont

HSCIPLINARY DECISIONS—Cont. PAG	R
Order VINERATES PQ Docket No. 139. Consont Decision	38 68 647 052 050 041 034
PAN AMERICAN WORLD AHWAYS, PQ Docket No. 54. Consent Decision. 36. STATES SHIPPING AGENCY, Inc., PQ Docket No. 129. Consent Decision. 36. STATES SHIPPING AGENCY, INC., PQ Docket No. 122. Decision And Order	040 037 054 048
WATER, CHARLES R. PQ Decket No. 110. Decision and Order	

POULTRY PRODUCTS INSPECTION ACT

DISCIPLINARY DECISION:

E

In re: Ronnie Farrington, Clarence R. Brown and Singer Rance, Inc. A.Q. Docket No. 185. Decided September 30, 1985.

Cattle moved without owner's stotement-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, 1900, as anmeded, cAQ (21 U.S. 6, 8111 and §100) and regulations promulgated thereunder, by a complaint filled by limited States of the Animal and Plant Health Impaction Service, United States Department of Agriculture. The complaint alled by the State of the Animal Act of the Act of the Animal Act of the Act of th

Derseant to section 1.380 of the Rules of P-pactice (* CFR § 1.186) applicable to the proceeding, Singer-Ranch, Inc., was informed in the complaint and the letter proceeding, Singer-Ranch, Inc., was informed in the complaint and the letter with the tentry (20) deeper should be for the complaint, and that failure to Ille an answer to, or pleef specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to section 1.3860 of the Rules of Practice (* CFR § 1.3160). Singer Banch, Inc., was also informed that the failure to Ille an answer would constitute a waiver of heart that the failure to Ille an answer would constitute a waiver of heart that the failure to Ille an answer would constitute a waiver of heart that the failure to Ille an answer would constitute a waiver of heart that the failure to Ille and the Rules of Practice (* CFR § 1.380).

Singer Banch, Inc., filed neither us merer nor any other decument during the twenty day period. Singer Banch, Inc., failure to file an answer within the time provided constitutes an admission of the completing primaries to section 13960 of the Management on the compliant pursuant to section 13960 of the completing term of the complete term of the completing term of

PINDINGS OF PACT

- Singer Ranch, Inc., respondent herein, is a corporation doing business in Texas, whose multing address is Route 3, Box 119A, Lowisville, Texas 75056.
- On or about May 10, 1984, the respondent never interestate from Lowisville, Texas, to Sand Springs, Oklahoma, approximately 3K cattle in violation of section 71.18 of the regulations 01 CPR §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 compliant. The consequence of such a five ure were explained to the respondent in the complaint and in the later of service that accompanied it. By its allence, respondent and admitted all of the material allegations of fact in the complaint and has waived a bearing.

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 bundred dollars (\$600, which shall be payable to the "Tressurer of the United States" a certified check or money order, and which shall be forwarded to Kris H. Rejirl, Office of the General Coursel, Room 2422, South Bulleing, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty (301 days from the affectly eatie of the Mines of the Coursel.

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 annihable to this proceeding? CFR 8 1145

[This default decision and order became final November 12, 1988.—Ed.]

In re: Ronnie Farrington, Dr. Clarrice 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 Pebruary, 2 1900, as emended, (Act Cill U.S.C. 9111 and \$1200 and regulations promulated thereunder by a complaint filled by the Administrates promoted the properties of the Completion Service, United States Department of Agriculture. This Impedient Service, United States respondent Clarence R. Brown violated the Act and regulations reproduced the Permuter of CPR \$11.1 et say). Copies of the complaint and the Rules of Fractice Governing Proceeding under the and the Rules of Practice Governing Proceeding under the consequence of the Completion of the Completion of the Complaint and the Rules of Fractice Governing Proceeding under the processing of the Research Completion of the Completion o

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Carronce R. Brown filed subther an nazour par any other decommend during the reventy day peried. Cleance R. Brown's failure to file an answer within the time provided constitutes an administration of the section. 1,189,6 to complaint presents to escellon. 1,189,6 to the section in the complaint presents to escellon. 1,189,6 to file an answer also constitute 600. Carronce R. Brown's failures to file an answer also constitute 600. Carronce R. Brown's failures to file an answer also constitute 600. Carronce R. Brown's failures to file and the file of the

FINDINGS OF FACT

- 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 interestate from Lewisville, Texas, to Sand Springs, Oklahoma, approximately 38 cattle in violation of section 71.18 of the regulations (9 GPR §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 collars (\$500), which shall be payable to the "Treesurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Rejirl, Office of the General Counsel, Room 222, South Building, United States Department of Agriculture, Washington, D. C. 20220-1400, within thirty (30) days from the effective date of this area.

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 annicable to this proceeding of CFR 3.145 his

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

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

Decision by Edward H. McGrail, Administrative Law Judge.

ORDER GRANVING 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: Bonny A. Guillson, 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 Veterinarias and Suspension or Revocation of such Accreditation of CFR parts 160-162, by a combination of CFR parts 160-162, by a combination of CFR parts 160-162, by a combination Survival On Administrator, Animal and Plant Health Inspection Survival Cultitod States Department of Agriculture, alleging that Behly Acquired, Volation of Parts 160-162, by a combination of the Rules of Practice and Parts 160-162, by the Parts 160-162, by the Parts 160-162, by the Parts 160-162, by the Committee of Parts 160-162, by the Parts 160-162, by the Committee of Parts 160-162, by the Parts 160-162, by th

 For the purposes of this etipulation and the provisions of this Coment 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, nother admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waves.

(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;

CONSOLIDATED ENTERPRISHS, INC. Volume 44 Number 7

(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 gainst the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (6 U.S.C. § 504 et seq.) for fees and other expenses incurred by him in connection with this proceeding.

FINDINGS OF FACT

 Bobby A. Guilfoll, respondent herein, is an individual whose mailing address is 179 Wees Main Street, Glagow, Kentucky 241.
 Respondent is now, and at all times material herein was, a Dector of Veterinary Medicine and an Accredited Veterinarial in the State of Kentucky under the provisions of the regulations of Title 6 Cube of Pederal Recolutions, Parts 169-162.

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 Cines B state-Civil pennity-Consent.

Kevin Thiaman, for complainant. Rescondent, zeo 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

[&]quot;"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 thoreunder (6 CFR §78.4 et sep.). The parties have sgreed 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 jurialization in this matter, nether admits nor denies the remaining allegations in the complaint, admits to the Findings of Pact set forth helow, and valves.

(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 "provailing party" in the proceeding and waives any extion against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (U.S.C. § 604 et seq.) for fees and other expenses incurred by the

FINDINGS OF FACE

respondent in connection with this proceeding.

GEORGE J. SCHWEIZER, JR. & CONSOLIDATED ENTERPRISES, INC. 2695 Volume 44 Number 7

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 filled 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 mayed interstate-Civil penalty-Consent.

Jaru Rulsy, for complainant. William B. Greens, Carterovillo, Georgia, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSERST 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 flied by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regutation, arounded the sundance of CPR § 181, et sep. 1 The parties

tion Service alleging that the respondent violated the Act and reginations promulgated thereunder of OFR §73. It seems 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 the provisions of the provisions of the purpose of this stipulation.

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

(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 the proceeding.

PINDINGS OF FACT

 Cliff Martin, respondent, is an individual whose address is Martin Road, Cartersville, Georgia 20120.

Martin Rolan, Cartersvine, Guorgia 2012.
2. Between the dates of March 21, 1984, and May 16, 1984, the respondent moved cattle interstate from the Ronnoko Stockyards, Inc., Ronnoko, 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,

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.

OPDVP

The respondent is assessed a civil penalty of sight thousand doilant (8,000,00), syabile in eight quarterly installants with the first installanmi of \$1,000,00 dise January 15, 1986. The respondent shall be presently sending a certified teake, or money order about the present system of the control of the control of the Office of the General Counsel, Room 2422, South Bailding, United State Department of Agriculture, Washington, D.C. 23650-1400. The remaining seven installanous of \$1,000 seak shall be due no the fifteenth of Agriculture of 1986, and January, July the History of 1986, July and Cotton of 1986, and January, July

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

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

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

Cattle moved interstate-Civil penalty-Consent.

Mark Dopp, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

This proceeding was instituted under the Act of February 2, 1908, as amended (Act) (21 U.S.C. §§ 111 and 120) by a comploint filled 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 stigulations:

 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 allogations in the complaint, admits to the Findings of Fact set forth halows 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

respondent in connection with this proceeding.

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 see) for fees and other expenses incurred by the

FINDINGS OF FACT

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. (S500). The respondent shall send, payable to the Treasurer of the United States' a certified check or money order, to Mark D. Dept. Office of the General Counsel, Room 2628 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty 900 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 compininant. Respondent, pro se.

....,

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1968, as amended (Act), (21 U.S. 6, §§11, 120, 1229 by a complaint filled by the Administrator of the Animal and Plant Health inspections Service alleging that Mickel L. 1991kino, respondent violated the Act and regulations promulgated thereunder (7 CFR §76.1 er sey.). 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 admite that of Secretary of the United States Department of Agriculture has juriediction 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

- 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, Louisians.

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 (\$25,000 which shall be payable to the "Treasurer of the dollars (\$25,000 which shall be payable to the "Treasurer of the United Statios" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room \$242 South Building, United States Dep tremor of Agriculture, 12th and Independence Ave., S.W., Washington, D. C. 20226—300, 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 tober 25, 1985.

oved interstate without certificate-Civil penuity.

James Moss moved cattle interstate that were nonvaccinates, over 18 ge, from herds not known to be affected with brucellosis. Respondent was assessed a civil penalty of \$500,50.

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 GPR § 1.30) applicable to this proceeding, the respondent was informed in the letter of service that an answer should be filled 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 1.38 of the Rules, 7 CFR § 1.139, provides that the admission by asswer of all material allegations of fact centrised in the complaint shall constitute a waiver of hearing, and that upon such admission complaints shall life a proposed decision and a such admission complaints shall life a proposed decision and the control of a rectation of the below listed chronology and citation of admissions by respondent is necessary for clarity of the record, and control of the control o

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 eral heavier.

However, he did deny the material allegations of Paragraph, III of the compilant. In accordance with section 1.14 of the Rules, 7 GPR §1.141, complainant properly filed a Motion to Assign Date for Oral Hearing on APIR §2. 1985. Thus, at this junctive of the pre-ceedings, section 1.144 was not available to complainant as an exceeding, section 1.144 was not available to complainant as an exceeding the property of the paring provident. Additionally, we therefore, the property of the property

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 pestponed. My Order of July 28, 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 cenclude this matter through consent negotiations. On August 28, 1988, complainant filed a Metion to Diamiss Paragraph III of the complaint with respect to Junes Mess, 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 preposed Decision and Order for James Moss.

By separate Orders of the undersigned, dated August 27, 1985, the oral heaving scheduled for August 29, 1986, was encelled and rescheduled to October 80, 1986, and the Motion to Dismise Paragelp III of the compilatin as to James Mess was granted. The record does not show a similar Motion to Dismise Paragraph III of the compilatin as a unique temporate Wood. On September 30, 1986, the compilatin as a unique temporate Wood. On September 30, 1986, signed on October 1911 Wood was filed and issued by the undersigned on October 1911 Wood was filed and issued by the undersigned on October 1911 Wood was filed and issued by the undersigned on October 1911 Wood was filed and issued by the undersigned on October 1911 Wood was filed and in the challenge, against a total civil penalty of \$1,000, aligned on the Challenge and the Challenge and

On October 11, 1985, Billowing reasonates Mose' reply to complainant's Motion for Decision and Order for James Mose, complainant, requested postporament of the hearing scheduled for opposition of the complainant's Motion for Advanced the Complainant's Motion for Complainant's Motion for Complainant's Motion for Control 2018, Complainant of Complainant's Motion for C

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

Paragraph. II of the complaint allegon respondent Meas moved approximately 7% cattle interprate from Oregon, a Gland A State, to Cheney, Washington, in volation of §78.96) of CRR 790b) of the regulations because the datte, which were nonvacates over 18 months of age and from brids not known to be affected with here controlled to the companied by a controlled to the companied by a controlled to the companied by a controlled to the controlled

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

In response to complainant's Medien 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 sivice of the veterinarien, and did not believe it we his fault if he recaived wrong information with regard to the shipment of these cattle. Thus, he stated, in essence, that he had seted in good faith, and this was a militastic circumstance.

As the respondent has admitted the allogations in Peragraph II of the compleint, 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 assuction against him. Further mitigation is not warranted. Therefore, the material allegations of fact in the complaint or adopted and act forth as the Fundings of Fact.

FINDINGS OF FACT

 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 exite interstate from Oregon, a Cless A State Chancy, Weshington, in violation of 9 CFR 87890h because the cattle, which were nonvaccinate over 18 months of age and more than the cattle, which were nonvaccinate over 18 months of age and more herds not known to be affected with brucellosis, were moved interstate without being accompanied by a certificate of the cattle of the

CONCLUSIONS

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

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

OPDED

Respondent James Most in brethy assessed a civil penalty of five handred delians [6500]. The respondent hall send, payable to the "Treasurer of the United States", a certified check or money order, to William desono, Office of the General Counsel, Room 2422, 2000. The County of the

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

In re. Travis E. Farmer. A.Q. Docket No. 127. Decided September 30, 1986; Amended Decision and Order Decided October 31, 1985.

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

Respondent moved brucellosis-exposed cattle interestate without a required permit. Respondent acted antiraly on his own volition and initiative. Respondent was assect a civil penalty of \$600, which by amended decision and order is to be paid off in ten equal monthly payments of \$60,00.

Joseph Pembroke, for complainant. Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER AMENDED DECISION AND ORDER

AMENDED DECISION AND ORDER

This matter involves an alleged violation of quarantine restrictions which prohibit cattle shipments without certain documents. Respondent Farmer admitted shipping brucellosis exposed cattle as alleged, but contended that the shipment in question was done in accordance with "davice of . . . a federal inspector." Par. 4, Respondent's Answer fluid 122774.

The parties agreed that:

1 Act of Fabruary 2 1983, as amended, 21 U.S.C., \$2 111 and 120, and implementing regulations, 2 UER 73, of say.

In particular, the complaint alleged violation of \$78,800, that is, movement of brushloss exposed cattle not second and a permit, as required.

- "1) On or about Sanday 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 Carrollten, Georgia for auction.
- "2) One of the above cattle tested cut 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 brusellosis eradication program, asid that Mr. Parmer called the technician at the technician's home that evening to inquire about quarantine questions. The technician said he told Parmer that everything would be quarantined for 120 days. That meant the posture from which the bruselosis reactor cattle canne, the pasture to which they were taken from the stockyard, and anywhere size they was be taken.

The quarantine often continues beyond a 120 days if other cattle show up as brucellosis reactors. The quarantine continues until they have all clear readings over a particular period of time from all cattle in the herdis. 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 forwhich 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 Parmer that he could not return the cattle to Alabama, and failed to reach him until the following Monday. At that time, respondent Parmer 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 uchnician 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 mould be so careless and uninformed. The technician was firm, positive, caler and determined in his presentation of his evidence. There was no hesitation or doubt. The technician firmly and strongly states the events as he recalled them. They are plausible and carry per-

snasive 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 quarantized (as the point from which the brucellosis reactor cow came

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 programdestroying disadvantage saists there, if the technician did what rescondent Earner said be 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 toch his chared pasture at Ranbure, Alabama in violation of §76 to of the regulations (9 CFR 78.8(o), because the cattle were not accommanied by a required nerminal.

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 8500.00. Great weight must be given to the sanction recommended by the Administrators. In re Sp. B. Gaiber 6.C., 31 AD 843, 845–51, 1972; In re J. A., Speight, 33 AD 230, 310–19 (1974); In re Samuel Exposito, 38 AD 613, 665 (1979).

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

protes

OPDER

Respondent Farmer is assessed a five hundred dollar (\$500.00) civil negativ.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

Compleinant 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(9, 1985, in [ten] (10) equal monthly payments of (\$50) fifty dollars pen month."

The motion should be and hereby is granted.

IT SHOULD BE AND HEREBY IS ORDERED that the Order en-

tared 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.⁸

The Respondent shall pay this civil penalty in ten (10) equal

monthly payments of fifty dollars (\$50) each, beginning on the lat of the month following the day this Amanded 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.—Rd.)

^{*}The civil penalty chall be peld by certified check or money order, psychole to the Treasurer of the United States, and mailed to Attorney Joseph P. Pembroke, Office of the General Council, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 2020.

The respondent shall pay the tivil penalty by certified check or money order, payable to the Treasurer of the Valled States, and mailed to Attorney Joseph P. Penshtoke, Office of the Ganeral Counsel, Room 242-South Building, United States Department of Arrivalture. Washington D. C. 2020

In re: Gary Hoffman, A.Q. Docket No. 99. Decided November 6, 1985.

Swine moved interstate without certificate-Civil penalty.

Respondent chipped awine interstate without health certificate. That respondent was without specific knowledge the pigs would be hanled across state lines does not relieve him from responsibility. Respondent was assessed a civil pensity of \$500.00.

Kris Ikajiri, 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 Bealth Inspection Service, United States Department of complaint Chary Before, and the Complaint Charge Complaint complaint Chary Before, under 21 U.S.C. § \$111, 120 and 122. The complainant charges respondent violated the statute and pertinent regulations on September 21, 1985, by moving swine interstator from Ashley, North Balcots to Sauk Center, Minnescota, which were known to be infected with or supposed to we contagulated sites says to be the contract of the co

CFR §5 76.60x(1), 76.12 (Schedule B) and 85.7(b)).

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

PINDINGS OF PACE

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

2. On September 21, 1988, 214 swine were moved interstate from a rectiving and shipping facility in Ashley, North Dakoda, conducted for American Feeder Pig Coop receiving facility at Sauk Conter, Minnesota. The swine moved interstate unaccompanied by a cottificate attesting that they were not known to be affected with or exposed to hog cholera; were not vaccinated for pseudorabics; and were not known to be infected with or exposed to pseudorabics.

 On September 21, 1983, Gary Hoffman accepted and shipped swine from a facility in Ashley, North Dakots, on behalf of American Feeder Pis. 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 Pier' facility at Sauk Center, Minnesota.

4. The veterinarian who inspected the pigs on September 21, 1988, was paid by American Feeder Fig on the basis of a flat amount for his services for the day. The veterinarian inspected the amount for his services for the day. The veterinarian inspected the free of disease. However, he did not fill out and provide the certificate requirted by 9CFR \$76.0000, 76.12 (Schedule B), and \$8.7(b) because he was not asked to do so. His instructions in these respects were normally given him by Gary Hoffman.

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

 Gary Hoffman inadvertently failed to obtain and send the requisite health certificate for swine moved intentate 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 awine without the required health certificate because he was only an employee and did not know these play would actually be taken out of state. Respondent argues that the responsibility for chattaining the necessary health certificate rested solicy with the trucker amployed by American Feeder Plg Coop who made the decision to take the rice to Minnesotta.

Rown though I accept respondent's testimony that the interstate shipment of swine without the required health certificate was unittended 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 eved a driver responsibility for compliance with the requvise would, in facil, be handed across state lines does not relieve him from that rescondability the beams liable for this consequence

him from that responsibility. He became Hable for this consequence when he "received (the swine) for movement." See the definition of "moved", 9 CRR \$\frac{1}{2}\) % [61(q) and \$5.1(q). Moreover, it was understood that unless Hoffman had local buyers willing and able to pay more for the birs than American Pacific His was easily of the him. Then pigs were to be moved interstate to the Sauk Center, Minnesots, 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 falled 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 unsersed.

ORDER

Gary Hoffman, respondent, is assessed a civil penalty of five hundred dollars (\$500). The civil penalty shall be payable to the "Freesurer of the United States" by certified check or money order and shall be forwarded to Kris H. Italjiri, Office of the General Counsel, Room 282, South Balloling, 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 penelty.

Respondent moved cettle interstate on two occasions without required owner's or

Respondent moved cettle interstate on two occasions without required owners 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 complainent. Respondent, pro sa.

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.), hereinaften 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 filled on June 19, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agricuture, On August 4, 1985, the complaint was personally delivered to the responsibility of the Parker Durham, at his residence at 008 North Meridian, Waurlas, Otalbamon, The complaint alleged that on or about March 21, 1984, and Agril 12, 1994, respondent terraspected a total of approximately 17 or settle interests from Denton, Teas as Qualified Of 27, 11 (1994) and 1994 (1994) an

Additionally, the March 24, 1984, movement was in violation of section 71.18 of the regulations of CFR §71.18 in that the cattle in that movement were not accompanied by an owner's or shipper's statement, or other decument, containing prescribed information. Respondent failed to file an answer, thereby admitting the allegations and waiting a hearing. (See 7 CFR §1.18)

Accordingly, the material facts allaged 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

- Harold F. (Red) Durham, herein referred to as the respondent, is an individual whose address is Box 144, Waurika, Oklahoma 78873.
- 2. On or about March 24, 1984, the respondent moved interstate approximately lifty-three (30, statile from Denton, Texas, to Comandes, Oklahoma, in violation of section 71.18 of the regulations (9 RR 47118), in that the cattle were not accompanied interstate (9 yan owner's or shippers statement, or other document, containing Dressribed information, as required.
- 8. On or about March 24, 1984, the respondent moved interstate approximately fifty-three (35) cattle from Denton, Texas, to Comande, Cataloma, in violation of section 75, 80(3)(3)(v) of the regulations (CBT, 97, 28, 80(3)(v)), in that the cattle were not accompanied interstate by a certificate, as required.
- 4 On or shoul Marco 24 1924, the respondent moved interstate approximately fittpetines (3) satisfarron Denton, Texas, to Comardos, Ottas 1985, 1

- 5. On or about April 12, 1984, the respondent moved interstate approximately eight-four (84) cattle from Denton, Texas, to the State of Oklahoma, in violation of section 78.86303000 of the regulations (9 CPR §78.9603000), 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 78.36(3)301/0) of the regulations (9 CFR § 78.96(3)301/0), 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. (Gelo Durham is hereby assessed a civil possily of two thousand five hundred dalms (800.00 per violation). This penalty shall be payable to the "Treasurer of the United Starts" by cartifold checke or among roder, and shall be forwarded. Starts by cartifold checke or among roder, and shall be forwarded. Starts by cartifold checked or among roder, and shall be remoded. But the companies of the companies of the companies of the companies of the But the companies of the companies of the companies of the longer, Titles desired by the companies of the contract of the contract of the contract of the companies of the contract of the start of the contract of the companies of the contract of the start of the contract of the contract of the contract of the contract of the start of the contract of the contr

(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 filled 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.

BruceHosis-exposed cows moved interstate—Backtag and earing 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 Pebruary 2, 1909, an amended, Act of ULSA, §111 and 120 by a complaint filled by the Administrator of the Animal and Planst Health Imperion Service alloging that Paul Brown d/br/a Paul Brown Cattle Company, respondent, violated the Act and regulations promulgate of thereunder of UTB §7713 and 7828. The parties have agreed that this proceeding about he terminated by entry of the Consent Decisions of the Consent Consent Consent of the Consent Consent

 For the purposes of this stipulation and the previsions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has juriediction in this matter, neither admits not enhance the remaining allegations in the complaint, admits to the Findings of Fact set forth bibliow, and walves:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain (indings and conclusions with respect to all material bases 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 Statea 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

- 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.
- 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.
 Between the dates of April 19, 1984, and May 4, 1984, the re-
- Between the dates of April 19, 1984, and May 4, 1984, the respondent removed backtag and eartag identification from a brucellosis-exposed cow.
- On or about May 15, 1984, the respondent moved a brucellosisexposed 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 dispersion of this proceeding with respect to the respondent, such order and decision will be issued.

ORDER

The respondent is assessed a civil ponalty of two thousand dold are 36200.00 The respondent salla pay the civil penalty in eight monthly installments of \$250.00 beginning January 1, 1986 with a final payment due August 1, 1986 50, Bach payment shall be by cert-fined penalty of the Theoretical Payment of the United States, and sent to Jaru Ruley, Office of the General Counsel, Room 242, South Building, United States Department of Agriculture, Weshington, D. C. 29256-100.

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. 855. Decided November 4, 1985.

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

Robert Ertman and Donald Trucy, for complainant.

Debra F. Pickler, 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

This processing was instituted under the Arimai westare Act, as amended CU SCI 231 et sey, "CAC" by a Complaint filled by the Administrator, Animal and Piant Health Inspection Service ("APHIB"), Unice States Department of Agriculture, charging that respondent violated the Act and the regulations and standards issued thereunder 9 OFR Parts 1, 2, and 3. This decision is entered pursuant to the consent decision provisions of the Rules of Practice anolicable to these proceedings of CPR 8, 11889.

Practice applicans to these precessings (VLR's 1,100).
The respondent admits the yiredictional allegations contained in the complaint, specifically admits that the Secretary and the state of the contained in the complaint, specifically admits that the Secretary and the state of the contained in the contained allegation in the contained allegation of the contained the contained

FINDINGS OF FACT

- Respondent, the University of Pennsylvania, has a mailing address of Office of the President, 101 College Hall, Philadelphia, PA 19104
- At all times material herein respondent operated a research facility resistered 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.

OPPE

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

THE UNIVERSITY OF PENNSYLVANIA Volume 44 Number 7

(9 CFR Parts 1, 2, and 3) and shall cease and desist from any viola-

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:

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.

(b) on the proper care of injured animals.

It is understood that such consultations are to assure that re-

spondent establishes and maintains an adequate program of veterinary care and are not intended to interfere with the actual conduct of research.

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 anesthesis, the degree of sanitation maintained in operating rooms, and the post-operative care given research animals.

(e) The committee shall make quarterly reports to the Vice Provest 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.

A. Respondent shall distribute a copy of this Decision and Order to all of its personnel who are reprosible for the care and handling of research animals subject to the Act. Respondent shall manitatin 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. Anrsi, 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 Orbober 20, 1985, an order was issued denying respondent; Petitisin FR Remaindentienth. No effective date was fixed in that order alone respondent stated the was going to appeal to the properties. The properties of the properties of the properties of the base appropriate United States Curu of Appeals and the appeal to the appear priest Dutied States Curu of Appeals within the time limit, the properties United States Curu of Appeals to the appear properties United States Curu of Appeals, and respond to the after service of this order. If within that 20-day parties, responsible after service of this order. If within that 20-day parties, responsible after service of this order. If within that 20-day parties, responsible properties United States Curu of Appeals, and requests a stay order proming the orders 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 sec.) ("Act") by a Complaint filed by

the Administrator, Animal and Plant Health Inspection Service ("APHIS"). United States Department of Agriculture, charge that respondent violated the regulations and standards issued under the Act 9 CFR § 1.1 et seq.). This decision is entered purant to the consent decision provisions of the Rules of Practice applicable to these proceedings of CFR § 1.188.

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 walves or all hearing and further procedure. Complaint 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: WILBUR and SARAH CHRISTENSEN. AWA Docket No. 285. Decided December 2, 1985.

Compliance with the Act-Consent.

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

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, se amonded, 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, 11380.

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 welve hearing and further procdure herein. Complainant and respondents consent to the issuance of this order.

ORDER

Respondents are ordered to case 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. 287. Order issued December 2, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER DENYING STAY ORDER

On November 28, 1985, respondent Itsel a request for a size possibility doubt control of proceedings for histories of proceedings for histories of proceedings for histories, and the transpose only request encloses a "copy of my appeal to the U.S. District Court Eastern Division at St. Lozia, Missouri," That court has no jurisdiction of an appeal in this case. As stated in the Judicial Office or sorter finding effective data fills (November 3, 1985, "IJF an appeal is taken, it must be to the appropriate United States Court of Appeals of U.S.C. 32 \$456(6)." The "U.S. District Court Eastern Division at St. Lozia, Missouri* is not a "United States Court of Devices and the Court of the Cour

In addition, the reasons set forth in respondent's appeal to the District Court do not raise any serious legal issues that would warrent the issuance of a stay pending the outcome of any appeal. Act the issuance of a stay pending the outcome of any appeal and the court of a period of the superporties United States Court of Appeals (7 USAC, \$24860), and significant of the superporties United States Court of Appeals (7 USAC) warrented, the Judicial Officer will deep the request for a stay is warrented, the Judicial Officer will deep the request for a stay.

In re: Homer Syzelev. AWA Docket No. 840. 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 grant-

ed. Accordingly, is 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. §\$ 2131-2155 (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 antered 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 pergraph of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, sevies one 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

- Patricia Blowers is an individual doing business as Windsong Kennels, and her mailing address is Route 3, Box 14, Danbury, Wisconsin 54890.
- The respondent, at all times material herein, was a dealer 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.
- The respondent, at all times material herein, was licensed as a 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 the 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. Cossherd, Springfield, Missouri, for respondenta.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a proceeding under the Animal Welfarr 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 systematic to the consent decision provision of the Rules of Practice (7 GPR Section 1188).

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 bearing and further procedure herein. Complainant and repondents consent to the issuance of this Order.

ORDER

A civil penalty of \$500.00 is assessed against respondents. The
 Administrator acknowledges receipt of said sum and said penalty is
 bereby deemed satisfied.
 Respondents shall seem and dock formulations.

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

This order shall have the same force and effect as if entored after a full hearing and shall be effective on the first day after service upon respondents. In re: Uvica 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 Detained and Order previously like in this case 6th Auril. Dec. 200 (1890), the Judicial Officer withdrew febrars must impact ton from respondent indefinitely, but suspended the detail for an one as David Passers in not associated with respondent and provides no direction or arbive to and exercise no control ower respondent. The Order was based on David Pensater's followy convictors of britings a supervisory Pederal ment inspection of more some based on David Pensater should be control over the control

The original Decision and Order was affirmed by the United States District Court. Ulies Packing Co. v. Bergland, 511 F. Supp. 1656 (BD. Mich. 1981), but was manualed by the United States Court of Appeals for the Sixth Growt to afford the Juddicial Officer on apportunity to consider the Court of States of the Sixth Packing Co. v. Bergland, No. S.1-1958, sip. on a 56 (6th Corr. Sept. 2, 1982).

On appeal, Pennetr's principal argument is . . (that) the Judicial Officer erred in refusing to consider mitigating circumstances. We agree, Miligating on the properties of the continuation of the continuat

^{*} Case was not included in 1983 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, etc., to determine whethor 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 the contract of the contr

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

On April 26, 1978, David Penster was found guilty by the United States District Courfe for the Essearn District of Michigan of head violated 18 U.S.C. \$201(b) by bribling a supervisory United States Veterbrarian-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 hibbys datus, it Ju S.C. § 201, in a form-count Indistruent returned and fined on November 16, 1977. Specifically, decentered to the control of the control of the control of the contents twin, November 24, December 10, December 10, and December 17, 1970 to a U. S. Veterinarian-Inspector for the purpose of Inthuneing that official in decisions and octions regarding inspections of meat at a mest-processing regarding inspections of meat at a mest-processing right to trial by jury. The government acquiseed in the waves and the Court, having conducted an inquiry on the rocord, was satisfied that the waves we voluntary and intelligent. Trial was begun on that day and concluded on the control of the control of the control of the control of the Court's findings of fact and condusions of law." "Prior to March, 1975, builds and satisfation imprections at the Utica Pocking Plants had been considered by 58tas edices who were, by virtue of statutory and conferential notherity, supervised by federal officers and who enforced pertinent federal regulations. After March, 1975, the responsibility for imprections and enforcement devolved directly on federal authorities, and a staff of federal impretures assumed the relevant duties. At all times pertinent here, the staff consisted of Craig A. Reed, a Doctor of Vetbury and the staff consisted of Craig A. Reed, a Doctor of Vetbury and the staff consisted of Craig A. Reed, a Doctor of Vetbury and the staff consisted of Craig A. Reed, a Doctor of Vetbury and the staff consisted of Craig A. Reed, a Doctor of Vetbury and the staff consisted of Craig A. Reed, a Doctor of Vetbury and the staff consisted of Craig A. Reed, a Doctor of Vettaring and the staff consisted of Craig A. Reed, a Doctor of Vetsigned to the plant. Dr. Reed of Craig A. Reed, a Doctor of Vettaff worked on the plant premises and every new constitution of the contract appreciase and steps by the impreciation of the plant. Provides a proposal to the contraction of the plant premises and every new terms of the plant premises and every new terms.

"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 exemination 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 carcase may require sectioning with loss of some parts, or it may be rejected altogether or approved sitogether. 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." Total to the second of the Shipping and the second

"As is perhaps inevitable in that type of eitnacion, exem friction developed between management and the inspection team. The furmer complained that some shut-downs were unnecessary or had been unescensiryly prolonged, that inspectors were too trict or picayune; that the inspectors were ending shiftening and expectage of the plant considered thand, the veterinarian estigned 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 endorring 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 assignsble. This result was brought to the attention of David Feneter, 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 stoppers 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 1R 2R 3R. and 4B."

"There is no doubt that David Feneter paid over the finale to the federal Glores and that it was he intent to influence the officer in the performance of his official duties. The Issue remains, however, as to the nature of Feneter's intentions; since that issue will determine whether he is utility of a violation contemplated in 18 U.S.C. § 20(16) or of one described in § 20(16), the former carrying a much higher potential ponalty 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

"Subsection (f) sets forth a lessur offense included in the offense described in subsection the difference constrainting in the higher degree of criminal knowledge and purpose betckened by the adverse of criminal knowledge and purpose betckened by the adverse of the constraint of t

"In Breaster, 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

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

[&]quot;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 capsoity, or in his place of trust or profile."

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 illogal 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 2010 is a gratuity section."

"Hi is apparent from the language of the subsection that what Congress had in mind was to prohibit an indvidual, 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. Pumi 384 F2d 102 at 196 (2d Cir. 1965), cert. denied 383 113. sert"

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

"The vull sought to be prevented by the deterrent effect of 15 U.S. & 2010.16 is the atternant suffered by the public when an official is corruped and threatly perficiously 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. dozob, 431 P.24 754 4 1750 Ed. Cir. 1700, cort. deviel do U.S. 850."

"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-stoppour and by giving the company the henefit of the doubt with regard to hogs of questionable soundness. This understanding is borne out by the transcripts of the recorded conversations between Roed and Fenster. They revoal that while Fenster expected Reed to maintain an appearance of conscientious enforcement (Exhibit 1B, pp. 11 and 14), he also expected that more hose 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 aheets so that inspectors would have less inducement to stop the line for the purpose of earning overtime payl; 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

Ment and meat food products are an important source of the Nation's total supply of God. The Parison was the Nation and the Parison was the Nation and the ment throughout the Nation and the ment of the Nation and the ment of the Nation and the Parison was the Interest to Foreign commerce. It is not the paid interest that the health and walfare of communication was the National N

[&]quot;the for no particular significance or consequence that not all the terms of the understanding was to no every constant that from the function payment to fixed while the Court, as it is of the most consider two two inspects to payment to fixed on one occurred to the court inspect to by which consider the court inspect to by which consider the court inspect to be written as the constant of the further's Intent on absorber occasion. See Kingmann v. 10.8, 22 mit of 20 to 20 cg (cf. Cr. 1869).

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, adultarated, 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 provent 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 Femiors, respondent's president and half-owner, was convicted under it SUAC, \$20(10), of bribing the supervisory Federal meat inspector at respondent's plant on four supervisory Federal meat inspector at respondent's plant on four quire that the bribe be given 'corruptly' to "influence a public of infeal to depart from conduct deemed seemital to the public interface of the standards, the Court is satisfied that the facts enablabel, at trial bepeak beyond a resiscable doubt a violation of \$20(10).

A highly qualified psychiatrist, who conducted a psychiatric interview of David Fenster and testified on his bohalf, 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 Fanstor's conduct strikes at the heart of the meat inspection program. This would be true oven 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 Taylor in her decision reviewing the original decision is this case (Utica Packing Co. v. Bergland, 511 F. Supp. 655, 1662 U.1.) Mich. 1881, rev'd on other grounds, No. 81–1883 (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 uncorned overtime and thereby soften the acuity, and repeated no sertions 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 intreduction of unwholesome meat into commerce through Utics if not suspended, which finding is not required under that section, these transcipts are substantial ovidence of that likelihood

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

In southern California between 1974 and 1976, 17 mentpacking houses and 35 employees of mentpackers were indicted and convicted of either britery or Illegally girtus gratuity to mest graders. The involved plants constituted "a major part of the slaughtering parts or those using Federal grading service" in southern California CT. 19).

Sixteen Federal meat graders were indicted and convicted of receiving money.

Since must impacte a cannot observe every activity at a plant by every employee which affects the wholesomeness of the product, the impaction services set, the able to depend on the criticality and interrity of the plant experience to be seared that the health and welfare of compression and evidence of compre

Also, ment impactors are relatively low paid Federal employees. Packers have, at times, paid weekly (wax free) bries to ment inspectors or graders equal to or more than their Federal take-home pay (see In w Netional Meat Packers, Inc., 88 Agric, 10c., 169, 171-72 (1978). Accordingly, if we are to be assured of having wholesome ment and ment field products from a particular plant, we must know without question that the plant's management will not attempt to thick any impactors at the plant's management will not attempt to thick any impactors at the plant's

It is the view of the Administrator of the Department's meet in special program and the Judicial Office that every person convicted under 18 U.S.C. § 2010b) of corruptly briding a meet inspector, with the necessary proof of criminal knowledge and purpose, is unfit to receive Federal meet inspection, irrespective of any mitstagic accumulationse. That conduct dame so atrikes at the heart of the meet inspection program as to prove conclusively, without the meet inspection program as to prove conclusively, without multiple of the program and the process of the process of the meet inspection program as to prove conclusively, without multiple or program as the province of the process of the process of the meeting of the process of the process of the process of the process of the meeting of the process of the process of the process of the process of the meeting of the process of

Accordingly, in the present case, the Judicial Officer hold that repondent was until to receive Perfect meat imperior heause of David Penner's bribery convictions, irrespective of any mitigating circumstances. For Judicial Officer's decision medic is client that mitigating circumstances are to be considered in the case of feloment of the control of

In the Norwich Beef case, the falony which afforded the jurisdictional basis for withdrawing imprection service involved the receipt of a truck lead of stolen beef. Since that folony is not directly involved with ment impection, all of the facts and circumstances had to be considered to deternine whether the recipient of ment 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 most impection program. Respondent's president and half-owner was convicted of "corruptly" respondent's paint under a statist which "is to discourage one from seeking on advantage by attempting to influence a public ordinate of the product of the convergence of the product of 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 Ca. v. Bergland, 511 F. Supp. 655 (E.D. Mich. 1981).

I believe that the original administrative decision in this cease is correct, notwithstanding the reversus by the Court of Appeals. This decision by the Court of Appeals in this case will assure the district button of travelocenom or adulterated meat in some intranson. In the court of the c

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 up, 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 bribary under B U.S.C. § 201 to will be found unfit to receive Pederal meat inspection regardless of the mitigating factor present, it also engogests that some midigating factor would outweight a bribary conviction. Otherwise, the Concept factor would outweight a bribary conviction. Otherwise, the Concept factor would outweight a bribary conviction. Otherwise, the Concept factor would outweight of the present case to consider the undigesting circumstances, not withstanding Fenster's convictions for bribing the supervisory mean impostor.

In other words, the Court's statement quoted above was made in the case where the Judicial Officer had held that Feneter's conduct so strikes to the heart of the policies of the Fedoral Meat Inspection Act that no possible mitigating circumstances could outwelf the fedoral words of the conduction of

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 cases in which on appeal does not lie to the Sixth Circuit. In all cases in which an appeal does not lie to the Sixth Circuit. In all cases in which an other set with the court of the court of

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 Fennet restricted that price to offering the bribes, he felt that the inspectors were enforcing the rules unfairly, arbitrary low of 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 comprisery to induce him to sell; that one of the contract of the contract of the part of the comprisery to induce him to sell; that one of the contract of the con

There is much evidence in the record to demonstrate the reasonabless of Mr. Fennter'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 respected 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 by truck care.

On many days during the summer of 1976 (preceding the briles in November and December 1976), incre than 15 or 20 hogs died on the trucks because the line had been atopped by the impactors (Tr. 277-289). Some Gederal inspection foft that Inspection exposure earl's plant was more strict than at its competitors' plants, and David Penater's non observed that at a competitor's plant the line was not stopped for conditions which he felt were far wome than at the exceeding the conditions which he felt were far wome than at the competition of the conditions which he felt were far wome than at the competition of the conditions which he felt were far wome than at the competition of the conditions which he felt were far wome than at the competition of the conditions which he felt were far wome than at the competition of the conditions which he felt were far women than the conditions are considered as the conditions which were considered to the conditions which he felt were far women than the conditions which were conditions and the conditions which were conditions as the conditions which were conditions where the conditions which were conditions where the conditions which were conditions where the conditions where the conditions which were conditions where the conditions where the conditions which were conditions where the conditions where the conditions where the conditions where the conditions which were conditions where the conditions where the conditions which were conditions where the conditions where

Weighty evidence proves that much corrective action by the Impectors at Ulico way natified. A complemen Review Staff gave responder's plans the lowest possible retting in Spitenther 1978. If conditions were worse at computing an impection retting in Spitenther 1978. If conditions were worse at computing the impectation retting in Spitenther 1978. If conditions were worse at computing the spitent in Spitenther 1978. If conditions were worse at computing the spitent in Spitenther 1978, the spitent in Spitenther 1978 and the spiten

Respondent contends that the ring leader of the inspectors hurressing the plant was John Stadler, a close friend of Dr. Road, who received the brites in this case. John Stadler "had to black people" at respondent's plant (Tr. 1026); he "had no use for blacks" (Tr. 1036), he "onlated 'upolavisan's (Tr. 1036), who comprise a large portion of respondent's work force. He referred to David Fenster's partner as "a study 'Orgonisan's (Tr. 1036).

David Penater is a lew, and inspector Stadler made such obscores and descentory comments and offer star of the deemory precludes mee from quoting his comments and the properties of the from quoting his comment of the transcript reference). In particular, Inspector Stadler had a "personal delike or Instructionary David Penater" (Tr. 1056.)

Inspector Stadler, Dr. Reed (who received the bribes) and another inspector "would go to a bar after work and think of ways to act up Mr. Fenster, or cause problems to him the following day at the plant." to "make it rough on the plant" [17, 1055]).

These circumstances lend support to the view that David Fonator at least had a reasonable basis for believing that he was being hurrassed 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.

Noiwishanding these circumstances, they are no excuse for bribery. An individual who field the being mistercated by Pederal impectors (or who actually is a first ing misternament from impectors) counts take the matter law is a first individual by offering bribes. He must pursue the administrative "shands by offering bribes, the mist pursue the administrative "shands by offering which is the initial efforts are unconcessful, he must pursue the shands by the initial efforts are unconcessful, he must pursue the reaches the top, if all that fails, bribery is still inaccusable in the limit of reaches the top, if all that fails, bribery is still inaccusable.

If an individual having difficulty because of Federal inspectors for a imaginary) could salve his problems by bribing the inspectors, it would lead to the public interest being autverted, not only at that individual's plant, but at other plants, where the practice

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

Respondent also contends that Fenster's conduct was aberrant before resulting from particularly stressful conditions and exactions of edge peychic injuries while a victim of the Nazi Holoaust. David Fenster witnessed the killing of this 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 Femier undoubledly was under great sites and emotional statu at the time of the bribery in 170°. In 1076 he lod the sight of his right coy, after several operations. Por months after the opments, by but flatedbear and nerve problems, requiring the torests, by the flatedbear and nerve problems, requiring the content of the content of the content of the content of the started to go had in 1976. He committed numerous doctors, receiving started to go had in 1976. He committed numerous doctors, receiving conflicting advice as to the desirability of surgery, which subjected him to great emotional stress. He had additional problems because the content of the content of the content of the content of the prefer to above, further post this policies.

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 neat 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 (R.D. Mich. 1981), revid on other grounds, No. 81-1383 (6th Cir. Sept. 2, 1982) that this argument by respondent—

is a alander not only on the devicts auxivious of the Halocaust but on this country, to which Penner immigrated and in which he has built an enterprise which his econmist testified is worth \$200 million to his community, in which this record indicates that he has had access to rever level of the United States Department of Agriculture in values the Secretary of Agriculture to discuss his difficulshing the Secretary of Agriculture to discuss his difficulshing the second of the Secretary of Agriculture in values to the Secretary of Agriculture to discuss his difficulshing the Secretary of Agriculture to discuss his difficulture of the Secretary of Agriculture to the Secretary Section 1997 of the Section 199

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" (bbd.). That is, if Fenster's experience through the Nazi Holcoaust could cause him to rever to brible the program of the program

there is containly the possibility that he would again revert to brisin or you doef further stressful circumstances. Mr. Prosterier's attraction could get worse, both with respect to his health and his business. Many well ran businesses have gone bankirathy or are on the verge of bankrupter, Accordingly, if Penster's experiences through the Mast Holocaus for 30 years before held some part in leading to the her between the properties of the properties of the properties of the the properties of the properties of

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 moord of respondent and David Peaster, and his present good reputation, despite the conviction. Here again, I give more weight to the facts involved in the foliacy convictions than to opinions as to respondent and Fon-star. have reviewed too many files where highly respected persons excelled as to a profit so that the despite of the proving that the engaged in serior and the serior of the proving that the engaged in serior, translation contains, to state harmy 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 16, 1978, the U.S. Yeterinarian who serves as Area Supervisor filled report advising the Director of Meat and Poultry Inspection that the respondent plant had, since Deember of 1978, established "a clean meat program" and "now is producing very clean hogs and plant meanament can be proud of their product."

Although this is the most sense reconst.

Although this is the most sense and the mitigating circumstance relief on hy respondent, the spin to tip the existing respondent's favor, in the absence sin respondent's favor, in the absence and the sense of the spin to the sense for a sense and the sense of th

Where a serious and wilful violation of a regulatory statute administered by this Department is found to heve 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. 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.

can be record charge were to be given to violators of the Department's equitatory programs even where the first violation was much support to the program of the program of

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 fellony or more than one leser volation (2.0 LSC, 871). A second chance policy would, in effect, result in withdrawing inspection only after conviction of more than one follow.

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

elapsed. The bribery occurred at the end of 1916. The indistrument was returned and filed on November 15, 1917. The criminal proceeding was concluded August 22, 1978. The criminal proceeding was concluded August 22, 1978. The criminal convictions from 40 he had for the present deministrative proceeding, which was initiated on October 18, 1978. The Administrative Leav Judge decided the case Petrany 11, 1980, and the Judicial Officer decided decided the case Petrany 11, 1980, and the Judicial Officer decided decided the case Petrany 11, 1980, and the Judicial Officer decided the case Petrany 11, 1980, and the Judicial Officer decided the case Petrany 11, 1980, and the Judicial Officer decided the Control of the Petrany 11, 1980, and the Judicial Officer decided the Petrany 11, 1980, and the Judicial Officer decided the Petrany 11, 1980, and the Petrany 11, 1980, and

absence of the Sixth Circuit Court's opinion in this case.

Respondent contends that withdrawal of meat inspection would

advensity affect lies as the waterstand or med Impection would advenily affect lies as the water for the case, and the community, the under the terms of the order in this case, and the community affect of the case of the order in the case, and the community affect of the water for the case of the case of

absence of the Sixth Circuit's opinion in this case.

Two other circumstances that I regard as totally irrelevant, but which should be mentioned in

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,

In the Gas II consister Stack Front, Inc., 18 April, 19 18, 184, 193 (1991), In the Sold State, So. 17 Art. Does 1109, 1179-1109, 1179-1109, A. or Acada Salata, So. 17 Art. Does 1109, 1179-1109, A. or Acada Salata, Salata, S. Ordan, S. Ordan, 1930, Inc., 1931, 19

nonstabless, there are, of course, degrees of brilary. In this case, the brilary was not as flagrant as it could have been. That is, al-though Mr. Franker did not want the line stopped as often, there is cone basis for his belief that the line was being stopped unnecessor on the size of the belief that the line was being stopped unnecessor of the size of the size

Second, the testimony in this proceeding indicates that the brites would not have been given if Dr. Deed and nor misunderstood a comment by David Fensier. Deed and nor misunderstood a comment by David Fensier, and later histed strongly to Fensier that he wanted money from Fensier testified than in September 1976 when Dr. Reed was in Fensiers testified than in September 1976 when Dr. Reed was in Fensiers furnier masset, "What is also want?" (Tr. Food by Hole, Footser meant, "What an I doing wrong? What do you want from mo? What do you want for mo? What do you want from mo? What the you

Dr. Reed took Penster's statement as suggesting a bribe, went to the PIII, got wiredup with a tage recorder, and then were look Penster's office on November 24, 1976. Br. Reed with the work of custion by swign, "Well, you told me, you asked me what I will CH: 712. Dr. Reed then said, "Well you know"—"You know what" CT: 712. Fenster naturally took this on an invitation for a bribe, and immediately said, "What do you want, money? Well, I'll give you a hundred," "What do you want, some "Yr. 777. The

Although Pentser's testimony in this proceeding is different from Dr. Reed's testimony in the criminal proceeding. Dr. Reed dd not footfy in the criminal proceeding, and the state of the proceeding neverthermoding the finth the ware ciginal to the proceeding never the state of the proceeding never the proceeding new proceeding new proceeding ned Dr. Reed did not testify in the deministration of the proceeding ned Dr. Reed did not testify in the deministration of the proceeding ned Dr. Reed did not testify in the deministration of the proceeding ned Dr. Reed did not testify in the deministration of the proceeding ned Dr. Reed did not testify in the deministration of the proceeding ned Dr. Reed did not testify in the deministration of the proceeding new pro

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 eworn by Dwid Fenster at the administrative proceeding in this case, this would be a mitigating circumstance to be considered under the Sixth Circuit's remaind order (although I would give such circumstance no weight in the absence

Considering all of the mitigating circumstances in this case, is strongly bellow the proposed is unfit to receive Federal inspection so long as David Fenter is associated with the plant. However, my bellef is based on the strongly held view that any person convicted where is U.S.C. § 2000.0 of corruptly bridge a Federal main particular control of the proposed proposed in the proposed pro

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

- Mr. Fenster's reputation in his community, despite his conviction by the United States District Court, is axcellent;
- 2. His bribing of the Veterinarian-Inspector was apparently aberrant behavior for him resulting from: a serious shealth problem of the problem of edd psychic injuries while a victum of the Mark Holocaust, and c) misapprehasions concerning monitariation of various inspectors who had undertaken its enforcement of Federal Meat Inspection Act requirements, and.
- 3. The problems which led to his aberrant behavior have largely dispersed leading the U. S. Veterinarian who serves as Area Supervisors. In an official report, on October 15, 1979, advising the Bins of Most and Posturp Language deviating the Bins of Most and Posturper of 1979, established "a clean must provide "self" new its expension of 1979, established "a clean must "self" new its productly very clean hogs and plant management can be proved of their product."

Based on those facts, the Administrative Law Judge made "the consequent finding that recurrence is unlikely because of the gencual excellence of Mr. Fonster's character and reputation and the alimination of the conditions and medivations which led to the commission of the fallow," (Initial Decision 9).

If miligating circumstances must be considered, I cannot reasonably imagine any stronger militaring circumstances than appear aby imagine any stronger militaring circumstances than appear aby imagine convicted under 18 USA 5 2010.0 and have been II at fit to receive Federal meet impactation, then have been an analysis of the converse of the convers

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 prejudica

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

Marshall Marcus, for complainant. Peter O. Sufir, 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. section 90 sey, and 671. The action was instituted by D. Donald Flouten, Administrator of the Food Safety and Inspection Service (FSIS). United States Department of Agriculture.

The Complaint alleged, in general, that because of the frieny convictions of Respondent and its President, Loopold Koppel, for complares to violate the Federal Mest Impaction Act 22 U.S.C. section 601, of soc) sometimes bereinsfar referred to as the "Au." the Respondent is until to engage in any business requiring inspection of the Complaint and the Complaint and the Complaint in the Complaint Complaint in the Complaint Complaint

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, Dorollua A. Baker, issue a subpoana 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 subject na duces tecum and, at the hearing, certain documents were provided to Fort Plain. However, the Complainant refused to produce cortain 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 Depertment 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 subposed above focum in the United States District Court in proceeding: Fort Plain Peckler Department of Agriculture, CVII 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 Whelington, D. C. and on Angueri 18, 1984, in Alberty, New York, before Administrative Lew Judge Dovolet, Balbert. The Complainant was represented by Marshall Marcus, Balbert. Grandler Constant Complainant was represented by Marshall Marcus, Grandler of the General Counsel, United States Department of Agricultus Washington, D. C. 20250, and the Respondent was represented by Peter O. Safir, Esquire, of Kleinfald, Kaplan & Becker, 1140 Nine-test Street, Nr. W, Washington, D. C. 20253.

FINDINGS OF FACT

- Fort Plain Packing Co., Inc., hereinafter sometimes referred to as the Respondent, is a corporation, operating a mest packing establishment, at Route 5, Nelliston, New York 13410.
- Respondent, is now, and at all times material herein, was the recipient of inspection services, under Title I of the Act, at said establishment.
- 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, conspirincy to defraud the Government and feloniously violate the Federal Meat Inspection Act 21 U.S.C. section 601 et sex). In violation of 18 U.S.C. section 871.
- 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 fibiliously 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 i with the United States, Leopold Koppel executed a sworn Affidavit outlining the details and specifies 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 wareness 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 illeand activities:
- ¹ There is some evidence that the plea agreement, in part, was induced by reason of feer 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 viscers from cattle slaughtered at Fort Plain Packing Co., Inc.;
- (d) Removal and concealment from the Federal inspectors of growths, lesions, timors, 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, abscasses, cysts, bruises and other abnormalities from the carcasses retained by a Federal inspector for further examination by an official voterinarian 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.

 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 therain, the Respondent corporation is unfit, as that term is used in the Act, to receive insacction services.

9. The evidence shows that if Mr. Looped Koppel, after the transitional period provided herein, disassociates himself from the corporation, and disposes of his sock 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 1 of the Pederal Mest Impaction Act 2012. Sc. section 60 et sex).

CONCLUSIONS

This was a rigorously contested proceeding and centered primarily upon the sanction, if any, and the extent thereof. It is not contested by aither 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 Raspondent has put in issue the correctness of Complainant's refusal to produce cartain 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 corpurate Respondent is in full compliance with the applicable regulatiens 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 Ment Inspection Services. The composite summarization of these letters reflects the high regard in which Mr. Keppel was held both personally and in a business relationship, with the community-at-large. The Complainent maintains that these letters should not be considered by the Secretary in his determination of fitness and they were admitted for the limited oursess of showing that there was wide-sprend 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 bolt testified and wrote a letter in support of Mr. Kopupi to the sentencing United States District Court Judge was John M. Kling, D.V.M., a Veterinary Pithologist and Professor testing Veterinary Publicology at Correct University of Professor States and Professor States of Pro

An ordentiary document of significance is an eight page later, which was written by the end id-hom I. King, D.Y.M., daned August 24, 1988, in which he addressed the Honorable Howard Munno, United States District Judge, for the Northern District of New York. At that time and in that letter, Dr. King addressed the count was the second of the page of the

A brief summary of the views of Dr. King indicate that it was his opinion as an expert in the field of Veterinery 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 stremously objected were written on behalf of the Respondent. Incident to the plea agreement, Mrs. Roppis, wife of Laopold Koppel, sought and obtained severable and the second section of the control of the con

The history of the Respondent's discontent with the laspecting personnel provided to his plant pursuant to the Federal Meat Inspection Act is one of longstanding controversy, although notitive of the control of the property of the control of any critica 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 improperty in the descharge of his

Porhaps 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 in unduly ster 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 oncomous houldity towards For I pitali Packing Company over many years, primarily because of its president, Mr. Loc Koppel. Mr. Koppel has been a thorn in the side of the USDA since the early 1970's, continuously complaining about harmsements and constantly peaking both his companion to the companion of the comp

"Beginning in 1982 with the placement of a new inspector who had previously left the service and in spite of a hirling 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 Loo Köpple. * * * Indeed, he had a private vendetta because of a romantie lissies with one of Mr. Köppels employees. who left the company in January of 1983 and was, subsequently, denied unemployment compensation in March of

"As will be testified to by various witnesses, 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."

"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 Lee Koppel. They did. He has suffered enormous personal anguish and through the public and trade crefts, has been subject to notoriety and sobile 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 pic-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 isspection services under the Act.

³ In addition, some employees, such as the honer, believed the Respondent was treated differently from other plants by the inspector commencing in 1988. (Yr. 249-242. 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 counsed did acknowledge in objecting to a question posed to Dr. Pruche 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 on how it will [be] consider[ed] in a judicial proceeding." (Tr.

Complainant's counsel acknowledged that what 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 berein. 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 senctioned and imposed but supended for so long as the individual named had "no contact or dealings with Federal meat inspection or grading service personnel, and" compiled with other conditions.

Steens Food Inc., et al FMIA No. 10 (June 10, 1981) inspection services under Title I were indefinitely withdrawn per the properties of the properties of the properties of the from the respondent and meat grading and inspecting services were indefinitely withdrawn from the respondent and any establishment operated by the respondent therein and any establishment in 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 satesholder and loy figure in the respondent them as a stockholder and loy figure in the respondent beau neas, and the Department's losse procedure contributed to image them as the provided to Respondent's plant for several years, respondent should have some time in which to astrompt for fill common else to load the firm. Also, Ries and about have time within which to see it his stock provided about have time within which to see it has stock to the stock of the sto

Uliar Facking Company, Inc. FMIA. No. 35. (March 20, 1984) wherein the indefinite withbrawa of impactions services was suspended provided certain conditions were compiled with, and there was the further protein that the respondent therein would be permitted to be associated with the respondent therein would be permitted to be associated with the respondent rim for one year subsequent to the date the order beamed final to dispose of his stock.

Theory Provision Company, Inc. FMIA No. 40 (May 13, 1864) wherein the indefinite withdraws of impaction services was suspended on the condition that a certain individual not be associated with the Repondent, etc. but suith the provisio that the named individual would be permitted the seasonable with the Repondent's firm for one year to be associated with the Repondent's firm for one year to be associated with the Repondent's firm for one year to be a seasonable of the seasonable with the Repondent's firm for one year subsequent. On the seasonable with the seas

Wasnaki Proutino Company PMLA No. 4.1 Ulbaruary 18, 1880 wherein the indefinite withdress of inspection services was suspended for so long as certain consistion services was suspended for so long as certain conditions, with the partner protein that the named individual should be permitted to be associated with the Responders form for 50 days subsequent to the date the order bave for services and their such individual would have one year special subsequents of the scale of the condition of the scale of th

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.

Bristo Mest Company PMIA No. 56 (Rebrary 9, 1828) the order therein provided for the resumption of inspection of Respondent's establishment on the conditions enumerated the resumption of the providence of the conditions enumerated the result of the conditions enumerated the result of the result

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 Meet 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 seriouness of the actions resulting in the felony, convictions of both Mr. Koppel and the Respondnt corporation, included among such witnesses was Doctor Jack Laighty a Vaterinatian of many years experience with the Departments Denter Reand J. Prucha, Depart, Administrator with the Departments Meat and Poultry Inspection Operations; and Mr. Gotter, Compliance Official with the Department. The stationary of these witnesses indicated that they regarded the actions resulting the felory convictions to be those of a most serious and fair reaching nature. Mr. Gonder indicated that in his consideration of a sanction, he took into consideration that which led him to be lieve that there had been a course of consiste extending over a meter and a language of the control of the consideration of the control of t

The principal piece of evidence upon which the Complainants rolles consists of a ten page Affladric (Complainants' Richiet O signed by Mr. Koppel with respect to the follow conviction. With respect to other matter relating to the three and a half year page to other matter relating to the three and a half year all Most Inspection Act occurred prior to the year 1988. The wideness in the record of this case does above that Mr. Koppel made frequent complaints about the inspectors to various people and a temperature of the control of the control

The Complainant admits and the case law of the Department, reflects that miligating circumstances may and should be taken into consideration in a proceeding of this nature. (Tr. 91-113. Accordingly, evidence relating to entitigating circumstances was received and has been evaluated herein! The penalties for the crimal violations of the Pederal Most Impection Act have already been determined and paid. The purpose of this proceeding is not been imposed by the United States District Court Judge. The Complainar's interest in this proceeding is to season the wholescenemes of

¹⁹as fix re Agez Man Coupany, PMA Docket No. 78 (September 5, 1989) and five national end once sited therink, an acted in that cases, the delitery grant of authority to the Secretary to withdraw must impaction for a foliary conviction for expensity limited to withdraws for "such particle of indefinitions," as in decrease ensury in effectivate the purposes of this Art (La, Federal Ment Emperican Act, see amounted (Repulsar adolpt); 15 cm. 15, 60, 170 (1991), conflicts in 21 U.S.C. verdices and accept the conflict of th

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 with four Pederal Bank Linspection Services which would result in the closing of the plant facilities of the Repondent Another much would be to achieve a nale of the plant facilities to a their query having no prior association with the Respondent. If the plant and facilities were soil cutriplit 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 persuative veduces of record are those of Cl the plant at the time of the oral bearing was operating in full compliance with the time of the oral hearing was operating in full compliance with the requirements of the Agriculture languescents (*0) Mr. Koppel has removed himself from the kill floor and from any association with the inspectors at the plant; and, (8) considerable affects has been devided to finding a means to keep the plant in operation, which would be of benefit to the community and to the emisor, and to the product of the complex of th

⁴ However, cf. Apex Meut Company, PMIA Docket No. 78 (September 5, 1986). In this most recent care, the Respondent therein sought to show that it was currently guitting out a product in compliance with Department regulations. The decision therein stated:

[&]quot;However, such evidence would not be sufficient to change the result in this case.

[&]quot;The argument that a respondent is presently complying with the relevant regulatory pregram is made in slanet every distiplicant case the comes before the Judicial Office, and is almost always true. Only a foolbardy respondent would contain to violate a regulatory statute, effer complish it filled, pending the outcome of the litigation. Exemplary conduct during the course of litigation is nower considered as a weighty, miligating circumstance.

Whether they be called miligating circumstances, or, circumstances, or, circumstances under which the Respondent corporation seeks to retain the inspection services, the evidence herela suggests a program whereby the employees would obtain somewhat point employees would obtain somewhat point and have been a fine of the Compalation. This would not appear to be objectionable to the Compalation. This would not appear to be objectionable to the Compalation. This would not appear to be objected to make a showing the contract of the long terms of the contract of the long terms of the contract of the long terms of t

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 having 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. Varione 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 se a going concern, then, of course, that is within the Secretary's discretion. However, if the Secretary, in keeping with other previously

⁹ As previously noted, the crucial determining factor, with respect to sanction relates to the presence or nonpresence of Mr. Roppel. For instance Mr. Prucha, the Deputy Administrator, representing Mr. Houston, testified, smoon other things.

[&]quot;Q--Were Mr. Koppel to divest himself of ownership in that plant and, in addition, not have any activities in the plant whistsoever, would that modify your restition?

[&]quot;A-I would consider it, yes." (Tr. 559).

decided cases, and in considering the voluminous evidence of record with respect to the miligating circumstances of this case, decided that the Respondent corporation as restructured and without the presence of Mr. Koppel, is fit to continue in business, then his as a presence of Mr. Koppel, is fit to continue in business, then his as the presence of the continue of the continue of the continue of the There is little to be achieved by letting, a potentially unprefitted unity continue in business, and, in vive of the autument, experience, and knowledge of the witnesses who represented various auditior or were knowledgeable of various entities which would provide the funding, it is doubtful that the financiary would be forthcoming to the continue of the continue of the continue of the continue of the wealth be allowed to by and sel citative.

In view of the considerable lapse of time which has transpired since the oral hearing and this Decision, it is believed that a transltional 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 en 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 pravail.

Insumuch as the facts set forth in the record, as a whole in this case, have 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 Mact Impection Act, and that each Order will be in accord with the alternative sunctions set forth in the above cases.

ORDER

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

Provided, Knower, that each withdrawnal and dunial of impaction thall be suppended for so long as lecookd Repul: In not associated, brown the time durations set forth herein regular to the contractions were applicable, with Repubment, it is associated, as assigns, directly or through any corporate or other device, an an larged Kircely and the complexes, and for so long at Lepold Kircely and the complexes, and for so long and Lepold Kircely and the complexes, and for so long and the complex of the complexes and for so long and the other control over Seeke no direction nor advice to, and occucions no control over Seeke no direction some size of the contraction of the control over the control

Trended 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 attack and ownerable in the Respondent corporation, and said association of six months shall be in the limited capacity of buying and selling extile and for the survose of frainines stabus.

Provided, Aconew, and notwithstanding the foregoing last provion, if the employer purchase of the corporate stock and the funding contamplate the time of the oral hearing and on Brief, or some similar arrangement takes effect, then, in such event, Loopold Koppel, is premitted to be succitated with Respondent corporation in a capacity limited to buying and selling of cattle and training others for a transitional period of one veer:

Provided further, in the sensut the employee purchase of the stock and the further growth at the time of the oral barrieg and on Both, or some other standard and continued to the further standard and on Both, or some other standard continued to the Decision of the Decision and Orders 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 Lauric Koppel (wife of Leopold Koppel), then, to the extent applicable, this Decision and Order with respect to the divestiture of stock ownership shall be applicable to the stock of Mrs. Lauric Koppel (Tr. STI).

And provided further, that if it is determined, after opportunity for a hearing under the Federal Ment 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 varriets 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 Dockst No. 91, PPIA Dockst No. 13, Decided December 18, 1985.

Withdrawai and denial of inspection services, suspended with conditions.

Kris Ibajiri, for complainent.

Marnin B. Sanni, New York, New York, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

STPULATION AND CONSENT DICISION

These are proceedings under Title 1 of the Pederal Mest Inspection Act (PMA) as amended (21 U.S.C. § 600 is eac) and the Poular Products Inspection Act (PPIA) of U.S.C. § 640 is each to withhold and deny Inspection services under the above acts to respondent. These proceedings were inlitted by a complaint file on June 12, 1956, by the Administrator of the United States Department of the grave of the complaint on August 2, 1986.

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:

Por 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 waivos any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1880, Pub. L. 96–831, which went into effect October 1, 1981, for fees and other expenses incurred by Respondent in connection with this proceeding.

 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 PACT

(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 Tiles 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 Out for the District of Maryland and the United States District Court for the District of Columbia, of 47 felony and misdemeaner violations of the Federal Meat Inspection Act. At least 4 of these abroumentioned convictions were folony violations involving the liligal transportation, sale, and offer for easile of non-federal for the field of the second of the federal forms of the field of the federal forms of the field of the field

Iy 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 servious under Title I of the PMIA and the PPIA are, withheld from and denied to respondent, its successors, affiliates and assignoes for a period of five years. However, said withhelding and denial shall be assepneded and held in abeyance and inspection services shall be provided to respondent so long as, in addition to all other resultments of inspection.

- 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.
 - 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 meet 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 notice to and supervision by the on-site U.S.D.A. Inspector. 4. Respondent does not process, handle, or store custom exempt
- Respondent does not process, handle, or store custom exempt products or game, whether for customers, employees, the owner, friends or relatives.
 Respondent does not process, handle or store any non-feder-
- ally inspected product. This special condition precludes the processing, handling or storage of state-inspected product.

 6. Respondent maintains full, complete, accurate and appropri-
- Respondent maintains full, complete, accurate and appropriate written records of its business activities.
 Respondent does not knowingly hire or permit the employ-
- ment of any person who has been 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 years. During the five-year period, the Socretary 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 mentals from the initial grant of inspection service, the Pool Safety inspection Service may consider any potation for good cause to modify the special conditions set forth in paragraphs of a through? with a view to terminate or amend some or all of the special conditions. After five years from the initial grant of impaction, 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 fands checke--Fallure to puy when due--Bonding requirements--Suspension---Consent.

Ben Bruner, for complainant.

Jack Jones. Templer, Texos, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (U.S.C. § 181 et sec, by a complaint filled by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondant willully violated the Act and the regulations issued thereunder (9 CFR § 201.1 et al., 180.2). This decision is entered pursuant to the connent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1,138).

The respondent admits the jurisdictional altegations in paragraph 1 of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, awaive 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.

PINDINGS OF PACE

- R. D. Plunkett, hereinafter referred to as the respondent, is an individual whose mailing address is 1417 McClanhan Road, Apt. 216. Marlin, Taxas 76661.
 - 2. The respondent is, and at all times material horein 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 netred

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:

- 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;
- Failing to remit the net proceeds from the sale of consigned livestock in commerce on a commission basis to the consignors;
- Pailing 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 filling and maintaining a reasonable both equivalent, as required under the Act and the regulations.

Respondent fa suspended as a registrant under the Act for a partied of forty-fine 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 certification of the forty-five day period of suspendent, after the expiration of the forty-five day period of suspendent.

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—Custodisi Account for Shippers' Proceeds—Suspension—Consent.

Joy Hocklerg, for complainant.

Respondant, ree as.

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 thereander (8 CFR § 20.1.) This decision is entered pursuant to the consent decision provisions of the Roles of Practice applicable to this proceeding (7 CFR \$1.188).

The respondents admit the jurisdictional allegations in paragraph of the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor dany the remaining allegations, varies or all 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 PACE

- Randy Crook, hereinafter referred to as respondent Crook, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.
- Roy Wayne Harris, hereinafter referred to as respondent Harris, is an individual whose business mailing address is Box 410, Ringling, Oklahoma 73456.
- Respondents Crock 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) Rogistered 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 entared.

ORDER

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

- 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
- 8. Using funds received as proceeds from the sale of livestock sold on a commission besis 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 paymont of amounta due the respondents for lawful marketing charges. The respondents are suspended as a registrant under the Act for
- 21 days and thereafter until second time as they demonstrate that the deficit in their custodial second time as they demonstrate that the deficit in their custodial second the control of the deficit in their custodial account has been eliminated, a supplemental order will suced 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-Linbilities exceeded assots-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.

DECISIO CONCERNINO STATE WIDE MARKITHO, INC. AND LARRY ROSS This proceeding we incitationed under the Packers and Stockyards Act of U.S.C. \$181 et set; by conformation, United States Department of Arciculture, alleging that thereton, United States Department of Arciculture, alleging that thereton, United States Department of Arciculture, alleging that the control of CPU and the Act and the requisitions sistend theretone of CPU and the Act and the requisitions sistend theretone of CPU and the Act and the requisitions sistend theretone of CPU and the Act and the requisitions sistend theretone of CPU and the Act and the requisitions sistend theretone of CPU and the Act and the requisitions of the Act and the requisition of the Act and the Act and the requisition of the Act and the Act and

The respondents admit the jurisdictional allegations in peragraph 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 respond-

- ent 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
- A newpondent state wide as, and at all times material herein
- (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.
- 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.
- 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 desigt from:

- Engaging in the business as a dealer while current liabilities exceed current assets;
- 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 memorands which fully and correctly disclose all transaction involved in the business of monoment State Wide, including but not limited to: (a) fully or most problem of the work of the control of

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

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.

Packor-Lishilities exceeded assets-insufficient funds cheeks-Fallure to pay when due-Fallure to pay full purchase price-Default.

Stephen Lupercile, for complainant, Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF

This is a disciplinary proceeding under the Packers and Stockyards Act. 1821, as anended and supplemented (7 U.S.C. § 181 of 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 Agricultura, charging that the reproductive similar volume the Agricultura,

Copies of the Compilant and Notice of Hearing and Rules of Practice of CFR \$108 is eq.) governing proceedings under the Act were served a 1.00 et seq.) governing proceedings under the a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an edimination 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 elleged 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 FACE

1. and Lamby Pucking Company, hereinstitue referred to an the corporate respondent, in a carporation againsted 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 multiply address in P. O. Box 670, 84. Cloud, Minnesota Exist.

- (b) Corporate respondent, at all times material herein, was: (1) Engaged in the business of manufacturing or preparing
- meats or ment find products for sale or shipment in caumerze; and
 (2) A packer within the meaning and subject to the provisions of the Act.
- (e) James Landy, hereinafter referred to as respondent Landy, is an individual whose business mnifing address is P. O. Box 670, St. Gload, Minnesoth 55031.
 - (d) Respondent Landy, at all times nuterial herein, was:
- (I) Tressurer 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 cornorate respondent.
- the corporate respondent.

 (c) Allen Bright, hereinafter referred to as respondent Bright, is an individual whose business mailing address is P. O. Box 670, St. Cloud Minnesotn 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 rasets. As of that date, the corporate respondent had current liabilities totalling \$4,608,174.00, und current seasots totalling \$4,608,469.00, resulting in an excess of current liabilities over current assets totalling \$4,608,469.00, resulting in an excess of current liabilities over current assets on \$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 8570,988.00.
(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 shout the dates and in the transactions suggest to use graph III of the Complaint and Notice of Hearing, purchased meet and issued checks in payment therefor which were returned unpudto the bank on which they were drawn because respondents did not have and maintain sufficient funds on deposit and available in the occount upon which each 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 First 8 and 4 bent

By reason of the facts found in Findings of Fact 3 and 4 herein, respondents have wifully 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 sasigns, 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:

 Purchasing livestock while insolvent;
 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

1 Postock; and
4. Failing to pay the full purchase price of meat or livestock.
This decision and order shall become final without further pro-

ceedings 35 days after service hereof unless eppealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

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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.

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

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

Stephen Luparello, for complainant.

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 (U.S.G. § 184 et say, 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 (0 CFR § 20.11. et see,). 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 Secretary has jurisdiction in this matter, teither admit nor deep the remaining allegations, with oral bearing 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.

buy and sell livestock in commerce for his own account.

FINDINGS OF PACT

- 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
- (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

- Allen Bartels, hereinafter referred to as respondent Allen Bartels, is an individual whose business mailing address is Winthrop, Miunesota 55396.
- 4. Respondent Allen Bartels is, and at all times material herein was:
- (a) Rageged 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 Alviu 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

- 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;
- ing 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 fluxed treatment or undue preference or advantage related to the purchase or sale of irrestock in commerce from any customer or prospective customer based out the offering or eying by respondent money or gifts or services to so for the benefit of any customer, prespective customer, their officers, agents or monthlesses.
- Respondent Allen Bartia, his agents and employees directly or through any opportune or their device, shall cease and dealst from through any opportune or their device, shall cease and dealst from attempting to indice or a contract or advantage related to the purchase or all of livestock in contract or advantage related to the purchase or also of livestock in contract or advantage related to the purchase or also of livestock in contract or advantage relatance or prospective outcomers beard on the effecting of prospective outcomers, beard on the offering option of the opportunity of the opening opening of the opening of the opening of the opening opening of the opening op

Respondents Alvin Bartels and Allen Bartels shall keep and maintain accounts, records and measurement which fully and correctly disclose the true nature of all transactions involved in their business subject to the Packurs and Stackyards Act, including last, pol limited to such tickness issued or received in connection with the purchase or sale of livestock, and warkshocks made or caused to be made in rouncetion with the parchase or sale of livestock.

Respondent Alvin Bartels is suspended as a registrant under the Act for a period of four (1) mostlys.

Respondent Allen Burtels is prohibited for a period of faurmonths from engoling in business or apporting subject to the Act as a market sagency, buying or selling livestock in commerce our commission business or fermi-ships dockyard services, or as a dealer, baying or selling livestock in commerce either on his own account or as the employee or open of the wondor 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 av Alvin Barreis, Allen Barreis, and Gallen Gaue. P&S Docket No. 6801, Decided November 18, 1985.

Market agency—Prohibited from receiving anything of value except as consideration for services lawfully rendered—Prohibited from landness subject to the Art—Comment

Stephen Lapurello, for complainant

David D. Meyer, Laketiehl, Minuscota, for respondent

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO GAILEN GAGE

This proceeding was instituted under the Packers and Stockyarols Act (F USC. 9 Hz et say.) by a complaint filled by the Administrator, Packers and Stockyarols Administration, United States Department of Agriculture, alloging that the respondents wifully violated the Act and the regulations issued theremoder (C CFR § 201. et seq. This decision is entered pursuant to the consent decision providence of the Rules of Practice applicable to this proceeding (7 CFR § 138).

Respondent Gallen Gage admits the jurisdictional allogations 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, valves or all 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

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

Respondent continued to operate as a market agency after being notified of bond requirements and that his surety band 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 registrent for 50 days and thereafter until in compliance with the bonding requirements, and was ascessed a civil penalty of \$4,000.00.

Reie Paul, for complainant,

W. F. Counties, Amerilia, 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 (T 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 allogue that LaVerne Jenkins, heretanafter referred to as the respondent, is an individual doing business as Laferred to as the respondent, is an individual doing business as La-Verne Jenkins Cattle and Grain Co., with a mailling address of Rox 150, Campa, Colordo. The complaint Turbure 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 all livestock in commerce for the 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 355,000.00 surety bond on May 14, 1984, and that his operations subject to the Act required bond coverage in the amount of 885,000.00

Such activities are alleged to be in wilful violation of section 312ah 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, 1986, distillantifully being indicational allegations and denying all cheer allegations of the complaint. An oral hearing was held in Lamar, Colorison on January 22, 1986. Respondent appeared pro s, and complainant was represented by Eric Paul, Office of the General Countries, United States Department of Agriculture. Two witnesses testifully and the complainant was represented by Eric Paul, Office of the General Countries, United States Department of Agriculture. Two witnesses testifully are considered to the complainant of the Complainant Respondent conducted cross-szandantion and testified on his own behalf.

KINDINGS OF PACT

- 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) 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).

 Respondent has been engaged in the business of buying livescook for others for approximately twenty. (20) years and considers himself to be an "order buyer" rather than a "dealer" or "trader, ince he purchase livestock on order an excitive compensation from his principals by way of a commission where then a profit on speculative reach. Clenkin, Tr. 72-74, 79.

4. On May 12, 1976, an earlier surety band 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 besie without filling and maintaining a reasonable bond or its equivalent until May 9, 1977. (Cx 1: Stroud, Tx, 9-10).

 On August 5, 1977, a consent order was entered in In re La-Verne 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. (Ct. Jp. 44)."

 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. 20-11).

7. On May 14, 1994, the \$55,000.00 surely bond maintained by respondent was offered by terminated after the argiration of a hirty day notice period. Respondent was offered by certified mail letter dated April 10, 1984, of the coming termination date, and advised that offered with the filling of an adequate bond or trust fund agreement would be in violation of the Ada of regulations, of the property would be in violation of the Ada of regulations, of the property of the p

8. The surety band 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. 90, This condition clause myddles).

"(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 Slockyards Administration at Washington, D. C., at least thirty (80) days

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prior to the effective date of such termination. In the cent that the Surety named herein writes a new bond to replace this bond for the same Principal named herein, the value of the properties will be surfeed, and this bond will become make provides or will be surfeed, and this bond will become make the provides of the provides of the proplacement bond. Immediately upon filing a claim for reconery on this bond, unless the Surety believes that such only in its Privaleus, the Surrety shall cause termination of this bond in Privaleus and the privaleus of the privaleus of the privaleus of the PSAS-1 (ITTA-8 1 HE STIT), Dec. 4 (1978).

9. The livestock purchase transactions which eventually led to the May 14 1384 band termination, occurred almost eight months previously, on September 9 1983. Respondent purchased 46 head of Westeck from the Cattleman's Livestock Commission Congressy of tweether from the Cattleman's Livestock Commission Congressy of radio feedlot operator who was not registered and bonded under the At. Mr. Kulia paid for the livestock with a 514,642 in S876 check and Cattleman's Livestock Commission Company filed a claim against respondent's bond (Cs. 126, Strond, Tr. 56-50, Jeakins, Tr.

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 bend claim had been withdrawn after an attorney employed by respondent had obtained payment from Mr. Kula (CK 15 Stroud, Tr. 69; Jenkins, Tr. 76).

11. This August 14 1984 letter served two purposes: (1) it authorized a full release of the preceded from the terminated aurety bond; and (2) it provided respondent, his surety, and the state official who served as trustee on the bond with appress written notice that the bond which had terminated on May 14 1984, could not be resinsted and would have to be replaced with a new bond or bond equivalent (Xs 165 Strond, Tr. 34).

12. The new bond that respondent was required to file with the Secretary, however, was now in the amount of \$\$5,000\$. 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, for C. James Stroud, and a marketing specialist working under his euparvision, Mr. Darcy, White (Ge. 5; Stroud, Jr. 16-16; White, Tr. 6):

13. This \$85,000 bond requirement represented a normal increase of \$20,000 (\$55,000 to \$75,000) based upon a charply higher reported dollar volume of livestock purchased on commission during the calendar year 1988, 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 (Stroad, Pr. 17). An unsuccessful attempt was made on September 6, 1964, however, to reinstate the bond terminated on May 14 1964 apparently restriction to the termination date (Ox 15 Stroad, Tr. 39-44, 96 White, Tr. 63-64).
- 15. The letter purporting to reinstate the \$55,000 band was not received for filing by complainant's Denver regional office. Withrese Stroad testified that the Packers and Stockyards Administration would have refused to permit reinstatement and accept this lotter as a reinstatement because the termination had already of Courred Stroad, 7t. 30-41, 40).
- 14. During the period May 16 1984 through December 2B 1984, respondent was above to have purchased livestock on a commission basis from five pacted stockyander or auction markets located in New Mexico, Texas and Oklahoma, primarily for various principals located in Colorado (Cas 5-14, Strond, Tr. 17-38). Such purchases constitute only a semple of his full time business durling this period.
- 17. The invoices obtained from the five auction markets show purchase of livestock that exceed \$50,000 in total dollar volume and which earned respondent a total of \$1,500 in comra lessions. These commissions were paid to respondent by the various scalling market agencies on the day of sale and thinged to his principals (78,8-54). Gentle, 77. 85-80.
- 18. Purchases made on a commission basis by responder t wore generally paid for by his principal. One purchase made on November 9 1894 at Ostteman's Livestock Commission Company wers paid for by Mr. -technic (Berod, Tr. 32; Cx 1). In the case of purchases made for 31 color of the through Colorador propondent would write a check using a 37 Cattle Co. checking account on which he was authorized to draw (Cat 6, 9-1, 12-44, Jachian, 7-79-8-0, 93).
- 19. Respondent is engaged in the purchasing of livestock for a unber of feedlog on a set of the purchasing of livestock for a suther of feedlog on a feed of the state going to ST Cattle Co. declarate, Tr. 92-30, In addition, repondent explained that it was declared to purchase for new satomers only later checking with that bankers to see if their noney was good derkings. Tr. 80.
- 20. Complainant's regional supervisor, Mr. C. James Stroud, preented direct testimony, unrefuted by respondent to the effect that ill indications show that Mr. Jenkins is continuing to operate at

the same level in which he responde for 1988 GErund, Tr. 893." Responder's 1988 annual report (CE 2) shows the purchase on a commission basis of 24,485 head of cattle for a total buying commission learning and the commission basis of 24,485 head of cattle for a total buying commission income, after opposes, or 574,456. Assuming that the low control of the control

21. The statement in the September 5 1984 inter from Lumberman Mutual Insurance Company that respondent relies upon—"We now wish to relustate this band and consider it in full force as if it was now cancelled" merely implies an intention to provide overage from May 14 1984 ownerd. There is no express committee ment to hear board claims arising out of transactions that occurred between May 14 1984 ownerd. There is no express committee to the contract of the c

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 (Jonkins Fr. 78-79, 90-91, 93).

CONCLUSIONS OF LAW

Respondent's Operations as a Market Agency Buying Livestock in Commerce on Commission after May 15, 1985, Constitute a Wilful Violation of the Act and Resultations

There is no real controversy in this proceeding as to the nature of the bointees engaged in by respondent. He has admitted being registered as a dealer and buying livestock in commerce on commission (Answer; Cox 1-3). Whether he is called a market agancy buying on complision in accord with the language of the Act or an order buyer to flow 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 of CPR 201.27 et.

He has filled to maintain this had coverage on two occasions. During the first cossion, in 1976, he estimated to purchess lifest stock on commission for approximately a pure not had so now board (5.1; Floring 6.1 the has explained during the order of the size in this proceeding that his band was terminated in 1976 high regions from a form of the first proceeding that he band was terminated in 1976 high regions from a form of the first proceeding that the band was terminated in 1976 high regions from a form of the first proceeding that the band was terminated in 1976 high regions from a first proceeding that the proceeding that the band was the band was the first proceeding that the proceeding that

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

Unfortunately, respondent falled in learn that his diligation to comply with this order was mandetery. When nodified in April, 1984, that his bond was going to be terminated on course of a bond claim (or S. Firdinal); p. Jon failed to either arts pervent this termination before the May 14, 1984 termination date prevent this termination before the May 14, 1984 termination date promptly dealer of the man of the man of the course of the stop engaging in learness for which bond overage was a require-

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 band coverage was not needed in his case because he was only buying or commission and was prudent in accepting prospective outsomers. It is not not to be a superior of the contract of the contract of the new bond claim might arise, they provide no valid basis for a continued operation in noncompliance with the bonding requirements and the IST Contract Order.

Respondent has repeatedly shown a lack of good faith effort to comply with the bending requirement and a willingness to latens others for such neaconplisms, programly, his operation without bond coverage between May 12, 107 man, h. in operation without bond coverage between May 12, 107 man, h. in operation without self to an improper refused of his surely to large \$1, 107 m. was attributed to an improper refused of his surely to large coverage (decrease), and the surely of the surely of

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 surchase 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 bend coverage, or cease to operate while not in compliance. His assertion that there was no withit violation of the Act rings hellow 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 statents to his reconstillations under the Act.

Cartainly, his explanation as to why he has not obtained the \$86,000 in bend overage required fit this pattern. He explained that his accountant was too busy with tax work to get him the neeceasty financial information to submit to a nurely company (Janceasty financial information to submit to a nurely company (Janant in May 1964; Perhaps the true reason respondent has not made a real effect to comply with the increased coverage demand is simply that he believes it is unresionable to require the same bond overage of an order buyer as a dealer buying livestock for his own account. However, operating subject to the Act requires that companies regulations that are deemed reasonable by each resistant to

Respondent contends that the violations should be excused because of his fact of responsibility couples with a good fight attempt at compliance. Unfortunately, the acts and omissions of respondent learning cannot be passed over so elamply. It is true that Mr., durishins dain out "anticipants" the failure of his disclosed principal, Mr. Robert Kulis. Loss for livestock nurshased on his behalf.

The possibility that one of the principals for whom reasonatem. purchases livescoke might not pay for such livested, a, on the head of the hand, an anticipated contingency that is provided for in the oboding regulations. Respondors voluntarily assumed the obligation of the continuous properties of the obligation of

Respondent also assumed the obligation of maintaining bond corenge that fully complies with the Act and regulations or ceasing to purchase livestock on commission. These fundamental obligations of sugging in a regulated business rested on respondent La-Verna-Jankins in full force. They were reinforced by the entry of a prior order of the Security. He was again advised with respect to sught-obligations on May 26, 1846 Garcy White, Tr. 40: The record in this proceeding demonstrates that respondent neither lacked responsibility for the violations here nor acted in a resonable and timely manner to comply with his responsibilities.

It is a flagrant compile of a registrant operating in necessity may be a flagrant of the compile of the compile

It must be concluded from respondent's actions and from his fasures to act, that he has wilfully violated section \$12(a) of the Ast and sections 201.29 and 201.30 of the regulations promulgated thereunder (9 CFR 201.28, 201.80).

Sanctions

Sanction testimony was presented by complainant's Denver reional uppreviers, Mr. C. James Stroud (Tr. 66-69). He explained shaft four sanctions were necessary: (1) a cease and desist order against operating without filing and maintaining the resulted bond; (2) an indefinite suppression until compliance with the baning requirement was achieved; (3) a suspension for a 30-day periof and (4) a 55.00 (vi) penalty.

Great weight must be given to complainant's recommendation concerning austicians. In 29 B. Galber and Company, 31 Agri. Dec. 843, 846–61 (1972), In re. J. A. Speight, 33 Agric. Dec. 280, 819 (1974), In re. Samuel Especito, 83 Agri. Dec. 613, 666 (1978) Severa sanctions have been the clearly established policy for examinations of the company of the c

(1974). A cease and desist order is routinally imposed whenever substantial noncompliance with the bonding regulations is found to have occurred. Respondent violated the 1977 cease and desist order (N.

Respondent did not refute the evidence presented by complements to the increased bond coverage required (\$85,000), or with respect to respondent's failure 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 pensity 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 (Strond, Tr. 66-67).

Complainant argues that to deter similar noncompliance, a civil penalty equal to five percent (6%) of the unsatisfied bonding requirement is appropriate. This would amount to \$4,250 in this instance, however, rounding up to the next \$1,300 increment is appropriate because of the circumstances established in this proceeding.

However, consideration must be given to the fact that Responder ent in good faith reasonably (from his limited perspective) helieved that he did have at least \$55,000 bond coverage from the time he received the September 6. 1986 insurance company letter, his belief was not fully or legally well founded, but it is an ameliorating factor, not credited by compaliant.

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. 502, 566-67 (D. Kan. 1980). If uncheckeds, it would make it very difficult to enforce compliance from other individuals who buy livestock on commission (Stroud, Tr. 68-68).

Respondent's testimony has established that he is a careful and superimend professional order layer and, therefore, loss 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 liverscope of the control of the cont

The policy decision to require market agencies buying on commission to maintain the same dellar amount of bend 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 resultations.

Respondent has falled 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.

Laya livey livestock as a middleman under the Act, and has an obligation to pay for such livestock whenever his principal fails to deexpression of whether the name of the principal was ellecticed by the such that the such such that the such that the such that (1977), Arnold Livestock Sales Ca. v. Factoria P. Soup. 1819, 1820-23 (D. Nal. 1974), United State Fidelity & Gourantee Colcor Creek Cattle Co., 92 Idaho 889, 462 P. 24 98, 594-038 (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 atockyards, 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 WERER: Whether it's disclosed or undisclosed"

A. Thet's correct, Your Honor." [r. 37-38]

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

is unfounced. 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 1884 (Jenkins, Tr. 98-99).

The only way the public can be fully protected when a market agency or design 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 toll penalty and a \$0.00 story superssion in addition to the routine indefinite suspension and cases and cleated order to the considered necessary by the complainant to determ such conduct on the part of respondent and others similarly situation.

When due consideration is given to the volume of respendent's unknowled expensions, the length of time involved (approximately n year new, as well as in 1976-77), the substantial earrings he has derived through such operations, and his failure to take prompt and decidive action either to head off a termination of his 855,000 and of colain the subsequently required 855,000 hond, it must be concluded that these sanctions, when considered under the cited precedents must be seatgment here.

CONCLUSION

The evidence of record and applicable precedents presented beard clearly and convincingly establish that respondent has wiifully violated section 31240 of the Act 77 USC § 21580, and sections 21.29 and 20.13 of the regulations (9 CFR § 29.01.29, 20.130). Respondent's actions constitute an unfair and despitive practice and insertli the sublic. Therefore, the fellowing crief should be leaved.

ORDER

Respondent LaVerne Jankins, individually or through any corporate or other device, in connoction with his activities eubject to the Packers and Stockyards Act, as amended and supplemented, shall cease and deside from engaging in basiness subject to the Act for which honding is required without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulaside both of the squivalent, as required by the Act and the regula-

Respondent is suspended as a registrant under the Act for thirty (30) days and thereafter until such time as he compiles 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) days wistened.

In accordance with section 312(b) of the Act (7 USC 218(b)), spondent is assessed a civil penalty in the amount of Four The sand Dollars (34,000,00).

sand Douers (34,000,00).

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

Order become final.

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

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 1.142c

A copy of this Order shall be served upon the parties.

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

In re: Beef Nebraska, Inc. P&S Docket No. 6094. Decided November 26, 1985.

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

The defined Officer effected Jerkey Weber's neity ordering respondent to concern state from insign decide on encole banks. Backey at the contract of the state of the loss, believed by the state of the state of the state of the state of the loss, believed by the state of the state of the state of the state of the loss, believed by the state of the state of the state of the state of the loss, believed by the state of the state of the state of the loss of the state of the state of the state of the state of the loss, believed by the state of the state of the state of the loss of the state of the state of the state of the state of the loss, believed by the state of the state of the state of the loss, believed by the state of the

Kenneth H. Veil, for complainant.
William T. Onèca, Omaha, Nebraake, for respondent.
William J. Weber. Administrative Law Jarlan.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Peckers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et eq.). I An Initial Declaron and Order was filed on April 3, 1985, by Administrative wiges William 3'. Weber (ALJ) ordering respondent to cease and dealst row "issuing checks in payment for

¹ See generally Campbell, "The Puckers and Succepturds Act Regulatory Program," in 1 Devideon, Agricultural Linu, th. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Hard, Agricultural Long, ch. 71 (1989).

livestock drawn on remote, distant, or country accounts, including any account with the State Bank of Palmer, Nobraska, 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 567 (7 CPR § 2.35). 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 \$38 billion livestock industry, I am sotting 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 unpuds for a total of over 430 million in livestock sales' (S. Rep. No. 192, 94th Cong., 22 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(a)).

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., 24 Sess. 8 (1976)):

The position of Asidai Officer was established generated to the Act of April 4, 1987 U.St. 95 (4-50), and Recognition Phys. No. 2 of 1986, 18 Pez. 18g. 182 (1987), vertical 6, 19.2 (1997), and 1997 (1997), because the present judgment of 1997 (1997), which is present judgment of 1997 (1997), which is present judgment of Officer was appelled in January 1997, having her part trial litigation, 1997 (1997), which is present trial litigation, 1997 (1997), which is present trial litigation, 1997 (1997), which is present the factions of the prior Judicial Officers and Systems and Stockyards Act regulatory present Disconsist 1997,

The principal complains from the producer and feeder representatives were the field of proteins from sacker failures and from various devices fusch as a checked drawn on distant banks utilized by packers to delay payment for livestock purchased. The resulting "bost," which emounts to enormous sums on a national suggregate banks is used by packers to help finance their transport of the production of the production of the sum of the production of the production of the production was a sum of the production of the production of the transport of the production of the production of the statute which requires product enactions of a Pederal statute which requires product enactions of the production of the transport of the production of the product

On July 12, 1982, respondent began participating in a "scheme" (I would use the word "scam" if we were not dealing with repute ble banking officials) offered by its bank (Omaha National Bank, s "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 Omahn 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, Omsha 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 bankrupty, and also delays the time for the livestock seller's bank to receive credit for the check deposited by the livestock seller's

FINDINGS OF FACT

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

 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 Stockvards 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).

^{*} 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 1641 "country" routing symbol (CX 5, pp. 9, 18; 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).

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

- Palmer shall allow all ONB controlled diabursement 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 latter 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 ONE's reserve account.
- 3. Palmer authorless ONE to intercept and settle controlled disbursement items before those items are charged to the Palmer account, and ONB is further authorized to the Palmer secont, and ONB is further authorized to General Presented Palmer items directly to Cantral 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 latter.
 - (d) ONB shall be responsible for the linterception and settlement of controlled disbursement terms 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 settls disbursoment 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.
- 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, 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 cour try bank for purposes of [its] controlled disbursement product" (Th. 70).

 Pursuant to the Intercept Agreement and the Controlled Dis bursoment 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 endpoint deadlines (discussed in Findings 12-14, infra). The cash itoms are generally delivered to or picked up by Omaha National Bank by 10:00 p.m. each day. Thereafter, Omaha National Bank processes the items, segregating the checks drawn on State Bank of Palmer by Cmaha 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, Orasha National Bank's Second Vice-President (in charge of its tecks presenting nativities), testified that after its computer sorts out the checks of the standard belong to State Bank of Palmer, the remaining checks are scalarly belong to State Bank of Palmer, the remaining checks are such that computer again but the computer is instructed this time to only the computer again but the computer is instructed this time to only the computer again, but the computer is instructed this time to only the computer again of the computer of the comput

Olace the items are initially read through our readersorter—that's a hardware that actually does the sorting of

^{**} Bach back is assigned an identifying routing number "denlier to a Social Scotfly number, but it is the handlary" (fr. 58. (The first four degle are the routing symbol, 190; and the east of Omahai they back. The South office, "On the when the heads" a good at elser through the Poderal Settern System (and the or each in which he heads a social set of the property of the control of the contr

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 cuetomrs, and those checke that are drawn on Omaha National Bank or accounts of Omaha National Bank or accounts of Omaha National

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 beer 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, "Den'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 larguest check collection system in the country. Mr. Federy, Vice-Fresident of the Federal Reserve Bank of Kanasa City, testified concerning a 1979 study belowing that 40% of all checks are handled through the Federal Reserve System. The other checks are exchanged directly between banks within a clearing-bous area or they are collected through a private correspondent relationship between banks (Cry. 90). Susting the substance of the contractions to restrict collection, systems rather bank choose to participate in private collection, systems rather can be applied to the contraction of th

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 "seening bank." The bank no 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 "prosented" to the navier bank [77, 374-76].

The funds can be transferred from the paying bank to the depositing bank by means of ledges entiries on thir respective accounts at the Fuderni Reserve Bank, i.e., the paying bank's account is deliced and the depositing Bank's account is ordered. After a check reaches the Federal Reserve Bank, the day on which the funds are reaches the Federal Reserve Bank, the day on which the funds are reaches the Federal Reserve Bank, the day on which the funds are reached to the reachest the funds of the fu

bank, a country bank, or an RCPC (regional check process); 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. Cnecks 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 bank in a cordance with scheduler published by the Federal Reserve System (7. Se-41, 67. 29. 29.75, 8.0.17.12, 37.44.13, 05. 8. p. 81 KM 1, 12

Effective February 15, 1982, the Februal Bearty Bank of Kans (Ly, Omaha Branch, gawe lamedisten), as more depth of evaluability to the depositing bank if (0 checkedas, as more day has now a contract the contract of the contract Bearty Bank 19; 123 a.m., or 60 checks drawn on a city bank such as Omaha Nations Bank were received by the Omaha Federal Bearty Bank by 83 a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as State Bank is a.m. Checks drawn on a country bank such as the such as the

If the RCPC checks were "fine corted," the cut-off time wee 2:00 a.m. (CX 5, p. 9), RCPC banks are looted within about 90 miles of Omahs, and checks deposited with the Omahs Periceal Record Benk by 12:01 a.m. are processed and sent out to the RCPC banks by about 5:00 a.m. of 8:00 a.m. of the same day (TY, 56:-97).

⁴ The would given by the Probril Reserve Braik to the depositing braik's account at the Probril Probril Reserve Braik of Provincial Gradie (Tr. 851-58, 400, analyses to late cancellation of the braik returned of the STD, Dut "Provincial Review by the Prof." sensity of the returned of the Probrid Dut "Provincial mount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose" as "tendermount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose" as "tendermount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose "as "tendermount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose "as "tendermount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose "as "tendermount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose "as "tendermount to final credit" (Tr. 41); and one of the Old Probrid Dutpropose "as "tendermount to final credit").

	Class of Item	Out-Off Time	Fund Avoilabilit
Cit	У		
Ma	chine processable checks	8:80 e.m.	Immediate
RC	PC		
Mo	chine processable checks	12:01 e.m.	Immediate
Pin	ne mort ?	2:00 a.m.	Immediato
Con	untry		
411	Lehanko	8:00 n.m.	Next day

13. Effective May 27, 1983, the Omaha Federal Reserve Bank achedules 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		Out-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	200 a.m.	Immodiate
	Country		
	Unsorted	8:00 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

 $^{^7}$ Pine corted items are items sorted "to a specific ABA number or routing transit number" (Tr. 71).

bank during the period in 1982 when Omaha National Bank este 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 am. on Day 1, the funds would be credited (i.e., available) the depositing bank as follows:

Itan		
City check RCPC check Country check	Fund Availability Day 1 Day 2 Day 2	

Example 2. If the same checks were received by the Omaha Ped eral Reserve Bank at 9:00 a.m. on Day 1, the funds would be credited (i.e., available) to the depositing bank as follows:

Item		
City check RCPC check Country check	Day 2 Day 2 Day 2	Fund Availabilit

Example 3. If the same checks were received by the Omaha Federal Reserve Bank at 4:00 p.m. on Day 1, the finds would be credited (i.e., available) to the depositing bank as follows:

Item	Bart Committee		
City check RCPC obsek Country check	Fund Availability Day 2 Day 2 Day 3		

These examples litherate has there is more delay, or "float," in the check oblication system for checks drawn on country banks than checks drawn on city banks and country banks and the same and the sa

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 hank 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).

Prier to its perticipation in Omaha National Bank's Controlled Bulbursment Account program, respondent had to estimate what checks would clear the collection system each day. This resulted at times in respondent horrowing money under its eventwing not from Omaha National Bank (which is reduced or increased each from Omaha National Bank (which is reduced or increased each that were not extend the control of the control of the control that were not exclusive needed that day, if respondent undorsestmated its eash requirements for a particular day, Omaha National Bank homored the checks, and charged respondent an "overdruft" charge identical to the interest charge respondent would have paid for respondent had accurately estimated it each needs. Just continution of the control of the control of the control of the hank discourage on the control of the

16. A Controlled Disbursement Account (i) enables the bank of fetring the account to notify its customer each day of the excet 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 Dost inherent in the Federal Reservis check collection system, and (iii) permits maximum use or the customer's funds for Investment or debt paydown. A customer's

^{*}There is a 3-hour time period in which country checks have more dalay, or '5005,' then RCPC checks, i.e. checks deposited with the Cmaha Federal Reserve Benk Extween Stil p.m. of Dey 1 end 1291 am. of Day 2 (Tr. 45, 48; CX 5, p. 2)

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, 855-56, 402-03, 423).4
- 18. In order to offer a Controlled Disbursement Account to its contenser, Gonalas Attoinal Bank hold to limit the number of greatments in any given day (Fr. 51). Omaha National Bank identition of the Controlled Disbursement Account program (OK, for p. 18). The actual banks are actually be last of Fairner from a found in greatment of the Controlled Disbursement Account program (OK, for p. 18). The Controlled Disbursement Account program (OK, for p. 18). The Controlled Disbursement Account program (OK, for p. 18). The Controlled Disbursement Account program (OK, for p. 18). The Controlled Disbursement Account from other banks, and it was set then a member of my described from other banks, and it was set then a member of my described from the Controlled Disbursement Account Acceleration of Controlled Disbursement Account Acceleration of the Controlled Disbursement Account Acceleration of Controlled Disbursement Account Acceleration of Controlled Disbursement Acceleration of Controlled Di
- 19. Omaha National Bank selected State Bank of Palmer to take advantage of the deposit and credit availability schedules of the Pederal Reserve Bank applicable to cash items drawn on "country" banks. By choosing State Bank of Palmer visither than an experience of the Company of the Country banks. Ornaha National Bank obtained additional "float," i.e., delay in the check collection process (20, 25, 71, 23)-71, 44-85. Some of

⁹ Omahe National Bank accepts deposits for same day lodger credit as late as 9.00 p.m. on any hanking day (Tr. 425).

Omeha National Bank's competitors originally offered Controlle Disbursement Accounts on RCPC banks, but they switched a "country" banks after Omaha National Bank began using a "country" bank (Tr. 38, 414).

20. When Omaha National Bank officials met with their accounter who would be markeding its Controlled Bahursennes Account program to customers, the additional "float" time from 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 sure to explain Omaha National Bank's Controlled Disbursement. A count program lists as one of the seven features (Tr. 44; CX 5, 12).

 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 or secount 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 diabursing 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

Sale alternation is a

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 marksting 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 Disbursament Account to pey for its livestock purchases with checks drawn on State Bank of Palmer (CX 8-7; Tr. 194-204). All of these checks are collected through the

Federal Reserve Bank check collection system, and are subject to the deforred (i.e., next day) credit availability provided by the Pederal Reserve's deposit and credit availability schedule applicable to checks drawn on "country" endpoints (CX 3, 5, p. 9; RX 11; Tr. 194-94. 411-12).

22. Mr. Nelsen, Ornaha National Bank's Scood Vice-President in durage of check processing, testified that on awarege the increased "float" resulting from Ornaha National Bank's Controlled Dis-bursment Account program would be a fraction of a day, 80% to 90% of a day in case of national firms, and much less for existences to create the two floats and the state that the might be no delay or there might be no think and what type of item is one meached the Federal Reserve Bank and what type of item is one meached the Federal Reserve Bank and what type of item is one meached the Federal Reserve Bank and what type of item is one meached the Federal Reserve Bank and what type of item is one meached the Area and the Ar

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 andorsoment 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 data 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. 881-86, 423-27; RX 12)) for 32 checks issued by respondent from June 21 through July 2, 1982, before respendent began using Controlled Disbursement Account checks (CX 1). Of these 32 checks, 27 cleared through the Omaha Federul 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

¹⁰ The initials "FO" on Complainant's Exhibits 1-8 refer to the "Omaha Branch of the Federal Reserve Bank of Keeses City" (Tr. 200). The initials "SC" stand for the Sloux City, Iowa Bank, and the initials "ONB" stend for the Omaha National Bank (19:200).

¹⁰ The only three exceptions out of the 27 checks clearing through the Federal Reserve Bank were all deposited by Producer Order Buyers, Stoux City, Iowa. Ruch

The second sample period, from July 6 through July 10, 1882, also prior to responderfu see of Conventide Daubursement Account checks, contains 42 checks (CX, 20 of them. 18. by Them. 18.

The two sample periods after respondent began writing bisseader, the checks or Phisms Fatts Bank under Oraba National Bank's Chortolled Dickursement Account program were from July 12 through [1985, and Suphember 20 through 3, 1896 (CM 5). The 88 three houses the check of the period all cleaned through the check of the check which the contract the check was received by the Oraba Pederal Boserve Bank (CM oraba Pederal Bank) and the CM oraba Pederal Boserve Bank (CM oraba Pederal Boserve Bank (

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 sollers 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 Disbursament Account checks drawn en State Bank of Palmer (with a 1041 routing

¹⁹ The two exceptions involve checks written to Mr. Jehnson, each of which was endorsed on two different sates by the Omaha Federal Reserve Bank, and the checks cleared the same day as the second sodcrawment date by the Omaha Federal Reserve Bank.

symbol, the castomer receives ledger credit the day of receipt, but does not receive availability of funds until the accord 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 Disbursament Account checks cost a cooperative association. Producers Order Buyers, \$11.17 on a single check ave 207.08.06 ft. \$12.78.6 V.O.

26. When respondent began writing Controlled Disbursement Acquait checks for livestedcy purchased at the Comain stockyard, Mr. Couningham, Executive Secretary of the Omaha Livestock Exchange ten organization of livestock commission firms, advised respondent that under the Exchange rules, all livestock must be paid for with a local device, and that if everpointed vasuated with size of the country of the Commission firms, advised respondent variety of the Exchange rules. As a result, respondent pays for livestock bought at the Omeha stockyard with a local check (Tr. 318-71).

36. Omaha National Bank was not required to (and did not) doxian formal approval of the Controlled Disbursement Account program. Nonetheless, it discussed the program informally with Federacy al Beaurer System? In any Federal Deposit Insurence Corporation Officials, who advised that the program did not appear to violate their regulations (Tr. 68, 112, 346–747, CS. 6, p. 10, 878, 9.10. The latter to Omaha National Bank from the Regional Courseil of Federal Deposit Insurance Opporations that gets (SS. 6, 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 feat' time of checks for bank customers. If this were the case, the FDIC might find that an unsafe and unsound shaking practice existed.

 On January 11, 1979, the Federal Reserve Board issued a press release discouraging the use of remote disbursement checking accounts, stating (CX 10): 14

¹¹ When the Federal Beserve official signed the Intercept Agreement Involved in Orahis National Benk's Controlled Dishuraments Account program (see Findings 7—8), bir dis does approve the Gentrolled Dishurament Account programs (Tr. 1128, 23). "MTB adjoint Reserve Board's govern release and report (US, P. 10), received only bir office of proof (Tr. 116-16), were corresponsive occupied only their office of proof (Tr. 116-16). Were considered as part of the record (**CPR**).

2804

The Federal Reserve Board today made public a state-

ment of policy concerning the practice known as remote disbursement and announced a course of action intended to discourage such abuse of the check collection

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 concorns 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 diabursing 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 1/14 (}g) (1%) In re Dating Panking Co., 86 Agric Dec. 1181, 1228 (1977), offid, 618 7.22 1529 (9th Or) (21) Secutor), seet denies, 449 U.S. 1061 (1990); In re L. readock Marketing Inc. 35 Agric Dec. 1562, 1561 (1976), off'd per curion, 558 F.2d 748 (8th Ar. 1977), cert denied, 635 U.S. 968 (1975), For the name reason, CX 8, p. 1, received a an offer of proof (Tr. 219) is received as a part of the record.

The Board believes the banking industry has a public reponsibility not to design, ofter, promote or cherwise encourage the use of a service expressly intended to delay final settlement and which exposes payment recipionts 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 each management services needed by their customers through the use of payments methods that facilitate prompt funds well-fully to payment expleries and that protect banks from unnecespayment expleries and that protect banks from unneces-

Attached to the Federal Reserve Board's press release quoted immediately above was a Staff Report which states (CX 9, pp. 1-2):

 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 remotaly 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 subplect of recont Congressional bearings resulting in the enactment of legislation to require next-day final payment for livestick transactions.

American Beef Paelerer paid for cattle purchased from farmers in the midwest with checks arews on a bank in Oregon. When the company went bankrupt, the checks were dishonered. Actually, republic through drafts were used in lieu of checks by this company but banks treat each drafts as checked and the public is enteredly to diformed of not concerned with the exchange the research mands that the length of time required for clearing and resturn of the drafts probably caused much of the loss to the draft regionsh. Specifically, the longer clearing time may have affected the collectability of seme of the drafts, and the combination of the longer clearing and longer and the combination of the longer clearing and longer return times delayed identification and claim of assets (livestock).

Because check recipionts are generally not aware of the risks associated with remote disbursement and are not in a position to negotiate en alternative payment instrument (such as more readily collected chocks, currency, or wite transier), the Board believes that the banking industry has a responsibility not to encourage or even offer a service that is transied solely to delay final settlement and that for the contract of the contract of the contract of the towards related to the contract of the contract of the towards related to the contract of the contract of the contract of the towards related to the contract of the contract of the contract of the contract risks.

The Board is not discouraging corporate dishorsament arrangements with bank that provide for improved control over dulty cash requirements provided that the purpose of such arrangements is not to delay the collection of funds to the discovariage of the payee or other particlpants is the spayment system. Banks should provide the cash management services needed and demanded by their customers using personn embedies that fedilitate rapid collections, assure the prompt evaluability of funds to payment recipients, and protect banks from unnecessary risks.

Mr. Foley, Vice-President of the Federal Reserve Bank of Kanss City, who has the senior supervisory responsibility over the check collection system in the 10th Federal Reserve District (which is cludes Omaha), testified that he does not know whether Omaha National Bank's Controlled Disbursement Account program wis lates the Federal Reserve System's policy statement as to resole disbursements Cri. 117-239.

28. On February 23, 1984, the Federal Reserve Board issued a policy statement discouraging the use of delayed disbursement practices that increases "the collection time for checks by at least a day." The policy statement is as follows (emphasis added): 16

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 payes, or on institutions located

¹⁸ Official notice was taken of this policy statement (7 CFR § 1.141(g)0)).

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 disbursament 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 nunta location of institutions affering delayed disbursoment arrangements offen increases the collection time for checks by at least a day. Recipionts 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 unknowing by learn significant credit risk through such arrangements, which could be an embod of standing unsecured credit to a depositor and lead to violations of legal lending limits. Abbent proper and complete documentation regarding the credit workinses of the depositor, paying them against found hanking procision. Further, even if properly documented, 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 prudenty. If under or undocumented credit risk is disclosed or if lending limits are exceeded, examiners will continue to take appropriate corrective section.

The Board believe that the banking industry has a responsibility not to fifer or otherwise occurage the use of parability that the offer or otherwise occurage the use of arrangement that result in a delay in the collection and final settlement of checks. The Board has implemented a program designed to accolerate the collection of checks and encourage the banking industry is seek, further indefined to the collection of checks. The Board intends to according Board intends to monitor the success of voluntary afforts to reduce and eliminate the use of delayed delaturement arrangements. In instances where delayed dishurement abuses continue, the Board intends to pursue appropriate section. This may include Federal Reserve operational changes to pread up the collection of checks drewn on the changes to pread up the collection of checks drewn on

CONCLUSIONS

Mr. Nolem, Omaha National Bank's Second Vise-President in charge of check processing, admired that its Controlled Diaburament Account program resulted in a dealy of 1 day in the check of the processing of the control of the day reached the Protein Reserve Bank (Pfulling 220. As to other checks, there would be no oblezy, i.e., for checks reaching the Pederal Reserve Bank after the 850 am. cutoff time for "elsy" banks of Berrye Bank after the 850 am. cutoff time for "elsy" banks in the second of the second of the checks written by a custom using Controlled Behavement Account thesis would are friending 31. In the uses of repositional, its use of Controlled methods of the second of the second of the second of the processing of the second of the second of the second of the law between the second of the second of the second of the law between the second of the second of the second of the law between the second of the se

Omaha National Bank officials admit that the additional "float" time from the use of a "country" bank rather than an RQPC bank in its Controlled Disburssment 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" grapidal by Omaha National Bunk's representative relating to its dendrelled biblearment Account program. Omaha National Bank's literature lists five "lessofile" to castomers, including "frareased utilization of dishurament libra inherent in the opstem" (Rading 20). Accordingly, it is clear that respondent's Prosident uses last when respondent stopped wirting checks on its regular checking extension of the proposed of the proposed of the checking extension of the proposed of the proposed of the checking extension of the proposed of the proposed of the checking extension of the proposed of the proposed of the checking extension of the proposed of the proposed of the check callection of the proposed of the pro

Inst even if respondent's Fresident had not known that the use of Cardedle Disharmeout Account checke drawn on State Innia, of Palmer would come delay in the checke cleaving process, at least, with respect to some checks, the plain words of the Act show (and the legislative history contirmed that any practice by a pucker that guida in a delay in the check cleaving process is an undire praction is validation of the Act, prespective of intext. The 1976 amendwords to the Act provider (ILRAC Sec.)

§ 228b. Prompt payment for purchase of livestock

(a) Full amount of purchase price required; methods of pay-

lisch 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 signature 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, is 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 mall 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; dieclosure requirements

Notwithstanding the provisions of subsection to of this section and subset to such terms and conditions as the Secretary may prescribe, the parties to the pure shad of livatock may expressly agree in writing, sherry 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 rarket agency or dealer selling the livatock, and in the purchaser's records and on the accounts or other documents said of 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 harein provided, or otherwise for the property of the consideration of the control o

Subsection (a) of the statutory provision just quoted requires packers to promptly deliver or mail at elect to a livestock seller or wire transfer funds unless there has been a varier of the prompt payment requirements pursuant to the prompt payment to the seller of the prompt payment to the seller of the prompt payment to the prompt payment to the complainant concedes that respondant mailed the livestock checks in a timely fashion as required by subsection (a), we are concerned are not just the prompt payment to the prompt payment paym

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 unifary 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, deeler, or pracker purchasing livestock, [1] the collection of funds as herein provided, or [2] otherwise for the purpose of er resulting in extending the normal period of payment for such livestock shall be considered on "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair pratice" as used in this chapter.

Respondent contends that subsection (c) does not itself condenn any delaying practice, but morely states that failure to comply with subsection (a) is an unfair practice, unless the soller waives his right to prompt payment (which is permitted by subsection (b). Respondent contends that if a choice is timely muleit, it is immaterial whether it is written on a remote bank that would delay the check collection process by sworrd days.

Specifically, respondent argues that the words "collection of hunds" in the first bracketed clause of malacetian (5 are synanymose with the word "payment," and that with respect to cheeke saided by a packet, Congraes was concerned only with wiether the said the ducket in a timely manner, as required by subscition for the contract of the contract of the contract points, and the contract of the contract of the contract scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the desired of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the contract of the scale of the contract of the contract of the contract of the contract of the scale of the contract of the contra

When Congress said that any delay or attempt to delay by a packer the collection of funds as herein provided is an unful praction, Congress obviously Intended to include as an unfair practice, Congress obviously Intended to include as an unfair practice, under subsection for the writing of a check on a remote bank when would delay the collection of funds from a check timely mailed by a sacker in accordance with subsection (4).

Purthermore, even though complainant raise only on the first bruckets drause, the same result would be reached under the insurance of the second bracketed clause. The second bracketed clause. The second bracketed clause. The second bracketed clause is preceded by the word "or," which indicates that the various mamber of the sentance are to be taken separately. "In statutory construction "of "is to be given it normal disjoint/ete meaning" unless such a construction render the provision in question repug-mant to other provisions of the status." Gav Union Cenn v. Wait.

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 dolay 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 retting 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 logislative 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 psyment," Congress meant to include the use of checks drawn on distant banks.

A third possible interpretation of subsection (of would be to add a comma after the word 'observise'; thereby making the phrase "fire the purpose of or resulting in extending the normal period of pyrener" applicable to the first bractaced clause. But we ent if that were doen, as shown above, when Congress refurred to a dealay it "gayment," Congress had in mind dairy caused by decire such as "checke drawn on distant banks . . . to delay payment for line "checke drawn on distant banks . . . to delay payment for line ("the first of the first of the decire of

¹⁶ As shown below, this House Report relates to the version of the prompt payment legislation which had been divided into three autoscitions, and subsection (s) of that version does forth in the House Report) and subsection (a) of the final version enacted into law are verbelin.

The plain language of subsection (c) so clearly problibits packers from delaying the check collection process by writing checks on romote banks that an extended discussion of the legislative history of the amendatory language should not be necessary. But since repondent 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 being considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the light of the language through the considered in the language through the considered in the light of the language through the considered in the language through the language through the considered in the language through the language t

The entire prompt payment section of H.R. 8410, 94th Cong., Iss Seas, originally contained only two sentences, size, the language that is now in subsection (c), with an insignificant change. Specifically, the entire prompt payment provision of H.R. 8410, 94th Cong., at Seas, as introduced on July 8, 1975, by Representative Phone (for himself and Representative Bertland) provided: 'In

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 peaker purchaning livestock, the collection of funds through the malls, or otherwise for the purneas for resulting in extending the normal period of payment for such livestock shell 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' an used in the Act."

That original language is identical to the present subsection (o, except that the pinness "through the mails" was changed to "an hearin provided" (* U.S.C. § 2200cls) after additional provisions provided provided (* U.S.C. § 2200cls) after additional provisions provided (* U.S.C. § 2200cls) after additional provided provided (* U.S.C. § 2200cls) and (* U.S.C. § 2200cls) are provided in the provided provided province in language was utilizately enacted (with the insignificant change noted) is of particular importance since, as show below, the original language was proposed for the express purpose of prohibiting packers from delaying the check collection process by writing checks on remote delaying the check collection process by writing check on remote delaying the check collection process by writing check on remote delaying the check collection process by writing check on remote delaying the check collection process by writing check on remote delaying the check collection process by writing check on remote delaying the check collection process by writing check on remote delaying the check collection process by writing check on remote delaying the check collection process of the collection process of the collection process.

[&]quot;Amend Packers and Stockyards Act of 1821: Hearings on H.R. 8410 and Related Bille Before the Subcoven. on Livestock and Grains of the House Comm. on Agriculture, 94th Cong., 1st Sees. 9-10 (July 12, 28 and 24, 1975) [hereimafter cited on House Hearing).



Following House Hearings on H.R. 8410 and Related Bille 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:

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 transfor 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 Subcemmittee, 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. 12872 (1976), is also set forth in H.R. Rep. No. 1948, 84th Cong. 3 Res. 2-3 (Apr. 1. 1976).

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:

¹⁸ Comm. on Agriculture, U.S. House of Representatives, 94th Geog., 2d Secs. chainess Meetings on Fachers and Stockyards Act of 1921, As Amended 18 (Commune Dec. 1976) [hereinefter cited as Business Meetings].

¹⁹ The revised version was the version proposed of the House Business Meetings by Representative Hightower on March 31, 1976, except for a few minor change (Business Meetings, supra note 18, et 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.

"the Netwithstanding the provisions of paragraph (a) of this section and subject to such terms and conditions on this Selectedary may presentle, the parties to the purchase of the paragraph of the parties of the purchase such paralless or such, 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 desder selling the livestock, and in the purchaster than the paragraph of the parag

"(ii) Any delay or attempt to delay by a market agency, dealer, or packer purchesing livestock, the cellection of funds as harein 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 Ack. Nothing in this section shall be desured to limit the meaning of the term 'unfair practice'

Under the version just quoted, which was the version discussed in H.R. Rep. No. 1043, 94th Cong., 2d Sess. (Apr. 14, 1976), and debeted in the House on May 6, 1976, mailing a check would have been prohibited unless the parties agreed to such payment under

¹⁰ The word "egent" was subsequently changed to "representative."

subsection (b).21 However, during the House floor debate on May 1976, Representative Hightower offered an amondment to perthe 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 as payment at the point of transfer of possession, as heroin 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 won "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, 84th Cong., 2d

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, 870 U.S. 405, 411 (1962), A "page of history," when

hrough the mails." (This resulton also prohibits payment by e dreft.)

1 The west "daim" was utilizately changed to "receive."

at Since payment by mail would not have been permitted by this version (except by special agreements it was no longer appropriate to prohibit any delay "through the malls or otherwise, which is the phrase used in the sarlier versions of HR. 8410. Hence the parase "as herein provided, or otherwine" was nulnetitated for

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 1976 bankrupty of American Beef Packers, Inc., which went bankrupt leaving producers in 13 States unpaid for a total of over 850 million in livestock sales. As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1048, 94th Cong., 24 8ess. 5 (Apr. 14, 1976):

Between 1888 and early 1975 167 packers failed, keving livestock produces unpiled for owe \$84 million worth of livestock, by far the largest of such failures was that of livestock, by far the largest of such failures was that of a largest livestock, and the largest of livestock and the largest livestock and the largest livestock asids. Of particular concern to the livestock producers in the listance was the concern to the livestock producers in the listance was thas the listance was the listance was the listance was the listanc

As of July i, 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, sevoral States, including Kanses, Oklahoms, and Taxes, have enacted laws subjecting packers to strict prompt payment requirements.

USDA figures show that in 1973 sems \$13 billion worth of livestock and \$4 billion worth opultry were marketed in the United States, representing approximately one-third of all farm income. Livestock is probably the single most income to probe the single most income to the sing

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 dereited in our responsibilities to the American people if we failed to address the cvila 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 Senata 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 &

The most packing industry is, of course, an integral part of our Nation's agricultural marketing system. What is needed to prewnit fluture 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 as restrictive as to reduce competition in the livestock slaughtering business. H.R. 8410 accombilates this dual obsective.

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. 18,887 (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 bunkrupty of American Beef Packers, Inc., was repeatedly referred to in the Senate (Inu. 1), 1976 and Hose (May 6 and Aug. 80, 1976 debates on the 1976 amendatory legislation (II 20. 1986,

Without this legislation, sales of livestock to meatpacking firms would have continued without adequate assurances of payment—se was the case lest year when a major Midwestern meatpacker went bankrupt while many of our cattle producers were left holding över \$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) (emblass 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 18 Blasta. Jona and Nebraska were the hardest hit. The catastrophe cost people in these two Bates 182 million at a time when they were already besieged by bad weather and low prices. Like a bilazard or a drought, this disaster was audien and devenation; Ferlivestick; producers and businesses it hit could do little survey than 1975 prices and a state significant of the producers and businesses of the country of the survey of the state of the state of the state of the lapse of one of the Notion's 10 largest packers—American Bed? Psicters. In c. of Omnha.

The producers damaged by the failure of American Bied were not speculators. They had self breached for cash, expecting to be paid. More than 1 year laker, many producers producers producers produced by the paid of the failure of the producers produced by the paid of the producers of the producers of the producers and Stockyards Administrations sent the Congress or specific asson functional and disturbing conclusions. Disciplina and callions disregard for the livestock framework of the producers of the producers

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, 1978) referred to by Senator Clark. The report states (id. at 6):²³

STIMMARY

The following [five] practices were engaged in by ABP and Beefland with the overall result of imposing a \$20 million less on the livestock community:

(1) The deliberate use of distant bank accounts to create an unreasonably large fleat which resulted in more livestock producers not being paid.

Senator Dols, who supported H.R. 8410 122 Cong. Rec. 18,832 June 17, 1976), also referred to American Beef Packers' "munipulation 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

²⁵ Remandant complains that it was deprived of the right to cross-examine with respect to this report. But there is no right or need to gross-gramine with respect to legislative fects, as distinguished from adjudicatory facts. In re Speight, 33 Agric Dec. 280, 313 (1974). It is settled that opportunity for cross-exemination is required "if but only if adjudicative facts are in dispute." Devis, Administrative Law Treatise § 7.04, at 328 (1970 Supp.). See also, Davis, Administrative Law Treatise §§ 15.02, .03, 46, .08, .10, .12, .14 (1958 sed 1970 Supp.). The Packers and Stockyards Administration report is relevant here only to show what the Peckers and Stockwards 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 hero in the semerks by Senstor 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. 1632 and S. 2024 Before the Subcomm. on Agricultural Production, Marketing, and Stabilization of Prices of the Senate Comm. on Agriculture & Forestry, 94th Cong., 1st Sees, 29 (July 19 and 25, 1975) [horeinnfler illed as Senate Hearingeli

bankruptcy, caused nearly 1,000 farmers to hold worthless checks amounting to over \$20 million last year.

Ropresentative 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 Peckers 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 innovidege of the producer.

For example, American Beef maintained bank accounts in Scattle, Wash., and Salem, N.C., to increase the float time for clearing checks. Obviously this float worked to anhance 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 definitely 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. 12,882 (May 6, 1976): Next, here is a prevision in the bill, and I suppose it is the most controversial in the bill, about prompt payment. There have been great delay in the payment. Some of the packing companies have been proving by issuing starts on a bank. If they are doing business the reason of Olivies, been a supposed to the part of the part of the part of the suppose, if they are doing business out there, they given adult on a bank in Tallahassen, Fla. But, they have given draft on a bank in Tallahassen, Fla. But, they have given draft on a bank in Tallahassen, Fla. But, they have given draft on a bank in Tallahassen, Fla. But, they have given draft on a bank in Tallahassen, Fla. But, they have given draft on a bank in Tallahassen, Fla. But, they have given draft on a bank in Caule some time to

Similarly, Representative Hightower, a supporter of H.R. 8410 (122 Cong. Rec. 12,888 (May 6, 1976)), referred to the practice of packers writing checks on remote banks. He stated (122 Cong. Rec. 12,878 (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 enlowed 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 legiislative reports and floor debtack; the congressional hearings and business meetings relating to the amendatory legislation were filled with references to check and drafts drawn on remote bunks, and the need to enact prompt payment previsions to remocy that

At the shalp 28, 1976, seasion of the House Subcommittee on Livesche and Grains barrings, Mr. B. H. Jones, then Executive Viso-Predetent of the National Livestock Perdeter Association (NLFAA) which is presently the Alministenter of the Packers and Stockyards which is presently the Alministenter of the Packers and Stockyards atheritate a prepared statement on behalf of the Alministenter of the NLFA and was ultimately enacted, and the Alministenter of the NLFA and was ultimately enacted.

Mr. Jones, on behalf of the NLFA, testified as to the original two-sentence version of the prompt payment provision (which is

Millle v. United States, 719 F.2d 1249, 1252-53 (7th Cir. 1983), cert denied, 104 S. Ct. 374 (1884); Young v. TVA, 936 F.2d 148, 147 (8th Cir. 1979), cert. denied, 445 U.S. 382 (1898).

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 peyment 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 looperdizes the position of the livestock seller, as was vividly demonstrated in the case of American Besf.

American Besf 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 Colorum plant on a bank in Greenville, Nerth 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 heen 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.

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action in Colorado Michaelle

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.

Hence the livestock organization (NLFA) that had the origin; prompt payment language introduced (which is now identical to subsection (c), with one trivial change) referred to the prompt pay ment section as a section directed against the practice of "Extention of the control of the cont

Similarly, during one of the House Subcommittee's business meetings held on February 6, 1976, which was considering the ide tical language of the prompt payment provision discussed by Mr Jones on behalf of the NLFA, Mr. Imhof, counsel to the House Seb committee, explained that the provision "attempts to get at the problem of the float,"ze Business Meetings, supra note 18, at 38.

The NLFA was not alone in recognizing the need for prompt pay ment 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 propared 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 Bankrupt cy 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

as As shown above, the original two-sentance prompt payment provision reserved to any delay or otherspe to delay the "collection of funds through the mails, or other eruses while the final variate (now subsection (s) refers to any delay or attempt to delay the "collection of funds as herein provided, or otherwise" (7 U.S.C. § 278bct. The words "se birein provided" were more appropriate for the final version than "through the mails" aloos 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 intendicent change as completely emerculating the prohibition against "En tending Float Time" which was the major purpose of the original language. ** Mr. Imbot was discussing Committee Print No. 2 of H.R. 8410 dated February

^{5, 1976,} which as above above, had the same conclusing language as the original two embases proposal, but was preceded by other language requiring the buyer to transmit or dallier payment by the next day, in the absence of an agreement to the

chain which allow, and in fact encourage, situations such as this to occur.

For example: Once a feeder sells his absulptice cattle to produce, several things happen: First, the trucks pull in, load the cattle, take them to the absulptise/house, and three of tear days or a week later, a booker of entil in mailed. The control of the cont

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 such seller of cattle receives collected fuse after the sele, the cattle industry is losing some 89-10 thousand per day in interest. It is grossly unfair to hat thousand per left in 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):

 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 1976 before the Subcomittee on Agricultural Production, Marketing, and Stabilization of Prices of the Senate Committee on Agriculture and Forestry on the problems unonversed as result of the bankrupty of American Biest Packers, Inc., and on proposed legislation to correct those problems. Numerous withoses testified to the need for and destribuilty of serfagent statutory, requirements providing both for prompt pay-by packers of banking practices acclusitated to shape the collection of funds (Senate Heistings, supera note 230, size. Senator Clark at 13, prepresentative Prices at 259, trees the Control of the Control of the Senate Heistings, supera note 230, size. Senator Clark at 13, prepresentative Prices at 259, trees control of the Senator Clark at 13, prepresentative Prices at 259, trees control of the Senator Clark at 13, prepresentative Prices at 259, trees the Senator Clark at 13, prepresentative Prices at 259, trees the Senator Clark at 13, prepresentative Prices at 259, trees the Senator Clark at 13, proposed the Senator Clark at 13,

Albors, Jr., Fresident, Nebruska Livestock Feeders Associations 186-871, John K. Blythe, Kanssa Form Bureau at 101; Jacob L. Edds, 186-871, John K. Blythe, Kanssa Form Bureau at 101; Jacob L. Edds, 186-871, John K. Blythe, Kanssa Form Bureau at 101; Jacob L. Edds, 186-871, John K. Blythe, M. Livestock Feeders Association at 185. See, also, Ribort Louisborty, New Section of Agriculture of Afficient and 41; John Greig, President, Isowa Cuttlemen's Association at 85; Klossid Curres, Nebraska Farm Bureau at 129, Dao Guillième, Martin Konig, Director, Stath Dakota Bapartsonut of Agriculture at 144; and 184. Director, Stath Dakota Bapartsonut of Agriculture at 144; and 184. Black.

From the foregoing legislative history, it is clear that responseont's argument, i.e., that subsection (c) does not prohibit dellying tacides such as writing checks on remote banks, ignores the numb threat of the legislative concern (as revealed in the Houses Roport, the Sonate and Pouse floor debates and hearings, and the House Basiness Meetings) that prompted enactment of the 1976 prompt payment legislative.

Additional legislative history not relating specifically to delay caused by cheeks written on remote banks also demonstrates the subsection (s) of the prompt payment legislation was orincted is impose additional requirements on bayers, and was not Caro to tended by respondent) merely intended to state that fullure is comply with subsections (a) and (b) is unlawful.

For example, during the discussion of Representatives Hightower's amendment, which is the amendment that porzunits the mailing of a check if the seller is not present, Representative Highdower stated that postdating a check would violate subnection of the other prompt payment provision. He stated (122 Cong. Recc. 12,874 (Mar & 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 postclating a check would not be a violation of the intent of section 409(a).

Mr. Highrowes, Yes, paragraph (c) of that section says that any delay or attempt to delay by a market agency would be an unfair practice.

Mr. Myses 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. Highrower, It is.

Mr. Myers of Indiana. And, therefore, would be an illegal act?

Mr. Highrower. 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 priorio" (222 Cong. Rec. 18,838 (June 11, 1970). The language Senator Helms was referring to in the language of subsection (of clause 2 discussed 400-001, Insidiction, Representative Engelore explained than the prompt market agencies have attempted to stall the collection of funds through a variety of delaying practices" (122 Cong. Rec. 12,870 CMW of, 1976).

From the foregoing, it is clear that subsection (a) was intended to prohibit a variety of delaying taction, such as postdating a check or writing an insufficient funds check. Under respondent's interpretation of subsection (a) estible of these precisions would be prohibited on, or would any other delaying tactic be prohibited as long as the purchaser dropped a check in the mall within the time limit specified in subsections (a) and (b). Respondent's a classification of the contraction of the contractio

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 intended to eliminate 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. 18,882 (June 17, 1976)):

While I strengly support the bill, I am concerned that the prompt paymant provision, section 7, may smack a bit of legislative overikli 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 réquirement places such a heavy burden on the packing hidustry 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 pay-

However, Senator Dole disagreed with Senator Helms, and stated that "I true that in the operation and implementation and administration of this legislation, and have overally [122 Cong. Rec. 18,83 (June 17, 1976)]. But, in of have overally [122 Cong. ment is of no weight in interpreting the desirate since he was speaking in favor of a namendment that only in favor of an amendment that use of the senator in the senator of the senator in the senator of t

Beoproduct also rules on Depresentative Pages's showness made in the Bisses fore delates that "I begs that the membership will keep bit a bill to protect the sellem of Irwatcke rules are less than 10 miles." I sell bearing 10" (120° Com, Ec. 12876 May 4, 91°00. May 10" (120° Com, Ec. 12876 May 4, 91°00. May 10" (120° Com, Ec. 12876 May 4, 91°00. May 10" (120° Com, Ec. 12876 May 4, 91°00. May 10" (120° Com, Ec. 12876 May 10") (

The pecker 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. 18,838 (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.

Similarty, Senator Huddleston, Chairman of the Subcommittee on Agricultural Production, Marketing, and Stabilization of Prices, after referring to the 320 million tose caused by the bankruptcy of American Beef Packers, stated (122 Cong. Rec. 18,824 Quine 17, 1976). This situation must be corrected. The risk livestock selfors 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 HR. 8410 is our best essurance 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 0.0 or 0.0 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., filled 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 smended 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." "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 curias 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 455, 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); amphasis added). This shows clearly that Congress did not mean for the prohibition in subsection (c) to apply only to inten-

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 preearned to intend the natural consequences of its conduct, and the natural consequence of respondent's use of Controlled Distursement Account checks is delay (Findings 11-28) Respondent's President admittedly studied Omeha 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 distursement flost 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 Dishursement Account checks are a lawful business practice used throughout the nation. Fren 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, lives stock producers and sellers need the unique protection provided by the 1976 ground neuronal provision.

Although it is irrelevant whether Controlled Disbursement Account checks violate Federal Reserve Board policy or Federal Daposit Insurance Corporation policy, Controlled Disbursement Account checks present problems under the policies of both agencies (Findings 28–28).

As atated 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 unsefe and unsound banking practice existed" (Finding 26).

In addition, on January 11, 1979, the Pederal Reserve Board issued a press release discouraging the use of remote distaursment checking accounts. The Vice-President of the Pederal Reserve Bank of Kansses (Use did not know whether Ornahs National Bank's Controlled Disbursement Account program violates that policy statement, and, therefore, the validity of Ornahs National Bank's Controlled Debursement Account program is at least questionable, under the Board's January 11, 1979, policy statement, (Finding 87).

Furthermore, Omahe National Bank's Controlled Diskursement, Account program seem clearly contrary to the Potenta Reserva Board's Bristonary 25, 1984, policy statement, which disapproves of Board's Bristonary 25, 1984, policy statement, which disapproves of the checked by a least seed of "Climing 250. Omahe National Bank's Controlled Diskursement Account checks increase the collection for presponders' deached by a full sign most instances (Principa 23). Breace Omaha National Bank's Controlled Diskursement Account and Controlled Controlled Diskursement Account and Controlled Controlled Diskursement Bank as stated above, it is totally irrelevant in this case whether or no domah National Bank's Controlled Diskursement Account program violations the Reserva Bank's Diskursement Account program violations the Reserva Bank's Diskursement Account programs violations the Account programs vio

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 unzeasonable

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 "falmy 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 whother 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 Diebursement Account check which delays the check collection process violates the Act irrespective of when the

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, prohibite 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

BEEF NEBRASKA, INC. Volume 44 Number 7

against "[a]ny delay" in subsection (c).28 lrrespective 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 it use of Ormaha National Bank's Controlled Distursment Account program, the delay is not necessarily among the controlled Distursment Account program, the delay is not necessarily among the controlled Cont

The legislative history shows that Congress was told that a delay in the check collection process is damaging to livestock sellers since in it increases the risk of loss to livestock sellers in the event of a packer's backruptcy, and (ii) it denies livestock sellers of interest on their most for the period of the delay, if respondent can show

³⁸ In addition, a packer has no elucation "right" under the Act to mail or deliver as checks on the day after purchase. The legislative history of the prompt payment legislation shows that Congress intended for the seller, rather than the layer, has the both as the layer should be sended. When Regressmattler Hightoner introduced his emendment permitting payment by mail, he explained (122 Cong. Res. 1237 610 Mer. 5 1700).

Mr. Ceairman, first of all, we think it is important to emphasize that the seller, the preducer, if he is there and wants cash payment, is entitled to each payment.

Sensior Huddleston, in apposing an amendment offered by Sensior Huddleston, in apposing an amendment offered by Sensior Hulms Subsequently defeated that would have given packers the absolute right to mail a check (122 Cong. Rec. 18,893 (1976)); Astated (122 Cong. Rec. 18,938 (1976));

However, I must oppose the amendment that is being offered by the Senstor from North Carolina, basically on two points.

First, it takes from the celler 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 lossens up the process in favor of the purchaser.

Senate Clast kindlely opposed Senater Helmi amendment "houses it would take the option of the opposed School be made way free the sales and give it to the peach" (IEE Orang, Ros. 1884 Gross 17, 1976). Other Bayesenstatives and Senaters aimlaist versopation that appears options under the prompt jay fightedion rast with the salest (IEE Orang, Ros. 1889, 1826-17, 1889, 1889, 1889, 1870). The record here above the image of remodered checks are "plaided up without 50 the feeder," the selfies, the selfies, the selfies, the selfies, and produced the check are selfies, the selfies, the plain, or by the defree! (Tr. 1889 64, 1889, 1889, 1889, 1889).

that those legislative facts are not applicable to responsion, behald seek compressional exemption from the promety properties of the second seek control of the promety properties of "flow delict" in "the collection of funds" ("U.S.C. (agrees probable of "flow) delicy" in "the collection of funds" ("U.S.C. (228))(and the legislative history shows that Congress intended by the agreement of the control of the

Respondent argue that complainant should have proceeded in formal relamnshing rather than by an adjudiency proceeding. But formal relamnshing rather than by an adjudiency proceeding, but it is primarily within the discretion of the admitted proceeding or case by case. ** (Robert M. Budd, Chief of Complainant's Livestock Procurement Branch, testified that the agency foll that the Act was sufficiently explicit without a rule, but that, in any overall, and the sufficiently explicit without a rule, but that, in any overall the proceeding of the process of the sufficiently explicit without a rule, but that, in any overall the process of the sufficiently explicit without a rule, but that, in any overall the was sufficiently explicit without a rule of the sufficient process of the sufficient of the sufficient process of the sufficient process of the sufficient process of the sufficient of the sufficient process of the suf

Respondent compilities that it was desired discovery, but saither the Pickers and Stockyrals Act (7 U.S.O. 188 of eq.) nor the Rules of Practice (7 GFR § 11.00-151) perceive for explore the Rules of Practice (7 GFR § 11.00-151) perceive for explore the Practice of Core (1 to 10.00-151) perceive for explore the Practice of Core (1 to 10.00-151) and a Core (1 to 10.

Iven it discovery were somitable under the Packers and Stockyeria Act, it would not be reproported here. This is a case in which respondent admittedly use the Disbursement Account Account hockets to spy for its livestock. The only of the case in the volves a question of stationy interpretation. In this case inved and have been appropriate here. In any event, however, would not have been appropriate here. In any event, however, the proposed of the control of the control of the control complainate case, including copies of all exhibits, a list of wit-

[&]quot;M.R.B.", Bull Accepted Co., 415. US. 237, 280-56 (1974); N.R.B. v. Wysner. Gerden Co., 100, 114. (1985), SEC. v. Chenery Gerp., 382 U.S. 104, 190-500; U.H.T. Colarid A. J., 100, 1014 (1985), SEC. v. Chenery Gerp., 382 U.S. 104, 190-500; inc. v. Rogriand, 190, 192-7424, 77, 1014 (1614), cert. decided, 484 U.S. 4014 (1914), cert. decided, 484 U.S. 495 (1914).

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 full hearing, is dismissed as [the July July 2].

OBDER

Respondent Boof Nebruska, Inc., its officers, directors, agents and employees, directly or through any ecorprate or other dovice, in connection with its operations as a pocker, shall cease and desist from issuing cleakes in paymont for livestock drawn on remote, distant, or country accounts, including any account with State Bank of Pelmer, Planner, Nebruska, for the purpose of resulting in oxtending the time necessary to collect such cheeks, 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 Mourt Auburn Livestock. P&S Docket No. 6609. Decided Docombor 2, 1985.

Dealer—Market ngency—Pallure to pay or to pay when duc—insufficient funds

Wesley II. Huisings, Waterloo, Iowa, for respondent.

Decision by William J. Weber, Administrative Law Judge.
DECISION

This proceeding was instituted under the Prockers and Stockyand Act (* U.S.C. 181 as eap; by a Complain filled by the Administrator, Packers and Stockyands Administration, United States Department of Agriculture, alleging that the financial condition of the respondence of complaints of the Act and that the respondence willing violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice equilibrium of the Rules of Practice equilibrium to the consent decision provisions of the Rules of Practice equilibrium to the consent decision provisions of the Rules of Practice equilibrium to the

The respondent admits the jurisdictional allogations in paragraph to the Cemplains and specifically admits that the Servetary has jurisdiction in this matter, notitor admits nor denies the remaining allogations, survise oral hearing and further proceeding, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

sented.

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 52318 2. Respondent is, and at all times material herein was:
 - a) Engaged in the business of a dealer buying and selling live-
- stock 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 pro-

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. to hear all raight apply of motors and apply

LOUIE W. ARGOE Volume 44 Number 7

In re: LOUIS W. ARGOS. P&S Docket No. 6618. Decided December 10, 1985.

Dealer-Bonding requirements-Prohibited from operating subject to the Act-Civil penalty-Concept.

Stephen Luparello, for complainant.

William S. Robinson, Columbia, South Carolina, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

This proceeding was instituted under the Packers and Stockyards Act (U.S.C. § Bl. et eap.) by a complaint filled by the Administrator, Packers and Stockyards Administration, United States Deparnent of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (0 CFR § 2011 et e.g.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.188).

The respondent admits the jurisdictional allegations in paragraph of the complaint and specifically admits that the Secretary has jurisdiction in this matter, seither admits nor denies the remaining allegations, waives ord 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

- Louie W. Argoe, hereinafter referred to as the respondent, is an individual whose business malling address is Route 2, Orangeburg, South Carolina 29115.
 - 2. The respondent is, and at all times material herein was:
- (a) President of Argos 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 Argos, 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)), re-

spondent is assessed a civil penalty in the amount of Three Hundred and Fifty Dollars (\$350.00). The provisions of this order shall become affective 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-Fallure to pay when due-Civil penalty-Con-

Peter Train, for complainant. Respondent, no es

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AS TO DIRECT MARKET MEAT CO., INC., AND GERALD the other medical field and a 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 pursuant to the consent decision provisions of the Rules of Practice epplicable to this proceeding (7 CFR § 1.138).

Respondent Direct Mest Co., Inc. and Gerald Neshring sdmit the Unrisiditional nilegations in paragraphs I and II of the Complaint and Notice of Hearing as they pertain to them and specifically admit that the Secretary hes jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and Unricher procedures, and concent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this desistant.

The complainant agrees to the entry of this decision.

- FINDINGS OF FACT

 1. Direct Meat Co., Inc., hereinafter referred to as the corporate reapondent, is a corporation whose business mailing address is 11564 Gondol 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.
- Gerald Nachring and Lewrence J. Amann, hereinafter referred to as the individual respondents, are individuals whose business mailing address is 11564 Gondola Drive, Cincinnati, Ohio 45241.
- The individual respondents at all times material 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.
- 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 Nachring having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

2450

Respondent Direct Meat Co., Inc., its officers, directors, agents, and employees, and respondent Gerald Nachring, 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:

 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 precented:

2. Failing to pay, when due, for livestock purchases; and

Failing to pay for livestock purchases.
 In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Gerald Nashring 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—Fallare to say when sluc—

Robert Swartzendruber, for complainant.

Surpersion-Default.

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 Stockyarda Act, 1921, an annedde and supplemented (*U.S.C. § 181 ct eq.), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, Jinted States Department of Agriculture, charging that the repondent wilfully volated the Act and the regulations promulgated hereunder (9 CFR § 201.1 et sept.)

Copies of the complaint and Rules of Practice (7 CFR § 1.130 or ecy joverning proceedings under the Act were served on the re-pondent by certified mail. Respondent was informed in a letter of ervice that an answer should be filed pursuant to the Rules of 'ractice and that failure to answer would constitute an admission fail the material allegations contained in the complaint.

JAMES McGUINNESS Volume 44 Number 7

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.

an answer, are adopted and set to live in least of the This decision and order, therefore, is issued pursuant to section 1.189 of the Rules of Practice (7 CFR § 1.139).

PINDINGS OF FACT

- (a) James McGuinness, doing business as McGuinness Livestock, hereinafter referred to as the respondent, is an individual whose business melling 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 heals.
- 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 company in contrast the contrast transaction of the purpose of the contrast transaction of the contrast transaction of the purpose of the contrast transaction of
- (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 \$189,618.18 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 hersin, respondent has wiffully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

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

- 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:
 - Falling to pay, when due, for livestock purchases; and
 Falling 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 GPR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final December 11, 1985.—lot.]

In re: Dubuque Packing Company. P&S Docket No. 6529. Decided December 13, 1985.

Packer—Cease and dealst from giving or offering money or any gift or gratuity to or for any customer to influence purchases—Cease and dealst from soliciting or accepting favored treatments—Maintaining records that fully disclose details of all payments and gifts—Civil penalty—Content.

Peter Train, for complainant,

James M. Kefauver, Washington, D.C., for respondent.

Devision by Dorothea A. Baker, Administrative Law Judge,

DECISION

This proceeding was instituted under the Pubers and Stockyaria Act (U.S.G.) \$18 to \$40. her high referred to an the Act, by a Complaint and Notice of Hearing filled by the Act built of the Act, by the can difficulty and Administration, United States substitute, Agriculture, alleging that the respondents wilfully volted the Act, Agriculture, alleging that the respondent wilfully volted the Act, and the Act of the Ac

Respondent Daksquis Packing Company admits the jurisdictional allegations in paregraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary his jurisdiction in this matter, incline and the secretary has jurisdiction in this matter, incline and further procedure, and consents and agrees, for the purpose of cettling 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

 Dubuque Packing Company, horeinafter referred to as reapondent 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. Reprondent Dubuque is, and at all times material herein was: (a) Engaged in the businesse of buying livestock in commerce for the purpose of slaughter, and of manufacturing or preparing means or ment food products for sale or ehipment in commerce and (b) A packer within the meaning of and subject to the provicione 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 entaged.

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 prespective customer as an indocement to influence such persons to purchase or promote the purchase of meat, meat food products, poultry or noultry morduse from reacondom!

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 efficer, 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 outliver products from rescondent and

8. Making or offering to make brokarage commission or mechandising 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 noultry products including, but not limited to, the following:

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 transac-

tion 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 208(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.

1 PK: SIMPSON LIVESTOCK COMPANY. P&S Decket No. 6548. Decided October 30, 1985.

Desice-Market agency-Bonding requirements-Cease and desist from business for which bonding is required under the Act—Civil penalty—Default.

Thoron 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 f CFR § 1.180 et seq.) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was

SIMPSON LIVESTOCK COMPANY Volume 44 Number 7

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 proscribed 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

- (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 solling 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 heads.
- 3. The Packers and Stockyards Administration notified responds not on April 16, 1986, that the wavely hond it aministant to secure the performance of its livestock obligations under the Act was inadequate, and that it was necessary to file a bond re hond equivalent in the amount of \$15,000.00 before continuing in dealer or markers. Respondent was not an expectate bond coverage or large continuing in dealer or markers and the second of the continuing in dealer or markers and section \$2.00 and \$2.13.00 of the Act and sections \$2.00 and \$2.13.00 of the Continuing Continuing and the continuing 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 matter again resultant and a section \$2.00 and \$2.00 of the Act and the regulations are 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.

sgents and employees, successors and assigns, directly or through any corporate or other device, shall coses and denist from engine in business in any capacity for which honding is required under the Peckers and Stockyards Act, as memeded and supplemented, the the regulations, without filling 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 seg). [This decision and order became final December 13, 1985.—Rd.]

.A re. ALLEN H. RIFFEE, P&S Docket No. 6477, Decided December 16, 1985.

Dealer—Market agency—Fallure to properly weigh lirestock—Paying on the busis of false or incorrect weights—Fallure to maintain and operate scales to insure accuracy—Bonding requirements—Suspension—Consent.

Stephen Luparello, for complainant.

Arthur G. Canhiotts, Woodstock, Virginia, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DRUSION

This proceeding was instituted under the Packers and Stockyards

Act (T U.S.C. § 181 et eq.) by a complaint filed by the Administrator, Packers and Suckyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 2011. et eage.). This decision is entered pursant to the consent decision provisions of the Rules of Practice applicable to this preceding (7 CFR § 31,180). 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

- Ailen H. Riffee, hereinafter referred to as the respondent, is an individual whose business mailing address is Route 2, Box 470, Edinburg, Virginia 22824.
 - The respondent is, and at all times material heroin was:
 (a) Engaged in the business of a dealer buying and selling live-
- (a) Engaged in the business of a dealer buying and sening liveatook in commerce for his own account; and (b) Engaged in the business of a market agency buying live-
- stock in commerce on a commission basis.
- 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;
 - 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 201.78-1 of the regulations; and
- 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 it full compliance with the bending requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bending 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 LIVESTOCE EXCHANGE, INC., and CHARLES W. POEPPEL-MEYER, JR. P&S Docket No. 6517. Decided December 19, 1986.

Market agency—Dealer—Bonding requirements—Suspension—Connent, Stephen Laparello, for complainant.

Devald Rhodes, Biosmfield, Missouri, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act U.S.C. 818, let etc.) by a complaint filled by the Administration, Packers and Stockyards Administration, United States Department of Agriculture, alloging that the respondents witfully violated the Act and the regulations issued thereader (0 CFR § 20.1. et sec.). This decident is entered pursuant to the consent decision provisions of the Rules of Precitice applicable to this proceeding of CER 5.138.

The respondents admit the jurisdictional allegations in purngraph I of the complaint and specifically admit that the Sensetry has jurisdiction in this matter, neither admit nor deep the remaining allegations, waive our 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

 SEMO Livestock Exchenge, 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 63826.

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

 (a) Engaged in the business of buying livestock on a commistion 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.

 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. Peoppelmayer, Jr., directly or through any corporate or other device, in connection with their business subject to the Act, shall cesse and desist from engaging in business in any capacity for which bonding is required under the Act and the requisitions without filling and maintaining a resonable bond or its equivalent, as required by the Act and the regulations.

The respondents are suspended as registrants under the Axt for a period of sixty (60) days and thereafter until such time as they comply fully with the bonding requirements under the Axt 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 excitation of the sixty (60) day seried.

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. FRAME

HARING. P&S Docket No. 6583. Decided December 19, 1985. Packer-Fallure to pay when due-Fallure to pay full purchase price-Civil penal. ty-Consent.

Dennis Backer, for complainant. Richard R. Fowler. Manufield, Ohio, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockwards Act (7 U.S.C. § 181 et seq.) by a Complsint 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 asttling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF PACT

- 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 mesning 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
- (s) 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 entared.

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 desixt from:

 Failing to pay, when due, the full purchase price for meat and meat food products; and

 Failing to pay the full purchase price for meat and meat food products.
 In accordance with section 208(b) of the Act (7 U.S.C. § 198(b)), respondent J. Frank Haring is assessed a civil penalty of Two Thou-

sand 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.

Comes 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-

Barbara Harris, for complainant. Respondent, pro sc.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (T 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 pureaunt to the consent decision provisions of the Rules of Practics applicable to this proceeding (7 CFR § 1.188).

The respondent admits the jurisdictional allegations in pregraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining sliegations, 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.

PINDINGS OF FACT

 Lee Breitsprecher, d/b/a Two B Cattle Co., hereinafter : ferred to as the respondent, is an individual whose mailing address is Box 1781, Billings, Montana 59103. Respendent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock it 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

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 live stock: 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

Respondent is suspended as a registrant under the Act for 21 dava

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 Grest & Sons, Inc. P&S Docket No. 6484. Decided December 26, 1985.

Dealer-Drugs administered to livestock-Civil penalty-Consent.

Jory Hochberg, for complainant.

Keith Kostecher, Wausau, Wisconsin, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards AG (U.S.G. \$181 te seq.) by a Compaint field by the Administrator, Packers and Stockyards Administration, United States Departture of Agriculture, alleging that the respondent willing! violated the Act and the regulations issued thereunder (9 CFR \$201.1 or eag.). This decidies is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR \$1.180).

The respondent admits the jurisdictional allegations in pargraph lof the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the renaining allegations, walves 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

 (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. Marrill, Wisconsin 54452.

(b) Respondent Van Der Geest is, and at all times material

 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:

 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 materiating or alsaquiter of livestock, that drugs have not been administered to livestock, or that if drugs have 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 increase.

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, administoring 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 Decket No. 6633, Decided December 26, 1985.

Dealer.—Failure to pay when due.—Failure to pay full purchase price.—Insufficient funds checks.—Prohibite from engaging in business under the Act.—Consent. Thanca Heia, for complainant. Respections, pro as.

Decision by John A. Campbell, Administrative Law Judge.

This work as The 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 Administration, 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 apnliable to this proceeding (7 CFR 8 1.138).

This respondent admits the jurisdictional allogations in paragraph of the Complain and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allogations, service 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

- 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.
 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 surged.

OBDAB

Respondent, individually or through any corporate or other device, in connection with any business or operation subject to the Act, shall case and desist from:

- 1. Failing to pay, when due, the full purchase price of live-
 - 2. Failing to pay the full purchase price of livestock; and
- 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 terminaing this prohibition at any time after the expiration, of 30 days upon demonstration by respondent that all unpud illustration kellors have been paid in full, and provided further that this prohibition may be modified upon ecolication to the Packers and Stockvards

Administration to permit respondent's salaried employment by a registrant after the expiration of the 80 day period of prohibition This order shall have the same force and effect as if ontored after full hearing and shall be effective on the sixth day after service upon respondent.

Conies of this decision shall be served upon the parties.

In re: Buyord "Pete" Watson, Jr. P&S Docket No. 6572. Decided December 27, 1985.

Dealer-Bonding requirements-Failure to pay when due-Prohibited from opernting 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 of seq.). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR

The respondent admits the jurisdictional allegations in puragraph 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 98-1A, 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;

Volume 44 Number 7

(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:

 Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and amplemented, 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 probibited 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 Cattles Company, Sirloin, Inc Elexon Livestock, Inc., and Wesley Van Dyke. P&S Dute

No. 6487. Decided Docember 31, 1985.

Dealer—Market agenty—Misrepresentation of purchase weights and prices—in sufficient funds claricles. Palloys to the control of the co

sufficient funds clacks—Fallure to pay when due.—Suspension—Consent.

Peter Train, for escapialment.

Respondent, pro se. Decision by William J. Weber, Administrative Law Judge.

DECISION AS TO RESPONDENTS DAVID MULSO, DAVE MULSO CAPILE

COMPANY, AND SIRLOIN, INC.

This proceeding was instituted under the Prolers and Stockyan's Act (U.S.C.) \$18 is even by a Compulant fitted by the Administrator, Process and Stockyan's Administration. Under Steast Department of Agriculture, alleging that they are considered to the Act and the regulations issued therrunder 0 CFR \$ 9011.6 e.g. \$2.7 this deciding is entered gravament to the consent of decision previously of the River of

Respondents David Mulso, Dave Mulso Cattle Company, and Siloin, Inc. admit the jurisdictional allegations in paragraph I of the Complaint and specifically dentit that the Secretary has jurisdiction, that the secretary has jurisdiction, with oral hearing and further procedure, and consent cal specifically the proper 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

- David J. Mulso, hereinafter referred to as respondent Mulso, is an individual whose mailing address is 1328 Orchard Drive, Brookings, South Dakota 57006.
- 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) Registered as an individual with the Source of the second of the sec
- (b) Registered as an individual with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.
- 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.

DAVE MULSO CATTLE CO. Volume 44 Number 7

- 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.
 - Respondent Mulso was, at all times material herein:
 (a) Owner, in combination with his wife, of all the corporate
- (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.
- 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 sele owner of the corporate stock.
- 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, menaged 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:

- 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, lnaccurate or misleading weight or price entries for such livestock:
- 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;

 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, invokes, 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 mislated ingresord is made, in whole or in part, of such livestock purchase or sale transaction.

 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;

 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. Boycz. P&S Docket No. 6612. Order issued November 6, 1985.

Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

The Complainate 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 the complaint filed in this matter of the complaint filed in the complaint filed

October 18, 1985, be, and hereby is, dismissed with prejudice.

MISCELLANEOUS Volume 44 Number 7

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 alla, 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,

TI IS HERRENY ORDERUED that the suspension provision of the doorle issued March 16, 1973, is amounded to permit the respondent to operate as a dealer so long as he is cleared by a non-suspendent control of the contro

In re: Gerald F. Upton, d/b/a Degrapp Livestock Sales. P&S Docket No. 6196, Order issued December 4, 1985.

The Judicial Officer ruled on reconsideration that come and deside orders will be based in P&S coses. The Righth Circuit's opinion in Service setting sides a 46-day learned in P&S coses. The Righth Circuit's opinion in Service setting sides a 46-day learned to the Service setting of the Service setting sides and the Service setting in Service setting sides and the Service setting in Service setting sides and set irrespective of evil motive or reliance on errossous selvice, or sets with careless diverged of statistory requirements.

Order issued by Donald A. Campbell, Judicial Officer.

issued for the following reason (slip op. at 84):

RULING ON RECONSIDERATION

On October 2, 1985, the Judicial Officer filed the Decision and
Order in this proceeding in which a cease and desist order was not

Although a cease and desist order has routinely been issued in cases of this nature, I believe that it should be emitted in this case and in future cases where it is now

worthers, in view of the 1978 amendments to the Act, i.e., where there is no reasonable Bishinoth that the Department would seve seek to collect the civil pensity by the Act for violating a cease and desist order (V 19.6. 1918), where the 1976 amendments authorize the Secretary than the Control of the Control of 1976 amendments authorize the Secretary than the Control of 1976 amendments authorize the Secretary than the Control of 1976 amendments authorize the Secretary would see that the Secretary would

On October 15, 1986, complainant filed a petition for reconsideration, contending that cease and desist orders should not be omitted for the following reasons (Petition for Reconsideration at 1-8):

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 penulty 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 to asse involving registrates where the Department might be involved in a court proceeding for stances, see, to obtain an injunction in a bend-violation case, a case and dealer code plant of excellent to be issued aliced the code plant of the instance of the contract to the contract into the Department might wish to obtain by facility in such a proceeding for violation of a prior case and dealer order.

The Administration has three options available to it when a respendent has violated a cose and desid order. It can proceed with a second administrative proceedings it can proceed with a second administrative proceedings it it can proceed better administratively be seen administrative senctions, including suspensions and civil penalties where warranted, as well as through the courts to obtain where warranted is, as well as through the courts to obtain three options in this Administration has exercised all three options in the Administration of the control of three options in the Administration of the Court of the evil ability of all three options conditions an effective and important tool of the Administration in dealing with

Although the imposition of a substantial civil penalty and auspension 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 cesse and dealst from cetain practices provides espetific 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. Cesses and desist orders are freprovides 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 explanation is appropriate as to why I decided to omit cease and desist orders to near of serious trains product to omit cease and edites drawing to near of serious trains product where the Department would not likely seak to collision the modest city length imposed by the Act for violating a cease that the contract of the contrac

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 nurfits

The court agreed "with the JO that allorisation of one of the principal buyers as an active before treated to reduce competition at the Algens asies and, as a result, created a reduce competition at the Algens asies and, as a result, created a requirement of the region of the Algens asies and, as a result, created a requirement of the region of the reduced "only of the reduced" only of the reduced "only of the reduced on the reduced "only of the reduced on the reduced "only of the reduced on t

I disagree with the court's rise. Based on my 85 years' experience with the United States Experience of Agriculture, much of which has been devoted for Excitor and Stockers a

' iditor representing the e a recommendation to and the entire record in

2390

- 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 Packors 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 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?
- 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) (alin op. at 54-55):

Respondents would have to be intredistly naive not to know that their arement visions of the comprehensive Packers and Stockyards Act regulatory are comprehensive believe that they are intredistly naive. But it may even believe that they are intredistly naive. But it may even be an act which is probled a person (in installensity does leased 60 USC, 18th, as that a suspension order can be leased 60 USC, 18th, as the supersion order can be and which is probled a person (in installensity does not act which is probled as person (in installensity does related of antatory reprintenents. In a Robattin, 18th Arell hat y, Olive Little (1978), and cause cited therein. And see hat y, Olive Little (1978), and cause cited therein. And see hat y, Olive Little (1978), and cause cited therein. And see

The Court stated in Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 186-87 (1973):

The Secretary may support "for a reasonable specified period" any repietron who has violated any provision of the Act. 7 U.S.C. 2 which was been advantaged to case of "intentional and flagrant conduct" or case of "intentional and flagrant conduct in the Secretary to compensation, provide an action with the Secretary to impose it to deter repeated with the Secretary to deter repeated with the Secretary to the the

Supension orders have routinely been upheld where a finding of willfulness was made by the Department without finding that the respondant was that his conduct was unlawful. For example, in Goodman v. Benzon, 286 F.2d 896, 900 (7th Cir. 1961), the court uphald season-morder station.

We think it clear that if a person 1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on arroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is willy! Bastern Produce Co. v. Benson, 8 Cir. 278 F 23 Cos. 5

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 fitture case, even in futurcases that will be reviewed by the Eighth Circuit. (Hopefully Farrow is a judicial aberration that will not be reasested.)

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, individually or through any corporate or other device, shall cease and desist from:

 Weighing livestock at other than their true and correc weights;

 Issuing stale tickets, purchase invoices or other accounts o sale on the basis of false and incorrect weights;
 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 false

and incorrect weights; and
5. Falling to maintain and operate livestock scales owned o

controlled by respondent in such manner as to insure accurate 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 payable not later than the 90th day after service of this order, to be paid by certified check made payable to the Tressurer of the United States and mailed to the Assistant General Counsel, Packers and Stock yards Division, Office of the General Counsel, Room 24d-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 on the 80th day after service of this order; Provided, however, that i by any means or device whatever, all or part of the suspension that the supersion of the part thereof not effectively served shall be 0/1 the date fixed by a court of competent pried felton which issues an appropriate order with respect thereto, or 001 upon a showing made by complainant the date subsequently fixed by the Judicial Officer (principleton in the date subsequently fixed by the Judicial Officer (principleton in

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 Compleinant's Answer to Respondent's said Motion.

ODDED

The Respondent's Motion to Set Aside Consent Decision, filed November 13, 1985, is hereby DENIED.

Copies hereof shall be served upon the parties.

filed November 29, 1985, the following Order is issued:

In re: State Wide Markering, Inc., a corporation, Ruety Thomson, an individual, and Lanux Ross, an individual. P&S Docket No. 6588, Order issued December 6, 1982.

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 complainant'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 potition. Complainant filed an opposition on December 12, 1986, 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 U. ELRTON LIVESTOCK, INC., WES VAN DYKE, DAVID MULSO, TRI-STATE LIVESTOCK AUCTION CO., INC. and Paul Den Herder. P&S Docket No. 6129. Jack Broad BROOKS, BOYD BURTCH, SANDRA BRUTCH, DARRYL CRASCO, IREK CRASCO, LUKE CRASCO, MAYNARD CRASCO, ORVILLE JAST CRASCO, WILL CRASCO, DARCIE DONEY, WANDA DONEY, HIS FEWER, JAMES FEWER, LOREN FLADLAND, LARRY HAYNES, RAP MOND HEGLESON, CARL J. IVERSON, BRUCE KIRKALDIE, RAYMONI J. KNUDSON, MEISSNER RANCHES, INC., SHAWN MEISSNER, TH MILLER COLONY, INC., STEVEN PANKRATZ, JACK QUISNO, 804 Gerald J. "Bud" Walse, Admr., Estate of Gerald M. Wolsh: SAME. P&S Docket No. 6167. NOEL CAPDEVILLE D. SAME. P&S Docket No. 6165. CORN EXCHANGE BANK D. TRI-STATE LIVE STOCK AUGTSON CO., INC., ELETON LIVESTOCK, INC., STREOM, INC., DAVID MULSO, and PAUL DEN HERDER, P&S Docket No. 6166. Decided November 1, 1985.

Dealer-Insufficient funds thecks-Dishonored checks-Order for the payment of

The complaints of all parties recogn Corn Rechange Bank aliqued assless of livested to Ricken Livested, No., end receipt of the Rickensor Rev Insufficient forch Complaints Gern Rechange Bank aliqued to the Complaints Gern Rechange Bank aliqued to the Complaints Gern Rechange Bank aliqued to the Complaints of Corn In Complaints (Corn In Complaints, Complaints of Corn In Complaints, Complaints of the Complaints of Corn In Complaints of the Complaints of the Complaints of the Complaints of Corn In Complaints of the Complaints of Corn In Complaints of the Complaints of Corn In Co

John J. Caser, Presiding Officer.
Dasid R. Crary and Craig A. Roby, Sioux City, Iowa.
Deon J. Miller, Caldwell, Maho.
Michael F. Pipless, Sioux Falls, South Dakota.
Sieum W. Sanford, Sioux Falls, South Dakota.

Respondent Strices, Inc., pro se.

Decision by Donald A. Campbell, Judicial Officer.

Respondent David Mules, are as.

DECISION AND ORDER AS TO ALL RESPONDENTS EXCEPT TRI-STATE

LIVESTOCK AUCTION CO., INC. PRELIMINARY STATEMENT

These are four reparation proceedings under the Packors and Stockyards Act, 1921, as amended, begun by written complaints received as follows: from Mr. Arnzen February 1, 1988; from Mr. Broadbrooks and others February 22; from Mr. Capdeville March 7; and from the Corn Exchange Bank March 7. The first three complains alleged in substance sales of livestock to respondent Elkion conditions and the plant of the conditions of the condition of the conditi

Copies of the complaint of Mr. Arnem were served on all repondants named therein or pêrunary 25, 1988. Copies of the complaint of Mr. Broadbrocks and others, and the complaint of Mr. Coplavilla, were served or Bilkton and Wes Van Dybe on March 28, and on the other respondents named therein on March 28. Copies of the complaint of the Corn Exchange Bank were served on Bilkton on March 28, and on the other respondents named therein on March 28.

All respondents except Sirioin, Inc. duly filed answers. No issue was raised about timeliness of any neaver. Beach answer was such on, each party other than the one filing it. A reply was filed on behalf of complainant Arzane on April 12, 1983, which was essent 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. 362a(1) all those 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 litigates turning on the pleadings and prof in their respective proceedings notwithstanding the joint trial. Andur 26 Acrino § 15 for sq. The hearing was 100 per 1 chael F. Pieplow, Ben, Sioux Falls. Respondents Elikton and Van Dyke were expressanted by Seleven W. Sanford, Ben, Sloux Falls. Respondent Den Hende Falls expression of the Control of the Selection of the spondent Den Hende Falls expression of the Control of the M. Butler, and March and Selection of the Control of the Respondent Mules appearance of the Control of the Control of the Respondent Mules appearance of the Control of the Control of the Hende Control of the Control of the Control of the Control of the Institute of the Control of the Control of the Control of the Control of the West later field to on nebasty of all "sections" of the Control of the

As this a written, another siministicity proceeding is pending in the Department (PSB Decks 456); more general of the respondent in these reparation proceedings. Third general of the spondent in these reparation proceedings. Third with the proceedings in which case the proceedings in which case the proceedings in which case the proceedings in which we are represented by private counsel of their own choosing. In the proceedings we have been a support of the perfect of the perfect of the proceedings and the decision therein which will have the brotten of proceedings will be a record believed, for finding in these reparation proceedings, will be them or establishing any fact or as closing may insue in that other

FINDINGS OF PACE

 Complainant Urban "Shorty" Amzen at all times material berein was doing business as Cottonwood Sales Yard, engaged in business as market agency selling livestock in commerce on commission, with a principal place of business at Cottonwood, Idabo, and so resistance 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 Mon-

 Complainant Com 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 axisting under the laws of the State of South Dekota, with a principal place of business at Elkton, South Dekota, organized 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 tim Secretary under the Act.

 Respondent Wee 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.

- Volume 44 Number 7

 G. Respondent David Muleo, Brookings, South Dakota, at all times material herein engaged in business as a dealer buying and salling livestock in commerce either for his own account or as the acent of Elikot.
- 7. Respondent Paul Den Herden, Sioux Centre, Iowa, at all time material harchin engaged in business as a dealer burjug and selling livestock in commerce as the agent of Th-State of which he was compostion engaged in business as in market agency sulling and selling in the selling and selling in the selling and selling in the selling
- wise stated.

 9. At all times material herein Elkton had current liabilities in excess of its current sasets and, when livestock was obtained in its mans and by issuing checks on the Elkton checking securit, such checks ower drawn on insufficient funds in the hope characteristic formation of the contraction of the c
- 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" Armen neld and deliveral liberatch in response to an order placed by phone by relative to the propose to a refer placed by the best by the proposed by the pro
- 12. On dates as follows, complainants sold and dallvered livestock to respondent David Mulso acting in the name of Eliton, or to others under direction of Mr. Mulso acting in the name of Eliton, for agreed prices, and received checks in purported payment, issued on the Eliton checking account by Mr. Mulso, which checks were drawn on insufficient funds and were later returned unpaid, as follows:

Volume 64 Number 7	
December &	
Jack Broadbrooks	
Larry Haynes	\$2,822.
Raymond J. Knudson	8,682
	4,468;
December 7:	
Noel Capdeville	
Ben Fower	\$28,427
(parean for whom he acted)	10,322
James Pawer	
	7,176.6
December &	
Darryl Cresco	
Luke Crasco	\$11,476.
	\$8,702.90
	9,612.06
to a	10.014.0
(person for whom he acted)	18,214.0
Irene Crasco	5,630,0
Orville Jake Crasco	49,644.30
(persons for whom he seted)	48,644.80
Maynard Crasco	
Darole Doney	268.80 1.928.85
Wands Doney	
Will Crasco	1,994.00
Raymond Helgeson	31,683.90 5,104.20
(portion remaining unpaid after successful rec-	1.875.30
lametics of some cattle)	4,870.30
(persons for whom he sound)	40,157.00
Boyd Burtch	
Sandra Burtch	672.60
Carl J. Ivarson (through Dannis Ivarson)	672,60
Bruce Kirkaldia	28,007.00
Meistner Panahas V.	50,717.10
Meissner Ranches, Inc. (through Joe Meissner)	\$18,668.86
	183,88
(person for whom Jon Maisener acted)	18,862,24
Shawn Melanner	- Angelesia and
	006.48
Gerald J. "Bud" Water	24,921.80
Gerald J. "Bud" Waleb, Admr., Estate of Gerald M. Walsh	28,602.90
William Swale Land	- April 199
Describer of	

Loren Fiedland Stoven Pankrata Each complaint was filed within 90 days of accrual of the cause of action alleged therein.

8.188.00

URBAN ARNZEN s. ELKTON LIVESTOCK, INC. Volume 44 Number 7

CONCLUSIONS

Elkton was founded early in the year when Mr. Wee Van Dyke approached Mr. Deuld Mulios, then both of them must with Mr. Donnis Hart, Agricultural Representative of the Corn Exchange Hank, then all three of them me with Wr. Dipke, Mulles and Hart knew each called the was a supplied to the control of the Mr. Dipke, Mulles and Hart knew each called and hard knew each called and hard knew each called and hard knew each called the Mr. Dipke, Mulles and Hart knew each called and hard knew each called the Mr. Dipke Mr. Dipke was an expectation of the Mr. Dipke was an expected in the name of filkton the Elkton chart is an expectation of the Mr. Dipke were an except the Mr. Dipke were an expectation of the Mr. Dipke Mr

With Mr. Hegerield's approval the Cern Exchange Bank granted a line of credit the Eliton line of credit which in August was raised to \$170,000, at 17% interest. Mr. Hart described it Slosse Palls Tr. 489, as a "revolving line of credit to Eliton 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 testiment and Complainante Exhibit 6, the statement issued by this bank. Sol. the Bikton checking section if the the Schot of the Sch

We note as a fact, without any comment intended, that the Elikton checking account statement does not reflect return without payment of any item. That is, for an itom 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, solo Director, and sole shareholder, and Mesers. Van Dyke and Hart were its only officers, Mr. Van Dyke wart on one expedition to Montans in which he tended to the state of the

paymaster for Mr. Mulso and make repayments to that bank of the Elkton line of credit.

The business in which Elikton and Mr. Mulos actually empages we keying and selling cattle as a dealer, both on apeculation set as a sealer, both on apeculation as a segent for others. As to whether Measur. Van Dyke and Mulo groresenated to Measur. Hart and Hegerfold that the enterprise would be only an order buyer, buy only when it had orders frow other as that the income would be commissions only and its rid orders of the commission of the contrastive of the contr

The following are undisputed. Nothing was ever paid into Eikte ac acquial. If there ever was a time when Eithen had current asset in excess of current liabilities, it was not at any time materia hereis. Further, all checks issued on the Eliton checking necous to obtain livestock at the times material herein were drawn on it cufficed in the hope of covering them late.

In early October an advance of \$150,000 was requested, by M Mulso in the name of Elkton from Mr. Paul Den Herdor as Pres dent of Tri-State, on 552 steers consigned in the name of Elkton 5 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 steors & net proceeds exceeding \$150,000 the following week, and deducte the \$150,000 when it remitted the net proceeds on Friday, Octob 15. Thereafter Tri-State paid a number of such advances again cattle consigned to it in the name of Elkton, and deducted t) amount of each when it remitted the net proceeds the following Friday. In each of these instances, Mr. Hart or Mr. Hogorfold the Corn Exchange Bank in Elkton, South Dakota would phone t Mulso home in Brookings, South Dakota and tell Mrs. Mulso, Mr. Mulso if he was there, an amount to be deposited in the Elkt checking account. Then Mr. Mulso would tell Mrs. Mulso that T Stte was the place to go for money. (He sometimes told her oth places but those are not involved in these proceedings.) Then M Mulso would drive from Brookings, South Dakota to Tri-Stat place of business in Sioux Center, Iowa to pick up a check, Tl was a round trip of more than 200 miles and had to be complet by 300 p.m. the same day to get the advance chack to Mr. Hart Mr. Hegerfeld at the Corn Exchange Bank before it closed.

TriState conducted a weekly auction on Friday, though it me private treaty (negotiated) saise through the week. Tri-State ri thely, with some exceptions involving small amounts, issued chest payable to Rikton 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, much a loss was sustained on certain cattle abipted by Tivi States by Mr. Makin is the name of Elikton as to ba, for the first of the firs

agreed upon assumes of a sure scale. The rest when the conprom November 5 means, if no six other times, Elston had current liabilities in access of its current users and, when livestocks were lought in its name and were issued on the Elston checking account in period in the propose, the checks would be sured on insofting to the hope of covering them later. The Corn had been successful to the hope of covering them later. The Corn had been successful to the hope of covering them later. The corn had been successful to the Elston checking account to the hall amount of each such draft when depasted, and pay checks drawn on the account, without waiting for culcium of the funder covered by the draft. So far as the record shows his. Date liberder did not know that, but he admitted to what he called an

"operating assumption" to that effect.

Tri-State's hookkeeper told Mrs. Mulso that he would send her tri-State's hookkeeper told Mrs. Mulso that he would send her he hook 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 filkton are payee and "Tri-State through the sample contained handwritten entries showing filkton are payee and "Tri-State Livestock by David Mulso" in the place for signature. The book was mailed to be a signature.

All these instruments were made payable to Eliton, and all were deposited in the Corn Rechange Bank. They were on printed or now printed as to printed as to printed as to printed as to Eliton, and the second of the Northwestern State or the Corn State of the State

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 [Motles] I add, wall, I think it is rificious for Somm [Motles] to be travelling this approximately 300 mile round trip back and forth to Siesze Cherrel [Jones, the T-States place of hoatford the size of the size of the size of the size of the 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 toll up you are spirit to draw a dark on us, and when that thing hit is my bank I will, they will call me and I will approve it, and we will just headed it hat way I aid it it are old ingle, we can ill just headed it hat way I aid it it are old ingle, we can

.

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 chooks 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, Instructed my booklooper to contact our hank, and I said now make array ou have get but right one, because with the computers and so on coming in, I did have a right book which were shareholder to me, but we not have been a right book which we enharmstering to me, but was our hank good tilent of mine, and it has the wrong coding on the contract of the con

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. Yee, 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 Palls Tr. 185 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.

That the records alrows that Mr. Dem Herder agreed to lause, and for the records alrows that Mr. Dem Herder agreed to lause, and the records alrows the record of the records and the records and the records and times material herein believed the record of the records and the records and

reason, the record does not show.

About what Mr. Mulso told the Corn Exchange Bank persennel about the arrangement with Tri-State in early November, Mr. Mulso did not, and was not sated to, testify, Mr. Hegerfeld, on oramination by coursel for that bank who called him as a witness, testified (Sloux, Palla Tr. 39.3–29.

Q. What was it that was told to you?

A. Well, that it was, he [Mr. Mulse] 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 deposit 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. Mulio 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, reason, and since every one of them was executed by one of the Mulson, we will call them "Mulso instruments." The first was dated Tweeday, November 9, for \$801,284.88.

As before, on each such occasion, Mr. Hart or Mr. Hegerfield would phone the Moliso home and old Mr. Moles of Mr. Mules of its was there, as more than an experience of the moles and instrument would then the moles of the moles

Q. * * * When checks came in to the [Corn Exchange] bank from Montans 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 presented in our machines, we'd take a look at them to see the volume of the checks, to see if Elikum had enough on deposit to cover them. If not, I would give Susan Mulus a cail 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 someons at Tri-State would be phoned and told about a Mulso instrument when it was executed the testimony was conflicting.

Sems Mules instruments were executed and deposited in the Corn Bechange Bank at times when there were not sufficient as male consigned in the same of Elixen to 71:54xe and in their male consigned in the same of Elixen to 71:54xe and in their male continued to 71:54xe and the same of the same o

art. mance's testumony on crose examination (Stoux Falls 87. Md-fi.
On Wednesday, December 1, it was alleged on behalf of the
Miller Coleny, Inc., that complainant sold and delivered livested
to Elkton for an agreed price of which \$8,30,90.5 were unpaid. The
allegations of that complainant's eale, delivery and failures of payment were not established by evidence, were denied by Mr. Mulie,
but were admitted by Elkton and Mr. Van Dyke, in their answer.

In the week ending Friday, December 3, four Mulso instruments:

Mumber	Date of Execution	Amount
18	Wednesday, November 24	\$12,500.00
(not numbered)	Saturday, November 27	\$798,430.67
14	Tuesday, November 30	\$107,094.20
15	Friday, December 3	\$104,709.78

for a total of \$1,017,784.65, neached the Notthersstorn State Basic payment. This basic has do prove to show them, which required Mr. Den Harder to go to that beart. This was done. This was dead the interest or that loan. This was the first time "Pi-State had to borrow to hone such instruments Mr. Den Herder told Mr. Music in substance that he dejicted is such borrowing, and that the consignments by Mr. Mulio in the name of Eliton were exceeding what This shad to could handle.

On Monday, Tussday, Wednesday and Thurnday, Desember 6, 7, 8 and 9, the Montans ranchers often than The Miller Colony, Inc. sold livestock for agreed prices and received checks as detailed above in the Principal of Park. All those schools were issued by the Colony, Inc. and the Colony of the Col

The record contains some testimony of Mr. Malse (Sicux Falls, 78, 324, 520) that enough cattle were shipped to Tri-State to cover the Mulao instruments. However, as to what was done with these particular annials obtained from those Montana ranchers, this whether all of them, some of them, or none of them, were shipped to Tri-State, the record is inconclusive.

On Priday, December 10, complainant Arraen add and delivered livesteds to Elicon other than the ones mentioned above. However that the contract is bright to the contract to t

In the week ending Friday, December 10, three Mulso instru-

Number	Data of Execution	Amount
16	Saturday, December 4	\$000,000.00
17	Monday, December 6	\$464,809.21
18	Tuesday, December 7	\$168,022.06

for a total of \$1,222,831.27, reached the Northwestern State Bank for payment. Thi-State had to borrow again to become the control to the compared Mr. Den Herder to go to that benk again. This was done. This time 57.84at deducted the interest on the lean from the proceeds of sale of cattle consigned in the name of Elkton as further discussed below.

On Friday, December 10, Mulso instrument number 18, dated Wednesday, December 8, for \$159,463.82, reached the Northwestern State Bank for payment. To honor it would have required Mr. Dan Herder to go to that bank to berrow for the third time in two weeks. As previously statch, he had told Mr. Mulso that he objected to such berrowing and that the consignments by Mr. Mules in the name of Elition were exceeding what Tri-State could handle. As President of and in behat. If The the district of the president of and in behat. If The the district of the the three of the blank to dishounce that instrument names and the same was marked "uncollected funds," who made the decident same that instrument, "uncollected funds," on whether it was considered in Tri-State or someon in that hank, or whether that marking was done thoughtlesly or for a reason, the record does not show

Friday as previously stated was the day Tri-State routinely settled accounts and insured a check for the net proceeds of sale of likestack consigned in the name of the sale and sold since the previous Friday. That week Tri-State soldies. After deduction for Malointruments numbered 16, 17 and 18 instruct on the lost intruments numbered 16, 17 and instruct on the lost taken out to honer them earlier that week, are the sale states of deductions, the net proceeds were SSSS 310.98.

on Startway, December 11, Mr. Mules went to Tri-Starts' piece for bounces in Sion Center, lows and melt with Mr. Den Herier there. They reviewed the accounts of the sales by Tri-State the press west of credit consigned in the name of Bitton and, since where we can be consigned in the name of Bitton and, since where we can be consigned to the press of the sales where the sales were the sales where the sales were the sales where the sales where the sales where the sales were the sales where the sales where

On that day, Batterdey, Describer II, at the opening of baciness for Cern Exchange Bank records showeth the Bikton feech civing account at having a \$106,10 could balance and the Bikton lies of \$100,00 doith balance. After credit of the \$858,10.03 doing, 100,00 doith balance. After credit of the \$858,10.03 doing, 100,00 doing to the balance after credit of the shown for that day on the Bikton checking account statement, but destinent shows the checking account statement attendents the checking account as having a \$800,037,07 doing to \$100,00 doi

After those entries that bank made a \$169,00.00 entry in its records debiting the Bikton checking account and crediting the principal balance due on the Bikton line of credit. This reduced the figure for, the credit balance in the checking account from \$285,672.07\$, and reduced the figure for the debit balance in the other properties of the credit balance in the checking account from a \$285,672.07\$, and reduced the figure for the debit balance in the line of credit from \$370,000.00 to \$100.00\$. This in effect

would have been a transfer by that bank of \$189,900.00 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 serived 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. Muleo that such consignments were exceeding what Tri-State could handle, he had met with Mr. Muleo at that place of business in Sionx. Center, forwar on Saturday, and he fagered had Mr. Muleo would have been see notes of Elkten 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.

MM. Mulao testified that, when he went to Tri-State's place of business on Statutely, December II, he did so at the request of Mr. Hart. because of the dishoner the day before of Mulao instrument number 19 for Staff, 468.82, to collect the money and testighten the matter out, and that after that meeting he (Mr. Mulao) 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 (Sizur Falls IT, 601 et seq.).

a alide da l

- A. The first notice of dishonor I received on the \$159,000 check was Monday, December 18.
 - Q. Why do you say that?

have him get ahold of me.

- 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 puyment and asked her to please contact Dave [Mulso] and
- 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 sont 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

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 proviously 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

URBAN ARNZEN v. ELKTON LIVESTOCK, INC. Volume 44 Number 7

Northwestern State Bank so that he could read that marking, what if anything he was jold 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 mas dishoner by Tri-State or Mr. Dan 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 \$882,989.10, 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. Muleo'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 Wodensley, December 15, Mules Instrument number 22 was deposited in the Orn Exchange Bank. At the opening of business that banks records showed the Bilton checking account as having a \$1,519.88 crolls bankon and the Eliston line of crolls in a having a \$15,109.08 crolls bankon and the Eliston line of crolls in a having a \$15,109.00 dobit balance, which would leave \$15,5,00.00 available \$152,500.21 are shown for that day on the Bilton checking account asteament. Subtracting \$132,500.17 one \$1,50.15 would leave a shortage of \$131,655.80. No advance was public under a shortage of \$131,655.80. No advance was public under \$150,500.00 ccc \$150,500.0

On that day, Wednesday, December 15, Mules instrument number 21 for \$885,993.0 reached the Northwestern State Bank for payment. Mr. Den Herder as President of and on behalf of Tri-State directed that bank to dishoner that instrument. On examination by his own counsel, in testified (Sicer Falls Tr. 586 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 petiting calls, Alrendy on Webnes (Mr. Denaldeson west incore representing himself and Mr. Arman, and he shed some additional light on the situation awaying that he laid claim to the cautile or himself. Mike Denaldon, and for Mr. Arman, and I was receiving minimum shed self from ranches and subscreas and supervaisments with the contractions of the Mr. Arman, and I was receiving the contractions of the contraction of the Review of the Contraction of the Contractio

stock or the Gern Exchange Bank would hence Elkion Livensche's chocks, and I applied it out to him. I fill still clearly, that I would not sail livestock that I did not know to whom it belongs to be livensched. It is before to Elkion Livensche, if it belongs to Elkion Livensche, if it belongs to Elkion Livensche, if it belongs to all the ranchers in Montana, I said I don't know anymore, I said I'm not going to said that livensche Livensche and the said of th

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 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. If 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 seo.):

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

Q. Whether it was Wednesday or Thursday of that week, tell us as best you recall the substance of Mr. Den Harder's conversation with you.

A. Well, I can recall when he called he was wondering about—he heard we worn't paying checks drawn on Bitton Investock account for cattle purchased in Montana or wherever. I nearred him we had been paying checks are on everything that we had deposite. I don't recall just all west on in that coupling about the 882,000 or the 147,000, had a discussion later on with Paul [Dan Herder] that smod day.

- Q. Two calls the same day?
 - A. Voq
 -

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 idn'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 set it revolved.
 - Q. When you first heard of this situation, did you attempt to get shold 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 Weinesday, Doember 15, Mon lifereder testified (Bloos Faller 17, 1951 that he called Mr. Hart because of "runes " * * that the Corn Richange Bank was not noted to the country of the co

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. Yea-

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 Mesers. Hart and Hegerfeld informed Mesers. 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 hak to dishoner 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 Priday, 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 meeting with officers and counsel for the Northwestern State Bank and counsel for Tri-State a commitment was made that, pending resolution of the question of who was entitled to them, the

proceeds would be accrosed.

On Friday, December 17, Tri-State sold the cattle consigned in the name of Elkton and not specifically identified as their own and calcium by unjust sullers, and constraint in secretary and the state of FRB-\$\text{i}(3.05\), in a special ascount in according to their brands and All again cattle were ascount in according to their brands and All again cattle were ascount in according to their brands and the special control of th

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Bespondens Mules. Van Dyke and Den Hercite were each withe the definition of a "dune!" in section 500 of the Act, 71 U.S.C. 201, at the times material herein, on the besis that, as the record element produced by the three by the produced the respective expression with which he was affiliated. The data the region of the produced by the produced was produced by the produced by the produced by the produced produced by the produce

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 livesteck, by Mr. Mulso in the name of Elkton, or by Mr. Mulse 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.26 701, 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 livesteck dealers, for insolvency. See also Rowse v. Platte Valley Livestock, Inc., ___ Ag. Dec. ___ (Feb. 3, 1984), aff'd., 597

F. Supp. 1046, 604 F. Supp. 1463. Ag. Dec. . . . (D. Neirr. 1984). This is not inconsistent with other authority. "Deception is send-liked by the obtaining of something of values through the use of a close which the perpetuter knees is worthless." "I his guilty knewledge is the measure are of the officers. Specific intern to defended with the perpetuter knees is worthless." I have a specific spec

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 probibitions in section 307 and certain other escens of the Act wave written as probibitions of undire or unjust practices. In an writing those prohibitions, Congress had in mind furtilly, in excess the probibitions, Congress that in mind the control of the cont

Mr. Anderson. * * *

It was asserted by the gentlemen who preceded me, to whom I have referred, that if here was to be a regulation of this industry it should be in direct prohibitions of law. Me We have been trying direct prohibitions of law for metan 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 mothods of industry and of munificative and distribution change form day to day, and no positive iron-dad rule of law can be written upon the statute books which will keep pees with the progress of industry. So we have not sought to write into this bill arbitrary and iron-dad rules of law. We have rather closes not lay down cortain more or less definite rules, rules which are a sufficiently related to esselve have rather closes not assume that the contract of t

Our reasoning for interpreting the prohibitions on unfair or unjudy practices to include dealer! buying livestock while insolvent, or by use of checks drawn on insafficient funds, without discussing such facts to sellers, should be obvious from what happened in this case. Such a huyer, whatever his high hopes and good internal, subjects affects to the risk of failure of the buyer's ventures. That it is, ought to be borne by the buyer, and by others if they can be found to undertake this pitch willimity and without being de-

ceived for whatever their prospects of a profit from the venture if t 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 injustate to such eight.

Solvency or insolvency of a person subject to the Act is a quistion of that person's current liabilities and current assets. W.L. Bowman, 28 Ag. Dec. 1074, aff'd., Bowman v. United States Department of Agriculture, 363 F.2d 81, 25 Ag. Dec. 958 (5 C. 1980). See also Cargill, Inc. v. American Pork Producers, Inc., 426 F. Supp. 499, 504 (D. S.D. 1977). An otherwise insolvent buyer is not mole 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 atcount were returned to Mr. Arnzen and the Montana ranchors at a time when the Corn Exchange Bank records showed a large usdisbursed balance under the Elkton line of credit, shortly after that bank had made an entry to transfer \$169,900 from the Elkten 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 aivances 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 cour their purchase.

Mr. Mules contended in substance that he was acting as apet for Eltats in all the transactions (avoired precedings, the personal lability to Mr. Armen and the Moriad Indoor, as a pint but the substance of the substance of the substance of the substance with Eltats, or as an agent for Elkion, because that a lability with Eltats, or as an agent for Elkion, because that a lability with Eltats, or as an agent for Elkion, because that a lability with Eltats, or as an agent for Elkion, because that a lability of the substance of the Elkion, because that a lability of the substance of the Elkion, because that a lability of the substance of the Elkion, because that a plant acting eithir with the substance of the substance of the part acting eithir and the substance of the substance of the part acting eithir and the substance of the substance of the part acting eithir action of the substance of the substance of the personnel of the substance of the substance of the substance of the personnel of the substance of the substance of the substance of the personnel of the substance of the substance of the substance of the personnel of the substance of the subs

[§ 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 another'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.

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, 1181-3 (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 Corr Exchange Bank of Elkton, Mr. Mulso, Sirioln, Inc., or any combination thereof (that bank did not claim against Mr. Van Dyke hersin), so far as is shown in the record, is not sufficiently related to the business of buying and selling llyestock to be properly the concern of the Secretary of Agriculture under this reparation provisions of the Act. Elkton was only a

All complaneast' claims against Mr. Dar. Harder presented by an based on his direction to same the how of whath Corner which musel for the Malace Instruments, his later refractings are consistent with the book, his cellent of dishours each instruments numbered: It 21, and 22, and his transfer of the net proceeds, of the sailes in the wate satisfing December 17, of biveneck consigned to Tri-States in the name of Bitten and not specifically identified as their own and residented by unspid sellers, from the upon all account in the North-Stande Dishours and December 18, and the State State States in the Mandam Dupartment of Liveneck Dishours and December 18, and the State State States in the Mandam Dupartment of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck David December 18, and the Mandam Department of Liveneck December 18, and the Mandam Department of the Mandam Department of Liveneck December 18, and the Mandam Department of Liveneck December 18, and the Mandam Department of Liveneck December 18, and the Mandam Department of the Man

In Civil No. 82-2647, Circuit Court of the Second Judicini 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 Il 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. 118 (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,

URBAN ARNZEN v. ELKTON LIVESTOCK, INC. Volume 44 Number 7

Mr. Arnzen, or the Montaua 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 mistakes 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 was 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 Braud Enforcement Division was entirely lawful.

Issuance of a draft book to facilitate advances against consigned livestock is a common practice among livestock market agencies selling on commission. We take official notice of this; see 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 issuing 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 basis for that assumption shown in the record would be losses which he knew had been sustained on "forward contracts" with Tri-State, the repeated obtaining of abronous against consignments, and Me Multius's apparament of youth and insuperismon. Mr. Multius' states ment when he requissed an admit a many states a large state ment when he requissed an admit a many states a large states and the NSF checks to be covered. Mr. Den Herder did not have account constant and both liken's filancial condition so far as the record insulation about liken's filancial condition so far as the record insulation and the states of the states of the states of the distribution of the states of the states of the states of the distribution of the states of the states of the states of the states of a body of boths. Ground section, of the basis of the states of a body of boths. Ground section that the states of have committed an undair or unjust practice that make a special factor recalling it, he would have to have more information for four recalling it, he would have to have more information for the states of the states of

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 be thought it was a draft. That alons is sufficient basis for a finding that he is not personally liable for such a finders, but the record contains additional support for such a findinz.

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 cheeking account statioment, after the credit of the amount of number 20, which was paid in full, and the debut of all cheeks then presented for paymont, the checking account credit balance was over \$200,000, or well in screes of the amount of number 19. What reduced the credit balance in that checking account thereafter that day was the abovementioned 318,000 entry made by that hank 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 dishonered Elkton checks which had been issued for livestock. The record does not show the times of day when he hourd 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 or Friday, Docember 17, the cuttle then consigned in the name of Elkton and in the Trl-State yard were clearly subject to adverse claims which remained to be resolved as they could not cover an advance.

In these preceedings much was made of Mr. Den Hordre'n "opporting assumption" that Bilkton was claiming livested with NSI's checks in the hope of covering them latter and that the Corn Nothings Binkt was paying such and the control of the con in that bonk. The next week, the net proceeds of the sales of suc livestock in the week ending December 17, against which lest ments 21 for \$882,89.010 and 22 for \$814787.80 were drawn, we secrowed. Thus, for concluding that Mr. Den Herder should have known that his orders to dishoner the three instruments work known that his orders to dishoner the three instruments work cause such failures of payment for livestock and such losses, the "operating assumption" is not a basic part of the processing the processing the processing the sale of the processing the

The transfer of the STRA, I.O.B net proceeds, of the naise in tweek ending Deember II, of Invotes to compared to Tri-State in he name of Elisten and not specifically identified as their own naise calcinated by ampede allern, from the special account in the North western State Bank to the Montana Department of Livestein Maria Compared to the State State State

Mr. Den Herder tostiffed credibly that all those national comfere Mentana according to their branch, and this is corrected by other evidence, as shown above, that Mr. Musice had been forwarded in Mentana the previous seek, including the centre of the properties of the properties of the properties of the properties of Mr. Den Herder on December over the properties of the properties of mr. Den Herder on December over the properties of the theory of death that if world use those proceeds first to say the Mentana characteristic of the properties of the properties of the characteristic of the properties of the properties of the characteristic of the properties of the properties of the properties of the characteristic of the properties of the characteristic of the properties of t

in the name of Elkton, and were unpaid, once they were identified Such payment to sellers would be, not only entirely lawful end 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 wore 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 bena fide purchasers, the proceeds of sale of those animals. McMerty v. Hersog, 702 F.2d 127, 710 F.2d 429 (8 C. 1983); Hilton v. Mumau, 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, 1368 (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. § 85-1-8; and Temple v. Temple, 365 N.W.2d 561 (S.D. 1985). See also U.O.C. \$8 2 507(2), 2-511(9), and 1-103; V Scott on Trusts, 3d ed. §§ 463, 503.2; Begert, Trusts and Trustees, 2d ed. § 471; and Palmer, The Law of Reetlitation \$\$ 1.3, 2.14, 3.4, 3.16, and 4.16,

URBAN ARNZEN v. ELKTON LIVESTOCK, INC. Volume 44 Number 7

This is not to interpret the Act by its own force alone as providing a trust of soft funds as against a secured ordistor of Ellictoni.

Such a hoding, in hr s Somuels & Co., Inc., 488 F.2d 567 (5 C.
1978, in which the Court referred to 'trust imposed by prenceding statute,' was reversed in Mahon v. Stosser, 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 litigat User also GHF 2dd 18 and 56F 2dd 1950 show that better was seen to partie. The published decisions in that litigation was also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 18 and 56F 2dd 1950 show that the seen also GHF 2dd 1950 show the seen also GHF 2dd 1950 show the seen also

If these preceded had fallen into the possession of a person. while grew value, without notice of the wrong done is cust healters, it is would have been a different matter. However that did not happon and neither the Corn Exchange Bank. nor Elisten were obtained post-session of those proceeds so far as the record shows. As previously stated, as to what was done with the particular animals obtained from Mr. Armen and the Montana ranchers, the record is into-onthered to the second of Bank and the second of the similar obtained. This state for the second of the similar control of the similar control of the similar control of the similar control of the control of the similar contro

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?

А. Уся.

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, contring whether in fact all those animals had been paid for by Blk and there was no adverse interest in any of them, or this was b lived or asserted by that bank erroneously but in good faith, the record does not support any such finding.

Also, if any balance of those proceeds remained after such py ment to inspaid residents of Montana, the record does not show at reason for Mr. Den Herder on December 21 to doubt that be Brand Enforcement Division would apply the balance in access with law. Also, while the record shows a commitment by Thistic to escrew those proceeds, it does not show that that commitmer referred to any carticular secrepcies.

In view of all of the above, the transfer of those proceeds free the special account in the Northwestern State Bank to the Brazi Enforcement Division was only a move from one excrowee to ac other which was lust as sood.

As previously stated, we do not have the record of the above mentioned South Dakota court proceeding between the Corn Ec change Bank and Tri-State. From what we have, it appears to have been concluded therein that those proceeds were entirely the proerty 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 parhaps 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 Steekyards Act, as amended, to the transactions is dispute, is not shown in the record of these administrative proceedings. 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 these proceeds were entirely the property of, or subject to a valid lien in favor of, that bank, we hold that we cannot predicate personal liability of Mr. Den Herder on it because it is not supported by the record of these administrative proceedings.

Complainant in support of their claims against Mr. Don Herder relied shavily on "figur Liestat. Com'n Co., Inc. v. Marly Liestat. Com'n Co., Inc. v. Marly Liestat. Com'n Co., Inc. v. Marly Liestat. Com'n Co., Inc., V. Marly Liestat. Com'n Com'

In Hays the dealer purchased livestock from the complainantsellers 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 estopal theory in much the same way in reference to Branscene, infrail, And [market agency] argues that there can be no received to the result of the same that the received the received to the dentity practice. The Secretary also held, however, that it was unjust and unreasonable for [market agency] to retain the proceeds from the results of livestock with knowledge through the results of livestock with knowledge through the results of the results o

Such action other than issuance of the book of blank forms, to induce the complainants to rely on Tri-State and to clothe Eikton 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 languages in the Righth Circuit decision din crimved withmost of any instrument. In that case the desire had been keying livestock from complainants and paying for them awel, later with cheeks 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-bellers on account of the cattle purchased in one of the transactions but not the other. The cattle purchased in one of the transactions but not the other. The other had been also decided to the contract of the cattle purchased in one of the transactions but not the other. The cattle purchased in one of the transactions but not the other than the cattle purchased in the cattle purchased i

On Superminer S, 1978, when [market agency] and [dealer] sensitist their account and [market agency] relational the proceeds of sale of the cattle which [dealer] had consigned to blus for sale that day [market agency] three that a sale proportion of [dealer] purchases, for approximately amount of [dealer] purchases agency] did not have actual knowledge that some or let the cettle, which he had sold that day or consignment from [dealer] had been bought by [dealer] in cash sales noticed and the cettle, which he had sold that day or consignment of the cettle, which he had sold that done in the cettle which he had sold that done in the cettle which he had sold that done in the cettle which he had sold that done in the cettle with the cettle which had been bought by [dealer] in cash sales noticed or amount of the cettle with the cettle which had been approximately a support to the cettle with the cettl

We find that it was an unjust practice in violation of section 807 of the Act of U.S.C. 2009 for [market agency] to train the proceeds of sale of cattle contigned to him you may be used to be considered to the province of the contract of

The Righth Circuit affirmed our result. It wrote, 630 F.2d at 589, 89 Ag. Dec. at 884:

The hearing officer concluded that [market agency] know or should have known that the cattle had not been paid for by [dealer] that he had not notified [compalianate-shiers] 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 seach of them involved an issue whether we have purisdiction to order payment of reparation on account of a single transaction. On this see discussion in Md-South Order Buyers, Inc. v. Platte Valley Livestoch, Inc., 210 Nebr. 882, 316 NW-24 229, 41 Ag. Dec. 48 (1082). See also Neugleauer v. Rephen, Civ. 74-e019, U.S.D.C., D. So. Dak., So. Div., 1975, 34 Ag. Dec. 1712. That issue has not arrien in these proposedings.

The Corn Exchange Bank also relied on Branscome v. Schoneweis, 361 F.2d 717 (7 C. 1966), See also the administrative declaion 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 Lexist v. Birt., 512 Feb. 163 (G. 1976). See also the administrative decision which was affermed therein. Lexis and Bolong, 28 Ag. Dec. 1234 (1974). That firmed therein. Lexis and Bolong, 28 Ag. Dec. 1234 (1974). That concentration on Levin. The weidens showed clearly thin Dolong and Levis had entered into a joint venture agreement to purchase livestock and divide his profits equily). Levis contended that Dolong had made divide his profits equily). Levis contended that Dolong had made the purchase after termination of the venture. Dealong testified scale and the profits of the contended that Dolong had made scale in the content of the

consistent with Lewis' contention. There are no such facts about Tri-State in the record of these proceedings.

On behalf of Mr. Dan 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 resplaciests and collateral estoppel. That evidence was received on the understanding that the issue of its demissibility would be taken up at the time for preparation of this decision. We do not decide those issues because of the result reasons of the result reasons of the result reasons of the result reasons of the result reasons.

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 muterial 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 uncellected 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-montioned activities were proper or customary, because we simply do

As above the record clearly shows that some checks drawn on the Elkton checking account were dishonored by the Corn Exchange Bank befors 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 18th when Mr. Hart first understood that instrument number 19 for \$159,463.82 would not be paid notwithstanding the meeting of Messra Mulso and Den Herder on Saturday the 11th. Also as shove every cent which would have been deposited in the Eikton 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 lokton checking account and the

Elton line of credit was an attempt, based on that lack of understanding, due to that failure of communication, to transfer funda which were not there. As above, on Monday the 13th that bank understed that unmer 19 would not be paid after all, so that the Elton checking account had \$150,468.82 less than the bank's coronal showest it to have, so that the 38,900 entry involved funda which were not there, but it failed to reverse any part of that \$150,000 entry. For that fulture the record centains an explanation other than the obvious incendre to secure its \$150,000 entry. For that fullure the correct centains are explanation other than the obvious incendre to secure its \$150,000 entry. But the control of the control o

It further appears that the action of the Corn Exchange Bank before Wodnseday, December 15, dishonering checks drawn on the Elikton checking account, was what induced some of the unpuid persons from whom cattle had been obtained in the name of Elikton to stop cattle in transite to Tri-State, and to reclaim cattle consigned to Tri-State, and thus burst the bubble which that bank had helped to IN-State, and thus burst the bubble which that bank had helped

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.

Prejudgement interest is included in the language of section 300(c) of the Act, 7 U.S.C. 210(c), "pay to the complainant the sum to which he is entitled." Our orders to pay prejudgement interest were affirmed in House, and Rice, super, See also discussion in House, and the sum of the s

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, 64:Stat. 81, 7 U.S.C. 460-4569. See also Reorganization Plan No. 2 of 1985, 5 U.S.C. 1976 Ed. appendix pp. 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 ordor, see 5 U.S.C. 762-3 and United States v. L.C.C. 337 U.S. 426 (1949). On respondent's right to judicial review of such an order, see Liesatock Commission v. Hardin et al., 446 F.24 4, 30 Ag. Dec. 105 (6 C. 1971) and Fort Scott Sole 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, is any subsequent lighten involving this decision and order, any assumption. Highestic involving this decision and order, between the with the Peckers and Stackyards Division, Office of the Glorest with the Peckers and Stackyards Division, Office of the Glorest Commercial Com

ORDER

Within 30 days of the date of this order, respondents Elkton Livestock, Inc., Wes Van Dyke, and David Muise 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" Arazen:	\$141,290.8
Jack Brondbrocks:	2,822,514
Boyd Bartchi	672.60
Sendra Burtel:	672.60
Noel Capdeville:	28,427.26
Derryl Crasos:	11,476.56
Irone Creeco:	5,630.05
Lruke Crasco:	18.214.05
Maynerd Crases:	258.90
Orville Jake Crasco:	49,644.80
Will Craspo:	5,104.20
Darcie Doney:	1,928,85
Wanda Doney:	1,994.60
Ben Power:	10.322.05
James Pewer:	7,176,65
Loren Pladienst	8,188.00
Larry Haynes:	8,052.01
Raymond Helgeson:	49,157,00
Carl J. Iverson	28,007.00
Bruce Kirkeldie:	50,717,10
Raymend J. Knodson:	4.468.78
Meisster Ranches, Incc	18.882.24
Shawn Melsenen	606,48

B. J. HOLMES SALES INTERNATIONAL, INC. Volume 44 Number 7

| Steven Pankratz: 3,974.00 |
| Jack Quisno: 6 | Great J. "Bud" Walsh, Admr., Estate of Gerold M. 23,602.50 |
| Walsh: Walsh: 4 | Great M. 23,602.50 |

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, 48,309.50.

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.

16 CARES (See List at End of the Decision) Against B. J. HOLMES SAIMS INTERNATIONAL, INC., GARY W. HUNT d/b/a CAGSTAL CATTLE COMMAN, DAVID R. MONELL d/b/a DAMONE SAIMS & SERVICE, and LLOYD WOODRUFF. P&S Docket No. 6296. 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 WOODPUFF

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 filled 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.

vestigation report was duly served on each complaint.

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 bankruptsy. Accordingly these proceedings are stayed under 11 U.S.C. 362(a)) as to them. Cross claims of the Holmes firm are in abeyance. The proceedings went forward only as to claims of the complainents 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. Casoy 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

- Respondent Lloyd Woodruff at all times material horoin on gaged in business as a dealer buying and selling livestock for his own account in commerce.
- 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:

Amount	Complainant	Amount
1,650	Seari Widrick	\$2,500 900 550 2,200 1,650 1,350
	\$1,650 1,100 550 2,200 1,600 500 1,650	\$1,660 Bernat 1,100 Conway 550 Hebert

Magnetic street in a possession

 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 sipper in preson or by conselle or their representative, and no evidence was offered or received in support of their claims, with one ecception, Mrs. Seat, who appeared and tostified. Respondent Woodruff also, although duly notified, did not appear in preson or by comesion or their representative. The indirage of fact are based on the allegations in the computal settlement of the seat of the and the testimory received at the beautiful.

Mr. Mosell testified that, in all purchases of livestock made by him and involved in the 65 cases, he was setting 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. Success v. Herman Management, Inc., 35 App. Div. 2d 34, 447 N.Y.S. 2d 146 (2 Dec.), 1982.)

On possible liability of Mr. Monell in court under his surety bond so a United States Fid. & G. Co. v. Clover Creek Cattle Co., 92 Idaho 889, 452 P. 2d 993 (1989) and Arnold Livestock Sales Company, Inc. v. Paarson, 883 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 Varace 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, 1933, more than 9d days after December 22, 1932, 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 9d days after the cause of action accrues. We have no basis for a finding that we have jurisdiction in Mr. Tabolf's cap.

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 § 235, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450-4569, See also Reorganization Plan No. 2 of 1982, 5 U.S.C. 1976 cd., app. 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 8 202.117.

Volume 44 Number 7

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 Live stock 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. 21000, 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 whother the United States will participate as intervenor or amicus curiac 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 I, 1983 until

Complainent Aubin Buckbay Gilbetto Miller Morrow Schemp Sheldon Zehr	2,200 1,000 500 1,650	Complainant Bernat Conway Hebort Mitchell Patterson Seari Widdick	Amount \$2,500 900 550 2,200 1,650 1,850
Zehr		Widrick	560

Copies hereof shall be served on the complainants and Messrs. Monell and Woodruff, MOV To design on any

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. 6848

Stephen N. Bernat v. B. J. Halmes 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. 6844

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. 6847

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. Moneil 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/h/a Coastal Cattle Company, David R. Monell d/b/a Damone Sales & Service, and Lloyd Woodruff Jr.

P&S Docket No. 6817

Richard Morrow v. B. J. Holmes Sales International, Inc., Garv 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 Sci International, Inc., Gary W. Hunt d/b/a Coastal Cattle Compa David R. Monell d/b/a Damone Sales & Service, and Lloyd Wo.

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

Allieon 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/c Damone Sales & Service, and Lloyd Woodruff Jr.

P&S Docket No. 6839 Robert G. Zehr v. B. J. Holmes Sales International, Inc., Gary W. Hunt d/b/a Coastal Cattle Company, David R. Monell d/b/o Damone Sales & Service, and Lloyd Woodruff Jr.

MISCELLANEOUS REPARATION DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

GENE VOGTS II. GARDEN CITY LIVESTOCK MARKET, INC. P&S Dockst 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, 10.12 Tech 186. 3

Copies of the complaint, and of an investigation report prepared by the Packers and Rockyorth Administration of this Department and field in an proceeding pursuant to the Rules of Practice, were at the processing pursuant to the Rules of Practice, were resulted to support was served on complainant on September 24. An asswer and request for ord hearing was reserved from respondent on October 17. A copy thereof was served on complainant on December 5, No legal was related about timelines 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. Servinesses testified. No exhibits were received. No brief was filed.

It is undisputed that on December 6, 1982, of certain sheep which complainant had consigned to respondent for sale, some were sold at auction and some were bought by respondent in market support transactions.

Complainant contended that respondent, through its employee Dwayne West, guaranteed before the sale that he, complainant, would "clear" \$2500 per head not after expresse of sale. We have for many years forbidden a market agency to guaranty the price at which consigned livestock will be sold. ©CFR \$201.8. Thus we will not order reparation to be paid on the basis of any such guaranty if given.

Complainant testified that respondent through Mr. West premient to start bidding at \$21.50. It is undepted that respondent did not do so. Witnesses for respondent testified that market conditions were such at the time and pisso of sea leak no relief and the notion of the house position of the property of the

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 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 Prestice, 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., 387 U.S. 426.

The complaint herein is hereby dismissed.

Copies hereof shall be served on the parties.

Noreis A. Johnson & 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 reorived on March 17. It was alleged in substance that 15 animsls 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 Stockyarda 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,

An oral hearing as requested was held on May 23, 1984 in Farge, North Dakota before John J. Casey of the Office of the General Counsel of this Department, Complainant appeared without counsel. Respondent appeared by Jewel B. Roningen, its President and General Manager, 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 written authorization. The case involves estile 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 unleading at the stockyard. He unleaded 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 pers. 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

differences in the based counts.

On the above-mentioned form which the stodyered company provided and Mr. Johnson used, there was a legical principle that a revised provided to the stody of the stody

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 CFS, 23.5, as anthorized by Act of April 4,1190,46 Est. 81, 7 U.S.C. 4500-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1276 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.

LaPleur Brothers Co., Inc. v. Columbus Sales Pavilion, Inc. P&S Docket No. 6651. Order issued November 1, 1985.

Ronald W. Banks, Rapid City, South Dakots, for complainant.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921 as mended of U.S.C. 181 et seq.) A timely complaint was filled which complainant seeks reparation against respondent in the surface of \$43,184.60 in connection with a transietion timelying the shipment of livestock in intentate commerce. A copy of the formal complaint was served on respondent. Complainant, in its letter of Octuber 8, 1968, authorized districtated of the

complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

Mark Southworth e. B. J. Holmes Sales International, Inc., Gary W. Hunt d'Dia Coastal Cattle Company, David R. Monell d'Dia Damone Earle & Service, Canolin Isileese and Gall Snownen. P&S Docket No. 6298. Order issued November 8, 1856.

Complainant, pro se.
Paul S. Bayins, for respondent Gall 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

Copies of the complaint, and of an investigation report prepared by the Packers discovered Administration of this Department and filed in the proceeding grusant to the Rules of Practice, were duly served on sent respondent. A copy of the investigation report was duly served on complaints.

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 forwed only as to the Southworth claim against respondents Monell, Jahler and Snowden, and the Snowden claim against Mr. Monell.

A total of 66 belated cases including this one were consolidated for hearing, the rights of the parties turring on the pleadings and proof in their members the proceedings notwithstanding the joint rail. Analural Actions \$15 06 etc., the oral hearing was had on May 20, 1866 in Syracess, New York before John J. Cassy of the General Council 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 sgainst 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 esting asgent for Mr. Hunt and he disclosed this to the solier. His testimony was credible and the record contains no evidence to the contrary. He is not liable for the unpuli price of any of such livestock on that basis. Suscency v. Herman Managemen, Inc., 85 App. Div. 28 43.4 47 NJN-28 did 16 U. Delp 1989.

The claim of Mr. Southworth is dismissed as 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. Monif. Ms. Ishler and Ms. Snowden.

NORMAN HITCHCOCK v. GARY W. HUNT d/b/a COASTAL CATTLE COM-PANY and FRANK PRATT. P&S Docket No. 6326. Order issued November 8, 1985.

John J. Osrey, Presiding Officer. Richard E. McLenitkan, Glens Falls, New York, for complainant. Respendent, pro ee.

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 conplaint 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(aX1) as to him. The proceeding went forward only as to the claim against Mr. Pratt.

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 re-

At the hearing complainant Hitchcock and respondent Pratt although duly notified did not appear in person or by counsel or other representative, and no evidence was 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. Hitchcook.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 CFR § 2.25, as authorized by Act of April 4, 1940, 64 Stat. 81, 7 U.S.C. 469c-469g. See also Reorganization Plan No. 2 of 1963, 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

On a complainant's right to judicial review of such an order see 5 U.S.C. 702-8 and United States v. I.C.C., 387 U.S. 428. The claim of Mr. Hitchcock is dismissed as to Mr. Pratt.

Copies hereof shall be served on Mr. Hitchcock and Mr. Pratt.

WILLIAM A. BORRAU, WILLIAM W. BORRAU, and DORAGE R. BORRAU AND AULTER PLANE O, ANY W. Hore dish'to Coarral. Cavitae Couracy, Davus R. Montel, dish'to Coarral. Cavitae Couracy, Davus R. Montel, dish'to Dancer Salas & SERVICE, and Gall. Showness. DAVER N. M. BOLLE AND DANCER SALES AND AUGUST SALES SALES PARTICLATED AND AUGUST SALES AND AUGUST AUG

Complainant, 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 1988, 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. 365a(M) as to them. The cross-claims of the Holmes firm at in absymnon. The proceedings went forward only as to the claims against Mr. Monell. A total of 65 related cases including these were consolidated for herring, the rights of the parties turning on the pleadings and proof in their respective beging notwithstanding the joint relation of the properties of the properties of the properties of the May 20, 1985 in Syncous, Not 61 th before John J. Gassy of the Office of the General Counsel of this Department. No party was represented by counsel, fix, with one to the Lordon with were seculed. 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 relations.

The record contains no evidence whatever in support of the Snowden claims against Mr. Monall

At the hearing Mr. Monoil testified that, in all purchases of live stack made by him and involved in the 65 cases, he was acting as eases for Mr. International control of the control of

On possible liability in court under his surety bond see United States Fid. & G. Co. v. Clover Creek Cattle Co., 92 Idaho 889, 462 P. 2d 993 (1989) and Arnold Livestock Sales Company, Inc. v. Pearsen, 383 F. Supp. 1319 (D. Naiv. 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.

oee 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 Proceeding, or to reconsider an order, see Rule 17 of the Rules of Proceeding.

On a complainant's right to judicial review of such an order see 5 U.S.C. 702-8 and United States v. I.C.C., 837 U.S. 426.

The Bossard and Tiede complaints, and the Snowden crossclaims, are dismissed as to respondent David R. Monell d/b/a Damone Sales and Service.

Copies hereof shall be served on the complainents. Mr. Monell and Ms. Sprawies.

LLOYD WOODRUFF, JR. B. 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. O'Tede Issued November 8, 1985.

Complainant, pro se. Reangudent, pro se.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL

This is a reparation proceeding under the Packers and Stock-

yards Ac, 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 Huns subsequently entered bankruptcy.

Respondents Holmes and Hunt subsequently entered and Accordingly these proceedings are stayed under 11 U.S.C. 362m(1) as to them. The cross claims of the Holmes firm are in absyance. The proceeding went forward only as to the claim of Mr. Woodrulf aminst Mr. Monell.

A total of 66 related cases including this are were consollated for hearing, the rights of the parties turning and the pleadings and import in their respective proceedings not of the parties of the party was parties of the parties of the party was propersisted by coursel. Six vibraces teathful. No exhibit was re-represented by coursel. Six vibraces teathful. No exhibit was re-

ceived. 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. Monoil testified that, in all purchase of livestock made by him and involved in the 65 cases, he was action as agent for Mr. Hunt and he disclosed this to the sellers fill settlemory was credit bile and the record contains no evidence to the contains. He is not bile and the record contains no evidence to the contains. He is not bile and the record contains no evidence to the contains. He is not bill be settlemore to the settlemore that beats subject to the contains the settlemore that the settlemo

On possible liability of Mr. Morell in court under his surety bond one United States Feld & G. Co. v. Clour Creek Carlle Co., 92 Idaho 889, 482 P. 2d 993 (1999) and Arnold Lincoto 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 § 2.25, as authorized by Act of April 4, 1940, 58 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. Monall.

Copies hereof shall be served on Messrs. Monell and Woodruff.

RICHARD M. DUEL, U. B. J. HOLMES SALES INTERNATIONAL, INC., GARW W. HUNT d'Ib/s COASTAL CATLE COMPANY, and DAVID R. MONILL d'Ib/s DAMONE SALES & SERVICE, and ARCHER MEEK. P&S Docket No. 6352. Order issued November 8, 1985.

Complainant, pro se. Stratios, Sallisun, Monoco & Smith, Oxford, New York, for respondent Archie Meek.

ORDER OF DISMISSAL AS TO RESPONDENT MONELL AND MREK

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 propared by the Packers and Stockyards Administration of this Department and filled in the proceeding purchased to the Rules of Practice, were duly served on each respondent. A copy of the investigation report was duly served on combaliants.

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 Messrs.

A total of 65 related cases including this one were consolidated for breading the rights of the parties turning on the pleadings and proof in their respective proceedings notwithstanding the joint tails, Amiur22 denotes \$3.15 et seq. The oral bearing was held on May 20, 1485 in Syracuse, New York before John J. Casey of the Office of the General Counsel of this Department. No nerty was

Volume 44 Number 7

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, in not sufficient to support the Duell claim against Mr. Meek. What is in the investigation report about Mr. Meek reflects at most the allogation 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. Successey. Herman Management, Inc., 85 App. Div. 243, 447 N.N. 28, 216 14 (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, 462 P. 2d 993 (1969) and Arnold Livestock Sales Company, Inc. v. Pearson, 893 F. Supp. 1319 (D. Nobr. 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 First 91 7 II S C

450c-450g. See also Reorganization Plan No. 2

DISCIPLINARY DECISIONS

In re: Stoops and Wilson, Inc. PACA Docket No. 2-6875, Decided October 15, 1985.

Fallure to pay promptly—Publication of the facts—Default.

Respondent, pro as.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishabite Age and Commodities Agt 1390, as a mended of U.S.C. When Age is prevailed to the control of the Commodities of the Commodities, the Commodities, but failed to make full payment promptly of the greed purchase profess, in the total amount of \$1,001,863.10.

A copy of the complaint was served upon respondent which assiphain has not been conserved. The time for filling an answer bairy run, and upon the motion of the complainant for the issuance of Default. Order, the following Decision and Order is issued within further investigation or hearing pursuant to section 1.189 of the Rules of Perscient of CSFR 1.180.

FINDINGS OF FACT

 Respondent, Stoops & Wilson, Inc., is a Missouri corpestion whose address is 11800 West 63rd Street, Shawnes, Kansas 6892
 Pursuant to the licensing provisions of the Act, license number 137820 was issued to respondent on January 29, 1982. This license was renewed, annually, but terminated on January 39, 1985, pure ant to Section 4(a) of the Act (7 U.S.C. 4994(a)) when responden failed to oav the required annual license fee.

3. As more fully set forth in paragraph 5 of the complisit during the period April: through September 1984, respondent put chased, received, and accepted in interstate and foreign comment from 57 sellers, 509 tots of fruits and vegetables, all being prefit able agricultural commodifies, but failed to make full payant

STOOPS AND WILSON, INC. Volume 44 Number 7

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, Msers. 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 connocted with the respondent and not the merits of the complaint against respondent which Masrs. 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 Msers. 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 Masra. Blevin and Flosi is granted.

ODDER

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 Masrs. Charles

Blevin and Steven Floei is granted. This order shall take effect on the 11th day after this Decision

becomes finel. 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.

Prole 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.

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 Parinhable Agricultural Commodities Act, 1930, as assessed of U.S.G. 499a et al. phereisaffer referred to as the "Act," instituted by a phereisaffer referred to as the "Act," instituted by a processing the state of the color of the co

Upon the motion of the complainant * for the issuance of a De fault Order, the following Decision and Order is issued without further investion or hearing pursuant to section 1.139 of the Rules of Practics (7 GFR 1.138)

FINDINGS OF FACT

Respondent, Central WV Produce, Inc., is a corporation, whose address is 106 West Main Street, Sutton, West Virginia 26601.
 Pursuant to the licensing provisions of the Act, license number.

2. Pursuant to the licensing provisions of the Act, license number 889022 was size to repondent on November 8, 1982. This license was renewed annually, but serminated on November 8, 1984, pursuant to Section 4a) of the Act (7 U.S.C. 4994(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, restored, and accepted in interstate and foreign commerce, from 10 seilers, 33 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full pay-

*Complainant estables a letter from an officer of reasondent corporation stating has respondent does "not wish to occutes the issues" and "expressly consental to itselplinary 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.

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 Airther proceedings 85 days after service hereof unless appealed to the Secretary by a party to the proceeding within 86 days after service as provided in sections 1.139 and 1.146 of the Rules of Practice of CFR 1.159 and 1.146).

Copies hereof shall be served 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.

Fallure to pay promptly—Publication of the facts.

Edward M. Silverstain, for complainant.

Leonard A. Goldman, Les Angeles, California, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perfainable Agricultural Commedities dat 1989, as amended (7 U.S.C. 490 et epr; hereinafter referred to as the "act", instituted by a compliant filed on August 20, 1984, by the Director, Pruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agricultural Service, United States Department of Agriculture.

The complaint allogue that during the period November 1883 through April 1988, Reproduct failed to make full puryant brought you shall be suffered, in the total state of the period threed, in the total amount of \$1.189,877.64 for \$885,877.64 for \$885,877

FINDINGS OF FACT

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 820927 was issued to Respondent on March 20, 1978. This license was resourced annually, but serminated on March 20, 1984, pursuant to Section 4(a) of the Act (7 U.S.C. 4994(a)), when Respondent failed to pay the recuired annual license fea.

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 rull payment promptly to 49 sellers of the agreed purchase prices or balances thereof, in the total amount of \$11.898.7548, for \$284 lots of perihable agricultural commodities, purchased, received, and cacepted in interatate and for

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (*U.S.C. 499b), by failing to make full section of Section 2 of the Act (*U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Rindings of Fact No. 4 abova, for which the Order bolow is fasued.

Addeduce added by Administrative Law Judge: An oral hearing in this matter distance in June 19, 1985, in Low Angue, California. The Completional substant is part on July 23, 1988, and the Response to Smithed a Response therete to State of the State of the California of the State of the Stat

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 ϑ , 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 premptly—Publication of the facts.

Edward M. Silverstein, for complainant.

Respondent, pro sa.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a dissiplinary proceeding under the Perishable Agricultural Commodilies Act, 1809, as amended 7 U.S.C. 400s et sept. horeinofter referred to 60 to 40 Act"), instituted by a complete filed on November 14, 1825, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Proceedings of the Common of Agricultural November 14, 1825, and November 14, 1825, and November 15, 2. Pursuant to the licensing provisions of the Act, license number 780849 was issued to Respondent on March 1, 1978. This license terminate on March 1, 1985, pursuant to Section 4(a) of the Act 70 LISC. 4, 4964(a)), when Respondent failed to pay the required annual locense fee.

 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, Repondent failed to make full payment promptly as sellers of the agreed purchase prices or bisances thereof, in the claimount of \$200,046.05, for \$2 lots of fruits and vegetables, all being pershable agricultural commodities, purchased, received, and accepted in interstate and ferroir commerce.

CONCLISIONS

Respondent has committed wiltin; flagrant and repeated vichtions 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 Pact No. 4 above, for which the Order below is incom-

ORDER

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 USC. 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: Ven-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-explicated matter was issued upon consent of the parties, on Deember 4, 1986. In the Decision and Order, it was noted that the effective date thereof was to be December 2, 1986. December 9, 1986. Complainant, by Medion filed December 9, 1986, moves that the effective date be changed to December 9, 1986, moves that the effective date be changed to December 0, 1986 or 1986. The parties of the December 0, 1986, the other of the December 4, 1986, the other of the December 4, 1986, Decision and Order is hereby dered that the December 4, 1986, Decision and Order is hereby dered that the December 4, 1986, Decision and Order is hereby dered that the December 4, 1986.

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 al Commodities Act, 1990, as amended U.S.C. § 499a et secl. A tirrely complaint was filed in which complainant seeks a reparation award against seek as reparation in the amount of \$4,315.00 in connection with the sale of three shipments of tomatoes in intentals

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal curplaint was served upon respondent, which filed an answer therest denying liability.

Since the amount claimed as damages does not exceed \$18,000.00 the shortened precedure provided in section 47.20 of the Rules of Prestice (7 47.20) is applicable. Pursuant to such procedure is considered to be part of the evidence as are the vertical complaint and answer. The parties were given an opportunity to submit additional evidence in the form of vertical datasements and to fits briefs, but selected not to do.

FINDINGS OF FACTS

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. Ferry 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.

9. On approximately January 9, 1964, complainant soid to respondent 514 cartons of 8×6 tomatoes at \$14.00 per carton, or \$11,986.00, and Fig. 2cartons of 8×7 tomatoes at \$12.00 per carton, or \$30,50.00, plus \$20.90 pelletizing, for a total of \$32,14.000, fixed \$4,000 pelletizing, for a total of \$32,14.000, fixed \$4,000 pelletizing, for a total of soil of the fixed pelletized to the soil of January \$1, 1864, were ehipped in intertate commerce to respondents customer on about January \$1.

is84, and were received and accepted. On January 23, 1984, 528 cartens 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 \$25.40 palletxing for a total of \$996.40, f.o.b.

 The tomatoes sold on January 26, 1984, were shipped in interstate commerce to respondent's customer, and were received and accepted.

7. On approximately Pebruary I, 1984, complainant sold to repondent 206 cuttons of 5×6 tomatoes at 314.00 per on-tron, or 8,884.0, 432 cartons of 5×6 tomatoes at 316.00 per on-tron, or 8,8812.00, 611 cuttons of 6×6 tomatoes at 316.00 per carton, or 8,943.0, and 216 cartons of 6 ×7 tomatoes at 310.00 per carton, or 8,943.0, and 216 cartons of 6 ×7 tomatoes at 310.00 per carton, or 8,100.00, plus 310.75 pellatining, for a total of \$90.118.76, for 1.

8. The temators sold on Yebruary 1, 1984, were shipped in interdate commarce to reppondent's customer, and were received as excepted. On Yebruary 9, 1984, 1,249 certons out of the 1,446 origirally shipped were federally inspected. On Pebruary 11, 1984, respondent prepared and sent to complainant a "problem respect" respondent prepared and sent to complainant a "problem respect" respondent prepared and sent to complainant a "problem respect".

9. After receiving the problem reports for the January 9, 1984, and February 1, 1984, shipments, complainant's aslessman, Tom Srikes, called respondent's aslessman, Glenn Thomason, and asked that they were about. After Thomason explained what the reports represented, Benke stated that he would pay no attention to them at advised repondent to send federal inspections on the loads in-wed-. Respendent sent the applicable inspection reports to complete.

stinant on Pebruary 16, 1984.

10. On or about March 8, 1984, Thomason apoke with Banks over the telaphone, and they agreed to price adjustments of \$1,50 per arten for the January 9, 1984, load, and \$2,00 per carton for the Pebruary 1, 1984, load, Thomason confirmed these price adjustments in a March 6, 1984, letter to Banks, which states as follows.

As per phone conversation regarding allowances on tomatoes that showed problems, we are taking the following adjustments per you on these invoices:

is relevant part:

Guif Lake #8708, your #9505, adjusting \$1.50 per case on all 1,465 cases.

herein accrued.

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 lonewer, as there is strong evidence in the record supporting reproducts claim of mutually agreed upon price adjustments. In a Narch 8, 1984, letter to complainant's Tom Banks, contained in the neptr of investigation, respondent's Glenn Timenson refers to price adjustments arrived at with Mr. Banks of \$1.50 per curton for each of the 1,656 cartons of the January 9, 1984, shipment and \$2.00 per curton for each of the 1,656 cartons of the 24th price of the 1,656 cartons of the 24th price of the 1,656 carton of the 24th price of the 24th p

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 barden of proving a breach of warranty, respondent is liable for the contract price of the ternatoes it purchased, received, and accepted from complainent.

Complainant, pro se. Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

the Act.

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 syidence. The parties were given an onportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

- Complainant, Beefstake Tomato Growers Inc., is a corporation whose address is Rt. 2, Box 1700, Naples, Florida.
- 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
- 3. On approximately June 2, 1984, complainent 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 ellegedly 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. U. EMERSON H. ELLIOTT d/b/s EM-ESSON ELLIOTT PRODUCE. PACA Docket No. 2-6747. Decided November 7, 1985.

Burden of proof-Breach of warranty-Liability limited to produce shipped. Where respondent falled to provide evidence that the poppers were improperly packed, and that the small pappers 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 poppers 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 \$6,884.55 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,

Since the amount claimed as damages does not exceed \$15,000.00, denying liability. the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such p^{rC} the report of investigation is considered to be part of the e^{ν} as are the verified complaint and answer. The parties w^{cC} an opportunity to submit additional evidence in the form field statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

- Complainant, Battaglia Produce Sales, Inc., is a corp.
 whose address is 1705 Weeksville Road, Elizabeth City, North
 line.
- Respondent, Emerson H. Elliott d/h/a Emensul 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 rei of peppers consisting of 253 carton of extra large at §51 carton, or \$1,543.90, 697 carton of medium large at §53 carton, or \$1,543.90, 697 carton of medium large at §53 carton, or \$1,583.75, plas \$22.90 for a total medium at \$45 carton, or \$1,583.75, plas \$22.90 for a total medium at \$45 carton, or \$1,583.75, plas \$22.90 for a total medium large carton consistent of \$6,644.55, both the contractor price medium large peppers was subsequently resulted to \$1,65 carton pursuant to an arrementa by the sartias.
- 4. On July 12, 1984, complainant loaded onto a truck furment to respondent's customer in Canada, 263 cartons of large pepus, 477 cartons of medium large pepus, and 400 tons of small peppers. A bill of lading was prepared by complain reflecting the number of cartons loaded on board the truck.
- The trucklead of peppers was received and accepted by spondent's customer. Respondent has failed to pay any part of agreed upon contract price.
- 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 255 cartons of extre large ; pers, 307 cartons of large peppers, and 275 cartons of medium pers, but the papear received castener were inselling pers, but the papear received castener were including a consider in cartons arrived, respectively, castener respondent, there were few medium, and as Therefore, claims respondent, there were few medium, then if the papear had been pecked in the proper cartons, the constraints of the papear of the constraints of the papear of

aspondent's automer received and accepted the truckload of 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 prependerance 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 reppers 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, as reparation, \$5,90.30, 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 swarded.

Stanley K. Bruza, Mount Vernon, Washington, for complainant.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agriculturol Commodities Act, 1930, as amended 7 U.S.G. 493a et seço. A timely complaint was filed in which complainant seeks as award of traparation against respondent in the amount of \$16,814.78 in connection with the shipment in interested commerce of four trucklots of senanguay. A copy of the report of investigation made by the Dopurtuse was served upon the parties. A copy of the formula complaint was served upon respondent, which filled an unverified amendate the decaying liability to complainant. Although the amount claimed is the formal complaint occode \$15,00,000, the parties waived out to first a complaint occode \$15,00,000, the parties waived out of \$2.00 of the formal complaint occode \$15,00,000, the parties waived out of \$2.00 of the formal complaint occode \$15,00,000, the parties were part of the evidence in the case, as in the Departure considered part of the evidence in the case, as in the Departure diversity of the evidence. In addition, the parties were given an opportunity to fill excess in addition, the parties were given an opportunity to fill opening statements. Complainant filled as opening statements follow the successful of the parties were given an opportunity to fill opening statements. Gon even statements. Complainant filled as opening statements follows the statements of the statements of the parties were given an opportunity to fill opening statements. One seven statements. Complainant filled as opening statements. One of the statements of the statements of the statements of the statements of the statements.

FINDINGS OF FACT

- Complainant, Shane Farms, Inc., is a corporation whose address is 1803 Bradshaw Road, Mount Vernon, Washington.
- Respondent, Corgan & Son, Inc., is a corporation whose scheres is Row A-No. 161, New York City Torminal Market, Brox., New York. At the time of the transactions involved herein respectent was licensed under the Act.
 On or about May 10.
- On or about May 19, 23, 29, and June 21, 1984, complainant add to respondent, and shipped from loading points in the State of Weshington to respondent in Bronx, New York, four trucklots of fresh asparague at a total price of \$64,122.0, fo.b.
- 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.
- The formal complaint was filed on December 26, 1984, which was within nine months after the causes of action herein accraed.

CONCLUSIONS

Respondent's answer to the formal complaint was in the form of an unvertified letter from its president. This letter has no evidentia ry value in the proceeding, but does serve to join the issues between the parties. See Forell, Inc. v. Anthony Abbate Fruit Distributors, 32 Agric Dec. 1990 (1973).

In its letter respondent alloges that all of the asparagus was received from complatinant on a commission basis. There is no evidance in the record to support this contention by respondent, and complatinant has submitted as its opening statent two officavits, one from its precident and the other from its marketing director, denying that the four shipments of asparagus were on a consignment basis. Both affidavits affirm that the four shipments were old at the fo.b, price stated in the compliant. We conclude on the basis of all of the evidence that respondent purchased the aspergus at the prices set forth in the complaint, totaling 540,1220, and accepted such asparagau upon arrival. Respondent has not proved any defense to complainant's claim. Accordingly, was (54,124.78 in respondent's failure to got fair. Accordingly, was (54,14.4.78 in accordingly was complainant's claim. Accordingly, was (54,14.4.78 in washed to complainant with interest.)

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reperation, \$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.

GABSDEN 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.

Regundant found liable for the contract price of a load of isonatoes which the conplaint alleged had been purchased, received, and ecoupled, where respondent alleged had been purchased, received, and ecoupled, where respondent alleged that it had made payment for contractor, and economiciants provided cridence that

such payment was for a load of termstone 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 Agriculture.

A commodities Act, 1990, as sended of U.S.C. \$499e et seq.). A
timely commodities and the seq. (A commodities are parameters as the seq.) and the seq. (A commodities are parameters are produced in the amount of \$7,524.00 in connection with the sele 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.

Volume 44 Number ?

Since the amount elaimed as damages does not second \$15,000.00.

Practice of CFR 47.20 is applicable. Pursual 47.20 of the Rules of Practice of CFR 47.20 is applicable. Pursual the procedure, between the report of investigation is considered part to the evidence, as is the verified complaint. The answer, since it is considered part of ovidence. The parties were given an opportunity to submit additional evidence in the form of verified adatements and to the briefs, but elected not to do not of verified adatements.

FINDINGS OF FACT

- Complainant, Gadsden Tomato Co., is a corporation whose address is P.O. Box 1018, Quincy, Florida.
- 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 \$7.52.4,00, f.o.b.
- 4. On June 30, 1984, complainant loaded the 1,584 boxes of tone-toes onto a truck bearing licease number S28996 File., with respondent's place of business as its destination. The driver was instructed to refrigerate the load at 54°F. A bill of lading was prepared reflecting this information, and signed by the driven.
- On June 30, 1984, the truckload of tomatoes was shipped, in interstate commerce, to respondent, who received and accepted it upon arrival.
- On July 2, 1984, complainant sent respondent an invoice reflecting the contract terms, including the sales price of \$7,52490.
 Respondent never made any objection upon receipt of this invoice.
- Respondent has failed to make any payment for the truckled of tomatoes at issue.
- 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 loaded 1,848 boxes of tomates on a truck for shipment to respondent. Complainant has also included a copy of (is invoice to respondent, aboving the data of billing at olly 2, 1988, There is nothing in the record showing that respondent did not receive and accept the truckload of tomateue. In addition, there is no evidence that respondent dijected upon receipt of complainant's invoice. Therefore, it is clear that by accepting the tomates without objection, respondent became liable for the spreed center price thereto the contract price the contract

Respondent's failure to pay complainant the agreed contract price of \$7,524.00 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

OBDER

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.

MENDRISON-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 repuration proceeding under the Preinshelb Agriculture. A commodities Act, 1980, no smeaded Of USA. § 498 et sep. A timely informatic compilation was filed on Privacy 31, 1986, and a timely informatic compilation was filed on Privacy 31, 1986, and a recovery \$85,023.00, which amount is alleged in by respondent inches price for terminates and to make price for terminates and to gain 4 and 18, 1986. Respondent filed in answers to the formation compilation on September 10, 1986, and a native to the formation compilation on September 10, 1986, and the price of the

due and owing to complainant on account of the transactions in volved berein.

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 smount, \$23,970.00. Payment of this amount shall be made within 10 days from the date of this order with interest thereon at the rate of 18 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 units 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 VILLALOROS d/b/a TERREN BRAND INTERNATIONAL. PACA Docket No. 2-6683. Decided No. vember 21, 1985.

F.O.B. sule—Inspection—Accountings—Repuration awarded.

George S. Whitten, Presiding Officer. Complainant, pro re.

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 [185,000,00], the parties waview of our hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (TCPS 47.00) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evertified pleadings of the parties are considered a part of the verified hearings of the parties are considered as part of the verified hearings and the parties were given an opportunit a negative father form of swown of the parties were given an opportunit as negative father form of swown of the parties were given an opportunit on a possing state her form of swown of the form of swown of the parties when the parties were given to the parties of the parties of

FINDINGS OF FACT

- Complainant, Cal-Mex Distributors, Inc., is a corporation whose address is P.O. Box 1717, Chula Vista, California.
- Respondent, George Villalobos, is an individual doing business as Teksun 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.
- 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:

VOICE	SHIP- PING DATE	QUANTI- TY		DESCRIP- TION	SIXE	BACH	TOTAL AMOUNT
6480	3/9/84	396	Fits.	Pink	5×6	7.00	2,772.00
		1820	Fits.	Yomatoes Pink Tomatoes	6×6	4.00	7,920.00
		Pé	PAC			.50	858.00
			Part				11,650.00
6481	8/12/ 84	646	Flts.	Pink Tomatoes Pink Tomatoes Pink	5×6	6.00	3,454.00
		756	Les.		6×7	6.00	3,780.00
		44	Len.		7×1	4.00	216.00
				Tomatoes Pink	.6×T	5.00	540.00
		108		Tomatoes			868.00
	100	H	P&C	STATES IN			9,278.01

				onic et manue			
IN- VOICE	SHIP PING DATE	,	ANTI-	DESCRIP- TION	SIZE	EACH	TOTAL AMOUNT
6482	3/14/		Lgs.	Pink Tometoes	6×6	5.00	1,846.00
			Lga.	Pink Tomatosa	6×7	5.00	3,555.00
		420	Lga	Pink Tomatoes	7×7	4.00	1,680.00
			P&C			.60	700.00
							7,280.00
6501	3/10/ 84		Fits.	Pink Tometoes	6×6	6.00	792.00
		1295	Lgs.	Pink Tomatoes	6×6	4.50	5,827.56
			Pac	Pink Tomatoes		.60	718.58
							7,883.00
6524	3/19/ 85		Pits.	Pink Tometoes	5×6	7.00	1,848.03
		1134		Pink Tomatoes	6×7	4.50	8,108.00
			P&C			.60	. 699.00
							7,650.00
6542	3/24/ 84	65	Fits.	Pink Tomatees	4×5	6.00	396.00
		330	Fits.	Pink Tomatoes	5×5	6.00	1,980.00
			Lgs.	Pink Tomatoes	6×6	5.00	1,620.00
		1088		Pink Tomatosa	5×6	5.00	5,276.00
			P&C			.50	887.50
							10,158.50
6554	3/27/	896	Fite.	Pink Tomatoss	5×6	6.00	2,876.08
ed.		1462	Fits.	Pink Tomatoes	5×6	6.60	7,200.00
la job in			P&C			.60	924.00

X 6550 3/50 284 Fits. Pink S4 Tometoes 694 Fits. Pink 18,560.00

4×6 6.00 1,684.09 6×6 6.00 3,684.00 Volume 44 Number 7

4. All of the produce listed above originated in Mexico and was ahipped by complainant from its place of business in Chila Vista, Chilronia 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-

PERISHABLE AGRICULTURAL COMMODITIES ACT Volume 44 Number 7

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 complained 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 us to any of the invoices. See Fowler Packing Co. v. Associated Grocers On 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 involves 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 tematoes 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 540-8 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" have a substantial number of cartons of fornates dumped, but it is no substantial number of cartons of fornates dumped, but it is no where disclosed on what date the dumping took place, nor was the report of sales accompanied by timely dumping certificates. The five fiderial inspection certificates dated April 4. and April 5, 188, although they show in some cases very large amounts of decay, as although they show in some cases very large amounts of decay, as some shown of the superclines covered by and certificates were held pier to the inspections.

Respondent has complained throughout this proceeding that couplainant violated section 47.8% of the Rules of Fractics 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 mandator requirement. Such is not the case. This section of the Roles 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 necessiting under the Art A nature was a well-such as the Art A nature of the Art

ORDER
Within 80 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 MARKSTING COMPANY D. JOHN R. HOFFMAN, JR., PRODUCE Co. PACA Docket No. 2-6711. Decided November 21, 1985.

P.O.B. sale—Acceptance—Payment to wrong party—Failure to pay—Reparation awarded.

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 Agriculture.

An immunication Act, 1989, as mended of U.B.C. 499a et sept.

An immunication Act, 1989, as mended of U.B.C. 499a et sept.

All the complainant seeks a reparation of the complainant seeks are paraticularly as the complainant seeks are paraticular

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 abortance inhalled of procedure provided in section 4.250 of the Rabes of Practice of C.SPS \$47.00 vas followed. Purmant to this procedure, the verified pleading of the parties are considered a part of the ordinary of t

FINDINGS OF FACT

 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 21-28-25, Louisville Produce Terminal, Louisville, Kentucky 40218. At all material times, the respondent was licensed under the Act.

3. On or shout Pelvaruy 20, 1894, in the course of interestate converse conspiration, by oral contracts, odd to the vespondent a pet dat tree/thost of lettuce, consisting of 480 cartens, at an agree that tree/thost of lettuce, including the contract of the contract o

 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.

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 entared into an agreement whereby the complainant would seel and the respondent would buy a partial stuckload of letaxy consisting of 480 cartons. This is the position asserted by the conplainant, the complainant's position is consistent with its invoice, — 4—ith the broker's memorandum issued by Twiori-Flower. The

SIX L'S PACKING CO. s. EMERSON-BLLIOTT PRODUCE Volume 44 Number 7

2955

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 relationshy 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.

Therefore, on the besis 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 researation 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 18% 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 Florids and then

Where respondent scrupted tomators contract destination in Florids and then shipped them to his customer in Puerto Rico, inspection in Puerto Rico, which included undestremined propertion of bunators from another shipment, was insufficient to show breach at contract destination in Florids. Reparation awarded to complainant for behave 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. § 493a et seq.). A

3 We note that, on Acel 4, 1984, respondent issued a check to Taylor-Riyers for Month is claims was proposed for \$30 extent of fatters at \$8.00 per certain. See that the size of the size of the size of the size of the certain size of the size was \$4.00 per certain. Also, in any years, over if responding that flyper-Byers \$1.247.00 for the lettuce, Taylor-Byers size not the proper payer, and respondent still remains chiliquet to complicated. Adors p. Farra, \$1 days, 10.84.49 43 (1972).

timely complaint was filed in which complainant sought an award of reparation against respondent in the amount of \$16,704.00 in connection with two shipments of tomatoes in interstate compages.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complications we served upon respondent, which filled an answer thereto admitting isolarly to compliantant for the entire normal of the September 7, 1984, adaptent of tensions, or \$8,754.00, and for \$3,054.05.00 in the interest tensions, or \$8,754.00, and for \$3,054.05.00 in the contract, or a total adplainant for a believe of \$8,274.00 in connection with the August plainant for a believe of \$8,274.00 in connection with the August in fewer of complainant against respondent requiring the payment of \$13,057.00 is an undisputed amount. Respondent's inhibitor for \$13,057.00 is an undisputed amount. Respondent's inhibitor for \$13,057.00 is an undisputed amount for Respondent's inhibitor of \$13,057.00 is no undisputed amount of the subdistrated amount had been seen order for the answer amount of the undistrated amount had been seen

Although the amount claimed in the formal complaint asceeded is allowage, the survival and the shortwest and the shortwest and the shortwest method of precedure provided in section 47.50 of the Rules of Practice ("CPS 47.50 is applicable. Pursuant to this precedure, the circumstance of the section of section of the section of sectio

FINDINGS OF FACT

- Cemplsinent, Six L's Packing Company, Inc., is a corporation whose address is P.O. Box 1987, Hollywood, Florids.
- Respondent, Emerson Elliott, is an individual doing business
 as Emerson-Elliott, whose address is P.O. Box 745, Casselberry,
 Forida. At the time of the transactions involved herein respondent
 was liceased under the Act.
- 3. On or about August 17, 1984, complainant sold to respondent orbital consisting of 1284 packages of extra large Shickshimp Fride brand temates at \$6.00 per package, plus 15 cents per package for patiesting, and \$22.50 for a temperature recorder, for a total pelos of \$7,919.10.
- On August 17, 1884, complainant shipped the tomatoes from loading point in Shikeshinny, Pennsylvania to respondent at contract desination in Casselharry 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 meraly 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 shnormal 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., 87 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 cornplainant'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 ahipment 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

ALER W. SHILL THE SEC

to complainant for the full purchase price thereof, or \$7/1.19.6. Complainant was previously awarded \$5.64.2.0 of this smouth by our order of March 26, 1986. Consequently respondent's remaining inability to complainant is for \$2,876.80. Respondent's failure to pay complainant send amount is a violation of section 2 of the Act for which repeatation 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 thereas 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. HUMPHRETS d/b/a HALLMARK PRODUCE COMPANY U. THAD-DEUS J. SOBIECH d/b/a TED SOBIECH. PACA Docket No. 2-6757. Decided November 22, 1985.

Waiver of oral hearing-Fallure to raise specific defense in answer-Jurisdiction to award freight charge.

Where respondent falled to raise specific defense to complainant's for purchase price of produce received by respondent, complainant awarded respection. Respondent was found to harm warder of all hearing by not objecting to inadvertent use of abortened procedure. Beerchary was found to have jurisdiction over alleged freight charge which were a component of the contrast between the particles.

Complainant, pre 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 of U.S.C. 499a et eeg.). A timely complaint was filed in which complainent sought an award of reparation against responder in the amount of \$45,830.76; in connection with the simple commerce of eight connection with the simple commerce of eight connection.

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,

HALLMARK PRODUCE CO. st. TED SOBIRCH Volume 44 Number 7

the proceeding was insérvirently set down as a non cell hearing area to he heard under the shortened method of procedure provided in section 17.20 of the Bullot of Practice of CFR § 47.20. On March 22, 1055, the preciding officer words a letter to complainant giving complainant 20 days from the date of needpt of the letter in which to the an opening statement under the shortened method of procedure. A copy of this letter was sent to respondent's attorney, in this letter the preciding 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, 1986, a letter was addressed directly to respondent's attorney giving respondent opportunity to file an answering statement pursuant to the denotenden denbod of procedure. There also was no objection as a consequence of this letter. Since respondent was made aware of the fact that the shortend method of procedure would be followed, and have about the objective of procedure would be followed, and have also shown the shortend method of procedure would be followed.

Neither party filed any evidence under the shortened procedure.

Both parties were given opportunity to file a brief, and complainant submitted a latter in which he stated the respondent hed 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 \$8.070.00.

FINDINGS OF FACT

 Complainant, Jack T. Humphreys, is an individual doing business as Hallmark Produce Co. whose address is P.O. Box 1267, Edinburg. Toxas.

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 soid and shipped to repondent 900 fifty point acies of Pre-Pak Yellow Oniona at 37.80 per saok, or a total price of \$7,000.00 delivered. Respondent received and accepted the onions at its place of business in Pine Island, New York, and has paid complainant \$4,960.00, leaving a balance still thou end owing of \$2,870.00.

 The formal complaint was filed on November 23, 1984, which was within nine months after the causes of action heroin account

CONCLUSIONS

As set forth in the preliminary statement complainant, by an efmission 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 commedities at destination but denied, in general terms, any liability to complainant. A letter from respondent's atterney which accompanied the answer stated in relevant part that "In sum and substance, the respondent claims that he has paid to the complainent 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 onlons 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, 1988, after being served with complainant's beint responders' attorney filed a letter with the bearing devia flexing that the remaining disputed amount of \$2,070.00 was for freight as the shipment which is the subject of finding of fact 3, and that one sequently the Department has no jurisdiction to adjudicate it the pub. Responders' determination that the amount of \$2,070.00 one pub. Responders' determination that the amount of \$2,070.00 one pub. Responders' determination that the amount of \$2,070.00 one which were submissed appendix of the publication of the public which were submissed appendix on the publication of the publication of the meants' indicate that the althouse was excitated. In the five devices 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 haior \$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. & ELLIOY, INC. PACA Docket No. 2-6876. Decided November 26, 1985.

Brokerage-Counterclaim-Burden of proof.

Where respondent falls to sustain its burden of proving that broker/complainant falled to carry out its duties as a broker, broker/complainant awarded brokerage carned.

Educard 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 Agriculty. And Commodities Act, 1800, as amended (7 U.S.C. § 490e et set). At the complaint was filled in which complainant seeks a reparation overal against respondent in the amount of \$1,272,00 in connection with alk transactions, in interstate commerce, involving perishable extractivativa 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 filled an answer thereto denying any liability to complaint, the Respondent also filed a counterclaim against complainant in which it seeks a reparation oward against complainant in the amount of \$37,013.88 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 this not exceed \$15,000.00, the shortened method of procedure, provided not exceed \$15,000.00, the shortened method of procedure, provided in section 47.20 of the Rules of Practices (7 CBP 4.47.20) was followed. Pruncate to this procedure, the verified piseding of the stress are considered a part of the swidenes of the case, as is the Department a report of investigation. In addition, the particle work the opportunity for further evidence by way of seven statements, but nother party did not. Also, nother party filed a bright.

FINDINGS OF FACT

- Complainant, Golden State Distributors, is a corporation whose mailing address is 1212 E. Brandywine Lane, Fresno, California 93710.
- Respondent, Wileman Bros. & Elliot, Inc., is a corporation whose mailing address is P.O. Box 308, Cutler, California 98615.
 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 responsive with regard to five immentions involving various ehipments of fraits, all being perishable agricultural commonities, in interstate commerce. The food brokerage carried by complainant with regard to these five shipments is \$800.00. As to each of these transactions, complainant issued brokers memorands of sale. Although it re-
- ceivid cepte thereof, respondent did not object to any terms constant threats.

 5. In siddlion to the five transactions mentioned in §4 above, or special state of the product of the prod

⁴ On October 11, 1984, the Department received a deposition from respondent's coursel. Such deposition was not claim pursues to the Rules of Practice, see 7 CFR \$ 47.10, and want of forms into ordinons in stoodness with the Rules of Practice, see 7 CFR \$ 47.20. Accordingly, it is not considered to be in switcome in this proceeding.

the brokers' memorandum, and did not object to any of the terms

6. Respondent involced A. Cancelmo for the 1,560 cartons of juns. The terms on the respondent's involce no 1-28-11, while lisent to A. Cancelmo on June 11, 1883, were the same as those on complainant's June 13, 1983, brokers' memorandom, i.e., respondent billed A. Cancelmo for the 1,560 cartons of plums at \$12.00 per aston, plus 70¢ per carton for cooling, and \$22.00 for a Ryan research, program of Lob. price of \$19,834.50.

The second and the se

8. On August 9, 1983, respondent filed an informal complaint with the Department regarding the load of 1,660 Red Beauta. This sas within nine months after its cause of action accrued. Although given the opportunity, respondent declined to file a formal complete.

plaint.

9. On October 14, 1983, complainant filed an informal complaint
garding the brokerage on the six transactions made the subject of
the complaint. This was within nine menths after its cause of
stipn accurate.

CONCLUSIONS

Complainant alleges that it provided responded truberage arrives on six transactions and that respondent has finish to pay it the MLZ700 owed it for these six and all of the ordence is the transaction of the six and the ordence of the transaction of the six as the ordence containing to the transaction of the six as the orden or the six transactions, and that complainant die set as a broker or, respondence or complainant the \$1,720.0 shared by the complainant the six and the six as the six a

³ These loads were among the five transcripts noted in if above with also we tradeered by complainant, Complainant issued brokers' netocorandum see, 534 s brokered by complainant, Complainant, Complainant issued brokers' netocorandum see, 534 s. Cancelino section of condition defects.

of section 2 of the Act for which reparation plus interest should be awarded.

Bogonderit's counterciaim deals with one of these six turns are times the size it slaged, when failed for prove, that respondent is turns at short karring sold that lead of 1,500 carrons of Red Bauste to Abut having sold that lead of 1,500 carrons of Red Bauste to Abut the Company of the Co

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 18% 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. U. EMERSON H. ELLIOYT d'his.

BASERSON ELLIOTT PRODUCE. PACA Docket No. 2-6716. Decides

November 26, 1986.

Collecting agent-Failure to remit to principal-Failure to submit evidence-ilability for full amount of claim.

Where respondent submitted on unverified answer and no evidence, his contestions cannot be credited and complainant's verified claims are given full credit. Thereas C. Heinz, President Officer.

Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

Completent, pro se.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1980, as amended (7 U.S.C. § 499a et seçà. A timaly complaint was filed in which complainant sought a reparation award against respondert in the amount of \$16,772.99 in con-

Respondent has alleged that the plume were said to this dealer for a price of \$12,800.45. The evidence irrefutably shows that the dealer had the leed auxilored for respondent's account, and that the proceeds on auxilian were \$15,110.00.

nection with the sale and shipment of four truckloads of watermel-

one is interestant commerce.

A cay of the report of investigation prepared by the Department was sered upon the parties. A copy of the formal complaint was sered upon the parties. A copy of the formal complaint was sered upon the respondent, who filed an answer scaling liability is the amount of \$15,580,94, and, in offset, decay of the complaint of the complaint of the parties of the remainder of complaintant chairm. But 1, 1985, respondent was ordered to pay complaint the unique da mount pursuant to section 700 of the Act (T U.S.C. § 409(ah), leaving present to section 700 of the Act (T U.S.C. § 409(ah), leaving

\$1,38215 in dispute.
Since the parties have waived crist hearing, the shortened processions the parties have waived crist hearing the first parties of CFR (47.5) is applied in section and to such procedure, the report of in- 47.5 in any included part of the evidence, as let werified complaint. The parties were given opportunities to subscribe the brief of evidence as let of the brief at evidence in the form of verified state attackment, but no brief, complainant authoritied a vertex of the parties were grant response to the brief and respondent subscribed subther an answering statement nor a sent response to the parties where the parties were processed to the parties where the parties were processed to the parties of the parties of

FINDINGS OF FACT

- Complainant, Libby's Fresh Food Company, Inc., is a corporation with a mailing address at P. O. Bex 577, Groveland, Florida
- 32738.

 2. Respondent, Emerson H. Elliott, is an individual doing business as Emerson Elliott Produce, with a mailing address at P. O. Box 746, Cassolberry, Florida 32707. At the time of the transactions involved heroin, respondent was licensed under the Act.
- 3. On or about June 19, 1984, complainant sold and shipped one trucklot of watermelons weighing #7,890 pounds to Cruce Produce, Salina, Kansas, Respondent negolisted the control of sale as complaisant's agent and agreed to invoice and collect the sale amount from the buyer and to remit \$4,620.35 to complainant.
- 4. On or about June 19, 1984, complainant sold and shipped one half of a trucklet of watermelous weighing 4,650 and the remaining half of the Protone, Millerelli, Pennsylvenia, and the remaining half of the trucklet to Four Seasons, Beaver, Pennsylvenia, Charles the charlest de sold and the proposed to the charlest of sold as complainant's agent and agreed t. invokes and collect the sales amounts from the buyers and to remit a total of \$4,462.02 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, Denvar, Ponnsylvania

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 wa-

termelons he negotiated on behalf of complainant on June 19, 1934, 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. Prillieits 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 unionding precision, reasonable time for, notice must be in clear and unustationable terms—Sale by sample, fallure to have sample federally inspected—Substandard U.S. Grade not necessarily evidence of unmerchantoble quality—Fallure to submit evidence of demagos.

Where completional contracted to still freues pinespile to reapondent which would confirm to a previously submitted amply, respondent vans found to have accepted the pinespile and to have failed to prove that the pinespile and do have failed to prove that the pinespile and so to the sample. Although the pinespile was found to be U.B. Oracle to De Substandard this was held not to be in fixed avidence of unmerchantishe quality. Comploisant was awarded repeated in the amount of the full purchase price of the pinespile.

George S. Whitten, Presiding Officer.

David B. Ward, Greenville, Scuth Carolina, for complainent.

Mitchell H. Kizner, Vinelon, 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 all Commodities Act, 1890, as amended CU LSC. 4990 at even Authority compliaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$8,287.10 in connection with two shipments of frozen pincapple in interstate commencion with two shipments of frozen pincapple in interstate com-

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 reopaned, and respondent filed an answer denying liability to complainant.

Since the amount claimed in the formal complaint does not coceal \$15,000.00 the shottened mathod of procedure provided in section 47.20 of the Rules of Practice of U.FR \$47.20 is applicable. Permanta to this procedure, the verification of the Practice of U.FR \$47.20 is applicable. Permanta to the procedure, the verification of the Practice of the P

FINDINGS OF FACT

 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 of dress is P.O. Box 520, Vineland, New Jersey. At the time of the transactions involved herein respondent was licensed under the Act.

 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 reapondont accord diced pineapple, approximately 1/2 inch in size, and also corrie crushed pineapple. Mr. Price replied that he might nut be able to supply pineapple that measured exactly 1/2 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, 1988, the parties entered into a contract calling for complainant to sell to respondent 750 40 pound containers of pineapple cubes, % 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. Lerree, 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 pinsapple weighing 35 pounds each, for a total price of \$5,097.10. and on October 7, 1988, 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 aize." 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, 1988, the broker notifled 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, 1988, the broker forwarded the telegram to respondent. The letter accompanying the telegram stated in relevant part as follows:

It was understood that the diess 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, 1988, the broker wrote the following letter to complainant:

Limpert Brothers has informed Connell and Cempany that the diede pinespile ahipped from your company is not acceptable for use in their products. They had agreed to purchase the pinespile on approval of sample and with the product shipped to be equivalent to the approved sample. The pinespile shipped was irregular in size and contains very large chunck 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.

 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 dieed pineapple shipped to Limpert Brothers from Global Trading Company.

On November 3, 1983, in the absence of Bob Green, I met with Charlie Liceratz 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 Limpart facility to inspect the sample submitted to your company by Global Trading. The product consisted of cuts fairly uniform in size and shape (approximately 1/2" to 1/2"), contained little or no fruit core, was yellow in color, had a brix mousurement of approximately 14°, and a distinct pineapple flavor.

If we can be of further assistance to you, please let us know

Sincerely,

Dick Westfull

11. On January 26, 1984, a federal inspection was made of th subject pineapple with the following results in relevant part:

Style-Chunka

Brix (liquid media only)—6.8 to 8.7 degrees

GRADE:

U.S. GRADE D or SUBSTANDARD, account "Defects" and "Character" (core material).

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 previousby 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(co)(1) and (ddX3). 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 faderal inspection of the 511 cases of juhaspile which resulted in grade of Der Substandard is in tested revision of compliances; beauth of contract. In addition, respondent maintains beauth of contract. In addition, respondent maintains beauth of contract in addition, and the substandard grade is conclusive expected purpose. Respondent is everage to obte counts. The federal inspection made on January 28, 1384, did not disclose the score opinis for color, uniformly of size and symmetry, absence of defects, and character. The inspection states that the pineapple was given U.S. Grade Der Substandard 'account' defecter and 'character' given U.S. Grade Der Substandard 'account' defecter and 'character' given U.S. Grade Der Substandard 'caccount' defecter and 'character' given U.S. Grade Der Substandard 'caccount' defecter and 'character' given U.S. Grade Der Substandard 'caccount' defecter and 'character' given U.S. Grade Der Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' defecter and 'character' given U.S. Grade De Substandard 'caccount' given U.S. Grade 'caccount' given U.S. Gr

ter (one material)." The United States standards for grades of frome pinceps of CSR \$2.0114 et sep.) provide in relevant just has a Suktandard classificación almone of defects in the standard classificación de company of the standard of pinceps (april to "shool siles, crushod, of the standard of pinceps) provide in relevant just fait fait to meet paragraph (or d'this sub-chair of pinceps) provide in relevant para that "frome pinceppie the standard provide in relevant just in this classification should not be read-placepie that fait in to this classification should not be read-placepie that fait in to this classification should not be read-placepie that fait in to this classification should not be read-placepied that fait of the standard placepied that the standard placepied the standard placepied that t

of 23 and etill 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 relevent 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. 166 (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 commer-

Begophete asserts that the 511 case of pineapple did not confern to be assemble portunity, and by complaintent, Mulle the testinguish of the product of the product of the product and product product of the product

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.

OPDER

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, 1988, until paid. Copies of this order shall be served upon the parties.

B. G. HARMON FRUIT COMPANY, INC. B. BUMGARNER PRODUCE, INC. PACA Docket No. 2-6748. Decided December 11, 1985.

Consignment-Danages-Failure to account.

Where respondent has failed to submit an account of sales to complainted, 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 conection 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 is ability to complainant.

The amount claimed in the formal compilant does not excel sliponous, and the shortment method of procedure provided in sliponous, and the shortment method of procedure provided in sliponous the sliponous considered as part of the evidence in the considered a part of the evidence in the considered a part of the evidence in the considered as part of the evidence in the considered as part of the evidence in the constraint procedure, the vertical procedure, the vertical procedure, the procedure is an opportunity to file evidence in the form of sworm shall exceed, but notice party tiles. Note they arry filed as brief.

FINDINGS OF FACT

- Complainant, B. G. Harmon Fruit Company, Inc., is a corporation whose address is P.O. Box 945, Clermont, Florida.
- 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.

 On or about December 10, 1883, complainant consigned to respondent one truckload of mixed citrue fruit. The truckload of fluit
 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 resdered an accountion of complainant. Respondent has paid complainant at total of \$960.00 for the fruit.
 - An informal complaint was filed on June 4, 1984, which was within nine menths after the cause of action herein accrued.

CONCLUSIONS

Respondent admits that the four was consigned to it by complaint and that respondent recovers each four. Respondent evidence held the respondent evidence has been a support of the fruit by a logis in its answer that following the rejection of the fruit by a consistence of the fruit by a support of the f

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 ancever, and accordingly we must conclude that respondent's allegation in regard to having been told by complainant that the truck was refrigerated, where the complainant that the truck was refrigerated, where communities the lock of refrigeeration on the truck would have been seleguate grounds for respondent to have rejected the truck, respondent instead accepted the truckload of citrus. In addition, respondent to have for down it was demanded by the failure of the truck to be refrigerated how it was demanded by the failure of the truck to be refrigera-

Complainant specifically allows in the formal complaint that respondent that falled, neglected and refunded to render an account of
alms relative to the trackboxer potential tracks and the relative to the trackboxer potential that allowed the renders abstraction to the surprise of any accounting to complainant. See the results of the renders appropriate of any accounting to complainant value of the renders appropriate to the form of an anxietal tracketton, that the citrus was in spec condition on arrival. We conclude that respondent deferees fail, and respondent in sliable 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 Tomatose 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 sa

Respondent, pro ss.

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. Complainent, Triple M Packing Inc., is a corporation whose address is P.O. Box 1358, Quincy, Florida.

Respondent, Corgan & Son, Inc., is a corporation whose address is 161-162 N.Y.C. Terminal Market, Bronz, New York. At the times of the transactions involved herein, respondant 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 eart a copy to respondent. Respondent returned the invoice, upon which it had made handwritten alterations changing the price from \$8.00 per carton to \$2.50, resulting in a total of \$5,148.00. Respondent paid this sum to complainant, but has falled to ranke any additional payments for this load.

6. On approximately July 9, 1984, complainant sold to respondent a truckled of tomatone consisting of 1,50% cartons at \$8.0 per carton, plus \$80 per carton from \$61,000 (a)\$. The contract policitating, for a callo contract prior \$61,000 (a)\$. The contract did not specify any grade. The trucklead of temporary for the trucklead of the specific policitating for and found to consist of U.S. number to tose with no decay. The tomatoes were abjuped to respondent, which received and accepted them, without objection.

 Complainant prepared an invoice on July 10, 1984, reflecting the agreed upon contract terms as set forth in Pinding of Fact 8, 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 tomatics.

7. The contracts for the two loads of fornatoes were negotiated by Robert C. Billout, an analyzer of Gargiato Inc., Naples, Briefals, Robert C. Billout, an analyzer of Gargiato Inc., Naples, Briefals, acting as the agent for complianant, and Doc Case, an omployee of Bondia Brokers, Perricha, acting as the agent for responden. Bondia Brokers of Professional and sent to the parties confirmation of sale for an analysis of the profession of the contractions called the grade of the tensions called the profession of the profession of the contractions of the profession of the contractions called the profession of the contraction of the profession of th

8. A formal complaint was filed on October 19, 1984, which was within nine months from when the causes of action berein accrued.

CONCLUSIONS

Respondent's only defense, contained in its unsworn enswer, is that it received an inferior grade of tomatose on both loads. Respondent contends that it has been accustomed to receiving Respondent operating and the forations striped by complainant were U.S. number three.

Disponent does not days having accepted the second second

CHAPARRAL PRUIT SALES 11. CORGAN & SON Volume 44 Number 7

broker's confirmations of sale do not mention the grade of the tometoes. 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 expressly warranted the tomstoes 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. U. CORGAN & SON, INC. PACA Docket No. 2-6751. Decided December 16, 1985.

F.O.B. terms-Freight foced by the buyer.

Where the prependerance of the evidence showed that respondant deducted a sum of money for freight, from the amount ownd complainant for the purchase of produce, and it was agreed that F.O.B. terms were in affect under which the buyer pays the freight, respondent was liable for the unpul contrast price.

plaint was served upon respondent, which filed an answer, desying liability.

Since the amount claimed as damages does not sected 3,15,100.10.

Since the amount claimed as damages does not section 4.70.0 of the behad Practice of CPR 472.0) is applicable. Pursuant to such provides a section 4.00.0 of the behad Practice of CPR 472.0) is applicable. Pursuant to such provides as it has verified as the verified on the section of the ordered as it has verified and the section of the conditional considered part of the evidence. The parties were considered parties and the behad of the parties of the evidence of the considered parties and the parties of the parties of the parties of the evidence of the parties of the evidence of the parties of the evidence of the parties of the parties of the parties of the evidence of the e

FINDINGS OF FACT

- Complainant, Chaparral Fruit Sales, Inc., is a corporation whose address is P.O. Box 7352, San Antonio, Texas.
- 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.
- On approximately April 25, 1984, complainant sold to respondent a truckload of cabbage for \$4,636.95.
- The truckload of cabbage was shipped in interstate commerce to respondent, which received and accepted it upon its arrival.
- Complainant sent to respondent an invoice reflecting the cotract terms. Respondent returned the invoice and wrote therea that it was deducting \$1,672.20 for freight, leaving \$2,964.75, which ident paid to complainant.
 - formal complaint was filed on December 14, 1984, which was sine months from when the cause of action herein accrued.

CONCLUSIONS

Volume 44 Number 7

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 18 percent per annum from June 1, 1934, until paid. Copies of this order shall be served upon the parties.

Anne G. DeLeo d/b/a Anne DeLeo Brokerage v. Corgan & Son, Ing. PACA Docket No. 2-6779. Decided December 16, 1985.

Burden of proof upon respondent-Breach of warranty-Change in cantract terms.

Where respondent admittedly purchased and accepted the produce from compilatiant, but failed to provide evidence to susfain its burden of proving a breach of warranty, and also failed to prove that compliance suchnorted any change in the content terms from a sale to a consignment, respondent is liable for the unpuid contract series.

Andrew Y. Stanton, Presiding Officer.

Complainant, pro se. Resnondent, 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 71 LSG. 199a et seq. 1, at the commodities and filed in which complainant seeks a reparation award against respondent in the amount of \$50,496.76 in connection with the sale and shipment to respondent of 15 truckloads of tomates in foreign commence.

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, denving 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 investigates is considered part of the evidence, as is the verified complicit. The answer, since it is not verified; is not considered part of the evidence. The parties were given an opportunity to submit additional verifience in the form of verified statements and to file briefs. Conplainant submitted an opening statement. Respondent elected as to submit any evidence. Neither party filed a brief.

PINDINGS OF FACT

 Complainant, Anne G. DeLeo d'h's Anne DeLeo Brokerage, is an individual whose address is 43 Lindon Road, Albany, New Yark.
 Respondent, Corgan & Son, Inc., is a corporation whose as dress is 191-192. Cerrainal Market, Broax, New York. At this times of the transactions involved herein, respondent was licensed under the Arr.

 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 Involce No.	Amount
7/21/84	073	\$3,200.00
7/39/84	697	8,600,00
8/1/84	706	250.00
8/3/84	705	5,400,00
8/21/84	747	4,650.00
8/29/84	762	
8/81/84	768	0,233.25 475.00
9/4/84	769	
9/5/84	775	1,828.00
9/8/84		5,625.00
9/10/84	784	5,800.00
9/11/84	785	5,128.50
8/12/84	790	5,900,00
		7,146,00
9/21/84	807	3,510.00
10/1/84	999	0.700.00

^{4.} The sales were negotiated by Henry Jacobs, Bronx, New York, who acted as the broker.

^{5.} The 15 trucklasts of produce were shipped in foreign conserve from a Ganada shipper, to respondent. Upon arrival of the functions, respondent stamped in shipper's invoices included with such trucklosis, 'RECRIVED UNDER PROTEST'."

 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.

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 truckionds, but allages in its unsworn answer that 10 of those truckionds contained produce that was in very poor condition. Respondent claims that it received these truckloades 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 meny 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 reparation should be awarded, with interest.

ORDER

Within 80 days from the date of this order, respondent shall pay to complainant, as reparation, \$59,495.75, with interest thereon at the rate of 13 percent per annum from November 1, 1984, until

Copies of this order shall be served upon the parties.

CONTINENTAL SALES CO. U. 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, Providing Officer. Complainant, pro so.

Respondent, pro pe.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is expected proceeding under the Perinhalbal Agricultus Commelline Act 1909, as amended (T U.S.C. § 40%) or smp.h. timely complaint was filed in which complaintant seeks an oward synarization against reproduct in the amount of \$2,23174 in one with the shipment in interestate commerce of 20 load of mixed with the shipment in interestate commerce of 20 load of mixed with the shipment of the report of investigation made by the Department. A copy of the formal complaint was served upon respect partners, a despite the formal complaint was served upon respect to the complete of the co

The amount delimed in the formal complaint does not exceed \$15,000,00, and the hardrand restood progressive too 472 of the Rules of Part of the \$15,000,00, and the part of the Rules of Part of the \$15,000,00, and the restood procedure, the verified procedure to the restood procedure, the verified procedure to the form of sworm statements, we, neither party did so. Neither party did so.

Texas, or Houston, Texas, twenty lots of mixed perishable produce having a total invoice price of \$23,310.18, delivered.

- A 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 belance 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 smout to a claim that a noral subtraintsion of credit twest granted to respondent by one of complainant's salesmen for shortages of product, Ferpolamagn product. Respondent attached documentation in an effort to substantiate the authoritations or credit. However, the documentation for the most part consists or self-serving notes made on its own purchase corder copies or on complainant's involves. The only exceptions from Flying Foods Inc. memorrantum's which such that the self-serving notes the self-serving the self-s

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 complain and has proven by a preponderance of the evidence that there is a balance still due and owing from respondent to complaining of \$2,231.74. Respondent's failure to pay this amount to complaining 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 18% per annum from February 1, 1984, until paid. Copies of this order shall be served upon the narties.

PIONEER MARKETING COMPANY & CORGAN & SON, INC. PACA Docket No. 2-6749. Decided December 17, 1985.

Unverified answer-Breech of worrunty-Resole not alloged-Accord and subfaction.

Where respondent's answer, with attained distantent, respondent failed to exclude any breach of warrasty or other defaues to liability for the serves leads of the which it is destribedly purchased, resistent, and the serves of the serves of

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, 1999, as amended (7 U.S.C. 499a et sey. I. A timas) complaint as filled in which complainant seeks a reparation award against respondent in the amount of \$29,176.50, in continuity with the sale and shipment of soven truckloads of lettuce in interstate commissor.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal combiant was served upon respondent, which filed an answer thereto lenying liability. Although the amount claimed as damages is greater than SILOGOUR, the parties sevied over labering. The shortened procedure provided in section 47.30 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 a like softened part. The sameer, since we will be a soft of the softened part. The sameer is the way given an opportunity and to file briefs, but sletch on to 4 on so.

PINDINGS OF FACT

- Complainant, Pioneer Marketing Company, is a corporation whose address is P.O. Box 2034, Yuma, Arizona.
- 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.
- 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	\$4,018.40
August 7, 1984	C0587	\$8,545.00
August 10, 1984	C0564	\$7,428.30
August 11, 1984	C0568	\$7,502.50
August 14, 1984	C0573	\$4,102.50
September 12, 1984	C0696	\$5,717.50
September 18, 1984	C0638	\$5,717,50
Depression 10, 1004		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 padd \$3,168.50, leaving \$850.00 allegolfy due and owing complainant.

5. Complainant shipped the lettuce reflected by complainant's in voice number C0557 in interstate commerce to respondent, which received and accepted it. Respondent has paid \$3,995.00 to on plainant, leaving \$2,550.00 allegedly due and owing. This paymen was not intended to be payment in full for the lettuce.

Complainant shipped the lettuce reflected by complainant's in voice number C0564 in interstate commerce to respondent, which received and accepted it. Respondent has paid complained \$3,218.30, leaving \$4,205.00 allegedly due and owing.

7. Complainant shipped the lettuce reflected complainant's invoice 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 Runge 42° To 48°F.

Applicant States: 850 cartons Conditions Head leaves: 1 to 2 heads in most cartons, none in some, average 6% demage by Rib Discoloration. I to 4 decayed heads in most cartons, none in some, average 10% Bacterial Soft Rot in various stages offsetting 1 to 3 Remarks Restricted to 150 cartons being unloaded and upper 4 layors of 3 camplete

stacks nearest roar door in that pertion of load remaining at time of in-

spection. 9. Respondent has failed to pay complainant any part of the contract price for invoice number C0568. 10. Complainant shipped the lettuce reflected by complainant's

invoice number C0578 in interstate commerce to respondent, which received and accepted it. Respondent has failed to pay conplainant 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 respondent, which On September 18, 1984, respondent secured a federal inspection of the lettuce of invoice number C0636, which reads as follows, in relevant part:

VARIOUS CONTAINERS Range 41° To 48°F.

Applicant States: 850 carters

Condition: Average 3% dam

Average 3% dismage by Russot Spotting, 1 to 4 hearls per carron average 11% deamage by Tipburn. 1 to 3 decayed heads per carron average 9% Bacterial Soft Ret in various states affecting 1 to 5 lenves.

- Respondent did not provide any evidence that it resold the lettuce of invoice number C0636. Respondent has paid \$1,467.50 for the lettuce, leaving \$4,250.00 allegedly due and owing to complainant.
- Complainant shipped the lettuce reflected by complainant's invoice number C0688 in interestate commerce to respondent, which received and accented it.
 - On September 18, 1984, respondent secured a federal inspection of the lettuce of invoice number C0838, which found as follows, in relevant part:

VARIOUS CONTAINERS Range 60° To 41°F.

Applicant Statue 850 cartons.

Condition: Head lead

Hear' leaves: 1 to 8 heads per carton average 8% damagn by discoloration following bruising scattered through-

out pack. Average 3% docay.

- Respondent has failed to pay complainant any part of the agreed contract price of \$5,717.50 for the lettuce of invoice number C0638.
- 17. A formal complaint was filed on December 7, 1984, which was within nine months from when the causes of action herein accrued.

CONCLUSIONS

Besproduct does not deep purchasing, receiving and accepting the sawn loads of leithese at issue. Breath the submitted at unverified narwer in which it alleger that the same that of an advantage of the same and th

However, even if we were to consider as evidence respondents 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 \$3,165.90, and provides no defense as to its failure to pay the belance of the \$4,018.50 contract price. Therefore, respendent is likelike for such amount, or \$455.00.

Begarding the truckland banding complainant's invoice number COSO, regulated assert has 15 and 500.000 in checks was cashed, and no mention was sever made affection. On the clear was cashed, and no mention was sever made affection. The complainant has submitted as reliable to the complainant has submitted as the complainant has submitted as the complainant has the complainant ha

Respondent allages that the letture contained in the truckload bearing complainant's invoice number (OS64 arrived in extremely poor condition. Respondent has submitted absolutely no evidence, see a federal inspection, to substantiate this claim, and it cannot be given any credibility. Respondent is liable for the difference between the 33,218,30 paid and the contract price of \$7,428.30.

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 S). 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 37.502.50.

Respondent has submitted no evidence whatsoever to support its claim that the lettuce in the load bearing complainant's invoice number C0578 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 musher C0386, the inspection report pertaining to that shipment (Finding of Pect 12 does indicate a breach of complainant's etilism the shipping condition warrang uniform the shipping condition was shipping condition with the shipping condition was shipping conditions and shipping condition was shipping conditions and shipping conditions with the shipping condition was shipping conditions and shipping conditions which was shipping conditions and shipping conditions are shipping conditions. The shipping conditions are shipping conditions and shipping conditions are shipping conditions and shipping conditions are shipping conditions. The shipping conditions are shipping conditions and shipping conditions are shipping conditions. The shipping conditions are shipping conditions and shipping conditions are shipping conditions and shipping conditions are shipping conditions. The shipping conditions are shipping conditions and shipping conditions are shipping conditions. The shipping conditions are shipping conditions and shipping conditions are shipping conditions and shipping conditions are shipping conditions and shipping conditions are shipping conditions

Tenerating the final ablument, learing complainant's invoke mumber COBS, respondent's defines is that the load arrived with severe condition problems. However, the fident laspection report respondent has a measurement of the properties of the properties of the contract of the contract

We have determined that respondent is liable to complainant for \$380.00 for invoice number C0545, \$2,550.00 for invoice number C0567, \$4,102.50 for invoice number C0564, \$7,502.50 for invoice number C0568, \$4,102.50 for invoice number C0563, \$4,250.00 for invoice number C0569, \$4,102.50 for invoice number C0563, \$4,250.00 for invoice number C0563, \$4,000.00 for invoice number C0563, \$4,0 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 py to complainant, as reparation, \$29,176.60, 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.

 P. Murphy Produce Co., Inc. d/b/a O. P. Murphy & Sons a Corgan & Son, Inc. PACA Docket No. 2-6781. Decided December 17, 1985.

Unverified answer not in evidence.

Where respondent falls to austain burdan of sharing breach by complainant, it is liable for full contract price.

George S. Whitten, Presiding Officer. Complainant, pro sc.

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, 1850, as amended (7 U.S.C. § 499a et sec). A timely complaint was fined with complainant seeks an award of reparation against responses in the amount of \$6,014,00 in consisting with the shipment in linear amount of \$6,014,00 in consisting with the shipment in linear amount of \$6,014,00 in consistence.

A copy of the report of investigation made by the Department served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying lisblily to complainant.

The amount claimed in the formal complaint does not exceed silfonome and the shortened mathod of procedurer provided in section 223 distances and the procedurer provided in secperation to the procedure, the verified complaint is considered a part of the sylicon in the case, as is the Department's report of investigation. The shawer, since it was not verified, in not in evi-

2993

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. Naither party filed a brief.

FINDINGS OF FACT

 Complainant, O. P. Murphy Produce Co., Inc., is a corporation deing business as O. P. Murphy & Sons whose address is P. O. Box 548. Soledad, California.

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 heroin respondent was licensed under the Act.
 On or about September 10, 1984, complainant sold to respond-

ent, and shipped from leading point in California to respondent in Bronx, New York, one truckloud containing 1,629 25 pound cartons of size large and larger green "Jues Ripe" brand tomatoes at 88.60 per carton, pig 20 cents per carton for palletization, and 820 for temperature recorder, for a total invoice price of \$8,014.00.

4. Respondent accepted the tomatoes unon 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.

 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 aligned that they arrived with 5% deepen and 6% section damage by amken dissolvered areas. Respondent further alleged that they arrived motify green or "just turning" olsow with very title set of color, and as they ripened up began to all the set of color with the color with the declaration of the color with the colo

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. Bright Moon Fruit & Produce Company v. V.F. Lanaza, 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 shill 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 AREONA D. GEORGE VILLALORIOS d/b/a Terrium Biano International. PACA Docket No. 2-6805. Decided December 17, 1985.

Pertial admission of liability-Contract price-Partial payment--lialoading ex-

Where respected a dmilled partial liability for the purchase of cight leads of work makes for which as Colver Requiring Payment of Undiquired Assembla was insort, admitted the contract terms for seven leads, and complainant's vernion of the too state price for on of the leads found to be preven by a supercondenance of the wis-dense, respondent is liable for the difference between the contract price of the wishest contract

Complainant, pro se. Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reperation proceeding under the Perinhablo Agricultural Commodities Act, 1990, as summed of $(U.S.C., 900a et ee_{V}) A$ timely complaint was filed in which complainant secks a reparation award against respondent in the amount of 226,819.42 in connection with the sale and shipment of eight loads of waterneloss in interates commerce.

A copy of the report of investigation prepared by the Department was served upon seach of the parties. A copy of the formal complaint was served upon respondent, which filed an answer therete, samitting liability for \$11,944.72, and denying liability for the remainder.

Although the amount involved exceeds \$15,000.00, the parties

Although the amount involved exceeds \$10,000.00, the perceival 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 ered 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 eleced not to do so.

FINDINGS OF FACT

- 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.
- Respondent, George Villaloboe d/b/a Teksun Brand International, is an individual whose address is 1855 Decatur Drive, San Jose, California. At the times of the transactions involved herein, respondent was licensed under the Act.
- From June 19, 1984, through July 5, 1984, complainant sold and shipped in intentate commerce to respondent eight loads of watermalons 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:

Com-

Date Shipped	plainent's Invoice Number	Sales Price
June 19, 1984	83	\$4,581.99
June 20, 1984	118B	\$1,414.81
June 22, 1984	179	\$4,581.19
June 24, 1984	214	\$4,579.00
June 89, 1984	490	\$4,445.00
July 2, 1984	565B	\$2,670.48
July 3, 1984	609	\$8,516.75
July 5, 1984	659	\$2,581.38
		Total \$28,319.42

- 4. The broker issued 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 watermeions were shipped to respondent, complainant prepared and sent to respondent invoices for all eight loade showing the agreed upon contract terms, except for invoice 500, where the invoice mistakently showed a contract price of \$3.05 per pound, or \$2.010.05 for all 46,809 pounds. A corrected lowice was later prepared and sent showing the actual contract price of \$3.05 per pound, or \$3.516.75.
- 6. Respendent returned the involces to complainant, making handwritten sleavestens abovering the following deductions for unlandwritten sleavestens as deduction of \$80.00, for invoice number 139, a deduction of \$80.00, for invoice number 179, a deduction of \$80.00, for invoice number 179, a deduction of \$80.00, for invoice number 480, a deduction of \$80.00, for invoice number 490, a deduction of \$80.00, for invoice number 500, a deduction of \$80.00, for invoice number 500, a deduction of \$80.00, and for invoice number 500, a deduction of \$80.00.
- Respondent has made the following payments to complainent for the eight loads of watermelone at issue, which complainent has accepted as partial payment:

Form of Payment	Date	Amount
Check	August 6, 1984	\$4,412.09
International Draft	August 17, 1984	34,679.00
Check	October 3, 1984	\$2,560.00
Check	October 22, 1984	\$1,000.00
Check	November 6, 1984	\$1,000.00
Check	December 11, 1984	\$1,000.00
	Total	814,591,60

- Complainant filed a formal complaint on November 19, 1984, which was within nine months from when the causes of action terein accrued.
- 9. Respondent filed an answer on March 27, 1985, admitting libility for \$11,944.72. On July 2, 1985, an Order Requiring Payment of Undasputed Amount was issued, ordering respondent to any complainant, as the undisputed amount, \$11,944.72.

CONCLUSIONS

In respondent's answer, which is the only evidence filled by respondent in this preceding, it definites using a balance of \$81,944.72 for the eight leads of watermelons. An Order Requiring Payment of Undisputed Annount was thus issued on July 2, 1866, (recting respondent to pay this way. The properties of the propert

With respect to the contract price for complainant's invices 600, complainant is assumited into evidence a corrected invoice 600, complainant is submitted into evidence a corrected invoice 640cd August 13, 1984, for \$8,514.75. The original invoice sent to respondent, 640cd with 740 per 1985, and 1985, and

Respondent's claim of payment is not denied by complainant. Further, respondent has preduced 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 \$877.00, which are deductable from the contract price, Complainant does not dany this allegation. In addition, the revote the deduction for unlocaling expenses on complainant's invoices when it returned them to complainant. As the watermeloon at issue were soft on a delivered basis, it was complainant's indiction to deliver the watermeloon to respondent from of any and expenses, a transport state of the property deductable.

Therefore, respondent's liability consists of the contract price for the eight loads of \$25,319.42, less \$377.00 in deductions for unloading and the \$1,85,010 a liracyl paid, or \$13,961.42. As an order alrendy has been issued for \$11,944.72, respondent is liable for an additional \$1,967.00. Respondent feature to pay such a unit 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, \$1,466.70, within interest thereon at the rate of 13 percent per annum from August 1, 1384, until paid. Copies of this order shall be served upon the narcies.

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 a reparation proceeding under the Perishable Agricultural Commodities Act, 1999, as amended (T U.S.C. 499e et sec). A Decision and Order was issued on June 28, 1988, awarding reparation to complainant in the amount of \$13,898.00 plus interest, and dismissing respondent's counterclaim. Respondent filed a timely petition for recensideration, and a stay order was issued on Soptember 25, 1985.

The petition, respondent makes numerous allegations of error. The first these allegations were extensively discussed in the Decision and Order, where they were found to be completely without morit. The period of the complete the decision of the complete the complet

Respondent controls in paramyter of the pattion that its contract with compliants was for the 1 feet pattion that its contract with compliants was for the 1 feet pattion that its contract with compliants as for the 1 feet pattion of 1 feet pattion of 1 feet pattion of 1 feet patting and 1 feet pat

In paragraph 11 of its petition, respondent claims that the Autumn fresh lot was found by a federal inspection to contain excessive defects, and argues that this lot should not have been averaged 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 Autum 11. 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 were 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 egricultural commodities tendered for delivery on a single corntract, [and] such commercial unit must be accepted or rejected in its entirety."

Finally, respondent datines in paragraph 2 of its petition that there was insufficient verdence to partie the conclusion of the Decidence of t

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, the set is hereby vacated, and the June 28, 1985, Decision and Order is bereby vacated, and the June 28, 1985, Decision and Order is bereby reinstated. The reparation awarded in the June 28, 1985, Decision and Order shall be paid within 80 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 Coeforation v. Livacich Produce Inc., atta Rancho Packing Coand/or Valu Pak Inc. PACA Docket No. 2-8847. Order issued November 5, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commidtities Act, 1930, as amended (7 U.S.C. 498a et sec.), 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 respent the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CRF).

The record has been carefully considered and it is concluded that the motion to repose was filled within a reasonable time, and that good reason has been shown to relief requested in the motion should be granted. Mendelson Jether relief requested in the motion should be granted. Mendelson Jether The Third First Distributes, 16 A.D. 790 (1987). Accordingly, responsibly to the property of the prop

Furukawa Sales Co, Inc. u. Lucky Seven Produce Company a/Us Texas Produce Company and/or Berchmark Brokesage Inc. PACA Docket No. 2-6919. Order issued November 5,

ORDER OF DISMISSAL AND DEFAULT ORDER

This is a reparation proceeding under the Parinhald Agricultural Commodities Act, 1930, as an excellent of U.S.C. 480 s. 4 sepo.). A timely complaint was filed in which complainant sense in the complaint of the sense of 1,484.30 gent reproduction, in the alternative, in the amount of 1,484.30 gent of 1,484.30 g

In a letter dated October 2, 1985, complainant authorized dismisal of its complaint against respondent Lucky Seven Produce Comsay, but of against respondent Benchmark Brokerage Inc. Acordingly, the complaint is hereby dismissed against respondent ucky Seven Froduce Company.

MISCELLANEOUS Volume 44 Number 7

As respondent Benchmark Brokerage Inc. has failed to file an answer and is in default, an order without further procedure is appropriate pursuent to 7 CFR 47.8(d).

Complianant, Provisawa Sales Ca. Inc., is a corporation whose address is 968 Black Rend, Santa Maris, Galffornia, Respondent, Benchmark Brokersge Inc., is a corporation whose address is 3100 Produce Row, Heuston, Toxas, at the times of the transactions involved herein, respondent Benchmark Brokersge Inc. was licensed under the Act.

The fines alleged in the formal complaint are hereby adopted as andulings of fact of this order. On the basis of these facts, we constude that the existon of respondent Benchmark Brekerage Inc. are involation of section 2 of the Act U.S.C. 499th and have resulted in damages to complainant of \$1.543.0. Accordingly, within a days from the date of this order, respondent, \$1.543.0. Accordingly in the section of the complainant of \$1.543.0. Accordingly within the days from the date of this order, respondent, \$1.543.0. with interior than the control of the cont

Copies of this order shall be served upon the parties.

VEGGO INC. v. MOORE MARKSTING INTERNATIONAL INC. PACA. Docket No. 2-8890. Decided November 8, 1985.

Bankruptey-Stay order.

Complainant, pro sa.

Bertran H. Ross, Los Angeles, Californie, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1989, as amonded of U.S.C. 498 et sey. As timely complaint was filled in which complainant seeks reparation of \$3,886.00 against respondent in connection with transactions in intervatuae commerce involving shipmonts of mixed regetables. A copy of the formal complaint was served upon respondent has filed an answer thereth.

Complainant, 1889 in a server three wiferes in P.O. Complainant, Vego Inc., is a corporation whose salivers in P.O. Flox 4487, Salinas, California. Respondent, Moore Marketing Inc., is a corporation whose address in P.O. Box 3817, Salinas, California. Respondent was ilcurated 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 filled in the United States Bankrupty Court, Esstern District of California, a voluntary pedition for reorganization pursuant to Chapter XI of the Bankrupty Act (II USAC, §§ 1910-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Department.

II U.S.C. § 882 provides for an automatic stary against continuing an action involving a debt once a pury has filled a point of the first star of the first provided by the first provided by the first provided by \$800\$, that repersion proceeding is bravely continued until the Department receives proper notification that the Chapter II proceeds in our pursuing in the United States Benkruptey Court has been debt to provide the continued to a start provided by the Chapter II proceeds the continued of the Chapter II proceeds the continued to the Chapter II proceeds the continued to the Chapter II proceeds th

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 Conditions Act, 1980, as amended (*U.S.C. 499 et seq.), a Decision and Order was issued on Soptember 27, 1985, awarding reparation to the complainant in the amount of \$462.00. By motion received Cother 15, 1985, respondent has moved that this matter be reconsidered and reopened for the introduction of new vidences.

Respondent asserts that the Decision and Order concluded orroneously that the contract between the parties was f.o.b., and not delivered. Respondent claims that it can establish that the sext polatose at issue were sold on a delivered basis, and wishes to introduce evidence to do so.

The Rules of Practice provide that a patition to reopen to introduce evidence may be filed only before the issuance of the final order, 702420b, Therefore, as respondent's patition to repwes filed after the Decision and Order was issued, it is untimely and must be denied.

The sydence in the record fully supports the Decision and Order and, therefore, the petition for reconsideration is without merit and is interest, decisied. The reparation awarded in the September 27, 1985, order shall be paid within 30 days from the date of this order.

MISCELLANEOUS Volume 44 Number 7

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 reportation proceeding under the Perinhable Agricultural Commodities Act, 1950, as ammedia of U.S.G. § 496 as 490., an order was issued July; i. some off of U.S.G. § 496 as 490., as a consideration of the Complainant and July; i. some off of 19,024.80. On July 10, 1985, as a synchronized for the Complainant of 19,024.80. On July 10, 1985, was synchronized for the Complainant was practiced filteen days from date of receipt of the stay order in which to file an answer to the patition. No naver was filed by complainant.

Respondent's objections to the decision and order of July 1,1835, twere fully answered therein, and upon reconsideration we find that the order of July 1,1858, is supported by the victions and the law applicable thereto. Accordingly the stay of August 12, 1988, is are cated, and our order of July 1, 1985, is hereby reintanted except that the reparation awarded therein shall be paid within thirty (3O) days from the date of this order.

Copies of this order shall be served upon the parties.

SOL SALINS, Inc. v. Fresh As Can Br. Inc. PACA Docket No. = 6877. Order issued November 25, 1985.

ORDER OF DISMISSAL

This is a reparation proseding under the Perishable Agricultural Commodities Act, 1980, as amended Cf U.S.C. 498 of sey). A timely complaint was filed in which complainant seeder reparation against respondent in the amount of \$219,471.17 in connection with numerous transactions involving the shipment of miscallaneous produce in inderstate commerces.

A copy of the formal complaint was served on respondent. By A copy of the formal 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, 1986.

ORDER UPON RECONSIDERATION

In this reperation proceeding under the Periahuba Agricalurus Commodities Act, 1900, as amended (7 U.S.C. 1900 at step), an order was isseed July 1, 1985, awarding reparation consideration. On July 30, 1985, respondent 1986, a matter of the proceeding the proce

In its petition respondent contends that the order of July 1, 1985, is in error in event respects. We have reconsidered the error and find that respondent's contentions without merit. The mattern raised by respondent were considered to the first and order of July 1, 1985, and upon reconsideration we find a single and order of July 1, 1986, and upon reconsideration we find the threshold the supported by the vedence and by the law applicable thereto. Accordingly expendent's petition about the same threshold the threshold that the support of July 1, 1985, and 1985 the same product of the support of July 1, 1985, and 1985 the same product of July 1, 1985, and 1985 the same product of July 1, 1985 the same product of July

Copies of this order shall be served upon the partles.

MOSE MARTINOUS D. 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, 1909, as amended II Uzel. 65th et et ap.), an order was issued July 2, 1965, reparation to complainant against responsable. Or duly 1, 1804, 1907,

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, respond-

ent did file a reply on September 18, 1985. We have carefully considered the matters raised in respondent's petition, and have reconsidered our order of July 2, 1985, in the ight 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. 4. 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 smicably 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 diemissed.

Copies of this order shall be served upon the parties. les applies never

THE NUMES 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, 1990, as amended (7 U.SC. 499n et sept.). A timely complaint was filed in which complainant seeks reparation against responder in the amount of \$8,000.00 in connection with a transaction involving the shipment of cauliflower in interstate commerce.

A copy of the formal complaint was served on respondent which find an answer thereto denying any liability to complainant. On November 12, 1988, 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-FREST FRUITS & VEGE-TABLES LTD. U. 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.

Nugrat & Schapanski Orchard v. Figor 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 R. T. & M. MARRET SERVICES INC. a/t/a GET FRISH PRODUCE CO. PACA Docket No. RD-86-4. Decided 'November 4, 1985.

Respondent was ordered to pay complainent, as reparation, \$497.50 plus 13 percent interest per annum from May

Respondent was ordered to pay complainant, as reparation, \$4,259.25 plus 13 percent interest per annum from December 1, 1984, until paid.

Gallan 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, \$5,215.01 plus 13 percent interest per annum from April 1, 1925, until paid.

SALIMAS MARKSTING COOPERATIVE D. WAYNE M. HATANAKA d/b/a W.H. DESTRIBUTING, PACA Docket No. RD-86-7, Decided November

Respondent was ordered to pay complainant, as reparation, \$3,493.45 plus 13 percent interest per annum from May 1, 1985,

MECCA FARMS INC. D. TOMMY HAWKINS and DARRY HAWKINS &/HAWKINS & HAWKINS PRODUCE CO. PACA Docket No. RD-86-8. Decided November 8, 1985.

Respondent was ordered to now complete at prevention

Respondent was ordered to pay complainant, as reparation, \$30,672.20 plus 13 percent interest per annum from March 1, 1985, until naid.

BUSHMANS' INC. U. WOODSTOCK POYATO CO. L/ID. PACA Docket No. RD-86-9, Decided November 8, 1985.

Respondent was ordered to pay complainant, as reparation, \$6,596.80 plus 18 percent interest per annum from August 1, 1984, until page 1, 1984, and 1, 1984, and

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. u. Gilbrat Guerra d/b/a Gilo's Produce Co. PACA Docket No. RD-86-11. Decided November 12, 1985.

Respondent was ordered to psy complainant, as reparation, \$3,622.50 plus 13 percent interest per annum from February 1, 1985, until paid.

BRUCE CHURCH INC. E. EMANUELLA L. PERAINO d/b/a THE TOMATO OUTLET. PACA Docket No. RD-86-12. Decided Nevember 12, 1986.

Respondent was ordered to pay complainant, as reparation, \$847.50 plus 18 percent interest per snnum from December 1, 1985, until paid.

HELLE TOMATO CO. INC. U. 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, \$5,658.98 plus 13 percent interest per annum from June 1, 1985, until paid.

OLIVER P. WOLFE III d/b/a M & T PRODUCE DISTRIBUTORS t GEORGE HOWARD d/b/a The PRODUCE CO. PACA Decket No. RD 86-14. Decided November 13, 1986.

Respondent was ordered to pay complainant, as reparation, \$5,658.98 plus 13 percent interest per annum from June 1, 1985, until paid.

OF THE PARTY OF THE WORLD'S

OLIVER P. WOLFE, Jr. d/b/s Wolvenine Fruit Co. v. George Howard d/b/s The Produce Co. PACA Docket No. RD-88-16. Decided November 13, 1985. Respondent was ordered to pay complainant, as reparation, \$5,958.00 plus 18 percent interest per annum from July 1, 1985, until paid.

ROGER SALES INC. U. 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 Novamber 1, 1984, until paid.

BOSTON TOMATO CO. INC. P. CARON FRUIT CO. INC. PACA Decket 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 U. 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 Vo. RD-86-20. Decided November 14, 1985.

"as ordered to pay complainant, as reparation, 13 percent interest per annum from Juna 1, 1985,

PRODUCE SALES INC. PACA Docket No. RD-86-21. Decided November 14, 1985.

REPARATION DEFAULT DECISIONS Volume 44 Number 7

2011

Respondent was ordered to pay complainant, as reparation, \$103,353.00 plus 13 percent interest per annum from June 1, 1985, until paid.

Elmoo v. Ernest G. Anderson d/b/a Andr'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. E. T & M MARKET SERVICES INC. a/t/ a GET FRESH PRODUCE Co. PACA Docket No. RD-85-24. 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 Lyb. 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. E. 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. CRGWN 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 Branes Inc. v. Al Nagelbert & Co. Inc. PACA Docket No. RD-86-28. Decided November 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$61,825.47, 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 18 percent interest per annum from April 1, 1985, until paid.

C. A. CIRULI BROKERAGE INC. v. A. PELLEGRING & 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, 1986, 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. PELLEGRING & SON INC. PAGA Docket No. RD-86-84. 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. a. PONTIOUS BERRY FARM INC. PACA Docket No. RD-86-85. Decided November 27, 1985.

Respondent was ordered to pay complainant, as reparation, \$6,928.45, plus 18 percent interest per annum from April 1, 1985, until paid.

BUD ANYLE INC. D. 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 I, 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'Ib/a GILO's PRODUCE Co. PACA Docket No. RD-86-39. Decided Novomber 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.

CULIAGAN PRODUCE COMPANY INC. v. TRIPLE B PRODUCE DISTRIBU-ORS 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 TOMATOSS. PACA Docket No. RD-86-41. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,765.90, plus 13 percent interest per annum from December 1, 1984, until paid.

THE WOODE COMPANY INCORPORATED P. ERNEST G. ANDERSON d/b/a AND'S PRODUCE CO. PACA Docket No. RD-88-42. Decided November 23, 1985.

REPARATION DEFAULT DECISIONS Volume 44 Number 7

2015

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, \$49,034.50, plus 13 percent interest per annum from December 1, 1984, until paid.

HUNT OIL COMPANY a/t/a PLANTATION PRODUCE COMPANY a FREE STATE PRODUCE INC. PACA Docket No. RD-86-44. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparatios, \$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. Ltv. PACA Docket No. RD-86-45. Decided November 29, 1985.

Respondent was ordered to pay complainant, as reparatice, \$23,527.40, plus 13 percent interest per annum from October 1 1984, until paid.

THE CROSSET COMPANY v. KEVIN J. REC/b/e J M J PRODUCE. PAC!
Docket No. RD-86-46. Decided December 8, 1885.

Respondent was ordered to pay complainent, as reparation, \$4,825.25, plus 13 percent interest per annum from July 1, 1985, until paid.

COLORADO POTATO GROWERS EXCHANGE S. MIRE D. PERRINS d/b/a TRIANGLE PRODUCE. PACA Dosket No. RD-88-47. Decided December 3. 1985. Respondent was ordered to pay complainant, as reparation, \$4,660.00 plus 13 percent interest per annum from April 1, 1885, 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 Cyrus Association v. Morningside Produce Inc. PACA Decket 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 D. MARTIN MONTES d/b/a M & M PRODUCE BROKERAGE, PACA Docket No. RD-86-50. Decided December 4, 1986.

Respondent was ordered to pay complainant, as reparaties, \$2,740.00 plus 13 percent interest per annum from April 1, 1985, until paid.

EXAS TOMATOES INC. v. TRIANGLE PRODUCE. PACA Docket No. RD-86-51. Decided December 4, 1985.

Respondent was ordered to pay complainant, as reparatios, \$4,685.00 plus 13 percent interest per annum from February I, 1985, until paid.

Girazian Fruiv Co. Inc. a. Jeffrey L. Hemphill d/b/a Central Velley Produce Co. PACA Docket No. RD-86-53, Decided December 4, 1985.

REPARATION DEFAULT DECISIONS Volume 44 Number 7

Respondent was ordered to pay complainant, as reparation, \$5,619.20 plus 13 percent interest per annum from October 1, 1985, until caid.

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. a West Coast Product 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 percent interest per annum from October 1, 1984, until paid.

TERRIES NOIRES SHERRINGTON LTD R. J. P. DANIEL PRODUCE INC. PACA Docket No. RD-86-82 Decided December 5, 1985. Respondent was ordered to pay complainant, as reparation, \$1,750.00 plus 18 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, 1885.

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 !. 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 reporation, \$1,061.10 plus 18 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-86-68. 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.

REPARATION DEFAULT DECISIONS Volume 44 Number 7

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 NASIVE AMERICAN FARMS E. PRN FRUIT & VEGETABLE BROKERS. PACA Docket No. RD-86-65. Decided December 18, 1995.

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 CYRUS & 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 18 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. S. NATIONAL PRODUCE DISTRIBUTORS INC. PACA Dockst 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. S. CROWN PRODUCE Co. PACA Docket No. RD-86-69. Decided December 19, 1985. Respondent was ordered to pay complainant, as reparation \$3,244.00 plus 13 percent interest per annum from June 1, 1985 until psid.

A. VILA PRODUCE DISTRIBUTORS INC. v. CROWN PRODUCE Co. PACA Docket No. RD-96-70. Decided December 19, 1985.

Respondent was ordered to pay complainant, as reparation, \$21,890.46 plus 13 percent interest per annum from June I, 1985, until paid.

ANTIGO POTATO GROWERS INC. v. DICKEY CREW d/h/s CREW TRUCK-ING. 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. E. JERRY K. POLE 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.

MESSA BAY CITRUS CO. INC. U. TRISTAR INTERNATIONAL INC. PACA Docket No. RD-86-74. Decided December 19, 1885.

Respondent was ordered to pay complainant, as reparation, \$22,733.28 plus 13 percent interest per annum from January 1, 1985, until naid.

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/s W. H. DISTRIBUTING. PACA Docket No. RD-86-76, Decided December 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$18,368.35 plus 13 percent interest per annum from May 1, 1985, until paid.

VAL-MEX FRUIT COMPANY INC. 4. 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, \$49,303.69 plus 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-88-78. Decided December 20, 1985.

Respondent was ordered to psy complainant, as reparation, \$3,307.50 plus 13 percent interest per annum from March 1, 1985, until paid.

INTERSTATE PACKING Co. v. PRN Faurt & Vecetable Brokers Inc. PACA Docket No. RD-38-79. Decided December 20, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,420.70 plus 13 percent interest per annum from July 1, 1985, until paid.

SUNFRESH INC. U. MOUNTAIN VIEW PRODUCE INC. PACA Docket No. RD-86-80, Decided December 27, 1985.

Respondent was ordered to pay complainant, as repulainant, as reparation. \$2,131.94 plus 13 percent interest per annum from November I,

COLORADO POTATO GROWERS EXCHANGS v. J.D.C. ENTERPRISE/D.C. ENTERPRISES INC. d/b/a ROGINES PRODUCE COMPANY. PAA Docket No. RD-86-8)ket No. RD-86-81. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparationant, as reparation, \$5,860.00 plus 18 percent interest per annum from May 1, 1m from May 1, 1885, until maid.

Henry Ankeny Co. e. J.D.C. Enverdress Inc. d/b/a Ros Inc. d/b/a Roders Produce Company. PACA Docket No. RD-86-82. Decided Dec6-82. Decided December 27, 1985.

Respondent was ordered to pay complainant, as reparationant, as reparation, 34,301,50 plus 13 percent interest per annum from Februarym from February I, 1985, until noid.

SEABOARD PRODUCE DISTRIBUTORS INC. U. J.D.C. ENTERPRE J.D.C. ENTERPRISES INC. d/b/a ROGERS PRODUCE COMPANY. PACA Docket No. RD-4 Docket No. RD-86-88. Decided December 27, 1986.

Respondent was ordered to pay complainant, as reparations, as reportations, \$4,627.05 plus 13 percent interest per annum from April 1, 198 from April 1, 1985, until paid.

TRICAR SALES INC. v. CHINO'S PRODUCE INC. PACA Docket No. RICA Docket No. RD-86-84. Decided Docember 27, 1985.

Respondent was ordered to pay complainant, as reparationat, as reparation, \$5,162,70 plus 18 percent interest per annum from May 1, 188from May 1, 1985, until paid.

White Colors

REPARATION DEFAULT DECISIONS Volume 44 Number 7

2023

JAMES D. IRIS d/b/a STATE WIDE BROKERAGE CO. U. GEORGE HOWARD d/b/a The PRODUCE Co. PACA Docket No. RD-86-85. Decided December 27, 1985.

Respondent was ordered to pay complainent, 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. Hayanaka 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 interest per annum from May 1, 1985, until paid.

RICHARD S. BROWN INC. E. WAYNE M. HATANARA d/h/s W.H. DIS-TRIBUTING. PACA Docket No. RD-85-87, Decided December 30, 1985.

Respondent was ordered to pay complainant, as reparation, \$1,200,00 plus 13 percent interest 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, 1986.

Respondent was ordered to pay complainant, as reparation, \$24,454.60 plus 13 percent interest per annum from May 1, 1985, until paid.

SEABOARD PRODUCE DESTRICTORS INC. v. CHINO'S PRODUCE INC. PACA Docket No. RD-86-89, Decided December 39, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,981.30 plus 13 percent interest per annum from June 1, 1985, until paid.

The state of the s

AL FINER Co. a. 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. II. ALEX PRODUCE INC. PACA Docket No. RD-86-91. Decided December 30, 1985.

Respondent was ordered to 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. a 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 18 percent interest per annum from October 1, 1984, until paid.

RALPH SAMERL CO. OF EL CENTRO E. NATIONAL PRODUCE DISTRIBU-TORS INC. PACA Docket No. RD-86-98, Decided December 30, 1985. Respondent was ordered to pay complainant, as reparation, \$5,178.00 plus 18 percent interest per annum from May 1, 1986, until paid. 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 Paul Distribufors, 16 A.D. 780 (1987). Accordingly, respondents default in the filing of an answer is set 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, 1980, as amonded (7 U.S.C. 49% et sept.) 4. timely compilar was filed in which complainant seeks reparation of \$7,730.75 against respondent in connection with transactions in interstate commerce involving alignments of mixed vegetables. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto.

Complainant, Mann Packing Co. Inc., is a corporation whose address in P.O. Box 908, Salinas, California. Respondent, A. Levy Distributing Co. Inc., is a corporation whose address in 1569 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 preceeding the Department was advised that respondent had filed in the United States Bankrupky Courf., Essterm District of California, a voluntary petition for reorganization pursuant to Chaper XI of the Bankruptyc Act (I U.S.C. § 1101—1140. The Department also was advised that a discharge in the bankrupty proceeding would be a release of the claim before the Department.

11 U.S.C. § 862 provides for an automatic stay against continuing an action involving a debt once a party has filled a petition under the Bankrupte's Ocd. Therefore, in so continued until the Department prevents proper multimote that the Chapter 11 proceeding now pending in the United States Embryopy Court has been closed, dismissed or converted to straight bankruptey, or that the

debts have been discharged through confirmation of a Plan of Arrangement.

Copies hereof shall be served upon the parties.

FTO 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, 1989, as amended (f U.S.C. 499a & et sex). A standard of the Agriculture and the sex of the Agriculture of \$12,409 & gazinta respondent in connection with transactions in internate or the complex of the sex of the complex of the complex of the complex of the formal complexit was served upon respondent, and respondents has filed an answer thereties.

apondont has lited an answer mereto.

Complainant, lib 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
Arenus, Franc, Celifornia. 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 Science Programment of the Prior Pr

MISCELLANEOUS Volume 44 Number 7

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 Cammodities Act, 1999, a monded of U.S.C. 469 et a say, I the respondents failled to file a timely answer. A Default Order was issued on September 17, 1868. Respondent Cannin Perdous Ca, Inc. filed a motion to respen the proceeding after default and allow the filing of an answer pursant to section 47.56 of the Rules of Prestic of CPR 47.26(a) A Stay Order was issued on October 1, 1965, staying the Default Order with respect to Cannin Produce Ca, Inc. only.

The record has been carefully considered and it is concluded the the motion to reopen was filled within a reasonable time, and the good reason has been shown why the relief requested in the motion of hould be granted. Mendelson-Zeller Ca. v. United Fruit Distrib. tors, 16 A.D. 700 (1987). Accordingly, the default in the filling of a nanwer of respondent Camino Produce Co., Inc. is set aside and it Proposeed answer is bereby ordered filed.

Copies of this order shall be served upon the parties.
[NEW DOCKET NO. IS PACA 2-7007.—Ed.]

SARAS INC. v. MACK DEMESEY 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 Cammos ties Act, 1990, as amended (7 U.S.C. 499s et sey), the responden failed to file a timely answer. A Default Order was issued on Sey tember 20, 1985. On October 23, 1985, respondent filed a propose answer, in effect moving to reopen after default.

Respondent's proposed answer will not be accepted for filling. The Rules of Practice state that a default will not be reponed unlet the respondent presents a good reason why an answer was in trincyl field of 1987 4735(h), and respondent has not presented at such reason. In any event, the Department loss jurisdiction at the expiration of 26 days from the date of the control of the Corps, 78 F. Suppl. 309 (ED. Pa. 1948); Southland Produce Co. Cazamone Bruthers Wholskiels, 89 Agric Dec. 780 (1947). Dec.

Copies of this order shall be served upon the parties.

OTAY PACKING Co. v. J & S PRODUCE CORP. PACA Docket No. RD-85-393. Order issued December 10, 1985.

ORDER REOPENING AFTER OFFAULT

In this proceeding under the Perinhable Agricultural Commode itse Ast, 1986, a smood of U.S.G. Open at any 0, the respondent failed to file a timely answer. However, subsequent to the September of the Commode of the

The record has been carefully considered and it is concluded that the motion to repen was filled within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. Mendelon Seller Co. v. United Print Distributors, 16 Agric. Dec. 790 (1987). Accordingly, respondents default in our, 16 Agric. Dec. 790 (1987). Accordingly, respondent shall fill on answer within 16 of an answer with a state of the control of the within the control of the control of the control of the control of the default of the control of the control of the control of the resistance of a default order assistant reasonagement.

Copies of this order shall be served upon the parties.

MISCRLLANEOUS Volume 44 Number 7

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, 89 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 Decket No. RD-86-28. Order issued December 10, 1986.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1980, as amended (7 U.S.C. 490 et seq.). a Default Order was issued on November 15, 1985, awarding reparation to the complainant in the amount of 881,285.47. By motion, respondent has moved that this matter be responde.

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-85-846. Order issued December 11, 1985.

ORDRR

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1890, as amended (T U.S.C. 499a et seço.). A timely complaint was filled in which complainant seeks reparation of \$6,066.15 against respondant 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 harvier.

Prior to the issuance of a Default Order in this proceeding, the Department was advised that respondent had filled in the United States Bankruptcy Court, Eastern District of California, a voluntary potition for reorganisation pursuant to Chapter XI of the Bankruptcy, Act (II U.S.C., \$110-1174). The Department also was advised that a discharge in the bankruptcy proceeding would be a release of the claim before the Denormant.

11 U.S.C. § 862 provides for an automatic stay against continuing an action involving a debt one a pure has filled a position under the Bankruptey Code. Therafore, her has filled a position under the Bankruptey Code. Therafore, he havely continued a 1894, this repeating proceeding his harrly continued to the partment receives proper notification that the Chapter 11 probe partment receives proper notification that the Chapter 11 probe partment in the United States Bankruptey Court has been figured to the Chapter 11 probe that the Cha

Copies hereof shall be served upon the parties.

PARMERS EXCHANGE INC. D. 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 Agricultur-I Commodities Act, 1980, as amended (7 U.S.C. 499a et seq.). A omplaint 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 twiew 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 com-

plaint 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 usume that the transit time from complainant's place of business n Onley, Virginia, was no more than four days. Therefore, the roduce must have arrived not later then July 25 and 29, 1984, repectively. Where there is no probative evidence as to when paynent was due, it is presumed that such period was 10 days after he date of acceptance. See 7 CFR 46.2(aa)(5). Although the inforoal complaint did not allege any specific period for payment, the ormal complaint alleged that payment was not due until 90 days fter acceptance. However, this contention is contradicted by comlainant's own invoices, attached to the formal complaint, where he space under the heading "terms" is left blank. We, therefore, onclude that the 10 day period for payment was in effect, and the auses of action accrued on August 4 and August 8, 1984.

The Department lost jurisdiction after sine monits from when the causes of action accrued on August 4 and August 8, 1986, respectively, which preceded the filing of he informal complaint on May 16, 1986, T GFR 47.36a). Accordingly, the complaint is hereby demised.

Copies of this order shall be served upon the parties.

In re: Amigo Food Corporation P.Q. Docket No. 130. Decided No. vember 5, 1985.

Civil penalty-Consent.

Joseph Pembroks, 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 viclated 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

(a) any further procedure; II3(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 thereofili3(c) all rights to seak judicial review and otherwise challenge or contest the validity of this decision; and I 122. 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.

PINDINGS OF ...

DELTA AIR LINES, INC. Volume 44 Number 7

CONCLUSIONS

Respondent having admitting the jurisdictional facts and having reed to the provisions set forth in the following order in disposia of the proceeding, such order will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred de-(\$3000 which shall be payable to the "Treasurer of the United thee" by certified check or money order, and which shall be forrided to Joseph P. Pembroke, Office of the General Counsel, om 2428 South Building, United Estate Department of Agriculw. Washington, D.C. 20250-1400, within thirty (30) days from the stilve data of this order.

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

re: DRLTA AIR LINES, INC. P.Q. Docket No. 144. Order issued November 15, 1985.

vision 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 IDERED, that the Complaint issued in this matter on October 1985, be, and hereby is, diamissed.

In re: NATIONAL AIRLINES P.Q. Docket No. 118 and 185. Decided November 19, 1985

Gartage unloaded in violation of regulations-Civil penalty-Consent.

Joseph Pembroke, for complainant. Eilleen Gleiwer, 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. §§ 150as et seq.) and the Act of August 20, 1912, as amended, (7 U.S.C. § 161 and § 162), by complaints filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Netional 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 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 complaints, admits, to the Findinge 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 etipulates 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. THE SHARLAND OF

^{*}There were two different Complaints filed, and the Judga has made conforming changes to the Consent Decision, which is applicable to both.



White twibite Joseph Property

FINDINGS OF FACT

 National Airlines, respondent, is a corporation whose address is 3333 New Hyde Park Road, New Hyde Park, New York 11042.

 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, Jamaics, New York.

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 will be issued.

OPPE

- National Airlines, respondent, is assented a total civil penalty
 of (\$1,500) payable in four equal installments of \$315. Such installments shall be made payable to the "Treaturer of the United
 States" by certified check or mosey order. and sub- forwarded
 to Joseph P. Pembroke, Office of the General Couusel, Room 2422
 South Building, United States Department of Agriculture, Wash
 ington, D. G. 2920. The first installment shall be made thirty (30)
- days from the effective date of this order.

 2. National Airlines Compliance Agreement for J. F. Kennedy
 International Airport (Agreement number 23) dated November 6,
- 1984, is suspended until January 1, 1988.

 3. On or after January 1, 1986, National Airlines Compliance
 Agreement shall be reinstated, if and only if, the following listed
- criteria are satisfactorily 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 disputes arising between National Afriles and
 PPQ officials at J. F. Konnedy International Afriport, New York,
 PPQ officials at J. F. Konnedy International Afriport, New York,
 PPR officials at J. F. Konnedy International Afriport, New York,
 PPR officials at J. F. Konnedy International Africa and PPR official African African
- Building, 5566 Belerest Rosel, Hyattaville, Maryland 20782.

 6. National Airlines agrees to implement and continues a training and orientation program for all employees who handles e dispose of Foreign-origin garbage. National supplies shall assert that only such trained employees handled engineering garbage. Such training employees handled engineering garbage Such training shall include a minimum of one hour of initial interaction by a foreign distriction. In addition, such trained employees shall

be provided at least one hour of roview 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 employed participation in the training program.

 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 § 84.5.

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: Diarkta Lloyd Lines, P.Q. Docket No. 77. Order issued No.

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, 1986, is here-

In re James Kanda, and World Airways, Inc. P.Q. Docket No. 74. 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, 1935, 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. Decket No. 129. Decided November 26, 1985.

Garbage not in proper receptucies-Civil prosity-Consent. Joseph Pembroks, for complainant. Respondent, are as

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 Post 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 sec.) and (7 CFR § 330.400 et sec.). 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:

(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

Respondent also atipulates 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

 State's Shipping Agoncy, Inc., respondent, is a shipping whose address is 999 Wirt Road, Suite 300, Houston, Texas 77.
 On or about June 10, 1935, the respondent on its ship the b Address and the state of the state of the state of the state of the which was not contained in this Healt-profit overved receptacles.

CONCLUSIONS

The respondent having admitted the jurisdictional facts of 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 deliars (3250 which shall be payable to the "Treasurer of 1 of United States" by certified check or money order, and which als be forwarded to Joseph P. Pembroke, Office of the General Cos esi, Roma 2422 south Building, United States Department of Ag oulture, Washington, D.C. 20250, within thirty (30) days from ti effective date of this order.

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

In rev Delta Air Lines, Inc. P.Q. Docket No. 136, Decided December 2, 1985.

Consent-Civil penalty.

consent—Civil pensity.

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 Adan amended (Act O' U.S.C. 1150ac et see 1y ya complaint Hel by the Administrator of the Animal and Plant Health Importers See is alleging that Delta Air Lines, Inc., volated the Act of expultions promulgated thereunder (T CFR § 318.13 et see). Respondent Delta Air Lines, Inc., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Delthes See forth below and have agreed to the following stipulations 1. For the purpose of this stipulation and the provisions of this Connent Decision only, respondent Delta Air Lines, Inc., shifting appetition appetition of the proposed the property of the provision of the

(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

 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. § 546 et eray) for fees and other expenses incurred by it in connection with this proceeding.

FINDINGS OF FACT

 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, Atlants, Georgia

30320.
2. On or about August 20, 1985, at Henolulu International Airport, Honolulu, Hawali, 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 Dalta Air Lines, inc., is assessed a civil possibly of five hundred dellars (\$60,000, which shall be praphie to the "Threasurer of the United States" by the Hubble of the Conorder, and which shall be forwarded by the Hubble (Joffse of the General Coxisse), Room \$242 South Britist, United States Departtment of Agriculture, Washington, DA. 2009-1400, within thirty (30) days from the effective sides or 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 Dogs, for complainent. Carl A. Haberbosch, New York, New York, for respondent.

Decision by Dorothea Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of Pebruary 2.
1908, as ammedial, Act Old U.S.G., §§§11 and 180 by a complain
filled by the Administrator of the Animal and Plant Health Inappetion Service alleging that the responsions violated the Act and regulations groundgated thereunder of CPR § 50.1 et esp. The parties have greend that this proceeding should be terminated by entry of the Consent Decision set forth below and two green to the following stimulations.

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents specifically sent that the Secretary of the United States Department of Agriculture has juriadiction in this matter, neither simit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below and waits.

(a) Any further procedure:

AND BOOK STORES AND LOSSON

thereof:

(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

(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 walves any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1960 (5 U.S.C. \$504 steep.) for fees and other expenses incurred by the respondent in connection with this proceeding.

MARTIME OVERSEAS CORPORATION Volume 44 Number 7

PENDENGS OF FACT

 Pan American World Airways, respondent, is a corporation sig basiness at O'Hare International Airport, Chicago, Illinois, sit a basiness address of Pust Office Box 66684, O'Hare Airport John, Chicago, Illinois 66666.

 On or about August 31, 1984, the respondent had in its possesia, straw imported from the Central African Republic.

CONCLUSIONS

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

ORDER

The respondent is meanesed a civil penalty of one thousand doter \$1,000. The respondent shall send, symbole to the "Treasuror f the United States" a certified tecke or money order, to Mark D. Dopp, Office of the General Caussel, Room 2422, South Building, Dopp, Office of the General Caussel, Room 2422, South Building, Dated States Department of Agriculture, Washington, D. C. 2253-4400, within Unity (30) doys from the effective date of this

order.

This order shall become effective on the day this order is served uses the respondent.

In re: Martime Oversear Corporation, P.Q. Docket No. 148, Decided December 16, 1985.

Storage of regulated garbage abound ressel--Civil penalty--Connecti-

Jan Huley, for complainant. Recordent, pro se.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 6, 1805, as amended (Act) (21 U.S.C. § 111 as 2000 and the Federal 1805, as amended (Act) (21 U.S.C. § 111 as 2000 and the Federal complaint filled by the Administrator to the Animal and Plant Institute Inspection Service alleging the Administrator and Plant Institute Inspection Service alleging the Administrator of the Administrator (Act of the Administrator of the Administrator (Act of the Administrator of th



This order shall become offective 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 panalty.

This order shall become offective 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.

van assessed a civil ponalty of \$250.00. muda Woods, for complainant.

Fruit imported without penalty permit-Civil penalty. despondent was alloged to have imported two pounds of lines from Moxico into the Juited States without a permit accompanying the fruit. Respondent's failure to file my number to the ollegations constitutes admittance of the allegations. Respondent

tespondent, pro seheiston by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT This proceeding was instituted under the Act of August 20, 1912. s amended (Act) (7 U.S.C. §§ 151-164a and 167), by a complaint led by the Administrator of the Animal and Plant Health Inspecon Service, United States Department of Agriculture. The comlaint alleged that the respondent violated section 319.56-2(e) of to regulations promulgated thereunder (7 CFR \$319.56-2(e)). opies of the complaint and the Rules of Practice governing prosedings under the Act were served by the Hearing Clerk, by certied mail, upon respondent.

Pursuant to section 1.186 of the Rules of Practice (7 CFR § 1.136) plicable to this proceeding, respondent was informed in the comaint and the letter of service that an answer should be filed ithin twenty days after service of the complaint, and that failure file an answer would constitute an admission of the allegations the complaint, under 7 CPR \$ 1.186(c). The respondent was also formed that failure to file an answer would constitute a waiver of saring, as provided in section 1.139 of the Rules of Practice (7 FR 8 1.189).

The remondent filed on answer during the twenty-day provide al mode. Respondent's fullers to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.1860 of the Rules of Practice (CPR \$1.1860.) Respondent's failure to file an answer also constitutes a warbor of breating andre section 1.189 of the Rules of Practice (CPR \$1.180.) Excitation and the contraction of the complaint the complaint the prediction of the failure of file and the substitute of the failure of the complaint, they are adopted and set forth of the the fillings of Practice.

FINDINGS OF FACT

- Charles R. Waters, respondent, is an individual whose address is 4937 Tetons, El Paso, Texas 79904.
- On or about October 22, 1984, at El Paso, Texes, respondent imported two pounds of limes from Mexico into the United States in violation of 7 CPR § 319.56-2(c), because the fruit was not accompanied by a permit. as reonired.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The connecteurous of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his allence respondent has admitted all of the material allegations of fact in the complaint and has wived 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 [saned]

.....

Respondent Charles R. Waters is hereby assessed a civil penalty of two bundred fifty follows (2250), which shall be payable to the off two bundred fifty follows (2250), which shall be payable to the order, and which shall be forwarded to Fronds C. Woods, Office of order, and which shall be forwarded to Fronds C. Woods, Office of the General Conference of the General Mone 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250-1400, within thirty 500 does from the effective date of this order.

This order shall have the same force and effect as if entered ster full bearing aball be final and effective \$5 days ater service of this Becision and Order upon respondent, unless there is an appeal to the Judice of Order pursuant to section 1.145 of the Rules of Practice applicable to this proceeding of CERF \$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.

Fereign origin garbage aboard ship not in proper receptacies-Civil pensity.

Joseph Pesubroke, for complainant. Respondent, pro se.

Decision by Edward McGrail, Administrative Law Judge.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Act of Pehruary, 2 1006, as amended Cil U.S.C. \$111, [1, and 122]. The Pekral Plant Peat Act, as amounded (U.S.C. \$100a. et exp., and the Act of Plant Peat Act, as amounded (U.S.C. \$100a. et exp., and the Act of Committed Issued by the Administrator of the Antical and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that responsed has violated sections 111 and 120 of the Act Cil U.S.C. \$111 and \$100a. and sections and 112 and 112 and 1120a. and section of Committee and the Committee Committe

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.

Persuant to section 1.186 of the fathe of Practices of CPR § 1.186 applicable to the proceeding, respective uns informed in the 18-secular and the latter of service that an asswer should be filed with Henoring Clerk within theory 600 yas after service of the complaint, and that failure to file an answer either derying, admitting, or explaining the allegattes in the complaint and evapting, admitting or coll hearing would constitute an admission of such allegations and values of such hearing. More than twenty (00) days allegations are values of such hearing, More than twenty (00) days impossion, Segmontes in the file of the control of the contro

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and sot forth herein se the findings of fact.

PINDINGS OF FACT

- Flota Banenara, respondent, is a business or in the alternative, a corporation, whose mailing address is Ecuatoriana, S.C., Calle P. Icara, #437 Edificio Atahualpa, 90 Piase, P.O. Box 6883, Guayaouil. Remade.
- 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, merces, remark, rever your tasson.
 3. On or about October 17, merces, the reappondent on its ality the MV Ro Bamerallas, which arready the Very York, from Hondures, violated 380,000(b)(1) of the regulation (2 CFR § 30,000(b)(1)) association 94,50(b)(1) of the regulation (3 CFR § 30,000(b)(1)) association 94,50(b)(1) of the regulation (3 CFR § 30,000(b)(1)) and the late of the regulation of CFR § 30,000(b)(1) and the late of the regulation of CFR § 30,000(b)(1) and the late of CFR § 30,000(b)(1) and
- 5. On or about December 18, 1984, the respondent on its ship the Mr. (R. Emeraldas, which arrived in New York from Reaador violated section 39,400(M)(I) of regulations (**OFR 39,400(M)(I)) and section 94,60(I) of the regulations (**OFR 98,60(M)), because it had foreign origing arrhange on board, which was not contained in tight, leak-proof covered reconfidents as resurted.

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.

ORDE

Respondent is hereby assessed civil penalty to two thousand five united delites (25000 which shall be payable to the "Treasurer of the United Science of the Control of the Control of the Control he United Science of the Control of the Control Counted Control of the Control of the Control of the Control of Control of the Control of the Control of the Control of Control of the Control of the Control of the Control of Control of Control of the Control of the Control of the Control of Control of Control of the Control of the Control of Control of

This order shall have the same force and effect as if entered fire full bearing and shall be final and effective 35 days (7 CFR 11426) after service of this Decision and Order upon respondent,

unless there is an appeal to the Judicial Officer within 30 days purguant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

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 tamates without certificate—Civil penalty.

Respondent imported pork tameles from Maxico without a required certificate, Respondent neither desield the allegations nor requested a hearing. Respondent was assessed a civil penalty of \$250,00.

Mark Dopp, for completeent. Respondent, pro se.

Decision by John A. Campbell. Administrative Law Judge.

DECISION AND ORDER PRELIMINARY STATEMENT

This proceeding was instituted under the Act of Pebrua 1009, an amonded, (Act) (21 U.S.C. § §111), and 120) by a comp filled by the Administrator of the Animal and Plant Health Ins, thon Service, United States Department of Agriculture. The ocplaint alleged that the respondent violated sections \$9.5(0.30) of th requisitions promisized therauchor(OUPR § 9450,000. Cogiste of the complaint and the Rules of Practice Governing Proceedings Under tha Act www served by the Readray Clevic, by certified mall,

upon respondent. Pursuant to section 1.136 of the Rules of Practice (? GFR § 1.189, asplitable to this proceeding, respondent was informed in the complaint and the interfer of service in that an answer should be filled with plaint and the state of service in that an answer should be filled with plaint, 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 GFR § 1.143), and a waiver of such hearing. The latter also advised than expendent that failure to request an oral hearing, within the complaint weather of the such plaints of the such plaints of the such as a nanew mould continue a waiver of such 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 ellegations in the complaint nor did the respondent 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 Pact.

FINDINGS OF FACT

- 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 94.90x(3) of the regulations (9 CFR § 94.90x(3)) in the respondent imported pork tanales from Moxico 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 breeby sesseed a civil pensity to be harderfully oblicate 2020. The respondent shall send, payabe to the "Treasurer of the United States" a cartifact check or money order, to March D. hopp, Office of the General Coursel, Room 2422, hope, 2020. The contract of Agriculture, Weshington, D. C. 2020. State Department of Agriculture, Weshington, D. 2020. State Department of Agriculture, D. 2020. State Departmen

lecision and order became final December 13, 1985.-Ed.]

FRANCISCO CARRIZALES Volume 44 Number 7

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 menoded (T U.S.C. §31-164 and 167) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Impection Service, United States Department of Agriculture. The complaint alleged that respondent has violated sections 111 and 120 of the Act (£1 U.S.C. §111 and §120) and section 319.69-26) of the regulations promulgated thereunder (CFR §1315-6-CFR).

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.

amplicable to the proceeding respectable was formed as a special processing respectable to the proceeding, respendent was informed in the complaint and the letter of service that an answer should be filed with Hearing Clerk within twenty 600 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 or of hearing would constitute an admission of such allegations and waiver of such hearing. More than bewerity 00 days have allegated winces Reposited in the surface of the complete of th

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

 Francisco Carrizales, raspondent, is an individual, whose mailing address is 2677 Lima Street, Brownsville, Texas 78520.

 On or about June 19, 1984, the respondent imported one kilogram of limes from Mexico into the United States at Brownsville, Texas, in violation of section 319.56-20 of the regulations (7 CFR §§ 319.56-26), 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.

ORDE

Respondent is hereby assessed civil penalty of two hundred and filled and a colours (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. 20259-1409, 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 of CFR 1.142(2) after service of the Decision and Order upon respondent, unless there is an appeal to the Judicial Officer within 30 days pursuant to section 1.145 of the Butles of Practice applicable to this proceeding of CFR \$ 1.145(3).

[This decision and order became final December 18, 1985.—Ed.]

In re. IMPERIAL NURSERIES. P.Q. Docket No. 189. Decided December 16, 1985.

Transportation of regulated articles from gypsy moth high risk area through nonregulated areas—Civil penalty—Consent.

Kevin B. Thiemann, for completeant.

A. Rose 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, an anneade, and the Pederal Plant Pest Act (7 U.S.C. §§ 15:1-164 and 197, and 150as et say, 1 Acta) by a complaint and by the Administrator of the Annian and Plant Health Imperial Numerica, respondent, violated the Acts and regulations importal Numerica, respondent, violated the Acts and regulations that the proceeding period of the Acts and regulations that the proceeding act and the processing acts of the Plant Plan

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 stipplates and agrees that the United States of the Agriculture is the "prevailing party" in the proceeding and a state of the proceeding and the United States Department of Agriculture under the Equal Access to Justice Act of 1990 (5 U.S.C. \$ 564 et say.) for fees and other expenses incurred by the respondent in connection with this proceeding.

PINDINGS OF FACT

- Imperial Nurseries, respondent, is a business whose address is 90 Salmon Brook Street, Granby, Connecticut 08035.
- 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 interestate,
 through gypsy moth non-regulated areas, regulated articles from
 Granby, Connecticut, a gypsy moth high risk area, to East Detroit,
 Michigan.
 - On or about April 18, 1985, respondent moved interestate, through gypsy moth non-regulated areas, regulated articles from Granby, Connecticut, a gypsy moth high risk area, to Eligin, Illi-
- nois. On or about April 18, 1985, respondent moved interstate, 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 interestate, 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.

 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

 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 breastly the dollars 63,125.00 which shall be payable to the "Theasurer of the United Step of the Control of the Control order, and which shall be forwarded to Kevin B. Thiesmann, Office of the General Counsel, Room 222 South Building, United States Department of Agric, 21th and Independence Avenue, S.W. Washington, D.G. 20050-1400, within 600 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/furnugation—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 Pebruary 2, 1803, as amended, (Act) 23 U.S.C. \$8111, and 120) by a complaint filled 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 319.56-21 of the regulations promolgated thereunder (7 CFR §319.56-2 and § 319.56-2). Oppies of the complaint and the Rules of Practice Governing Proceedings Under the Act were served by the Hearing Clerk, by certified mail, upon respondant.

Personant to section 1.136 of the Bulse of Prectice of CFR \$1.189, applicable to the proceeding, responsed was informed in the con-plaint and the letter of service that an answer should be filed with the Hearing Ceffect 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 1.140 of the Rules of Practice of CFR \$1.1413, and a waiver of such hearing. The latter size advised the respondent that failure to request an oral hearing the first of the form of the first of the complaint and constituent of the first oral hearing. Respondent has failed containing an answer would constituent of the first oral hearing. Respondent her failed containing and in any names to salignations in the complaint and repondent has not requested an

oral hearing.

Responden's faiture to deny or otherwise respond to the allegations in the complaint constitutes an admission of such allegations,

pursuant to section .113860 of the Rules of Practice (7 CRR
§ 1.13860). Respondent's faiture to request a hearing constitutes a
waiver of such hearing. There sheing no basis for a hearing, then

terrial allegations of fact in the complaint are adopted and set forth

as the Findings of Fact.

PINDINGS OF FACT

 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 319.56-2 of the regulations (7 CFR § 319.56-2 and 319.56-2) in the respondent attempted to import two lines from Mexico which are prohibited entry without a permit, and mangoes and plum from Mexico which are prohibited entry without furnigation 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 premulgated thereunder. Therefore, the following order is issued.

ORDER

Bespondent Alma Romero Barteda is barrity assessed a civil good and all of who handered fifty dollant #2650. The respondent shall send a payable to the "Treasury of the United States" is cutfied check or money coder; to March D. Dopp, Office of the General Commel, and the Commerce of t

[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.

Poreign origin garbage not removed to approved facility—Civil penalty. Freeda Woods, for complainant. Remondent. No as.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER PRELIMINARY STATEMENT

This proceeding was instituted under the Ant of Roburys, 20, 2008, as anomeded (21 U.S. C. § § 11 and 120), the Federal Plant Field Act, as anomeded (7 U.S. C. § 15 (see - 100)), and the Act of August 0, 1912, as anomeded (7 U.S. C. § 15 (see - 100)), and the Act of August 0, 1912, as anomeded (7 U.S. C. § 15 (see - 100)), and a complaint filled by the Administrator of the Animal and Finat under the Act of August 1912, and the Act of CPR 348 (additional) and 49 (36) (31) of the CPR 34 (36) (31). Opine of the complaint and the Rules of Practice governing proceedings under the Act was severed by the Heaving Clark 1912, by certified mall, upon re-Act was conversely the Heaving Clark 1912, by certified mall, upon re-Act was severed by the Heaving Clark 1912, by certified mall, upon re-Act was severed by the Heaving Clark 1912, by certified mall, upon re-Act was severed by the Heaving Clark 1912, by certified mall, upon re-Act was severed by the Heaving Clark 1912.

Pursuant to section 1.136 of the Rules of Prectice (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 alword. Respondent's failure to file an answer within the time previded constitutes an admission of the allegations in the complaint, under section 1.1366 of the Rules of Practice (COFF, 1.11660. Respondent's failure to file an answer also constitute a water of bearing under section 1.139 of the falles of Practice (COFF, 1.1166). Since respondent is demind to have saminor to the complaint, they complain the complaint of the compl

FINDINGS OF FACT

 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 Aipprot, the respondent violated 7 CFR § 839.4000XI) and 9 CFR § 95.400XI), because it removed, from its flight TWA 741, which had arrived in New York from West Germany, forgoriging 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 ware 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 wrived 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 barely assessed a civil, penalty of seven hundred fifty dollars (876), which shall be payable to the "Treasuror of the United States" by certified cieck, or money order, and which shall be forwarded to Fronda C. Woods, Office of the General Counsel, Room 2423, South Building, United Office of the General Counsel, Room 2423, South Building, United States Department of Agriculture, Washington, D.C. 2029-1400. States Department of Agriculture, Washington, D.C. 2029-1400.

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 of the

[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 Rales, for complainant.

Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of Fabruary 2, 1956, as amended (Act) GI U.S.C. §§ 111 and 120) and for Fabruary 2, 1956, as a mended (Act) GI U.S.C. §§ 150sa et exp.) by a complaint filled by the Administrator of the Animal and Plant required to the Act of the

 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 inrelication in this matter, nether 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 sex.) 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.

8206

NOVEMBER-DECEMBER 1985

ANIMAL QUARANTINE AND RELATED LAWS P	AGE
BRUCKLLOSIS	
Exposed cattle moved interetate	2714
CIVIL PENALTY	
Of \$250.60	9699
Of \$500.00	700.
Of 82 000 00	2714
Of \$2,500.00	2711
Of \$8,000.00.	0000
DISMISSAL	
Granted	713
VETERINARY ACCREDITATION	
Suspension	692
ANIMAL WELFARE ACT	
BRIBERY OF MEAT INSPECTOR	
Dismissal of complaint with prejudica	124
CIVIL PENALTY	
or \$509.40	28
Of \$4,000,00	16
DISMISSAL	
Oranted	21
STANDARDS AND REGULATIONS	
Cease and desist from violating	28
Cease and desist from violating, ordered to comply with	ti.
FEDERAL MEAT INSPECTION ACT	
INSPECTION SERVICES	
Withdrawal and denial of	
PACKERS AND STOCKYARDS ACT, 1921	*
ACCOUNTS AND RECORDS	
Maintain records to fully disclose details of all payments and gifts	

PACKERS AND STOCKYARDS ACT, 1921-Cont.

BONDING REQUIREMENT P.	AGE
Violation of	2856
CHECKS OF DRAFTS	
Insuling checks on remote banks to delay check collection proc-	2186
lassing insufficient funds checks 2763, 2766, 2768, 2935, 2838, 2340, 2853, 2858,	2854, 2870
CIVIL PENALTY	
Cr esco.so.	2837
Of \$500,00	2844
Of \$2,500.00	2310
Of \$4,000.00	2863
Of \$30,000.00	2842
DEALER	
Bond, feilure to file and maintain	2837
Faikure to pay and/or failure to pay when dus 2763, 2766, 2851, 2854,	2966. 2969
giving money, gifts, or services	2771
Insufficient funds checks	2354
Insufficient funds checks and dishonored checks	2810
Issuing insufficient funds checks	2100
Micropresentation of weights	27/1
Preparing sed issuing certifications, or representing, that drugs have not been administered to livestock	2858
Prohibited from engaging in business subject to the Act 2771.	2964
Prohibited from engaging in business subject to the Act for 39 days and thereafter until bond requirements are met.	286
Prohibited from operating subject to the Act until in compliance with bonding requirements	2837
Suspended as a registrant	400
TOTAL DID AND MARKET ACENCY	
Bond, failure to file and maintain	924
Failure to maintain a reasonable bodd	, 204

PACKERS AND STOCKYARDS ACT, 1921-Cont.

DEALER AND MARKET AGENCY-Cont.
PA-
Failure to pay when due
Insufing insufficient funds checks
Misropresenting purchase weights
Misrepresenting the original prices of livestock
Prohibited from engaging in business subject to the Act until bonding requirements met
Suspended as a registrant
DISMISSAL OF COMPLAINT
Reparation—Authorized by complainent
Reparation—Completenent obose not to obtain receipt showing bend count. 231
Reparation—Complaint based on forbidden practice of general- tosing selling price
With prejudice
MARKET AGENCY
Complaint based on forbidden practice of guaranteeing selling price, dismissed
Failure to deposit into and/or maintain properly "Shippers' Pre- ceeds Account"
Prohibited from engaging in business or operating subject to the Act for 4 months
Prohibited from receiving anything of value except as consider- ation for services lawfully readered. 273
Suspended as a registrant
Violation of bonding requirements. 2794
PACKER
Cease and dealst from giving or offering meney or any gift or gratuity to or for any customer to influence purchase, and from soliciting or accepting fewored treatment
Fallure to pay and/or failure to pay when dee. 2768, 2888, 2888
Pallure to pay full purchase price. 280
Insufficient funds checks, issuing
Issuing chocks on remote banks to daily check collection proc-

3061

PACKERS AND STOCKYARDS ACT, 1921-Cont.

	PAGE
RECONSIDERATION/REOPEN	PAGE
On reconsideration, ruled that cease and decist orders will be issued in P&S cases	2861
SCALES AND WEIGHING	
Misrepresenting purchase weights	2858
Scales, maintain and operate to ensure accurate and correct weights	2846
SIMPPERS' PROCEEDS ACCOUNT	
Failure to deposit into	
Feilure to maintain properly	2764
STAY ORDER	
Motion for, denied	2969
SUPPLEMENTAL ORDER	
Bonding requirements, in compliance with, suspansion terminated	2861
SUSPENSION OF REGISTRATION	
Ruling on reconsideration that cesse and desist orders will be issued in P&S cases	2861
Suspended for:	
21 days.	2851
21 days and thereafter until custodial account deficit is eliza- nated	2764
30 days and thereafter until in full compliance with bonding requirements.	2174
45 days and thereafter until in full compliance with bonding requirements	2768
60 days and thereafter until in compliance with besting requirements.	2848
120 days and thereafter until solvent	2766
3 months and thereafter until solvent	2835
4 months.	2771
4 months and thereafter until in fell compliance with binding requirements	2846
6 months.	2840
8 years	2858

PERISHABLE AGRICULTURAL COMMODITIES ACF, 1630	PAG
ACCEPTANCE OF COMMODITY	
Claim of piecemeal acceptance rejected	295
ACCORD AND SATISFACTION	
Intent to assent to	298
ACCOUNTINGS	
Failure to submit	297
Inadequate due to lack of dates	
ADMISSION	
Partial admission of liability	. 200
BANKRUPTCY	
Reparation action continued panding bankruptcy proceeding 8002, 302	7, 202 a
BROKERAGE FEE	3131
Duties (ulfilled	
COMPLAINT	2961
Diemissal of	2934
Failure to submit account of sales.	2074
CONTRACT PRICE	
Liability for, less unloading expenses.	2995
Liable for full contract price	2N8
CONTRACT TERM	
Failure to prove charge from sale to coneignment	2981
Mutually agreed price adjustment	2034
COUNTERCLAIM	
Dismissed of	2951
DAMAGES	
Failure to submit evidence of	2067
DISMISSAL	
Complainant authorized dismissal of complaint 2001, 2004,	9704
Contract terms altered by mutual agreement	

3064 SUBJECT INDEX	
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1900-Cont.	
REPARATION AWARDED—Cent.	
	PAGE
Fatilure to pay	4. 300 1
Failure to prove credits enthorised	0204
Failure to anhmit evidence.	2954
F.O.B. sale, not commission beads	2941
Liability limited to actual shipment, not order	2059
Unverified answer not in evidence	2102
RESALE	
Not alleged	2566
STAY ORDER	
Pending filing of a copy of petition for bankruptcy	8002
Pending filing of an answer to the potition to reopen after do- fault	
Pending precedings for judicial review	3031
Vaceted—prior order reinstated	2962
SUITABLE SHIPPING CONDITION	3036
Warranty applicable only et contract destination	
UNDISPUTED AMOUNT	2946
Order requiring payment of	2045
WARRANTY	2046
Breech of	me
Fellure to establish existence of expense	1977
PLANT QUARANTINE ACT	
CIVIL PENALTY	
Of \$250,00	054
Of \$500.00	144
Of \$500.00	0.58
Of \$750.00	1638
Of \$1,000.00	42
Of \$1,125,000.	

Of \$1,500.00.....

PAGE	
3085, 3088, 3089	

Granted	3035,	3033,	303
GARBAGE			
Not in proper receptacles		2039,	804
Storage of regulated garbage aboard vessel	****	9H3,	206
Unleaded in violation of regulations		3016,	3056
PROHIBITED/RESTRICTED ARTICLE			
Imported without permit	3046,	8050,	305
Transported from gypsy moth high risk area			306
POULTRY PRODUCTS INSPECTION ACT			

INSPECTION SERVICES

DISMISSAL

	and denial of
WILLIGENWAL	and denial of



LIST OF DECISIONS REPORTED JANUARY FEBRUARY 1985

3067

PAGE

231

AGRICULTURAL MARKETING ACT, 1607

AGRICULTURAL MARKETING AGREEMENT ACT. 1907

DEPIANCE MILE PRODUCTS Co., A DIVISION OF DIRECTION. AMA Docket

No. M33-8. Digmigual COUNTY LINE CHEESE CO. INC. COUNTY LINE CHEESE COMPANY, A DIVI-SION OF BEATRICE FOODS CO., and MEADOW GOLD DAIRY, DEVISION OF

BEATERCE FOORS Co. AMA Docket No. M48-1. Diamissal.....

ANIMAL QUARANTINE AND RELATED LAWS

ANDREWS, PHILIP. AQ Docket No. 97. Decision And Order......

ASC AIR CARGO SERVICES INC. AQ Docket No. 22, Consent Decision A.W. CHERRY AND SONS. AQ Docket No. 17. Consent Decision

Brown, Bon. AQ Docket No. 108. Decision Amended..... BURK, RAY d/b/a BURK LIVESTOCK COMPANY, AQ Docket No. 23, Deci-

sion And Order..... BROWN, Bon. AQ Docket No. 108, Consent Decision.....

C.R. SCOPT AND CO. INC. AQ Docket No. 48. Consent Decision GILLIAND, PLUMA. AQ Docket No. 132. Consent Decision.....

HALL, DELL and Syzven W. Ullow D.V.M. AQ Docket No. 24. Decision As To Dell Hall FIGRINGS, THOMAS W. JR. AQ Dorket No. 20. Railing On Certified Ques-

PANTALION, M.L. and JDEY. AQ Docket No. 108. Consent Decision...... Proness Beer Company, AQ Dorket No. 103, Consent Decision........

SANNESS, LLOYD d/b/a PORK CENTRAL FEEDER PICE and WILLIAM BESSLER, AQ Docket No. 122. Consent Decision By Linyd Sammes SANNESS, LAOVE d/h/n POSE CENTRAL PRIDES From and WILLIAM

SCOTT, CORDIN O. AQ Docket No. 61. Consent Decision SILVA, ANTONIO, CARLOS and CLINDA d/b/s ROCKY MILE FORM. AQ

Docket No. 121. Consent Decision As To Carlos Silva..... SMITH, Bop. AQ Docket No. 85. Concent Decision..... STACKS, JOHN B. AQ Docket No. 42. Order Dismissing Complaint......

STORES AND BROGDEN STOCKYARD INC. AQ Docket No. 109. Decision And Order STOTLER, PATRICIA LEE, S.K.S PATRICIA PETTER. AQ Dicket No. 120. Order Granting Motion To Dismiss.....

TERRY'S FORM SERVICE, INC. and TOMMY JOE TOWNSERD. AQ DOCKST No. 185, Consent Decision THOMPSON, ALLAN. AQ Docket No. 101. Decision and Order......

VILLARI, SALVATURE and VILLARI TRUCKING COMPANY 6/b/a S&J VIL-LASS LAVESTOCK COMPANY, AQ Docket No. 118. Order Dismissing

Complaint

LIST OF DECISIONS REPORTED

2058

JANUARY-FERRUARY 1000

ANIMAL QUARANTINE AND RELATED LAWS-Cent.	PAGE
WOOD, WILLIAM "ED" AQ DOCKET NO. 82, Ruling On Certified Question WHIGHTS NASSAU COUNTY FARMS INC., W.P. WRIGHT SR, and W.F. WRIGHT JR AQ DOCKET NO. 121 Co.	
WRIGHT JR. AQ Docket No. 131. Consent Decision	. 212
ANIMAL WELFARE ACT	
BERDUSSER, OTAKOR, a/k/s OTVO BERGSENS. AWA Docket No. 241. Con-	
pent Decision Derra Amanes Inc. AWA Docket No. 327. Consent Decision	
Commit Decision	
aion	171
Judgement	185
	170
	103
	158
RICHARD, EMAGERE Ms. AWA Docket No. 315. Consent Decisions STURNERSURERS, JAMES and JULIA, d/b/a CONNER VIEW KERNELE. AWA Docket No. 2005. P. 10. 10. 10. 10. 10. 10. 10. 10. 10. 10	154
AWA Dockst No. 265. Docision And Order University of Connecticut. AWA Docket No. 273. Consent Decision	187
ZARTMAN, MARLIN A. d/b/n Gilleritteville Sales Stables. AWA Docket No. 259. Decision And Order	162
EGG RESEARCH AND CONSUMER INFORMATION ACT	174
L. Dotsis Eog Farm. ERICA Docket No. 6. Decision And Order	240
PEDERAL MEAT INSPECTION ACT	
SUMMIT BEEF COMPANY, FMIA Docket No. 81. Decision And Order WARRAW MEAT COMPANY, FMIA Docket No. 82. Stipulation And Con- ment Decision.	243
sent Decision	245
HORSE PROTECTION ACT	
PALMER, Diony E. HPA Docket No. 182, Doctsion And Order	
Ston And Order	248 248
PACKERS AND STOCKYARDS ACT	248
ALEXANDER, ROYAL J. and ALPHA ALEXANDER. P&S Docket No. 8405 Decision And Order Upon Admission Of Fects By Reason Of De- fault.	
	277
C&H CATTLE COMPANY INC. and Consent Decision.	888
6232. Consent Decision	74
Docket No. 6474, Decision With The Section Voting, P&S	

 Packing Inc.

Stay Order.....

SPENCE, PAUL J. P&S Docket No. 6454. Consent Decision

STANDISH STOCKYAROS INC., NORMAN DALE PECE, and RAYMIN BALEER P&S Docket No. 6125. Consent Decision With Bespect To Norman

WAITT, NORMAN, P&S Dorket No. 6419, Decision.....

١G	В		

GOTHAM PROVISION Co. INC. and WARREN B. Moone, P&S Docket No.	000
6499 Convent Decision	287
GRINSTEAD, JOS. P&S Dorket No. 6466. Consent Decision	282
HERMANN BOO MARKET INC., and BENJAMIN J. SMITH. P&S Docket	
No. 5279 Consent Decision With Respect To Benjamin J. Smith	283
HUMBERT HO. MARKET INC. and EENJAMIN J. SMITH. PRS DOCKST 140.	
8479 Consent Darision With Respect To Heinhold Beg Market Inc	270
Higgins, James, P&S Docket No. 6415. Decision	216

HULINGS, G. PALMER, RONNIE C. AUSTIN, and GEORGE CLINTON

McDonnzaa, P&S Dorket No. 5744. Order Denying Late Appeal..... HULINGS, PALMER G., RONNIE C. AUSTIN, and GEORGE CLINTON McDonner, P&S Docket No. 5744. Decision And Order..... KORMORUST, HAROLS, P&S Docket No. 6241. Supplemental Order...... 503 ORANGE MEAT PACKING CO., INC., and G. & L. PACKING CO., INC. P&S Docket No. 5717. Connent Decision With Regard To Grange Meet

RAADCH, CORA B. P&S Docket No. 6165. Consent Decision RECTOR AUCTION SALE BARN, INC. P&S Docket No. 6462. Consent Deci-SOUTHWESTERN SALES CO. INC., P&S Docket No. 6476. Consent Deci-

219 STAFFORD, ROBERT E., and CHARLES RAY, P&S Docket No. 6581. Amend STAFFORD, ROBERT E. and CHARLES RAY. P&S Docket No. 6381. Stay 238

203 203

WALKER, DANG and JULIA. P&S Dorket No. 0212. Supplemental Order . WILSON, GARY, P&S Docket No. 6403, Consent Decision PERISHABLE AGRICULTURAL COMMODITIES ACT, 1989

COURT DECISION:

States..... DISCIPLINARY DECISIONS:

PUPILLO, SALVATORE, PETITIONER 8. UNITED STATES OF AMERICA SING UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MAR-KETUNG SERVICE, and JOHN R. BLOCK, SECRETARY OF AGRICULTUSE OF THE UNITEO STATES. CVA-84-1065, Appeal From Order Of United

ASSOCIATED FORD SERVICES INC., d/b/a ASSOCIATED/ROMNEY FOOD

991

SERVICES, PACA Docket No. 2-9905, Decision And Order CURUMANO BROS. & Co. INC. PACA Docket No. 2-6540, Decision And

D.S. RUSSELL AND SOME INC. PAGA Docket No. 2-8644, Decision, And Order

JANUARY-FRBRUARY 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont.	
DISCIPLINARY DECISIONS-Cont.	PAGE
FARM MARREY SERVICE, INC. a/t/u FMS. PACA Docket No. 2-6611. D cision and Order. GAS PRODUCE DISPRISOVORS INC. PACA Docket No. 2-6846. Decisio And Order.	316
Gerater McCoys Markets Inc. PACA Docket No. 2-6398. Decisio And Order	n
LIVERLEY TRADING Co. PACA Ducket No. 2-6149 Decision And Co. S.	. 333
RECHMOND INSTITUTIONAL FOODS INC. PACA Docket No. 2-6674. Dock also And Order	
REPARATION DECISIONS:	
APPLE SALES INC. II. CHY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-0423. Docket And Order	496
BERRIDGE PACKING CO. II. FIRST QUALITY FRUIT AND PRODUCE CO. INC. and/or C.H. ROBINSON CO. PACA Divide No. 2, 2451. Decision.	405
Bio Rice Tomato Pacierras a Source & L.	679
Docket No. 2-0556. Decision And Order. BORRELI PRODUCE DISTRIBUTIONS II. CITY WIGE DISTRIBUTIONS INC. PACA Decket No. 2-6488. Decision And Order. BENEZO Co. Co. Co.	416
PROGUES CO. PACA Decket No. 9.6694	404
Pageuce, PACA Docket No. 2-6999, Repression Codes	407
And Order Matterns Inc. PACA Docket No. 2-6489, Decision	423
TORS INC. PACA Docket No. 2-6402 Decision And Code	554
BORHMANE INC. & JAMES S. CLESCON JR. 2013 JAMES S. CLEMONS SR. d./ b/a Gelando Produce Distributors. PACA Decket No. 2-4838. De- cisitet And Ordor	
Case Poster & Source - 14 f Pro-	446

JANUARY-FEBRUARY 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont.

E Vera Auto Sous Inc. a Manesses Prococco Co. PACA Debeta No. 4948LD Designia And Driver. 1948LD Designia And Driver. 1948 A Compared of March Control of March Control of March Compared of M	Decision And Order. Britan, Lordon Management Processor Co. PACA Decision No. 18 States, Constant W., Dom M., Constant W., Dom G., Con	REPARATION DECISIONS—Cont.	PAG
8-688. Decision And Order. Ginney, Casalaw W, Don M, Casarron, and Geaza, A. demonros of Ginney, Casalaw W, Don M, Casarron, and Geaza, A. demonros of Propuesto, Inc. PACA Dodes No. 2-688. Decision and Order Casarron States. Propuesto, Inc. PACA Dodes No. 2-689. Decision and Order Casarron States. Propuesto Casarron States. Pack Decision Casarron States. Pack Decision And Order. ELECTROP Process PACA Dodes No. 2-698. Decision And Order. Decision And Order. Decision And Order. Decision Order Decision And Order. Decision	Feliki Dreisins And Order. Giusco, Dastau W, Dan M, Jonarrow, and Giazao, A. demotron of Jonas Constant W, Dan M, Jonarrow, and Giazao, A. demotron of Jonas Constant W, Dan M, Jonas Constant S, et al. (2014). The process of the Part Part Part Part Part Part Part Part	Decision And Order	4
Mr. JOSEPHONE GENERO SALE DOWNAY IN PRAEMAN BROTHSES OGN. CORP PLOTION DE S. DIV YOUNG DESERVENCE S. DE PACA DodeN No. 5-6471 Design And Order. DOWNAY PLOTION DE S. DIV YOUNG DESERVENCE S. DE PACA DOWNAY PLOTION DE SALE OF THE SAL	Mr. JOSEPHONE GENERO SALE DOWNAY IN PRAEMAN BROTHSES OGN. CORP PLOTION DE S. DIV YOUNG DESERVENCE S. DE PACA DodeN No. 5-6471 Design And Order. DOWNAY PLOTION DE S. DIV YOUNG DESERVENCE S. DE PACA DOWNAY PLOTION DE SALE OF THE SAL	2-6194. Decision And Order	43
Decket No. 8-647th Decketon And Order	Decket No. 8-647th Decketon And Order	b/e Johnston-Geron Sales Company v. Peldman Brot Produce, Inc. PACA Docket No. 2-6249. Decision and Order	HERE 40
B-6802. Decision And Order. Chouvers Paccine Contract in Bacterie II Battory (Pri-2 Emersion Contract III Battory	B-6802. Decision And Order. Chouvers Paccine Contract in Bacterie II Battory (Pri-2 Emersion Contract III Battory	Bocket No. 2-5474. Decision And Order	50
ELECOT PROCESS. P.C.A. Docket No. 2-0785. Tasser P. ALGORI & KORGET BETTER STATE AND ASSESSED ASSESSE	ELECOT PROCESS. P.C.A. Docket No. 2-0785. Tasser P. ALGORI & KORGET BETTER STATE AND ASSESSED ASSESSE	2-4683. Decision And Order	6
No. 8-delle. Deciden And Order No. 8-delle. Deciden And Order Leve ACAD Charles See See See See See See See See See S	No. 8-delle. Deciden And Order No. 8-delle. Deciden And Order Leve ACAD Charles See See See See See See See See See S	ELLIGYT PRODUCE, PACA Docket No. 2-6706	51
hes PAGA Deside No. 6-8610. Desides And Order IN Manuscream v. Vor Brunes Corner Preser. PAGA Desides No. 8- The Thomaso Course v. R. Genes D. Paga Demogration Contents PAGA Deside No. 8-9-8610. Desides on Order No. 5-0465. Desides And Order John T. Handle No. 6-8610. Desides on Order No. 8-0465. Desides And Order John T. Handle Co. 10-8-9-8610. Desides And Order John T. Handle Co. 10-8-9-8610. Desides And Order John T. Handle Co. 10-8-9-8610. Desides No. 8- John T. Handle Co. 10-8610. Desides No. 8- John T. Handl	hes PAGA Deside No. 6-8610. Desides And Order IN Manuscream v. Vor Brunes Corner Preser. PAGA Desides No. 8- The Thomaso Course v. R. Genes D. Paga Demogration Contents PAGA Deside No. 8-9-8610. Desides on Order No. 5-0465. Desides And Order John T. Handle No. 6-8610. Desides on Order No. 8-0465. Desides And Order John T. Handle Co. 10-8-9-8610. Desides And Order John T. Handle Co. 10-8-9-8610. Desides And Order John T. Handle Co. 10-8-9-8610. Desides No. 8- John T. Handle Co. 10-8610. Desides No. 8- John T. Handl	No. 2-6402, Decision And Order	3'
607. Decision And Order The Charles And Order J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. WOO, Co-Varies, Inc. to Binamone Taxon Bro PAGO. Docide J.A. WOO, Co-Varies, Inc. to Binamone Taxon Bro PAGO. Docide J.A. WOO, Co-Varies, Inc. to Binamone Taxon Bro PAGO. Docide J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. Woo, Co-Varies, Inc. to Binamone Taxon J.A. Barries, Inc. A Corver Work Environmental March All Louise No. J. Barries, Inc. to Corver Work Environmental No. J. Barries, Inc. to Corver Brown J. Barries, Inc. A Corver Brown J. Barries, Inc. The Corver Brown	607. Decision And Order The Charles And Order J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. WOO, Co-Varies, Inc. to Binamone Taxon Bro PAGO. Docide J.A. WOO, Co-Varies, Inc. to Binamone Taxon Bro PAGO. Docide J.A. WOO, Co-Varies, Inc. to Binamone Taxon Bro PAGO. Docide J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. WOO, Co-Varies, Inc. to Binamone Taxon Brown J.A. Woo, Co-Varies, Inc. to Binamone Taxon J.A. Barries, Inc. A Corver Work Environmental March All Louise No. J. Barries, Inc. to Corver Work Environmental No. J. Barries, Inc. to Corver Brown J. Barries, Inc. A Corver Brown J. Barries, Inc. The Corver Brown	Inc. PACA Dorket No. 2-658), Decision And Order	41
PACA Doube No. 2-8885. Decision And Order JA. Woo Co-Verya, Inc. a Risuscent Fason Inc. PIOA Doubed Jas T. Bastan Co., Inc. a Cry West Dimensiones Inc. PACA Doubed No. 1-8445. Decision And Order Jacob T. Bastan Co., Inc. a Cry West Dimensiones Inc. PACA Doubed No. 1-8445. Decision And Order Jacob T. Bastan Co., Inc. a Cry West Dimensiones Inc. PACA Doubed No. 1-8485. Decision And Order Jacob T. Bastan Co., Inc. a Doubed No. 1-8485. Decision No. 1-8485. Decision And Order Jacob Doubed No. 1-8445. Decision And Order Kitasan Parra & Proposos Co., Dec. in Discussor Inc. PACA Doubed No. 1-8485. Decision And Order Jacob Biotocome An. in Permaterar Pion Procussor Comp. PACA Doubed No. 2-8485. Decision And Order Jacob Doubed No	PACA Doube No. 2-8885. Decision And Order JA. Woo Co-Verya, Inc. a Risuscent Fason Inc. PIOA Doubed Jas T. Bastan Co., Inc. a Cry West Dimensiones Inc. PACA Doubed No. 1-8445. Decision And Order Jacob T. Bastan Co., Inc. a Cry West Dimensiones Inc. PACA Doubed No. 1-8445. Decision And Order Jacob T. Bastan Co., Inc. a Cry West Dimensiones Inc. PACA Doubed No. 1-8485. Decision And Order Jacob T. Bastan Co., Inc. a Doubed No. 1-8485. Decision No. 1-8485. Decision And Order Jacob Doubed No. 1-8445. Decision And Order Kitasan Parra & Proposos Co., Dec. in Discussor Inc. PACA Doubed No. 1-8485. Decision And Order Jacob Biotocome An. in Permaterar Pion Procussor Comp. PACA Doubed No. 2-8485. Decision And Order Jacob Doubed No	5897. Decision And Order	61
No. 3-6465. Decision And Order No. 3-6465. Decision And Order Jan T. Pattalan Ed. Inc., See CVI. Dimensional Inc., PAAA Jan T. Pattalan Ed. Inc., See CVI. Dimensional Inc., PAAA Jan T. Pattalan Ed. Inc., See CVI. Decision And Order J. Bill Decision And Order Karasan Pizzar & Preseque Co., Dos. in Pizzarsan Decision Decision And Order Karasan Pizzar & Preseque Co., Dos. in Pizzarsan Decision And Order J. Bill Deci	No. 3-6465. Decision And Order No. 3-6465. Decision And Order Jan T. Pattalan Ed. Inc., See CVI. Dimensional Inc., PAAA Jan T. Pattalan Ed. Inc., See CVI. Dimensional Inc., PAAA Jan T. Pattalan Ed. Inc., See CVI. Decision And Order J. Bill Decision And Order Karasan Pizzar & Preseque Co., Dos. in Pizzarsan Decision Decision And Order Karasan Pizzar & Preseque Co., Dos. in Pizzarsan Decision And Order J. Bill Deci	PACA Dorket No. 2-6180. Decision And Order	5
Dodes No. 1-8482. Desides And Order. 3-8 Throntomerous As, One Wind Designation for PAGA Bankers No. 3-8 Throntomerous No. 10 Central Page 10	Dodes No. 1-8482. Desides And Order. 3-8 Throntomerous As, One Wind Designation for PAGA Bankers No. 3-8 Throntomerous No. 10 Central Page 10	No. 2-6405. Decision And Order	4
B-BBR. Decision And Order Jon Distance in Core With Distances and PACA Decision No. 9- Jon Distance in Core With Distances and PACA Decision No. 9- Jon Champ Proce in ca. 3 Passes Pace PACA Decision No. 9- Jon Champ Proce in Core Passes and Pace PACA Decision No. 9- Jones And Order Line Core Pace Pace Pace PACA Decision No. 9- BORD Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram And Decision No. 9- Memorane State Pace PACA Decision No. 9- Memorane State Pace PACA Decision No. 9- Memorane State PACA Decision N	B-BBR. Decision And Order Jon Distance in Core With Distances and PACA Decision No. 9- Jon Distance in Core With Distances and PACA Decision No. 9- Jon Champ Proce in ca. 3 Passes Pace PACA Decision No. 9- Jon Champ Proce in Core Passes and Pace PACA Decision No. 9- Jones And Order Line Core Pace Pace Pace PACA Decision No. 9- BORD Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram An . 10-Pace PACA Decision No. 9- Low Bibliogram And Decision No. 9- Memorane State Pace PACA Decision No. 9- Memorane State Pace PACA Decision No. 9- Memorane State PACA Decision N	Dorket No. 9-6494, Decision And Order	6
GRIL Decision And Order. 400. Decision And Order. Ann. Charter Processor Co., Don. In Frontance No. 9-8864 KALAGAS PERET & PROSESSOR CO., Don. IN FORMANDE POR PACKO Decision No. 4-6816. Decision And Order. 600. Decision And Order. 1000. PROCESSOR PROCESSOR PROCESSOR PROCESSOR DECISION. 1000. Decision And Order. 1000. PROCESSOR Decision And Order. 1000. Decision	GRIL Decision And Order. 400. Decision And Order. Ann. Charter Processor Co., Don. In Frontance No. 9-8864 KALAGAS PERET & PROSESSOR CO., Don. IN FORMANDE POR PACKO Decision No. 4-6816. Decision And Order. 600. Decision And Order. 1000. PROCESSOR PROCESSOR PROCESSOR PROCESSOR DECISION. 1000. Decision And Order. 1000. PROCESSOR Decision And Order. 1000. Decision	2-6386. Decision And Order	5
Jos. Chartes Protos Jine. S. Panter Fac Dee. PAGO, Dacket No. Feedlis, Delittish and Order Sec. 2016. In Proceedings of the Page 2016. Page 201	Jos. Chartes Protos Jine. S. Panter Fac Dee. PAGO, Dacket No. Feedlis, Delittish and Order Sec. 2016. In Proceedings of the Page 2016. Page 201	6485. Decision And Order	4
KALAGOS PERUFA É PRESENCE CA. DEL A FERGIAMO DE PARCA DOSSIE NO 4-68 D. DESSIE AND CARLOS DE PARCA DOSSIE DEL 600 D. DESSIE AND DEL A PARCA DEL AND DEL AND DEL AND DEL LESSIE AND THE DEL A PRIMERATION DE PARCA DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL MEDICAL DEL AND DE	KALAGOS PERUFA É PRESENCE CA. DEL A FERGIAMO DE PARCA DOSSIE NO 4-68 D. DESSIE AND CARLOS DE PARCA DOSSIE DEL 600 D. DESSIE AND DEL A PARCA DEL AND DEL AND DEL AND DEL LESSIE AND THE DEL A PRIMERATION DE PARCA DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL LESSIE DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL AND DEL AND DEL AND DEL AND DEL AND DEL MEDICAL DEL AND DEL MEDICAL DEL AND DE	Jon. Cimino Fooss Inc. u. Phims Pac Inc. PACA Docket No. 2-	5648. 4
Kind Patteres a. Cury Wee Derestores Bot PACA Doord No. E. Lessackand Paca Inc. In Proceedings A. G. The PACA Doord No. E. Lessackand Paca Inc. In Proceedings A. G. The PACA Doord No. E-HIT. Boolisis And Order No. E-HIT. Boolisis And Order No. E-HIT. Boolisis And Order No. E-HIT. Doord No. E-HIT. DOOR NO	Kind Patteres a. Cury Wee Derestores Bot PACA Doord No. E. Lessackand Paca Inc. In Proceedings A. G. The PACA Doord No. E. Lessackand Paca Inc. In Proceedings A. G. The PACA Doord No. E-HIT. Boolisis And Order No. E-HIT. Boolisis And Order No. E-HIT. Boolisis And Order No. E-HIT. Doord No. E-HIT. DOOR NO	KAMANS FRUIT & PRODUCE CO. INC. U. HOULSHAN INC. PACA D.	ocket
LOUGHARD FARRE DES. D. PETERSTERMAN. A. 6. G. DEN PAGA Decident Mo. Del-TRE Decident And Del-Tree Decident Mo. Dec. PAGA Decident Mo. Del-Tree Houseman Dec. PAGA Decident Dec	LOUGHARD FARRE DES. D. PETERSTERMAN. A. 6. G. DEN PAGA Decident Mo. Del-TRE Decident And Del-Tree Decident Mo. Dec. PAGA Decident Mo. Del-Tree Houseman Dec. PAGA Decident Dec	King Packing s. City Wice Distributions Inc. PACA Docket N	0. 2-
LOSS BOUNGOISSE As. 6. INTERPARTA FOOD PROCESSING COST. PACAS Doubted No. 2-6401. Decision And Order	LOSS BOUNGOISSE As. 6. INTERPARTA FOOD PROCESSING COST. PACAS Doubted No. 2-6401. Decision And Order	LINGSMANN FARMS INC. S. INTERNATIONAL A. & G. INC. PACA D.	ocket 8
MARK I. HANNES d'I/S CAT'S INCREMANDA. REK E SPANES PRODUCE INC. PACA Ducket No. 2-6964, Decision And Order McDeward Barvor Co. Inc. in Manuscran Furture Processor One. Pac. Microward No. 2-4660, Decision And Order Missouriese Zazimi Co., Inc. in Pac. Pac. Decision No. 2-4646, Decision And Order No. 2-4646, Decision No. 2-46	MARK I. HANNES d'I/S CAT'S INCREMANDA. REK E SPANES PRODUCE INC. PACA Ducket No. 2-6964, Decision And Order McDeward Barvor Co. Inc. in Manuscran Furture Processor One. Pac. Microward No. 2-4660, Decision And Order Missouriese Zazimi Co., Inc. in Pac. Pac. Decision No. 2-4646, Decision And Order No. 2-4646, Decision No. 2-46	LOUIS BOURGOINE JR. 4. INTERSTATE FOOR PROCESSING CORP. P.	AUA 6
McDonald Inform Co. Inc. is Madreell Fullance Proposed to, PACA Decket No. 2-4890, Deckson And Order Inc. PACA Decket No. 2-4848, Decision And Order Inc. PACA Decket No. 2-4448, Decision And Order Inc. PACA Decket No. 2-44	McDonald Inform Co. Inc. is Madreell Fullance Proposed to, PACA Decket No. 2-4890, Deckson And Order Inc. PACA Decket No. 2-4848, Decision And Order Inc. PACA Decket No. 2-4448, Decision And Order Inc. PACA Decket No. 2-44	MARK L. HAMESE d/b/e C.J's BROSSRAGE, S. REK E. SPARKS PRO	4
Menorisco: Zellem Co., Inc. s. Posity Surgista Inc. PACA Docket No. 2-4448. Decision And Order	Menorisco: Zellem Co., Inc. s. Posity Surgista Inc. PACA Docket No. 2-4448. Decision And Order	McDonald Import Co. Inc. v. Magnesia Fruianc Procus Co. P	5
		MENORISON-ZGIAM CO., INC. S. PURITY SUFREME INC. PAUX D	ocker
	The state of the s		

JANUARY-PEBRUARY 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1926-Cont.	
REPARATION DECISIONS—Cont.	ME
PACIFIC VALUEY PRODUCE Co. is Then Comm. Co.	CO II,
PAPPAR AND CO. II. RALPH & COMO COMPANY DE COMPANY	414
PAT DESTRUCTION CO. OF CAUSED AND OTHER	590
SALINAS LETTUCE PARMENT CORPERATION COMMENT	418
Order	
	524
	553
	307
SMITH FOOD SALES INC. II TRADE West Manual Control	100
Strevoo Inc. o. Michael Book Inc. PACA Double No. 5 come p.	67
SUN WORLD INTERNATIONAL INC M.C. C.	84
TANITA FARME INC. p. Core Work Description And Order	32
TEIXIDA FARMI Ivo - One William Bo	00
	90
Dorket No. 2-6419, Decision and Onless	10
PACA Decket No. 2-6554 Deckets And Cuty Product Company Inc.	2
6025, Order On Recognideration	
TABLE MARKET INC. PACA Dorket No. 9 (2007)	
PACA Docket No. 2. data D. city Wide Districtures Inc.	
MISCELLANEOUS REPARATION ORDERS: 476	,
BLUE ANCINCE INC. II. SO. CENTRAL BROKERAGE INC. and RODOLFO	
Russo d/b/a Gareway Produce Co. PaCA Docket No. 2-6840. Raling On Reconsideration. 660 Bus Anter Bus a Person Co.	
6927. Order Of Dismissed	
Docket No. 2-4297, Pulling On Paranythin Produce, PACA	
b/a JOHNSTON-GOMON SALTE CO. TO THE GERALD A. JOHNSTON d/	
INC. PACA Docket No. 2-6243, Ruling On Recognitionaline	

JANUARY-FEBRUARY 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1929-Com

I ERISHABLE ACKICCLICURAL COMMODITIES ACI, 15	go-Cont.
MISCELLANEOUS REPARATION ORDERS-Cont.	PAGE

GOLD COAST PACKING D. H. SCHNELL AND COMPANY INC. and/or LLOYO	
MEYERS Co. INC. PACA Docket No. 2-6414. Stay Order And Exten-	
sion Of Time For Filing Petition To Rehear, Reargue, And Recon-	
sider	61
HANESS MARK L. d/b/a C.J.'s BRONZBAGE U. REX E. SPARKE, PRODUCE	
INC. PACA Docket No. 2-6694. Order On Reconsideration	61

		L d/b/a C							
		ockat No. !							
Номкете	EAD TOX	AATO PACK	NO Co.	INC. D.	COMAT	ozs Ir	c. PAC	A D	oc
No. 2-	-6521. C	Order On R	econaid	eration					
NORGEN	FRUIT	COMPANY	a/t/a	CAL-FRO	ит и	D.J.	FORRY	Co.	I

		order On 1								
		COMPANY								
PAC	A Docke	t No. 2-6	\$37. O:	der	Vacat	ing	Stay	And I	deimati	atin
RENE F	ROGUES	DISTRIBUT	rone In	0. 41	BG E	NTE	RFRIR	as Inc.	a/t/s	a B

Sales. PACA Docket No. 2-6558, Order	614
STEVOO INC. II. NORDEM FRUIT CO. a/t/a CAL-FRUIT. PACA Docket N 2-6272, Order Of Dismissal	610
SUNVALLEY PACKING CO. II. C.H. ROMINION COMPANY, PACA Dock	et

No	2-66	12. Ord	ler Of Diem	detal			
Tom 1	Ванол 1349.	Ro Ra Order	NGH INC. s. Oranting	MUTUAL PRODUCE Reconsideration	Inc.	PACA Dock Amending	et No Prio

Order					
TOMATOES INC.	D. STANLEY BY	d Jon Russo	PACA	Docket	No. 2-6336.
Order On Re	consideration .				************
WENATCHSE WI	WORA GROWER	S ASSOCIATIO	N INC. I	ANTHO	NY J. D'AO
orusto d/h/s	TROPPE BANA	NA CO PACA	Docke	t No. 2-	6236. Order

JANUARY-FEBRUARY 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1938-Cont.

THE ACT, 1938-Cont.	
REPARATION DEFAULT DECISIONS—Cont.	PAGI
CONSOLIDATED MARRETING INC. 2. DAVET BROS. INC. PACA Docket No. RD-85-99.	
CRANE, RICHARD C. O. HEIDEMA FRUIT AND PRODUCE COMPANY, PACA- Droket No. RD-85-50. Stay Order	
ERINAURG FRUIT & VEGETARIE CO. INC. D. C&R PROBUCE CO. PACA Docket No. RD-86-98.	
F&I. ENTERFRIES INC. II T.J. POWER & COMPANY. PACA Docket No RD-85-54, Stay Order	
FLORIDA TOMATO PACKESS INC. U. STANLEY and JOE RUSSO. PACA Docket No. RD-85-15. Order On Request To Respect After Default	
GRIMARRA VINEYARDE COSPOZIATION, G. FRANK MARCHESOTTO COMPANY INC. PACA Docket RD-85-110	
	628
RD-85-108. GROWERS PACKING COMPANY II JOSEPH A. CUTTONE CO., PACA Decket No. BD. 81-28.	624
No. RD-85-82. GRIPTIN-HOLDER CO. e. RONNIE ADAMS d/b/a C&R PRODUCE CO. PACA Debat No. P. O. C.	618
Docket No. RD-85-88. Hall & Cole Produce Inc. s. Bracon Fruit & Produce Co. Inc. DAGA Produce Co. Inc.	629
PACA Docket No. RD-85-112 HENRY AVOCADO PACINO CORPORATION D. FERRANDO'S INC. PACA Docket No. D.	625
Docket No. RD-85-107 HUNTE POINT TOMATO CO. INC. S. D. FAVA INC. PAGA Decket No. RD- 85-86 Online Order Co. INC. S. D. FAVA INC.	624
INTERNATIONAL PRINTS AND PROVING PROPER PAGE - No. 1	528
PANY, PAGA Docket No. RD-84-476, Order Reopening After Default LR. Jerome Company Ltd. v. Mar Kauphan Inc. Paga After Decket No. RD-84-77	621
JOE PHILLERS & ASSOCIATES, INC. 4 AREAN TRADING COMPANY LTD. PACA Docket No. RD-85-79	619
J.S. McManus Padouce Co. Inc. a Andr's Produce Co. PACA Docket No. RD-85-117 J.R. Normy Courts	619
CAN CITY PADDUCE CO. 6/1/2 PULS CANDENAS d/b/s THE ALL AMERI-	626
J.R. NORTON COMPANY & TAYLOR Desire Inc. D. 101 P.	622
MARVIN SCHWARZ PRODUCE II JURING C. LOWING AS A. F.	621
MATARAZZO BEDS. Co. u. Bracon Pour A. D.	810
M.G. HURD AND SOME Day, a. Johns A. Do	625
MONTENEY AGRECUTERDAY DECRET NO. RD-85-61. Order of Diemissol	128
NED's Moony Cases Proposes has Page 194	123
	25

9075 PAGE

631

631

R24

617

523

830

818

620

605

422

JANUARY PERRUARY 1986

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1919-Cont. REPARATION DEFAULT DECISIONS....Cont.

NEW WEST FOODS D. PERSERATED FOODS INC. PACA Docket No. RD-85-	
47. Stey Order	627
	618

PRODUCE DISTRIBUTORS INC. II. MICHAEL BROTHERS INC. PACA Docket.

No. RD-85-93. Stay Order PRODUCE DISTRIBUTORS INC. U. MICHAEL BROS. INC. PACA Docket No. RD-85-88

PURE GOLD INC. P. FERNANDO'S INC. PACA Dorket No. RD-85-108 REX MUSISSOMS INC. II. LANS COV. WHOLESALE FORCE & PRODUCE.

PACA Docket RD-85-69 RIGHY PROSUCE U. CHINO'S PROSUCE INC. and/or STEPHEN J. WEIBEN-

BAKER d/b/a STEVE'S BROKERAGE, PACA Docket RD-85-108.....

RISING STAN BRONERAGE INC. II. DORPMAN PRODUCE CO. INC. PACA Ducket No. RD-85-89 ROCKY PRODUCE INC. II. MID CITY WHOLESALE PRODUCE CO. PACA

Ducket RD-85-71..... ROGER HARLOFF PACKING INC. S. CARL D. CUTTONE d/b/n JOSEPH A.

CUTTONE Co. PACA Docket No. RD-85-72 RUBCON: PARMS 8/t/8 CAL/SWISS FOODS D. PRIME-PAC INC. PACA Decket No. RD-85-87.....

SAM WANG FOOD CORP. INC. IS MANAGEAS PRODUCE COMPANY INC. PACA Docket RD-85-81 SAN MIGURE PRODUCE INC. II JOSEPH D. MOCERI PRODUCE INC. PACA

Decket No. RD-86-6 SEQUOIA ENTERPRISE INC. II. JOE N. RUSSO and STANLEY RUSSO d/b/s. STANLEY & JOE RUSSO, PACA Deciest No. RD-85-92.....

SIGMA PROBUCE CO. INC. II. MAX KAUPMAN INC. PACA Docket No. RD-85-75.... Sex L's Packing Company Inc. s. Clareton Tonato House, PACA

Dorket No. RD-85-90..... 621 Sex L'e Packino Company Inc. s. MBI Rosses. PACA Docket No. RD-86-115.....

SOUTHLAND PRODUCE COMPANY S/L/S WESTERN FRUIT SALES CO. S. FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-109 ... SQUEA BROS. PACRING CO. S. LAKE CITY WHILESALE FOODS & PRODUCE. PACA Docket No. RD-85-80 620

STONAGA FARMS CORPORATION & PURITY SUPREME INC. PACA Docket No. RD-85-91. Order Of Dismiseni 691

TEX-CAL LAND INC. U. JOS N. RUSSO and STANLEY RUSSO 6/b/a STAN-LEY AND JOE RUSSO, PACA Docket No. RD-85-23. Order Vacating

Stay Order, Reinstating Default Order..... THOMPSON BROKERAGE COMPANY INC. II BATEFULLE PROBUCE CO. PACA Docket No. RD-85-115

TIP TOP GROWESS AND PACKESS II. FERNANDO'S INC. PACA Docket No. RD-86-106

IANUARY-FERRUARY 1000

PHOTOTOL PROPERTY IN	
PERISHARLE AGRICULTURAL COMMODITIES ACT, 1980-Cont.	
REPARATION DEFAULT DECISIONS-Cont.	PAG
Ucun Padauce Inc. u. B & R Produce Inc. PACA Decket No. RD-85- 76	
RD-85-68 TAVERA FRUIT IMPORT INC. PACA Dorket No.	
Decket No. RD-86-164	
RD-86-67 SOUTHWEST PRODUCE INC. PACA Dockat No.	61
BLAINE M. PAVIA d/b/a LAND CON WHOLEN V. CARRELO AND	01
PACA Derket No. RD-85-109 YANGGH R. HEIDEMA FRUIT AND PRODUCE COMPANY. PACA Decket No. RD-85-78	62
PLANT QUARANTINE ACT	61
ALSENTINE LAKE, PQ Docket No. 32, Order Dismissing Complaint EASTERN AUGUSTA INC. PQ Docket No. 2, Consent Dockets HOWEL, MARK and NORTH AMERICAN VAN LAKES INC. PQ Docket No.	63
JINKNEZ, RAUL D. and Laus S. Perez. PO. Derbet No. 6. 19	658
Order Discussion Country Van Links. PQ Docket No. 28.	686
Order Dismissing Compilation KILLINGSWORTH, PHILLIP, PQ Dockot No. 13, Order Of Dismissal LOURDEN, AND RO Dockot No. 13, Order Of Dismissal	632 684
LOURGES, ANA. PQ Docket No. 30. Order Of Dismissal NOSTH AMERICAN VAN LINES. PQ Docket No. 16. Consent Decision	639
SOKALBRY, ROSERT and Gronal Van Law Lorder Of Dismissal	634
	683
Decree Van Louis Inc. Bo B	641 626

702

MAD	CH-APRIL	1995

AGRICULTURAL MARKETING ACT OF 1946 P/ COURT DECISION:

HORDEN, INC. THE SOL	UTHLAND CORPORATION,	and Carnation Company
u. John Block, St	ECRETARY OF AGRICULT	URE USDA AMA Docket

No. M 188-9 Order Denying Interim Rolled 661
Cal-Pacific Inc. 1&G Dockst No. 78. Stipulation And Consent Decision. 661

ANIMAL QUARANTING AND RELATED EXTED	
AGENTA, ONNAISO VIERNEA AD DIOIGN No. 183. Cament Designion ALM APPRISADA AND ARTHER AD ADMIT NO. 184. BROWN, TOWNY, AD DOME 10: 18. THE DESIGN DAVID AND BROWN, TOWNY, AD DOME 10: 18. THE DESIGN DAVID AND BROWN, TOWNY, AD DOME 10: 18. CHEMINE DESIGN DAVID BROWN, MAN, HOMEN No. 18. CAMENT DAVID AND BROWN, MAN, HOMEN No. 18. CAMENT DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. COMMAND TOWN DAVID AND BROWN, AD DOME 10: 18. DOMENT DAVID AND BROWN, AD DOMENT DAVID AND DAVID AND BROWN, AD DOMENT DAVID AND DAVID AND BROWN, ADDRESS OF THE SERVING DAVID AND BROWN, ADDRESS O	686 672 678 691 688 663 670 680 686 684 684 681 688
WOOO, WILLIAM "ED". AQ Docket No. 82. Default Decision and Order ZARRI, Kunny. AQ Docket No. 55. Consent Decision	674 688
ANIMAL WELFARE ACT	
GRAY, JUST, DICK W. PIRKEY, and SHARON DOGA. AWA Docket No.	693

HATTAN.	AUGH, JAMI	ss. AWA	Decket	No. 84	 Consent 	Decision	And
LEATHER	M, NOAH. A'	WA Dock J. AWA	et No. 8 Decket	No. 38	nt Decision 7. Consent	Decision	and
Orde	CLARENCE.	F. AW/	Docket	No. 83	4. Consent	Decision	And
MELTON	, SHARON.	WA Do	ket No. 1	53. Dec	sion And C	irder	misa

HORSE PROTECTION ACT

HORSE PROTECTION ACT	PAGE
McConnell, Jackie, Chester Gellespie, Sto Magoux Ker Shrom, E.B. Tanner, and Robert G. Terrell No. 174. Decition And Order Palaers, E. Denny. HPA Docket No. 182. Order Donyl Rossnsider And Motion To Reopan Heuring	HAROLD ROY, HPA Docket

PACKERS AND STOCKYARD ACT

DISCHLINARY	DECISIONS:					
CHARLES	F. POORE, INC.	CHABLES	F. Poore	and	Bornes C	

P&S Docket No. 6200. Decision	740
	825
Exes, Hazote, P&S Docket No. 6441. Decision	822
Hono, Donalo R. P&S Docket No. 6500. Decision	810
HURGENS, LONNIE GEORGE, P&S Docket No. 6478. Decision	824
HULDING, PALMER G. P&S Docket No. 5744. Clarification of Stay Order and Order Fixing Effective data	
PTT CONTINENTAL BARING COMPANY, P&S Docket No. 5956. Decision	827
	748
	806
	804
	910
	82)
	825
	830
	821
OHIO VALLEY LIVESTOCK CORP. MIGWEST LIVESTOCK and COMMODITY	742
	816
	746
REGTOR AUCTION SALE BARN, INC. P&S Docket No. 6402. Supplemental	913
	829
	B14
RICHARDSON, TOM F. P&S Docket No. 6435. Decision & Order Upon Admission Of Facts Bu Booket No. 6435. Decision & Order Upon	145
STANLEY, ROOSE E. JR. P&S Docket No. 6464. Decision Order	908
	312
P. P&S Docket No. 6656, Supplemental Order	18
Supplemental Order	128

PACKERS AND STOCKYARD ACT-Cont.

REPARATION DECISIONS-Cont.

HALBERT, WILLIAM A. P&S Docket No. 6180. Decision And Order	835
NATIONAL FARMERS ORGANIZATION, INC. P&S Docket No. 6168. Decision And Order. PRIMITY CATTLE COMPANY. P&S Docket No. 6985. Docket And Order.	843 851
PERISHABLE AGRICULTURAL COMMODITIES ACT	
DISCIPLINARY DECISIONS:	
DEMANTIA, BRNEST A. PACA Docket No. 2-6721. Decision And Order	878 869
PLEMING INVERSIOUNTAIN, INC. PACA Docket No. 2-6575, Order grant- ing motion to dismiss Rivzes Fooss, Inc. PACA Docket No. 2-6582, Declates And Order	878 871
REPARATION DECISIONS:	
A. LEVY DIST. Co., INC. v. STANLEY & Jos RUSSO, PACA Docist No. 2- 6612. Decision And Order	985
AJM FARMS, INC. B. JOR N. RUSSO, STAMLSY RUSSO, d/b/a STAMLSY & JOE RUSSO, PACA Docket No. 2-6842, Decision And Order	998 1066
2-6428. Stay Order. BELRIDGE PACIFIC Co. u. and/or C. H. ROMMON COMPANY. FIRE BELRIDGE PACIFIC Co. 140. PACA Decket No. 2-6451. Stay	1010
Order Order Dita "O" FOODS, INC. S. ROLAND MARKETINO, INC. PACA Docket No. 2-6381. Decision And Order	528
Docket No. 2-6585. Order On Reconsideration	1049
PACA Docket No. 2-6488. Stay Order	1071
PACA Docket No. 2-6169. Decision And Color. Sed Aboleh Cimino Co. BRYANT PACKING Co. B. M. OFFUTT Co., Inc. and Aboleh Cimino Co.	915
BRYANT PACKING Co. II. CUPUIT CO., INC. BRIDGE ACCOUNT	1973
BULL & PRICE, INC. 8/1/2 ALAN BULL PRODUCE TO TORS. INC. PACA Docket No. 2-6402. Stay Order	1071
No. 2-6617, Order Of Dismission	1074
Decision And Order	1060
No. 2-6505, Decision And Order	740

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cor

ARATION DECISIONS—Cont.	PA
CAAMANO BROG, INC. IL LARUE FOOD CORP. PACA Docket No. 2-65	
Decision And Order	ar,
AGE, INC. PACA Docket No. 2-6865. Decision And Order	9
Dacket No. 2-6422. Stay Order	10
No. 2-6603. Decision And Order	9
Docket No. 2-8599. Decision And Order	10
GENEROKER COLPORATION O/t/o GENERAL BROKERAGE CO. II HARMO	iN
City, Inc. s/t/s/ Hanson's West. PACA Decket No. 2-6596. Dec	4-
Son And Order Gold Coast Packing, Inc. ii. Palazola Produce Co. Inc. PAC	9
Docket No. 2-6615. Decision And Order	۸
Undisputed Amount	. 911
J-B DISTRIBUTING CO. S. CITY WIDE DISTRIBUTORS, INC. PACA Docket	
No. 2-6386. Stay Order)933
Docket No. 2-6597. Decision And Order	
KAPLAN'S PRUIT & PRODUCE Co., INC. E. HOULEHAN, INC. PACA Docket	1029
No. 2-6495, Order On Reconsideration.	1063
	1965
	89)
	200
	89)
Order Vacating Reparation Order, Dismissing Complaint	1079

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cont.

REPARATION DECISIONS...Conf.

KIRMARZICK, R.P. II. KING SALAD AVOCADO Co., INC. PACA Docket No. 2-6473, Decision And Order	1048
K.W. CHIMSTENSEN & SONS. 2. COMMODITY MARRETING CO. PACA Docket No. 2-6268. Decision And Order	. 1027
LEMMONS' FARMS, INC. II. WILLIAM R. WILLIAMSON d/b/a WILLIAMSON PARMS, PACA Docket No. 2-8524, Decision And Order	. 1017
Lebay's Frent Food Company, Inc. s. Emerson H. Ellaoye d/b/s Emerson Produce. PACA Decket No. 2-8716. Order Requiring Pay	
Martin Product Co. Inc. s. Francis's Product Inc. PACA Dooks	t .
No. 2-6586. Decision And Order	. 1051
PACA Docket No. 2-6882 Decision and Order	. 1002
JUGOS DEL VALLE, S.A., and H.J. HEINZ COMPANY, PACA Dooks No. 2-9438, Decision And Order	
M&M PRODUCE FARMS AND SALES. C. SOL SALINS, DEC. PACA Docker No. 2-6525. Stay Order	
MONTHUM AGRICULTURAL PRODUCTS, INC. B. AUGUST BATTAGLIA PROD	
ESSING CO., INC. PACA Docket No. 2-6523. Decision And Order	
2-6442 Decision And Order	961

NEW WEST FOODS, E. CALIFORNIA NATIONAL, INC. PACA Docket No. 2-NASH-DECAMP COMPANY, II. FLOYS J. BEYER, PACA Docket No. 2-8607. NICOLAUS, DONALD F. d/b/s D-N PRODUCE E. CITY WIGE DISTRIBUTORS.

PANDOL BROTHERS INC. II. PURITY SUPERME INC. BID/OF RAPAPORT AS-PAPPAR & CO. S. RALPH & CONG CUMMUNALE PRODUCE COSP. PACA

PARAMOUNT CITRUS ASSOCIATION, INC. 8. WEST COAST PRODUCE SALES, Dic. PACA Docket No. 2-6742. Decision And Order..... PHILLIPS, JOS, INC. 8: CITT WIDE DISTRIBUTORS, INC. PACA Decket No. 2-6488. Stay Order_______ 1086

PISMO-OCEANO VEGETABLE EXCHANGE & CONTINENTAL FARME. INC. P.J. TAGGARIS COMPANY, S. CHARLES NOSTHWEST COMPANY, INC.

P. TAVELLA CO. MIAMI INC. S. SANCO DISTRIBUTORS, INC. 8/1/2 SANOY'S MARKET BASKET, PACA Docket No. 2-6756, Order Requiring Pay-SEAROARD PROSUCE DISTRIBUTORS, INC. S. CITY WIGE DISTRIBUTORS, INC.

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cont.

REPARATION DECISIONS-Cont.	
Sir L's Pacsino Company, a Emergon H. Ellert d/b/s Emergon Ellert Products, PACA Docket No. 2-6727. Coder Receibles De-	AGE
	928
Syracuse & Jereine Produce Co., Inc. v. Anymony Gagliano & Co. Inc. PACA Docket No. 2-4623. Docksion And Order	
	670
TAMARA PRODUCE COMPANY E TOM LANGE COMPANY, INC. PACA Docket No. 2-6435, Decision And Order	84T
HER KING'S CHEEK GANNING CO., INC. B. EMERION H. BLLIOTT d/b/a EMERSON ELLIOTT PROCUCE. PACA Docket No. 2-8718. Repetation Order.	
Dorket No. 2-6419. Stay Order	986
LOTE PRODUCE PACA Decket No. 2-0750. Reparation Order. VED-Sig., Inc. o. Prices Pagning States Inc. PACA Decket No. 2-0750.	121
VEO-Mir, INC. B. ROSENTHAL & KLEEN LIVE PACE DATE NO. 6 COM	111
	66
V.V. Vooel & Sone Farme, Inc. v. Continental Farme, Inc. PACA Decket No. 2-5191. Decision And Order	
DISTRIBUTORS, INC., and/or Care Wine Property is City Wing	
Inc. PACA Docket No. 2-8513. Decision And Order	
PACA Decket No. 2-0412. Stay Order. 108 You Marier Co. n/t/a Lee & Lee D. Leetin Alexan Produce Co.	5
INC. PACA Docket No. 2-6685. Decision And Order	6
REPARATIONS DEFAULT DECISIONS:	
ANTHONY SILVESTRO, INC. U. SUNG LUNG Co., INC. PACA Dorlet No. RD-86-189	
No. RD-86-126.	
Docket No. RD-85-128	
748 d/b/s Texas Paddice, PACA Docket No. PD 55 Aca.	
Docket No. RD-55-148	
PACA Docket No. BYL-96-108	
Chang, Richard C. S. Heidema Fruit and Produce Co. PACA Docket No. RD-86-69. Order Reopening After Default (New Docket Ma.	

LIST OF DECISIONS REPORTED

MARCH-APRIL 1986

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cont.

REPARATIONS DEFAULT DECISIONS—Cont.	PAGE
DEW-GEO, INC. a/t/a CENTRAL WEST PRODUCE Co., INC. PACA Docke No. RD-85-144.	. 1081
FANCEE FARMS INC. E. RYEBSON CREEK PRODUCE CO. PACA Docket No RD-85-150. Order (Continuance)	. 1039
Fielda Growers and Packers Co-Op 2, Joseph A. Cuttone Co. PAC. Docket No. RD-85-153	1063
F&L ENTERPRESSES, INC. S. T.J. POWER & COMPANY, PACA Docket No RD-85-64. Order Vacating Stay; Seinstating Default Order	. 1097
FOUR STAR TOMATO INC. v. TOMATOES INC. PACA Docket No. RD-85	. 1083
FOUR STAR TOMATO, INC. I. TOMATOES, INC. PACA Docket No. RD-85 149. Stay Order	. 1100
GARIN COMPANY, THE, E. TAYLOS-BYERS INC. PACA Docket No. RD-85- 141. GRIPPIN & BRAND SALES AGENCY INC. 4. Box's PRODUCE INC. PACA	. 1082
DURNON NO. RD-85-147. HARMON, JOHN K. d/b/s Harmon Company Produce a Gwentolly.	. 1081
V. CARELLO and ELAINE M. PAVIA d/b/a LAKE CITY WHOLESALE FOODS & PRODUCE	. 1680
H & H PRODUCE SALES INC. IS FRANK MASCHESOTTO COMPANY INC. PACA Docket No. RD-85-148	. 1082
HOLLANGALE MARKETING ASSOCIATION S. HEIDEMA FRUIT AND PRODUCT COMPANY, PACA Docket No. RD-85-136	. 1099
J-B DISTRIBUTING CO. B. PRAINS MARGHEROTTO COMPANY INC. PAGA Docket No. RD-85-129. Kirk Produce Inc. B. Gwendgen V. Carello and Elaine M. Payle	1019
d/b/a Lake City Wholesale Poors & Produce PACA Docket No	1077
MAINS FARMESS EXCHANGE & HENRY PROPE INC. PACA Dacket No RD-85-128	1097
Meyes, Robert L. d'b's Meyes Tomatoes a Gulffort Tomatoes Inc PACA Docket No. RD-85-145	
MIGHAEL SANTELI & SONS INC. P. BMY DIFFRIENCES INC. PACA Docket No. RD-85-121. Militon E. Nelson d/b/s Nelson & Associates a Lake City Whole	
Mingon E. Nelson d'Ib'a Nilson & Associate & Labour and a sale Frode & Produce. PACA Dockst No. RP-85-135. Minjardo, Praner M. s. Texas Produce. PACA Dockst No. RD-85 9.	

New A. Late Orr Wittenack Poots & Prospect A Med Decke fo.
180-95-181 Ph. 180-95-

PERISHABLE AGRICULTURAL COMMODITIES ACT—Cont. REPARATIONS DEFAULT DECISIONS—Cont.

- Count	PAGE
RESENRORY AND KIKUTA INC. a/t/a R&K DEFRIBUTORS & WINDHILL FARMS, INC. PACA Docket No. RD-85-192. Stay Order	
SANTA CLARA PRODUCE INC. Books Reopening After Defugit	. 103
SEAL PRODUCE OF GENERAL INC C.S. P. D.	
	1078
SONGEA RANCHEE INC. D. AMOY'S PROQUEE CO. PACA Docket No. RD- 83-137.	1080
B/L/S NEW AIRLING PRODUCE CO. TACA P. BEST PRODUCE CO. INC.	
	1077
PAGA Docket No. RD-85-151. VALO-PAE INC. B. RICHARD V. FERITAS d/b/s Tarks Paggick. PAGA Docket No. RD 67-67-67.	1083
WATEGUARD RESERV. CO.OR II. Porton M.	1079
	1083
FRANK MARCHESOTTO COMPANY INC. BATCH PRODUCE CO. A.	
	1082
No. RD-85-138. WOODY'S TOMATO CORP. II. MAR-TIN TOMATO Co. INC. PACA Docket No. RD-85-198.	1681
YATARO MINAMI d/b/a H.Y. MINAMI STORE V. V. C. W.	1077
	1077
PLANT QUARANTINE ACT	
ANDERSON, SHIRLEY, PQ Docket No. 46, Consent Decision	1110
	107
	ш
	100
	103
GOODIN, HOPE B. PQ Decket No. 41. Consent Decision	103
Herresa, Carmen M. PQ Docket No. 54. Order Of Discriptual I KLM Royal Durce Asslanze. PQ Docket No. 38. Order Of Discriptual I I	107
PHILLIPPINE AIRLINES, JOHN A. BURGWANKEL and JOHN D. DIRRING.	103
	105
	1955
Reparation Default Docision listed above, the decision that are	

found on pages 1894 through the top of page 1994 were inscireteatly omitted when this list of decisions reported was compiled. Please refer to those pages for this information. Editor.

MAY ITME IAGE

3641-364E 1960	
AGRICULTURAL MARKETING AGREEMENT ACT, 1987	PAGE
SEQUEIA ORANGE Co. INC. AMA Docket No. FV907-11. Dismissel	1132
ANIMAL QUARANTINE AND RELATED LAWS	
BARE CHARLES AQ Dicket No. 148. Decision And Orber. Berrarow, Dawer L. Ad Dicket No. 160. Genese Establish. Bonessa, Kennerra. AQ Docket No. 160. Genese Establish. CAVEGERS, ROBERT & AQ Docket No. 152. Genese Dockets CAVEGERS, ROBERT E. JA. AQ Docket No. 152. Genese Dockets CAVEGERS, ROBERT E. JA. AQ Docket No. 152. Decision And Other. DOM, 400. ROBERT & DECISION CONTROL OF THE ADDRESS. DOCKET STATE ADDRESS. ADDRE	
HOPPMAN, GARY SING AMERICAN FERRER PIO CO-OP. AQ Docket N Dismissel MAYER, ELMO, AQ Docket No. 34, Default.	lo. 99. 1166 1152
MIMS MEAT CO. INC. and DONALS LYRIV BUSS. AQ Docket No. 18. sent Docision. MINO, LARRY, d/b/a R&M PERSON Ptg Contany, AQ Docket No.	1145
Default O'CORNOR, MICHARL. AQ Docket No. 119. Consunt Decision PLANTE, ROWARD and WARREN d/b/a Warries PLANT Form	1148 1157
Dochet No. 67. Consent Decision RAFFEL BEX & AQ Dochet No. 87. Cressent Decision. Roy Thour Are Sort Inc. AQ Decket No. 182. Consent Decision. SEFFIN, P.J. AQ Dochet No. 182. Consent Decision. SEFEN P.J. AQ Dochet No. 184. Consent Decision. STRUMBLE, FIEE. AQ Dochet No. 164. Consent Decision. STRUMBLE, FIEE. AQ Dochet No. 164. Consent Decision.	1144 1158 1134
ANIMAL WELFARE ACT	
AMERICAN AIRLINES. AWA Docket No. 895. Consent Decision. HENDESSON, J.M. and C.L. HENDESSON. AWA Docket No. 348. Con Decision.	20166
PRICHARD, A.J. AWA Docket No. 535. Consent Decision	
PACKERS AND STOCKYARDS ACT	
Bono, Richty. P&B Deckst Na. 6507. Cronent Decision. Brown, W.M., d'Alya W.M. Brown Certar Co. P&B Decket No. Consent Decision.	1186 1182 Deci-
CORDELE LIVESTOCK COMPANY and ROSES BLANCHARD. P&S Docket	No. 1184
CULVER, ROBER, BARARA, and LOSS OWN IN THE PASS DOCKET BY A STORY OF THE PASS	1218 2807 1206
WEAVER, PASS INCESS NO. 60.00	

PACKERS AND STOCKYARDS ACT-Cont.	PAGI
PERSON, ANTHONY J. JR. and VINCENT KUEPPNER, d/b/s PREMIUM PACKINO. P&S Docket No. 5426. Consent Dockston	
HALE, RICHARD, P&S Docket No. 5219. Consent Decision	1192 1181 1260
JACKSON, ARTHUR JR. P&S Docket No. 8309. Consent Decision	1175
	1212
Appeal	
RODARNEL, JERRY E. d/h/s. Mrsa. Parring and Burnell Order	1219
Brown J. Press Day Declaration	1189
Consent Decision Chess, and Modes Keny Perkins. P&S Decket No. 5498.	1205
sion	1107
SCHULENGERG LIVERTOCK AUGTON Dec. Appropriate Decision	12)2 1170
	1216
	1209
Van Litti, 30ki. P&S Docket No. 6501. Consent Decision	218 191
No. 5180 Compant Projects	173 176
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1900	
DECISION:	
JANTEO STATES BANKEUPTOY COURT, NORTHERN DRIVING OF THESE	

COURT

DALLAS DIVISION, PARSH APPROACH, INC. II. UNITED STATES OF AMER-

DISCIPLINARY DECISIONS

DECISIONS:	
ALSTON PRODUCE PACA I	Docket No. 2-8606. Decision And Order
AMBRIDAN-STREVELL INC.	PACA Docket No. 2-6234. Decision Am

Order 1231 HOWARD WOOD PRODUCE COMPANY, PACA Docket No. 2-8798. Consol

1257

MAGIC CITY PRODUCE COMPANY, INC. PACA Docket No. 2-6465. Appeal 1241

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1986—Cent. DISCIPLINARY DECISIONS—Cent.

RINGELA'S WHOLESALE, INC. a/t/a RINGLA'S WHOLESALE FRUIT ST PRODUCE INC. PACA Docket No. 2-8995, Decision And Order	
RINGELA'S WHOLESALE INC. 8/1/8 RINGLA'S WHOLESALE FRUIT AND	•
Procuos Inc. PACA Dooket No. 2-8816. Order Deaying Petition For Reconsideration	
RINGLIA'S WHOLESALE INC. 8/1/2 RINGLIA'S WHOLESALE FRUIT AND	
PRODUCE INC. Docket No. 2-6616. Appeal To The Secretary of Agri- culture.	1240
REPARATIONS DECISION:	
Abarti Padouce e. C.H. Roeingon Company, PACA Docket No. 2- 6457, Order On Reconsideration	1898
APPLE SALES INC. v. CITY WIDE DISTRIBUTORS INC. PACA Docket No. 2-	
6423. Order On Resensideration	1490
CONSIDERATION B. HOVEMON & SON and/or GROSCALOS	1373
DISTRIBUTING CO., INC. Decision And Order BORELLI PRODUCE DISTRIBUTION I. CITY WISE DEVENOUS INC. PACA	1800
Docket No. 2-6488, Order On Reconsideration	1889
THE BRINGS CO. S. HERLIGEA DAINY CAPILE INC. a/t/s HERLIGEA BROS. PRODUCE CO. PACA Docket No. 2-0184. Decision And Order	1367
BRYANT PACKING CO. B. M. OFFUTT CO. INC. and ASSURE B. GIMMO CO. PACA Docket No. 2-6518 Order Upon Reconsideration	1874
BUSHMANS POYATO SALES II. IGEAL FOOLS INC. PACA Decket No. 2- 8626, Stay Order	1877
C.A. MILOSLIVICH II. FRUYAS DEL VALLE DE GUADALUPE, S.A. JUGOS DE VALLE SA, and H.J. HIMZ Co. PACA Decket No. 2-6488. Stay	
Order	1875
CAAMANO BROS. Inc. u. LA Rua Foos Core. PACA Docket No. 2-4567. Stay Order	1876
CHAPMAN FRUIT CO. B. THI-STATE AGENCY, PACA Docket No. 2-6641.	1388
CORRY FOOD CO-OF E. NORMAN M. COPPIN INC. PACA Docket No. 2-6516, Stay Order	1376
DENTOS ANO PRIMOS PACKINO CO. S. WEST COLST PROGUCE SALES INC. PACA Docket No. 2-6797. Reparation Order	1350
DMB PACKING CORP. 18/1/16 DIMARE BIOS. DIC. OF CALIFORNIA D. GARDEN PRODUCTS INC. PACA Doctor No. 2-6545. Decision And	
	1904
FROMTIER PACKING CO. II. GRARGE TRUCK AND TRANSPORTATION INC.	1909
FRUIT DISTRIBUTING CORPORATION & CART D. HARNEY, d/b/s GART D. HARNEY COMPANY, PACA Docket No. 2-6502. Docision And Order	1331
GARIN COMPANY, THE, S. NASHOR-CAMP COMPANY, PACA Dockst No. 2-8018, Decisic And Orset.	

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1938—Cont.
REPARATIONS DECISIONCont. PAGE
GARIN Co., The, a: Eo Given Inc. PACA Docket No. 2-6821. Dismissol. 13 GEORGIA VEGETARLE CO. Inc. a: EMPRISON H. ELLOYT d'Als EMPESON ELLOYT PLOCENE, PACA DOCKET No. 2-6758. MORROTHO COM-
HEAD INC. S. ACTION CO. INC. a/t/e GORDON FOODS and/or HEADD POTATO CHIP CO. DF DES MOINES. PACA Docket No. 2-6722. Order Of Dismissal.
MEYERS CO., INC. PACK Decket No 2-6414. Order Granting Recon-
PACA Packet Mr. 0 4000 Pt. The PAC GROWERS AND SHIPPERS INC.
Co. o/t/e Diamono T. FRUIT SALES. PACA Droket No. 2-5714. Order Of Costinuance.
Co. Inc. PACA Docket No. 2-6648, Decision And Order
PACA Decket No. 2-6666, Decision And Order
end/or W.R. Riley and Son Inc. and/or B.P. Thappey's Sons Inc. PACA Docket No. 2-6510, Order On Bergerickening.
TOMATO, PACA Decket No. 2-56558 Decision And Order
HOWELL, CLEMON and JOE d'Ib/e HOWELLS FORMS R. THOMAS SCOTT, d'Ib/e S&H QUALITY PRODUCE. PACA Doctet No. 2-4610. De- cision And Order
No. 2.4059 Professional Inc. B. H. P. PRODUCE SALES INC. PACA Decket
Docket No. 2-6598, Davision And Order
No 2-6886, Order on Reconsideration
VEORTABLE Co. e/t/s AMERICAN PRE-PAR COMPANY, PACA Docket
Jos Pentares Inc. Crry Wess Distracturons. PACA Decket No. 2-6486. Order On Reconsideration. MOD
Oaket No. 2-6784. Reporation Order

LULU PACKING CORPORATION II. WEST COAST PRODUCE SAISS INC.
PACIA Decket No. 2,4765 Research p. Deley. 1259

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1986-Cont.

REPARATIONS DECISION-Cont.

PACA Docket No. 2-6765. Reparation Order	
IANN PACKING Co., INC. II STANLEY and JOE RUSSO. PACA Dorket	
No. 2-6617. Decision And Order	130
IARTORI BROS. DISTRIBUTORS & HOULEHAM INC. PACA Docket No. 2-	
6771. Order Of Dismissal	183
III.I.S DISTRIBUTING Co. N. ANTHONY TAMMARO INC. PACA Docket No.	1991
2-6687. Order	tav.
ins MUFFET FOODS INC. 8/L/S UNITED PACIFIC PACKERS S. V.I.P. FOOD DISTRIBUTORS INC. Reparation Order	190
AMI DE CAMP CO. II. FLOVE J. BOYER, PACA Docket No. 2-6667. Stay	100
Order	1974
EW WEST FOODS D. FROERATED FOODS INC. PACA Docket No. 2-6789.	10.
Order of Dismissal	1879
HOULAUS, DONALD F. d/b/s DON PRODUCE U. CITY WIDE DISTRIBUTORS	
Inc. PACA Dorket No. 2-6421. PACA Dorket No. 2-6421. Order On	
Reconsideration	1384
P. MURPHY PROPERT CO., INC. d/h/s G.P. MURPHY & SONE E. EMER-	
BON H. PLLIOPY d/b/a. EMPRICA ELLIOTT PRODUCE. PACA Docket	
No. 2-0770. Decision And Order	1274
ACIPIO TOMATO GROWERS II. CROWN PRODUCE DISTRIBUTORS. PACA	
Docket No. 2-6684. Decision And Order	1384
APPAS AND CO. II. RALPS AND CONO COMMUNALE PRODUCE CORP.	
	1371
-R FARMS SALES AND EXPORT INC. II. WEST COAST PROBUCE SALES INC.	1278
	tato
EGENCY COMPANY II. GRAVEON E. LEWIS 6/b/s TOMATO OF VIRGINIA.	LOAR
PACA Decket No. 2-6601. Decision And Order	1000
F. DONOVAN PARMS INC. II. CORGAN & SONE INC. PACA Decist No. 2-4803. Order Requiring Payment Of Underputed Amount	1847
E-1803. Order Requiring Payment Of Unicasputes Academic Schare C. Crawe & Helgema Fault and Produce Co. PACA Docket	
No. 2-6738. Order Vecating Order, Respending After Default Rein-	
	1378
Docket No. 2-6833. Order Requiring Payment Of Uncuputed	
	1365
ARABONA Descriptions to Barrier Recruss Inc., PACA Docket No. 2-	
	1274
	1887
	1051
	1019
	1010
Decision And Urday Kin L's Packino Company, Inc. u. Wandell L. Barnett d'o/o Bar- ker l's Packino Company, Inc. u. Wandell L. Barnett d'o/o Bar- ker Brokenaos, PACA Docket No. 2-6528, Decision And Order No. 2,6501	1818
NEST BROKERAGE PACA Docket No. 2-0428. Decket No. 2-6491.	
&M PRODUCE INC. S. LA PREFINE DE LA PROPERTIE DE LA CONTROL POR RECOPERTIES DE LA PROPERTIE DE LA CONTROL POR RECOPERTIES DE LA CONTROL POR LA CONTROL PORTLA CONTROL PORTLA CONTROL POR LA CONTROL PORTLA CONTROL PORTL	

REPAR

MAY-JUNE 1985

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont. REPARATIONS DECISION—Cont.

S. Stamouer Inc. a/L/s Stamouer Produce v. A. J. Produce Corp. PACA Docke No. 2-9650. Dismisses
THOMPSON SALES Co. Inc. B. FAVOR Inc. a/t/a MUNICIPAL Processor
PACA Docket No. 2-6663, Decision And Order
No. 2-5419. Order On Reconsideration
V. V. VOGEL AND SOME FARMS, INC. 8. CONTINENTAL FARMS INC. PACA Decket No. 2, 410.
Yarma Faurt and Cold Storage Co. s. International A.G. Inc. PACA Docket No. 2-6104, Discripsol. 1381
PACA Dorket No. Decision And Order
YARIMA FRUIT AND COLO STORAGE CO. E. CITY Wife DESTRIBUTIONS INC. PACA Docket No. 2-6412. Order On Reconsideration
ATIONS DEFAULT DECISIONS:
A & D CHEMPOPHER RANCH II. FRANK MARCHESOTTO COMPANY, INC. PACA Docket No. RD-85-272
AMIGO PROBUCE Co. INC. B. MARIA E. BENTARRA 4/4/a Persona Francis
& PRODUCE, PACA Docket No. RD-83-257. 1411 ARGUE & ROSERTE PRODUCE Co. s. Joe N. RUSSO and STANLEY RUSSO
d/b/e STANLEY & JOE RUSSO, PACA Dooket No. RD-85-241 1408 ANTHONY POSSITE INC. II. FOFFIANO PACKING COMPANY INC. 9/1/8
JMB PACKING CO. PACA Docket No. RD-86-220
No. RD-85-287. 1417 CHARLES T. BLAUE d'Ura B & M PACRINO CO. R. ANOT'S PROBUCE CO. PACA Books No. PR. 82-200
PACA Docket No. RD-85-292 1418 Sospia Faurr Co. Inc. s. Faurr Distratoring Coar. PACA Docket No. RD-85-103. Order Re-Opening After Default. 142
No. BD. 65. 00. DEURRAY-LEONG COMPANY ING. PACA Docket
1416

CHURCH INC. II. CORGAN & SON INC. PACA Docket No. RD-85-

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1916-Cont.

EPARATIONS DEFAULT DECISIONS-Cont.	PAGE
Carto, Robert W. d/b/a Prima Citrus & Prust Erchange v. Joe ?	ι.
Russo and Stanley Russo d/b/s Stanley & Joz Russo, PAC Dorket No. RD-85-270	A 1413
CHAMBERIAN & BARCLAY, INC. S. TAYLOR-BYERS INC. PACA Docket No.).
RD-85-202 CHUNK'S PRODUCE INC. S. TEXAS PRODUCE. PACA Docket No. RD-85	. 1412
250	. 1409
DEMARCO, RALPIE d/b/n MARCO TOMATO CO. S. CARON FRUIT CO. PACE Docket No. RD-85-240	
DEW GRO INC. 11/1/11 CENTRAL WEST PRODUCE II. BEST PRODUCE CO.	
Inc. n/t/a New Assumes Passuce Co. PACA Docket No. RD-85 216	
DEW GRO INC. 6/1/a CENTRAL WRST PRODUCE & MINGS DITORY CO	
PACA Dorket No. RD-85-152. Order Re-Opening After Default Deron Tom-A-Ton Companies Inc. v. R.H. Profesce Inc. and/or For	
HORIZON TRADING CUMPANY, PACA Docket No. RD-85-216. Stay	
Order DIXON TOM-A-TOK COMPANIES INC. B. R.H. PROQUEE INC. mid/or FOR	1423
HGEIZON TEAUING Co. INC. PACA Dockot No. RD-85-216. Dismissal.	1428
BYREKRIBF VEXENVARIABI INC. II. COROAN & SON INC. PACA Docket No. RD-85-288	1417
PARM PAK PRODUCTS INC. 11. ANUV'S PRODUCS CO. PACA Docket No. RD-85-294	1419
PAULHNER & BALLESTERIOS PROBUCE Co. INC. II. CORGAN & SON INC. PACA Docket No. HD-85-234	1406
POUR STAR PRODUCTS R. RONNEE ARAMS d/b/a C&R PRODUCTS Co. PACA Dorket No. RD-85-242	1408
FOUR STAR TOMATO CO. INC. 9, TOMATOS INC. PACA Docket No. RD- 85-149. Order Reopening After Default	1424
FRANCIS PRODUCE CO., INC. B. TOMATO OF VIRGINIA. FACA Docket No. RD-85-211. Step Order	1427
PRIMIT WESTERN MARRITHO INC. & PACA Docket No. RD-85-198. Stay Ordor	1422
GARLIC DISTRIBUTORS INC. S. BOST PRODUCE CO. INC. a/t/a New AIR- LEWS PRODUCE CO. PACA Docket No. ED-85-225.	1405
GARREN-TREE PRO CO. INC. D. BENCEMARK BECKERAGE INC. PACA Doublet No. P.D. St. 202. Order Correcting Prior Order	1428
GARREN-TERO PRO CO. INC. S. BENCHMARK BRINGRAGE INC. PACA	1418
Gino Pierto Inc. ii Stanlet & Joe Rosso, PACA Dorket No. RD-85- 239.	1418
	1407
GOLDEN EAGLE PRODUCE II WILLIAM H. CARRON GUEVA TRICHTATE CALLED	1405
GRAPADA MARKETING INC. ST. D. DE SE SEE	1412

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1920-Cont.
REPARATIONS DEFAULT DECISIONS—Cont. PAGE
GROWISS MARKETING SERVICE INC. R. WALDRON PROBUCE CO. PACA Decket No. RD-85-288. Skay Order
H&H PRODUCE EALES INC. II. BENEST G. ANDESSON d/b/a ANDY'S PRODUCE CO. PAGA Docket No. RD-85-295
J. MAHERAS Co. INC. S. CARON PRUIT Co. INC. PACA Docket No. RD-85-282.
J-B DISTRIBUTING CO. C. ERNEST G. ANDERSON dilbita Annella Processor
Co. PACA Decket No. RD-86-883. J-B Marketrino Inc. u. Davio W. Leour and Rossine L. Liour d/b/s Liour's Foraxo Surely Co. PACA Docket No. RD-86-302. 1420
J-B MARRETING INC. S. RENESS G. ANDERSON d/b/s ANDY'S PRODUCS Co. PACA Docket No. RD-85, 976
JAMES MATSO & SON S. CORGAN & SON INC. PACA Docket No. RD-85- 278
PRODUCE INC. PACA Decket No. RD-85-231
S5-235 ENTERPRISES & ROBERT STRILLY PRODUCE. PACA Docket No. RD-
85-196, Stay Order CORGAN & SORE INC. PACA Docket No. RD-
RD-85-196. Order Vacating Stay Order And Be Vallet No.
Order 1427 McEntier, Ja., R.C. d/b/a R.C. McEntier & Co. s. Mine Horoes d/b/ a Miner's Propagation PACA Docket No. RD-85-269
PACA Derivat No. PD-98, 100.
PRODUCE PACA Decket No. Dr. 48 arts
McRae Produce Co. Inc. a. Coroan & Son Inc. PACA Docket No. RD-85-297. 1419
GARLEY AND SOME INC. PACA Docket No. RD-85-221, Orders Of Continuesco.
MARONMA, BATIETA J. d/b/a East Coast Bronkers & Pachers. o. 1978 Calley & Scots Inc. PACA Docket RD-88-221 1403

No. RD-85-240.

REPARATIONS DEFAULT DECISIONS-Cont.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont. MONTECUCCO FARRES & LANGMARK TRADING COMPANY, PACA Docket NAUMES INC. II. PRANK MARCHESOTTO COMPANY INC. PACA Docket No.

RD-85-288 1419 NEDRASSA POTATO SHIPPERS INC. D. BEN CONTRIBAS PRODUCE. PACA NODALES FRUIT & TOMATO DIST. INC. S. CARRY DIST. Co. INC. PACA NORTHGEOR, KENT W. d/h/a/ NORTHGEOR DISTRIBUTING II. GEORGE VILLALAROS d/b/s TERRUN BRANG INTERNATIONAL. PAGA Docket No. RD-85-189. 1422 O & E GROWERS, INC. D. GREENFOLDT PRODUCE CO. INC. PACA Docket ORRAY PRODUCE COMPANY S. THOMAS J. BOWMAN INC. PACA Docket

ORRAY PRODUCE COMPANY S. THOMAS J. BOWMAN INC. PACA DECICE No. RD-85-237
PBU ENTERPRISES S/L/S QUALITY DISTRIBUTING OF CALIFORNIA S.
ANGEL W. DEMERSORTH d/b/a PROKOGA DISTRIBUTING CO. PACA
Docket No. RD-85-954
PACIFIC FARM COMPANY S. RICHARO V. PRRITAR d/b/s TEXAS PROSCOE.
PACA Dooket No. RD-86-251
PACIFIC GAMME ROMINSON Co. 8/1/8 PACIFIC FRUIT & PRODUCE Co. 8.
PRODUCE PRODUCTS INC. PACA Docket No. RD-85-297
II. STANLEY & JOE RUSSO, PACA Docket No. RD-85-277
Docket No. 9D-45-989
Principles Property Inc. is Princip G. Angesson d/b/a Anors
Process Co. PACA Docket No. RD-85-293
PEMBERTON PRODUCE INC. S. DANNY G. SCUBRY d/b/a RALEIGH BRO- KERAGE & DISTRIBUTING CO. PACA Docket No. RD-35-283
PLAINFERLO FRUIT & PRODUCE CO. INC. B. JCSEPH ASSALLA d/b/s Cms- MAR PRODUCE, PACA Decise No. RD-85-236
PRODUCE SPECIALIST OF ARREONA INC. R. ROBERT J. STELLY, Sc. d/b/s
R.J. Distributino Co. Inc. u. Jali Procede Co. Inc. v. 1425 RD-88-229, Stay Order R-J Distributino Co. Inc. u. Jam Procede Co. Inc. PACA Decket No. 1405
BOTTO COMPANY INC. PACA DORRE TO BROWSEADE INC. PACA Dorket

ROBLING & CATHEY, INC. II. BENCHMASH BROKERAGE INC. PACA DOME

LIST OF DECISIONS REPORTED

MAY-JUNE 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1880-Cont.	
REPARATIONS DEFAULT DECISIONS—Cont. PAGE	æ
RODER HABLOFF PACKING INC. & JACK W. MCNEIL d/h/a MCNEIL'S TO MATGER PACA Docket No. RD-85-201	18
BROKERAOE & DISTRIBUTINO CO. PACA Decket No. RD-86-273	
SANTO TOMAS PRODUCE ASSOCIATION 4: ERMEST G. ANDRESON d/b/s ANSY'S PRODUCE Co. PACA Docket No. RD-85-233 14	
	06
PACA Decker No. ED-85-255 14 Schware, Marvin A. d/b/s Marvin Schware Produce s. O'Connos	10
CITILE PACHING INC. PACA Docket No. RD-85-223 16 SIGMA PARDUCE CO. INC. S. FIESTA SALES INC. PACA Docket No. RD- 85-048	М
86-286	
SOUTHWESTERN NORTH CARGINIA FARKERS COOPERATIVE INC. o. GHAST BEHNETT, PACA Docket No. RD-85-225	•••
JR. d/b/a Bun's Product PACA Dealer No. Dr. of Col.	
Drobet No. Dr. 65, 544	
PACA Dorket No. RD-85-225 146 SUMPRESS, INC. II. LAKE CITY WHOLESALE POORS & PRODUCE and/or	
LAKE CITY PRODUCE PACA Decket RD-85-247 T. APKARIAN & Sons u. Joe N. Russo and Stanley Russo d/b/a Stan-	
LET & JOE RUSSO. PACA Docket No. RD-85-284 141 Tomators Inc. c. D. Paya Inc. PACA Docket No. RD-85-284 141	2
TRAUTHANN BROTTERIA CO. I. DEEP VALLEY FARMS INC. PACA Docket No. RD-85-256. 141 Trauthann Control of the Cont	
Docket No. RD-85-200	
Untailla Potato Inc. s. Benchmare Brokeraom Inc. PACA Docket No. RD-85-246. 1601	
RD-85-210 PACRESS INC. S. ISLAND DEINES INC. PACA Docket No.	
Docket No. RD-82-202	
WM. S. WRIGHT INC. II. JERRY G. LOWE d/b/s LOWE FRUIT AND	

PRODUCE, PACA Docket No. RD-85-282 1403 WORENER PRODUCE COMPANY INC. II GROVINARE PRODUCE CO. INC. PACA Docket No. RD-85-200 1420 WORLEY AND MCCULLOUGH INC. 8. FERNANDO'S INC. PACA Docket No. RD-85-244 COMPANY II. JOSEPH FEIDMAN INC. PACA Docket No.

RD-85-206 1411

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1920-Cont.

PLANT QUARANTINE ACT. PAGE CONTINUESPIAL AIRLINES and WEST COAST PRODUCE INC. PQ Docket No. 88. Order Granting Motion To Dismiss To West Central Produce PHILO, GARY and CONTINENTAL AIRLINES. PQ Dockst No. 78. Consent Decision.... KLM ROYAL DUYCH AIRLINES, PQ Docket No. 75, Consent Decision....... 1440 RAMOS, FRANCISCO. PQ Docket No. 37, Ruling On Reconsideration....... 1447 RAMOR, FRANCISCO, P.Q. Docket No. 87, Ruling on Certified Questions.... 1442 STENA LINE A.B., STENABULE/DAVIOSON, FQ DOCKET No. 91, Consent

LIST OF DECISIONS REPORTED

JULY-AUGUST 1985 ALLEN, CHARLES, JR., 611 ALLEN LANG AND CATPLE COMPANY, AQ

ANIMAL QUARANTINE AND	RELATED LAWS	PAGE

Docket No. 172 Consent Decision	1484
	1404
	1414
	1465
	1468
	1408
	1477
	1469
	1481
	1472
	1466
Runos, Michael B. AQ Docket Nos. 142, 165. Consent Decision and	1468
	1479
	1471
And Locality No. 174. Consent Ducksion	1495
PACKERS AND STOCKYARDS ACT, 1921	
DISCIPLINARY DECISIONS:	
Bory, Tony. P&S Docket No. 6482, Decision and Order upon Admis-	
ston of Party by Reason of Dist. Decision and Order upon Admis-	
	490
Supplemental Order Bowne, Bris. Pas Dechat M., 1999, P.	542
	583
	517
CLARK COUNTY COMMISSION, INC. P&S Docket No. 6555. Decision	540
mental Order Supple- D&R Livertock, Inc. and Donner D. R.	541
Decision and Order	
Decision and Order. EMARRON, DALE, and ROOF Page 6	500
Decision Decision Tone Skills, INC. P&S Docket No. 6560.	
Decision. Decision No. 6160. Grain Beat Passess. No. and Disc. 15.	1.5
6519. Decision DANIEL WINCKLER. P&S Docket No.	
GREEN, JOE. P&S Dorket No. 8549. Decision	99
Hogo, Donald P. P&S Docket No. 8500. Supplemental Order	96
JOHES, HARRY D. PAS Doubet No. 2011 Departmental Order	41
LANDMARK BEEF PROGRAMME AND MARKET LANDMARK BEEF PROGRAMME AND	38
RONALD HILLMAN, and CHAIR PROPERTY OF THE DURBANK, ALAN SILVERBRIO,	
Decision with Respect to John M. Burbank	21
Decision with Respect to Alen Silverbear	21

DIS

PACKERS AND STOCKYARDS ACT, 1921-Cont.	
DISCIPLINARY DECISIONS—Cont. P	AGE
Automotion Grown Resources, Inc., Marin Sann, and Room Reso- wax 1980 John No. 63th Deckets Decksto with Raugest to Blajd Schwe Addressmers, Passar, 1986 Docks No. 63th, Decket Grown Resources, Passar, 1986 Docks No. 63th, Decket Grown Resources, 1987 P. 1988 P. 1988 Docks No. 6387, Decket 63th villa Respect to Villag P. 1988 P. 1981 Consent Deckets. According No. 1981 P. 1988 Docks No. 63th Consent Deckets 63th Consent Deckets 74th Street, P. 1981 Dockst No. 6409, Deckets 74th Street, P. 1981 Deckets 74th	1511 1536 1635 1618 1594 1492
ART, STOCKEAN, M. S. PERS. P. P. S. Decker, No. 1887. Decision with Raspect to Orice & Livreitock, Inc., Barbars Stewart, and N. Addeph Stewart. Decision with Respect to Patel's Stockyard, Inc. Decision with Respect to Patel's Stockyard, Inc. SOUTHERS AND C. S. SERF, P. SEE DOCKS NO. 1867, Decision SOUTHERS GEOMES STOCKYARD, INC., and LOUIS N. WOODURK. P&S Ducket No. 1986. Desidion.	1506 1518 1494 1525
Doint No. 68th. Destition. 2015 Destit No. 68th. Destition No. 68th. Destition Vol. 97th Lower Fall Destit No. 68th. Destition United States of Lower States Lower States Control, Destition United States Control, Editor United States Control, Destition and Order upon Administrate Optical by Destition (Destition and Order upon Optical by Destition (Destition and Optical by Destition and Optical by Destition and Optical by D	
REPARATION DECISIONS:	
PLAYE VALLEY LIVESTOCK, INC. D. LLOTO ENGLEMAN SHIP DOWN A BRID LEMAN, P&S Docket No. 6544, Default Decision and Order	1548
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1938	
COURT DECISIONS	
A. PELLEGERIO & SONE, INC. U. U.S. DEPARTMENT OF AGRICUATURE SING. UNITED STATES OF AMERICA. No. 85-1251. Order UNITED STATES OF AMERICA. No. 85-1251. Westergrandum Opin	
United States of America, No. 36-10298-F-11. Memorandum Opin Press Approace, Iroc. Case No. 385-50298-F-11. Memorandum Opin	1546

DISCIPLINARY DECISIONS A. PELLEGRING & SONS, INC. PAGA Docket No. 2-4698, Decision and Order 1092 Beaten-Konour & Associates, PAGA Docket No. 2-4888, Decision and Order

Country College Of Fig. 1830 -Count.	
DISCIPLINARY DECISIONS—Cont.	AGE
COTYONE, CARL D., d/b/a JOSEFS A. CUTTONE Co. PACA Docket No. 2- 5751. Decision and Order	
NARMI, HANI, d/b/s Green Acess Product Co. PACA Docket No. 2- 6733 Decision and Order.	1678 1678
	1620
	1607
	683
Order	<i>67</i> 0
AGRA, INC. v. J. A. WOOG COVISTA, INC. PACA Docket No. 2-9869. De-	
	00.4
BANANA CO. PACA Decket No. 9, 6000 P. CACQUISTO, d/b/a Teoric	
ARIZONA, E. GEORGE VILLALOCCE, d/b/c TESSUN BRANG INTERNA- TIONAL PACA Docket No. 2-8305. Order Personnier No.	634
BATTAOUA PAGOUCE SALMA THE C. A. T. G	344
Bianchi & Sone Packino Co. s. West Coast Produce Sales, Inc. PACA Decket No. 2-8828 Coder Production of Packing Inc.	300
America Geometric, Inc., e/t/a Dole Graus, s. Wast Coart	61
	10
Buo Antia, Inc., p. Wast Coars Recover Coars December 16	
BULL & PRICE, INC., o/t/s ALLAN Bray Property Co., W	
C & E ENTERPROPER DOCKET NO. 2-646Z, Order on Reconcidenation 17	
CAL-MRX DEFRINGED INC. P. Mars. Decision and Order	
COLACE Rose, Ivo. p. J. Decession and Order	
INC. PACA Docket No. 2-6846. Order on Reconsideration	il.

LIST OF DECISIONS REPORTED

3019

PAGE

JULY-AUGUST

PERISABLE AGRICULTURAL COMMODITIES ACT, 1892.—Coet. REPARATION DECISIONS.—Cont. PREHI PACK, INC., S. DISLE BROKERAGE Co., INC. PACA Decket No. 2-

6455. Decision and Order	1662
FRESH WESTERN MARKETING, INC., S. THE FOREST CITY-WEINGART	1000
FRESH WESTERN MASKETING, INC., S. THE FORSE CITY-WEINGART	1711
Pagauca Co. PACA Docket No. 2-6661. Decision and Order	1111
G.A.C. PRODUCE Co. INC., s. OTAY PACKING Co. PACA Decket No. 2-	
6872. Order Requiring Payment of Undisputed Amount	1725
GLOBAL BERRY SALES, INC., D. TIDELAND FARMS PRODUCE, INC. PACA	
Docket No. 2-6705. Decision and Order	1729
GOLO COAST PACKING, INC., IL CETT WIDE DISTRIBUTORS. PACA DOSKet.	
No. 2-6474. Order on Reconsideration	1741
GOURNEY PRODUCE SPECIALTIES, v. RUSSO FARMS, INC. PACA Docket	
No. 2-8468. Decision and Order	1662
HARMON, JOHN K., d/b/e HARMON COMPANY PROBUCE, & A. LEVY	
Durr. Co., Inc. PACA Docket No. 2-6648. Stay Order	1785
INTERNATIONAL FROM AND FROMEN POODS, INC., d/b/s INTERNATIONAL	
FOOD DISTRIBUTORS, S. JIMINI TRADING COMPANY. PACA Docket No.	
2-8678. Decision and Order	1674
	2010
ITO PACKINO Co., INC., a WEST COAST PRODUCE SALES, INC. PACA	1678
	1010
J. A. Woon CoVerta, Inc., a/t/a J. A. Woon Co., u. Hap Sysco Foon	
SERVICES and/or TAYLOR BEGRERAGE COMPANY, INC. PACA Docket	1702
No. 2-6696. Decision and Order	1402
J. A. WOOD COVETA, INC., a/t/a J. A. WOOD CO., N. M. OFFUTT CO.,	
Inc. PACA Docket No. 2-6680. Decision and Order	1355
KDN ENTERPRISES, INC., DONALD W. MOORE, and HENRY J.	
RECHER, d/b/s J-B DISTRIBUTING CO., IL EMPISSON H. RIAIGIT, d/b/	
o EMPREON ELLIOTT PRODUCT, PACA Dorket No. 2-6717, Decision	
and Order	1722
Karamana Panna Inc. o Union Fruit Company, PACA Decket No.	
2-9614. Decision and Order	1690
Stay Order	1749
L. & E. FARMS, S. EMESSON ELLIOTY, PACA Docket No. 2-6636, Deci-	
sion and Order	1626
LEMMONS' FARMS, INC., IL WILLIAM R. WILLIAMSON, d/b/a WILLIAMSON	
PAUMS, PACA Docket No. 2-6524. Order Denying Petition for Re-	
consideration.	1740
LODEN, LOUIS, d/b/a LOU LODEN, U. OLIVER P. WOLFE, d/b/a WOLVER-	
INE FAUT Co., PACA Dockst No. 2-6555. Decision and Order	1631
M & M PRODUCS FARMS AND SALES, S. SOL SALINAS, INC. PACA Docket	
No. 2-6625. Order on Reconsideration	1752
No. 2-6625. Order on Reconsideration	
MARTINOUS, MOSS, I. KETH CONNELL, INC. PACA Dorket No. 2-6637.	1749
Stay Order	21.40
MARTINOUS POORS, & KEITH CONNEIA, INC. PACA Docket No. 2-6637.	1696
Decision and Order	1000
MENDELSON-ZELLES Co., INC., to WEST COAST PRODUCE SALES, INC.	
	1645
Amount Control of	

PRRISABLE AGRICULTURAL COMMODITIES ACT, 1830—Cent. REPAI

	PAG
METEO PRODUCE, INC., S. SAM TOCOG & SONS. PACA Dicket No. 2- 5882. Order Requiring Payment of Undisputed Account	
FOGUS, INC. PACA Docket No. 2-6890 Bangastica Colores	-00
DEL VALLE, S.A., and H. J. HEINE COMPANY, PAGE S.A., JUGOS	
NASSI-DE CAMP COMPANY & Proper I Proper In Proper Inc.	
6667. Ruling on Reconsideration PACA Docket No. 2-	195

172 .70 174

NASH-DE CAMP COMPANY, S. QUALITY PRUIT CO., INC. PACA Docket No. 2-6782, Order of Dismissal NORTHWEST FRESH, INC., S. ROBESTO H. GUTTERRES, d/h/a GUTTERREZ

OHUTA, INC., & SCHWEGMANN BEOTHERS GIANT SUPERMARKET, PACA PACIFIC FARM COMPANY, & CORGAN & SON, INC. PACA Docket No. 2-

PACEFIC FARM COMPANY, IL WEST COAST PROGUCE SALES, PACA DOCKST No. 2-6858. Reparation Order _______1690

PAT BROKERAGE CO., OF CALIFORNIA, INC., & QUARER CITY PRODUCE RIGHY PRODUCE, & GARY WATKING PRODUCE CO., INC., and/or STRPHEN

J. WIEDENBAKER, d/b/s STEVE'S BROKERAGE, PACA Docket No. 2-6713. Decision and Order..... RIMON, GLENN V., d/b/s ANTIGO POTATO BROKERAGE EXCHANGE, C.

KATHERINE B. SCHMINGE, d/b/e R & K SALER PACA Docket No. 2-S. STAMOULER, INC., d/b/a STAMOULES PRODUCE Co., s. WEST COAST PRODUCE SALES, INC. PACA Dorket No. 2-4851. Reparation Order 1679

SAM WAND FOOD CORPORATION, U. MAILLEY QUALITY PRODUCE COMPA-SCHNACHER, HAROLD L., d/b/a WONERBPUL PRODUCE & BROKERAGE Co., c. Windpiero Horman, d/b/a Allan Pickle Wome. PACA

SHARROOK BEOTHERS & SONE, INC., II. WILTON CATERESS, INC. PACA SIOMA PRODUCE CORP. INC., II. HARVEY C. HARREN, d/b/a HARVEY'S.

Syracuse & Jeneius Produce Co., Inc., s. George J. Turke, d/b/a TROOPIC KING GROVES, a/L/a SELVER PALM GROVES PACA Docket

T.J. POWER & COMPANY, S. BESTY'S WHOLESALE PRODUCE. PACA

TANITA FARMS, INC., S. CITY WIGE DEPRESUTORS, INC. PACA Docket

No. 2-6460. Order on Reconsideration 178 AND SECTION ASSESSMENT AND ASSESSMENT AND ASSESSMENT AS

PERISABLE AGRICULTURAL COMMODITIES ACT, 1931-Cont.

REFARATION DECISIONS—Cont.	PAGE
TANNYA FARMS, INC., S. THADDEUS J. SOSSEER, d/b/s TED SOSSEER FACA Docket No. 2-8868. Order Requiring Payment of Undispute Amount	d _ 1724
TERRA ROZA, INC., a/t/s GREEN ACRES, S HACIENDA BRANDS, INC. PACA Docket No. 2-6802. Order of Biamissal. Taans West Pauty Co., s. West Court Passucc. Sales, Inc. PAC.	1764
V.H. ANDERIAN AND CO., INC., R. GIANT FOOD, INC. PACA Docket No.	. 170)
2-6788, Order of Dismissal. V.V. VOCIL & SOMB FARMS, INC., U. CONTINENTAL FARMS. PAC. Decket No. 2-5191, Order on Reconsideration	١.
REPARATION DEPAULT DECISIONS:	
A.G. Shore Company, Inc., s. Gulf Lare Produce Co. PACA Dooks	4
No. RD-85-903. A. Levy & J. Zenviner Co., u. Teoy H. Caira & Sons, Inc. PAC.	. 1754
Decket No. RD-86-329	. 1759
BORITA PACKING CO., o/t/s BRITERAVE FARMS, IL TAYLOS-BYESS, INC. PACA Docket No. RD-88-312	. 1755
BONDA PACRIMO CO., B. J. P. DANIEL PRODUCE, INC. PACA DOORS NO	λ
RD-86-316. BUJULIAN BROS, INC. B. A. LEVY DISTRIBUTING CO., INC. PACA Dorke No. RD-86-310.	1755
CARGLINA PACKERB, B. JACK W. McNeil, d/b/s McNeil/s Tomaton PACA Docket No. Rd-85-328	J
COPPING BROS. ORCHARD CO., INC., IL HEIDEMA FRUIT AND PRODUC COMPANY, PACA DOCISE No. RD-85-327	e 1758
DOUGLASS, JOSEPHINE, d/b/e S. L. DOUGLASS, U. DANNY C. SCURRY, d/b/a RALKION BROWERAGE & DETRIBUTING CO. PAC.	Α
Dicket No. RD-85-309	4,
INC. PACA Docket No. RD-85-314. ROPEL, FRANK S. III, and THE PROPOSE CENTER, INC., d/b/s Skins Con	4-
SOLIGATION, a. Sam Wang Food Coss., Inc. PACA Decket No. RD 85-185. Order Responing After Default	1363
FARM PAR PRODUCES, INC., 8. ANDY'S PRODUCE CO. PACA Decket No.	1752
FARMERS POTATO EXCHANGE, INC., S. JAMES MAJORS, d/b/e J & 7	. 1757
FRANCIS PRODUCE Co., INC., it. TOMATO OF VA. PACA Docket No. RD	1765
FRESH WESTERN MARKETING, DRC., U. CORGAN & SON, INC. PAC-	1780
GERAWAN Co., INC., S. FRANK MARGICEOTTO COMPANY, INC. PAC.	A 1767
Go/Western Produce & Commonnes, Inc., a Corgan & Son, Inc.	D.

PERISABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont.

tot, 1000—conc	
REPARATION DEFAULT DECISIONS-Cort.	PAGE
GO/WESTERN PRODUCE & COMMODUTER, INC., S. LARR CITY WINGLESAN FOOLS & PRODUCE PACA Docket No. RD-SS-208	
GRANAGA MARRETINO, INC., U. DANNY G. SCUERY, d/b/a RALMON BRI KERAGE & DEFRINUTING CO. PACA DOCKET No. RD-85-525	
PRODUCE COMPANY, PACA DARRO NO. DV. SE. DAT. SA. O. WESTER.	N
RD-85-528	
GROWERS MARKETING SERVICE, INC., & WALREON PRODUCE CO. PACA Decket No. RD-85-258, Order Variation Step Code, Date Decket No.	. 1755
feelt Order McRay Produce Co., Inc., a. Coroan & Son, Inc. PACA Decket No.	
PACA Docket No. RD-85-904	1764
MONTEREY BAY PACKING CO BOY F. D	1756
ROGERT SWIFT CO., INC. PACA Decket No. RD-2-0799. NICE DELIS CO., INC., I. WINSTON C. BAILEY, d/b/a CLAUDE BAILEY, PAGEORG CO. RACE, D. C. S.	1758
NOGALES FRUIT & TOMATO DESCRIPTION AND AND AND AND AND AND AND AND AND AN	1754
Dicket No. RD-85-30R. Order of Dismisses. O. P. Murphy Pagguere Company, Inc., af/2a O. P. Murphy & Sons u. Jack W. McNell's Tomators, PACA Decket No. RD-85-324.	1761
	1757
BROKERAGE & DETRIBUTING CO. PACA DORSON R. BD-86-326 PACIFIC GAMBLE ROSINSON CO., RIVA PACIFIC FAUIT & PRODUCE CO., E. PAGUED PROCESSOR LO. ACCUSED FAUIT & PRODUCE CO., E.	1758
PAGOUGE PAGGUCTS, INC. PACA Decket No. RD-85-267. Stay Order POGETA, ANTHONY J., d/b/s ANTHONY POSSTA, INC., S. POPPHANO PAGENIC, COMPANY, INC., e/1/s JMB PAGKING COMPANY, PACA DOGSEI No. RID.RE. 1985. C. de. T. M. P. PACKING COMPANY, PACA	1769
R-J Distribution Co. Inc Jan. Barring After Default	1765
R. R. Toog Company . Process M.	1762
Famus, Inc. PAGA Decket No. RD-88-266. Order Denying Metion to Reopen After Defenit, Vecating Stay Order, Reinstading Default Order	1767
Order of Diamissel	766
STEVECO, INC., U. NORMAN L. GATINEAU, d/b/a GATINEAU ENTERPRISES. PACA Decket No. RD-85-225. Order Denying Motion to Reopen After Default.	761

ACT	MMODITIES ACT, 1936-	·Cos
M	MMODITIES M	JF, 1930

	PAGE
REPARATION DEFAULT DECISIONS—Conc.	
Sun World International, Inc., 2/L/a Sun World, t. Barton't Produce, Inc. PACA Docket No. RD-86-313	. 1756
TALBOTY FARMS, INC., IL JOHNNY D. BOLLEGOES, W. S.	. 1754
OUEE, PACA DOME No. HD-88-990. VAN BUKEN COUNTY FRUIT EKCHANGE, INC., G. J. & M. PROCUCE. PACA DOMEN No. RD-85-819.	
PLANT QUARANTINE ACT	
Photo delication and the state of the state	1780
ALLEED VAN LINES, INC. PQ Decket No. 105. Consent Decketon	1782
ALVARADO, IAN. PQ DOPRET NO. 51. OT 61 PARTIES. DIG. PQ Docket	t
ALVARADO, IAN. PQ Dorket No. 37. O'GHT GERINGE, INC. PQ Docket Continental Airlines and West Central Produce, Inc. PQ Docket	. 1776
No. 88. Decision and Order for Containing and Order	_ 1769
DOUGLAS, THELMA A. PQ DONES IN THE BRANG, PQ Docket No. 61	S
DOUGLAR, THEIMA A. PQ DOCKS No. 40. DOCKS BARE PQ DOCKS NO. 60 PLOKES, JUAN MONARES, d'Dés GUAYAROTA BRANE PQ DOCKS NO. 60 Defeuit Decision and Order	1771
Definalt Decision and Order HABRINGTON SHIP AGENCIES, Dic. PQ Decket No. 168. Order grantin	1782
Motion to Dismiss	
Motion to Dismiss	1782
Motion to Dismiss	n.
Motion to Dismiss LUPTHANNA GERHAN AMLINES, and NEIMAN MARCUS. PQ Dicket N LUPTHANNA GERHAN AMLINES, and NEIMAN AIR LINES.	1778
Ti. Consent Decision by Lufthansa German Airlines.	1783
T1. Consent Decision by Lathansa German Decision MEDITERAMERA PLOVIDEA. PQ Decision 108. Consent Decision	1768
MEGITERAMERA PLOVIDRA, Por Decision Company Decision	1.100
MEDITERAMERA PLOVIDAA. PQ Decket No. 72. Consent Decision REIMCOUGEZ, JOSE PQ Docket No. 72. Consent Decision	1778
REIMCOURT, JOHN PQ DOCKE No. 72. Committee and Order Rico, OBLAR DARIO, PQ DOCKE No. 81. Dockiden and Order UNITERAMY, PQ Docket No. 101. Consent Dockiden UNITERAMY, PQ Docket No. 101. Consent Dockiden	1775
Thursday, PG Dacket No. 101. Consent Decision Mexico to D	ls-
WESTERN AIRLINES. PQ Doctor No. 112. Cross	1782
WILLIAM J. VERMAY MOVING AND STORAGE, PQ Docket No. 93. Ord of Dismissel	er
of Distriction	

SEPTEMBER-OCTOBER 1985	
AGRICULTURAL MARKETING ACT, 1846 PAGE	
JACOB SCHLACTER'S SONS CO. FMIA Dotket No. 83, I&G Docket No. 79. Stipulation and Consent Decision	
AGRICULTURAL MARKETING AGREEMENT ACT, 1937	
SEQUOIA OBANGE CO., INC. et al., SIVERBENG FABRE, INC.; SURRY COVE CITALE ASSOCIATION; BELEIGHE PACKING Co. AMA Docket Nos. F&V 997-6, 907-8, 997-10. Order Dismissing Interdocutory Appeal	
ANIMAL QUARANTINE AND RELATED LAWS	
Astew ARWAN, Inc., Asaew Ara, Inc.) AQ Detet No. 178. Consent Desistion and Order. 110. Desistion. 2007. See See See See See See See See See Se	
rington 1809 HANSIN, GRORGE, and JAMES SEASECH. AQ Docket No. 184. Consent Danistry	
COMBON, BILL, 6/b/a BILL JOHN CATTLE COMPANY, and EDGAR L. HOL- COMB, AQ Docket No. 168. Comment Decision by Bill Johnson 1805 LAMER, CRAIG, AQ Docket No. 124. Comment Decision	
MILLER, James AO Decket No. 192, Consent Decision and Order., 1814	
Bill Wood	
MOMAS, Leon C. AO Doubat No. 164 Consent Decision 1822	
VHALEY, JONE, and J. M. Asy. AO Dorbet No. 105 Common Decision	
FRALEY, JOSE, and J. M. Ams. AQ Desiret No. 100 Committee 1828	
ns to Joba Whaley	

ANIMAL WELFARE ACT ANER, JOSTA L., d/b/s Jo's KENNEL. AWA Docket No. 267. Decision and Order 1840

2105

LIST OF DECISIONS REPORTED

SEPTEMBER-OCTOBER 1985

ANIMAT.	WELFARE	ACT-Cont.

ANESI, JORFIA L., &/h/a Jo's KENNER. AWA Docket No. 287. Order Dep nying Petition for Reconsideration. FOCKEN, DON and BEILAH. AWA Docket No. 310. Order Dismissing Compilation.	1831
Complaint Kinsingen, Dan S. AWA Docket No. 285. Order	1855
KINSINGER, DAN S. AWA DOCKER NO. 298. Order Granting Motion to Dis- Lowe, Marion. AWA Docket No. 298. Order Granting Motion to Dis-	
	1858
	1849
ROCKLANG FARMS, INC. AWA Dorket No. 351. Content Dortell	1831
	1840
	1838
WILLIAMS KEN, and M. H. ROZSINS. AWA Docket No. 239. Order	1851
WILLIAMS REN, and St. 71. NOSSING. WOOD, CHARLES S. AWA Docket No. 361. Decision and Order YOUES, KONE. AWA Docket No. 367. Order.	1849
	1851
ZOOK, ANNIE. AWA Docket No. 287, Order	1851
ZOOK, FANNIE. AWA DESRET NO. 2011. COURT INTERPRETATION ACT	

EGG RESEARCH AND CONSUMER INFORMATION A

REYNGLOS,	Huon.	d/b/a	REYNOLDS	FARMS.	ERCIA	Docket	No.	4.	181
Order									
	PPI	VED AT	MEAT IN	PECTIC	N ACT				

AFEX MEAT COMPANY, FM1A Docket No. 78, Decision and Order	1865
CHURCHILL MEAT COMPANY, INC. FAILA DECASE ITO	1884
No. 11. Decision and Order	ica 1886

end Order JACOS SCHLAUTHA'S SONS CO. FMIA Dorket No. 88, I&G Docket No. 78. Stipulation and Consent Decision. Order Granting Motion to Amend Stipulation and Consent Decision. Order Granting Motion to Amend Stipulation and Consent Decision.	1880 1890

OLE SALEM PACKING Co., INC. FMIA Docket No. 90, PPIA Docket No. 12. Consent Decision and Order 1881

HORSE PROTECTION ACT TUTY S. M., STEVEN H. TUTT, and HOWARD MAX BECKNELL. HPA Docket No. 187. Consent Decision with Respect to Respondent

PACKERS AND STOCKYARDS ACT, 1921

COURT DECISIONS:

U. S. COURT OF APPEALS, SEVENTH CERCUIT—Remanded to USDA for further opinions 2938

DISCIPLINARY DECISIONS:

A & O CAPTLE Co., INC. and ARTHUM G. ZURCHER, P&S Docket No. 8576 Decision 1926

SEPTEMBER-OCTOBER 1965

DACKEDO

PACKERS AN	D STOCKYARDS ACT, 1921—Cont.

DISCIPLINARY DECISIONS—Cont.
Bossa, Jacos P., d/b/a Chino Livestock Commission Company and Yanoace. P&S Docket No. 5884. Supplemental Decision and Order as a Rezult of Ninth Circuit's Remand
BUCHPOLZ, JOHN. P&S Docket No. Docision 2002 CARRY STOCKYARGS, INC. and JACX W. CARRY. P&S Docket No. 8558. Decision.
Decision
cision
mission of Pocts
HORTON, JOHNNY. P&S Docket No. 5443. Supplemental Order
HULINOS, PALMER G., ROMNIE G. AUSTIN, and GEORGE CLINTON McDonnella. P&S Docket No. 6744. Removal of Stay Order
ITT CONTINENTAL BARING COMPANY, P&S Docket No. 5855, Joint Stip-
Inc Decision as to Henry L. Lee and Circle L. Cattle,
Decision
5530. Decision and Order prop. Admirator of Phys. P&S Dockst No.
OAK LAKE CATTLE COMPANY, INC. P&S Docket No. 5550. Decision
ENG BARRARA STEWART, PAS Decidal No. 1805. N. Acolffi Stewart,
Order Granting Motion to Disputes. Corresant. P&S Docket No. 4843.
AUCTION, P&S Decket No. 8540 Decket, d/b/s OLNEY LIVESTOCK
Ramand (published as apparete melons and Order on
and Righty Thompson
1997

PAGE

SEPTEMBER-OCTOBER 1965

PACKERS AND STOCKYARDS ACT, 1921-Cont.

SUN LAND BEEF COMPANY, ROBERT MORAN and HARVEY DISTREM. PAS DOCKOT No. 6199, Decision	1952
THOMAS, BILL. P&S Docket No. 6514. Decision and Order upon Admis- nion of Facets by Reason of Default.	1984
Top-Line Pacsing Co., Inc., Vern Slage, and Wase Slage, P&S Docket No. 6554. Decision with Respect to Top-Line Packing Co., Inc.	1923
UPTON, GREALD F., d/b/a DEDRAFF LIVESTOCK SALES. F&S Docket No. 6196, Decision and Order	

REPARATION DECISIONS:

DISCIPLINARY DECISIONS...Cont.

HURS PLATTE VALLEY AUGTION, INC., U. PREUE LIVETOCE Co., and F. A. WELLMAN & SONS, INC. P&S Docket No. 6180. Decision and Order 2006

PERISHABLE AGRICULTURAL COMMODITIES ACT

DIS

CIPLINARY DECISIONS	
A. PRILEOSINO & SONA, Inc. PACA Docket No. 2-6993, Stay Order B. G. BALE'S Co., Inc. PACA Docket No. 2-6790, Decision and Order	
CAL-VIIO SALES, INC. PACA DOSES A. COTTONE Co. PACA Docket No. 2-	0040

	tay Order		4. 9.6760	1. Decision az	d Order	204
FRESH AP	PRODUCE :	Conr. PAC	Docket	No. 2-6767.	Declaiss and	201

Justim D. Moderi Product, Inc. PACA Docket No. 2-6745. Decision	9013
and Order	2010
and Order & Prosuce Co., Inc. PACA Docket No. 2-6681, Deci-	2016

	5016
aton and Order a sue Dray Order	2051
aion and Order. RENUME PRODUCE, 180. PACA Doebst No. 2-812. Say Order. VED-MEX, Inc. PACA Doebst No. 2-612. Order Denying Petition to Reconsider and to Recomm Heating.	2960

REPARATION DECISIONS: A. J. Tower & J. Terranger Co. a. West Coast Proster Sales, Inc. PACA

	2011	
Docket No. 2-6880. Reperspect Course Sales of Texas, Inc. PACA	2063	
Docket No. 2-4918. Reporation Order	4415	

ANYHONY, JUNKY PAUL, S. MARRET BARRET, INC. PACA DECEMBER 1881	2118
B702. Decision and Order. A. J. Sales Contant. PACA BATTAGERA PROPERS Sales, Dec. a. A. J. Sales Contant. PACA	216
BATTAGLIA PRODUCE SALES, INC. Decodiferation.	410

BATTAGLIA PRODUCE SALES, INC. II. Bernelderation	400
BAPPAGIAN PROBLET SALES, INC. IN DOCKETS OF THE DESCRIPTION OF THE DES	

LIST OF DECISIONS REPORTED

SEPTEMBER-OCTOBER 1985

REP

PERIABEBLE AGRICULTURAL COMMODITIES ACT-Cent.
ARATION DECISIONS—Cont. PAGE
BURIMAN POTATO SALER, R. LERAL FOORS, INC. PACA Docket No. 2- 692. Order on Reconsideration
CAL-MEX DISTRIBUTORS, INC., D. GERAT WESTERN PRODUCE, INC. PACA Docket No. 2-0736, Decision and Online
NATER PACA Docket No. 2-6589. Stay Order
Order upon Reconsideration
Darlet No. 2, 1939 Barrett S. D. Vasquez Phobuce, Inc. PACA
Declar No. 2 OFF Providence A. P. P. B. HAVANA POTATORS CORPORATION. PACA
Glis Order upon Recreasidarution. 2167 Diminuva Paroduce Co., it. Stada Darisiotitina Co., Inc. and/or Muspiry Oversicas USA, Inc. PACA Docket No. 2-6387, Order of Diminusal Co., Inc. and Co., Inc.
Deciet No. 2-6624. Decision and Order
Dissolved Confessature, it. Space, Desperatures Co., INC. and/or Museur Orentean USA, INC. PACA Docket No. 2-6889. Order of Dissistant Co., INC. and/or Co.
9719. Decision and Order
MURPHY OVERBEAR USA, INC. PACA Docket No. 2-6911. Order on
Disminal
G. A. C. PRIODUCE CO., INC., E. CAPOS PRODUCE SALES, INC. PACA Decist No. 2-6532. Declsies and Order 2145
HASHON, JOHN K., d/b/a HARRON COMPANY PRODUCS, v. A. Levy Dist. Co., Inc. PACA Desket No. 2-0712 Decision and Order 2070
FRUIT & PRODUCE CO. PACA POSTANY PRODUCE, B. PACIFIO
J. R. NOSTON COMPANY, II. CORGAN & SON, INC. PACA Docket No. 2- 5731, Decision and Order
JAMES MATEO & Son, I. FERRESSO & COMPANY, INC. PACA Docket No. 2-6726. Decision and Order.

SEPTEMBER-OCTOBER 1986

SEPTEMBER-OCTOBER 1986	
PERISHABLE AGRICULTURAL COMMODITIES ACT—Cont.	
REPARATION DECISIONS—Cont.	AGE
L-N-L PACKING, ING, II GEORGIE J. TURKE, df/h/a TROPIC KING GROVES, df/ld SELVER PALE GEOVES, PACA Docket No. 2-680. O'der on Reconsideration	2162
Todoo Produce No. 1. PACA Decide to	2159
MINARDO, FRANK M., U. CORGAN & HON, INC. PACH	2091
MUIR-ROBERTS CO., INC., IX SPACE Docket No. 2-6849. Order of MURPHY OVERSEAS USA, INC. PACA Docket No. 2-6849. Order of	2152
NOROTA PACKERS, INC., & INTERSTATE PRACTICAL	2081
O. P. MURPHY PRODUCE CONFARY, INC., #/t/a O. P. MURPHY & SONR, D. CLARKTON TOMATO HOUR. PACA Docket No. 2-d073. Decision. and	2128
PREMIUM FRIEN FARMS, IL ROBERT DWIFT OF	2160
No. 2-0826, OFBEF OF DESIGN TRACENCY CO., INC. PACA Dicket No. 2-	2160
REVECTOR PACKING COMPANY, d/b/a M&R COMPANY, it. HOULEHAN,	2110
RUTER, CHEFFER, I. C. H. ROBINSON COMPANY OF THE PACK Docket No. 2-4643. Decision and Order	2136
SAN BERNAUINO PROQUES TRANSPORT, INC. COMPANY, PACA Docket	2088
PAGA Docket No. 2-6610. Decision and Order PAGA Docket No. 2-6610. Decision and Order	
Order on Reputsideration	2100
SIGMA PRODUCE CO., INC., it HARVES	2109
Syracture & Jennies Products Silver Palm Grover, PACA Docke Thorse Kino Grover, at/a Silver Palm Grover, PACA Docke Thorse Kino Grover Recomideration and Denial of Petition for Re	2161
Syracuse & Jenius Pack Docket No. 2-6626. Order of Dismissal	. 2102
TRIXERA FARMS, INC. 6. COMMANDER OF THE OFFICE PROPERTY OF THE OFFICE OF THE OFFI	. 2100
THOMSEN'S RECEIVING STATES and Order	i zuee
No. 2-6979. Decision and Order	2078

LIST OF DECISIONS REPORTED

SEPTEMBER-OCTOBER 1985

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT-CORL REPARATION DECISIONS-Cont.

m	PAGE
THEARURE VALLEY GROWERS & SALES, INC. 8: SPACE DISTRIBUTING GO INC. and/or MCEPHY OVERSEAS USA, INC. PACA Decket No. 2-6012 Order of Distribution. THEOR SALES, INC. 11 LOW LODGE PACES.	
and Order Docket No. 2-6768. Decision	1
No. 2-6816. Order Bassistan Products Sales, Inc. PACA Docket	1
YARIMA FRUIT & COLD STORAGE CO., II. AU WEST GROWERS, INC. PACA Decket No. 2-6559. Stay Order	
EPARATION DEFAULT DECISIONS:	2151
A. Duna & Song, Inc. o. J. P. Davison, Pro-	
	2176
No. RD-85-363. Step Order	2110
No. RD-85-1016. DIAMOND TRADING COMPANY. PACA Dockot	2180
Docket No. RD-RE-APT	2172
APPLE SALES, INC., R. J. & M. PROSUCE, PACA Docket No. RD-85-852	2175
RD-86-361 OTAY PACKING Co. PACA Decket No.	2170
BLUE GOOSE GROWESS, INC., a/t/a DOLE CYRUS, S. MOORE MARKETING	2171
INTERNATIONAL, INC. PACA Docket No. RD-85-978	
Batta Key Opowens, Inc. v. ton V. Turney	2174
STANLEY & JOE RUSSO, PACA Docket No. RD-85-382.	2165
	2166
Docket No. RD. St. 1975.	
	2174
	274
PACA Docket No. RD. Re. 021	
No. RD-86-587 INTERSTATE PROBUCE, INC. PACA Docket	178
CALHOUM FRUIT & PRODUCE, INC., S. EMPIRE PRODUCE, INC., LANDMARK	177
ING COMPANY DACA PRODUCT AND SCHOOL STREET	
CHUNK'S PROSSICE INC. B. WOMEN ST. 200	166
COLORADO POTATO GROWING Pro-	176
	176
PRODUCE PACA DANGE No. DD. Se pro-	
PACA Docket No. BD. of Goe.	

PAGE

LIST OF DECISIONS REPORTED

SEPTEMBER-OCTOBER 1985 DEBRUYN PRODUCE Co., s. DAVID I. WOOD, d/b/s WOOD PRODUCE CO.

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cont. REPARATION DEFAULT DECISIONS-Cont.

PACA Docket No. RD-85-384	
DENNIS PRODUCE SALES, B. J. P. DANIEL PRODUCE, INC. PAGE DEC.	2172
DENNIS PRODUCE SALES, INC., E. ROY E. BARNES PRODUCE, INC. PAR	2170
DEGREE No. RD-38-308 DEW-GRO, INC., 8/L/S CENTRAL WEST PRODUCE, O. BEST PRODUCE C. INC., 8/L/S Naw Amline Produce Co. PACA Docket No. RD-88-3	
DEW-GRO, INC., n/t/a CENTRAL WEST PROGUER, S. TAYLOS-SYESS, D.	2167
PACA Docket No. RD-85-543 EASTERN IGANG POTATO COMPANY, G. J. P. DANIEL PRODUCE, IT PACA Docket No. RD-85-599	
FURURAWA SALES Co., INC., S. BENCHMARK BROKERAGE, INC. 8802	2172
Stay Order. Stay Order. PORUKAWA SALES CO., INC., M. BENCHMAIK BIOKERADS, INC. and PORUKAWA SALES CO., INC., M. BENCHMAIK BIOKERADS, INC. and	
GREAWAN CO., INC., B. BRICHMARK BROKERAGE, INC. PACA Docket ? RD-85-840.	
GREO GECHARGE & PROGUCE, INC., S. TERRY JEMMERON, d/b/s JEMMERON PROPUGE. PACA Docket No. RD-85-349	
GRENADA MARKETINO, ING., a/t/a RICHARIC A. GLAM CO., WASHINGTON PRODUCE COMPANY. PACA Dicket No. RD-85-285. Order Reopeni	ing 2178
After Default. Gwin, White & Paince, Inc., it Maggie-Paul, Inc. PACA Docket ?	46. 2180

HAROLO TATEVAMA & SONE, INC., S. FERNANGO'S, INC. PACA Decket HENRY ANKENY Co., a. CHINO'S PRODUCE, INC. PACA Docket No. RD-HIGHEY CITRUS PACKERS, S. JAM PROBUCS CO., INC. PACA DOORSE NO. ITO PACRINO CO., INC., R. A. LEVY DISTRIBUTING CO., INC. PACA Deckat No. RD-85-869 J. S. McManus Produce Co., Inc., u. Mayriew W. Diecz, d/b/s Mayr Duerz Co. PACA Dockst No. RD-85-895 2165 KAYE COMPANY, INC., THE, IL INTERSTATE PRODUCE, INC. PACA Docket MANN PACKING CO., INC., p. A. LEVY DESTRUCTING CO., INC. PACA Dockat No. RD-85-359 2171 MILLS DISTRIBUTING COMPANY, & CNING'S PRODUCE CO. PACA Docket MINARDO, FRANK M., ILL. WAYNE M. HATANARA, d/b/E W. H. DISTRIBUT-ING. PACA Decket No. RD-85-880 2176 MISSION FRUIT & VEHITABLES DESTRIBUTORS, INC., S. MAX KAUPMAN, INC. and/or M & M BROXESIAOS. PACA Docket No. RD-85-894 2178

SEPTEMBER-OCTOBER 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cont.

REPARATION DEFAULT DECISIONS—Cont. PAGE
MONPARDINI, DAVIO, d/b/g MONPARDINI PARM SURRIUM II Jon M.
RUSSO and STANLEY RUSSO, d/b/a STANLEY AND JOE RUSSO. PACA Docket No. RD-85-878
Naples Tomato Growers, Inc., u. J. P. Daniel Produce, Inc. PACA Docket No. RD-85-888
PROBLEC CO. PACA Decket No. BD-95-990 Codes Decket
Oray Pacining Co. a. J. & S. Propriet Comp. Back Dooks No. DD 65
8tay Order
PACIFIC FARM COMPANY, I. DANNY G. SCURRY, d/b/n RALEIGH BROKER- AGE & DISTRIBUTING CO. PACA Docket No. 1971, 25, 2022
PRODUCE PRODUCTS. INC. PACA Docket No. P.P. 05. 007. Oct. R.
PARKER, WILDIE SONNY II CHANGE V. I.
PAGGUCE SPECIALISTS OF ARRONA DOS S. BRAG D. McComm. 2169
MARIE E. MCQUEEN, d/b/a AL MCQUEEN & SONE PACA Dicket No. RC-85-344
RD-85-846 A. LEVY DISTRIBUTING Co., INC. PACA Docket No.
356
PACA Docket No. RD. 81.200 PACA Docket No. RD. 81.200
Lest Vegas Potator, PACA Ducket No. RD-85-348
LIOTT PRODUCE, PACA Docket No. RD-95-2077
Six L's Pacsing Company, Jun. v. K. & Phys. Rev. B5-870
SNOW AND SONE PROGRAM CO. T. LANGUAGE TO
Docket No. RD-85-347
SOUTHERN DELAWARE TRANS CROWNER ASSESSMENT 2177
Southern Valley Fatter Same Inc West Co. RD-86-381
INC. PACA Doctet No. RD-55-369 2178

SEPTEMBER-OCTOBER 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT-Cont.	
REPARATION DEFAULT DECISIONS—Cont.	AGE
REPARATION DEFAULT DECISIONS—COM-	
SPACA DISTRIBUTING Co., INC., E. THE VENTERABLE TRACING Co., INC. PACA Docket No. RD-85-357	2170
SUNKIST GROWERS, INC., it CITEUR, CITEUR, CITEUR, INC.	2177
SUNBHINE PRODUCE EXCHANGE, INC., D. A. P.	2174
TOM LANGE COMPANY, INC., IL DEEP VALLEY PARTIES.	2177
VALLEY COOLING, INC., a/t/a VALPEO PAURINGE. PACA Docket No. Montes, d/b/a M & M PRODUCE BEOKERAGE. PACA Docket No.	2168
VEGPACE, INC., D. DANNY G. SCUERY, GIRLS AND SELECTION OF	2172
VILLALORGE, GRORGE, d/b/a TRESUN BEARS IN No. RD-85-379	2175
VIRGINIA PEIGE FRUIT PACKER, INC. S. M.	2176
WARE PRODUCE, INC., a. HAYMONG O'NELL BOOK, S.S.	2169
PACA Dorket No. RD-85-332	2171
PLANT QUARANTINE ACT	2184
AIR EXPRESS INTERNATIONAL PQ Docket No. 111. Consent Decision	2221
Decket Nos. 27 and 58. Consont Decision. ALASEO AVIATION. PQ Docket No. 88. Default Decision and Order	2199
ALLED AVIATION. PQ Docket No. 89. Default Decision and Order ALLED AVIATION. PQ Docket No. 19. Default Decision and Order	2184
ALIAED AVIATION. PQ Decisit No. 19. Default Decision. AVIAE VAN LANES, INC. PQ Decision No. 112. Consent Decision.	2192
AYLAE VAN LINES, INC. PQ Deciset No. 112. Carleton and Order	
RIM ROYAL DUTCH AMERICA. PQ DOCUMENT AND OTHER PROPERTY DECISION	8100
LORGE RICHARD DURAN, Pol DOZES AND MARKET PO Docket No.	
MATTINGS, DERBUS, SEKVAIR, INC. and QANTAR Alleways, PQ Docket No. 89, Consent Decision	221
RICA FRUIT. INC., a/t/s SAMAR INTERNATIONAL SIZE OF SEC. 152. Driver of Dismissal. 52. Driver of Dismissal. Doublet Nos. 89, 95, and 102. Consent Decl.	221

LIST OF DECISIONS REPORTED

SEPTEMBER-OCTOBER 1985	
PLANT QUARANTINE ACT-Cont.	PAGE
TRAMS PRESSET LINE. PQ Docket No. 128. Order Grenting Motion Dismiss	to.
POULTRY PRODUCTS INSPECTION ACT	

CHURCHILL MEAT COMPANY, INC. PMIA Docket No. 86, PPIA Docket	
No. 11. Decision and Order	
OLE SALEM PACKING Co., INC. FMIA Docket No. 90, PPIA Docket No.	

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1985 AGRICULTURAL MARKETING AGREEMENT ACT, 1987

DIRMINGAL

3115

PAGE

Dishiteard
Petition for relief of audit adjustments
Temporary amandment supported
REQUIREMENTS OF MARKETING ORDER
Evidence supports temporary amendment
ANIMAL QUARANTINE AND RELATED LAWS
BRUCELLOSIS
Failure to test cattle
Interstate transportation of cattle
Interstate transportation of exposed calves
Interstate transportation of exposed cow
Interstate transportation of horse
Transportation of cattle without cartificate
CIVIL PENALTY
Of \$100.00
Of \$960.00
Of \$460.00
Of \$509.00
Of \$600.00
Of \$100.00
Of \$810.40
Of \$1,409.09
Of \$1,660.00
Of \$1 800.00
Of \$5,010.00
Of \$6,600.00
D. C.
Prosecution no lenger warranted 190
Without prejudice

The state of the s

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1985 ANIMAL WELFARE ACT

CIVIL PENALTY PAG
Of \$300.00
Of \$500.00
Of \$1,000.00
Of \$1,200.06
Of \$2,500,00
Of \$1,000.00
Of \$10,000.00, partly suspended
Of \$124,000.00, partly suspended
DISMISSAL,
Trivial violations involved
EXHIBITOR
License revoked for violations
LICENSE
Case and desix from buying transporting, and selling animals without a license.
Rovoked
Suspended
Suspended for 35 days
Suspended parmanently
SALE OR TRANSPORTATION
School omployees of regulations and standards
STANDARDS AND REGULATIONS
Cease and desist from violating
Résonte employees regarding 157
Ordered to comply with
EGG RESEARCH AND CONSUMER INFORMATION ACT
CIVIL PENALTY
Of \$28,000.00240
SANCTIONS
For failure to submit reports, segmentages

CUMULATIVE SUBJECT INDEX 3117	
JANUARY-FEBRUARY 1900 ACT	
INSPECTION SERVICE 248 Denial for indefinite time	
Denial for indefinite time	į
Intimidation of inspector	
SANCTION 24 Indefinite denial of inspection service	į
Indefinite denial of inspection service	ļ
Indefinite denial of inspection service, held in abeyance. 24: Suspension of inspection service, held in abeyance.	
HORSE PROTECTION ACT	
CIVIL PENALTY 24	9
CIVIL PENALTY Of \$2,00.00	ð
Of \$2,600.00	
EXHIBITOR 24	8
Disquelification. 24	
PACKERS AND STOCKYARDS ACT, 1921	
ACCOUNTS AND RECORDS	ø
ACCOUNTS AND RECORDS Keep and maintain, which fully disclose all transactions	
ACCOUNTS OF SALE OR PURCHASE	H
ACCOUNTS OF SALE OR PURCHASE Failure to show true and correct weights and/or prices	
BONDING REQUIREMENT 210, 201, 217, 278, 280, 286, 292, 2	ð
BONDING REQUIREMENT Violation of	
CHECKS OR DRAFTS 293, 2	9
CHECKS OR DRAPTS Failing to leaner drafts when presented for payment	8
Failure to remit funds to seller and to pay the pro-	0
Issuing drafts without written agreements from sense; 200, 282, 287, 3	ă
Isoming insufficient funds checks	
CIVIL PENALTY	81
Or\$400.00	Z
Of \$600,00	S
Of \$660.00.	2
Of \$700.00	3
Of \$1,000.00	. 5
Of \$1,760.00.	
Company of the Compan	

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1985

PAGE

PACKERS AND STOCKYARDS ACT, 1921-Cont. CIVIL PENALTY-Cont.

Of \$2,400.40
Of \$10,000.00
Of \$45,000.00.
DEALER
Bend, failure to file and maintain
Deception regarding price and weight
Falling to honor drafts when presented for payment
Failure to pay and/or failure to pay when due
Issuing false invoices 262
Suspended as a registrant
Using false and incorrect weights. 262
DEALER AND MARKET AGENCY
Bond, failure to file and maintain
Failure to maintain a reasonable bond
Pallure to pay when due
Issuing insufficient funds checks
Prohibited from business for specified period258
Suspended as a registrant
MARKET AGENCY
Bending requirement violation
Failure to maintain reasonable hond
Prohibited from business for specified period
MISREPRESENTATION
Original purchass prices for livestock
Original purchase weights
Purchase on a commission basis. 262
PACKER 282
Failure to hold funds in trust
Fallure to pay when due 283, 290
Failure to pay when due and/or failure to pay when dos
Insufficient funds obscion
287, 290

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1985 PACKERS AND STOCKYARDS ACT, 1921—Cont.

PREVIOUS ORDERS	998
Late appeal of Decision and Order denied	900
Provisions stayed pending judiciel review	208
Suspension steyed pending judicial review	
PURCHASE PRICE	549
Decoption regarding	
SCALES AND WEIGHING	ana 699
False and incorrect weights	219, 209
SUPPLEMENTAL ORDER	900
Supposation of registrent terminated	
STAY ORDER	200
Of suspension provisions	508
Pending judicial review	206
STISTERNATION OF PROTECTION	
Indefinitely until complience with bonding requirement	217, 219, 200
Burnanded for	
22 days	998
90 days	989
1 yeer	308
Terminated following compileros	
Deception regarding price and weight	988
To be and incorrect weights	
PERISHABLE AGRICULTURAL COMMODITIES ACT.	1939
ACCEPTANCE OF COMMODITY	628
ACCEPTANCE OF COMMODITY Absent notice of rejection	es 970 578 679
Absent notice of rejection	
to the second of the contract terms	



3120

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1986 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1938—Cont.

Cont.	
ACCORD AND SATISFACTION P.	AGE
Acceptance of check in full settlement	£90
Patiture to prove	541
ACCOUNTINGS	
Failure to eccount truly and correctly	010
Failure to keep account of sales.	600
Lack of causee Hability for entire purchase price	409
ADMISSION	418
Of indebtedness 467, 488,	
AGENT 407, 485,	696
As opposed to broker	
Broker represented as.	904
AGREEMENT	108
Dissatisfaction not besis for voiding	
Fallure to prove agreement to purchase.	190
APPEAL	45
Due to denial of request for a continuance	
Of licensing auspension	10
BANKRUPTCY S10, 3	58
Autometic termination of license	
Reperetion ection continued pending bankruptcy proceeding	14
BROKER	14
Acted as respondent's egent	
Daties of	18
BROKERAGE FER	6
No liebility for, found to be seller's agent	
CHECKS	4
Feilure to cash timely dose not relieve indebtedness	
COMPLAINT	2
Diemiesal of	2

CUMULATIVE SUBJECT INDEX JANUARY-PERRUARY 1985 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1939---Cont.

CONSIGNMENT PAGE
Complainant entitled only to proceeds less expenses
Failure to prove.
Records not supporting accounting
CONTRACT
Broach et
Pailure to preva 388, 576
Pailure to prove damages resulting from
Failure to prove existence of
Failure to ship in suitable shipping condition
One percent variation in damage from tolerance does not con-
atitute
Burden of proof unmet
Change in terms
F.O.B. or consignment disputed373, 858
Modification of 409
Oral
CONTRACT PRICE
Pallure to pay
CONTRACT TERM
Breach of, feiture to dry onless
Modification of original
COUNTERCLAIM
Dismissal of
COURT DECISION
U.S. Court of Appeals for the Elighth Circuit, Appeal from order, upholds senction, responsibly connected person
DAMAGES
Based on lowest known market price
Failure to prove.
Failure to ship in suitable shipping condition

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1985 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1910—Cont.

DISMISSAL	PAGE
Breech of warranty	594
Complainant authorized dismissal of complaint	
Complainant did not prove it was correct billing party	970
Complainent endorsed respondent's check in full settlemer	vt. 500
Complainant fulled to prove change in contract terms	504
Complainant feiled to prove purchase/receipt or liability	cee
Contract terms did not include pick-up date	491
Due to repudiction by seller	200
Fedure to meet burden of proof	400 404
Pallure to present evidence of value	rao
Failure to prove agreement to purchase	
Fallure to prove consignment sale	640
No breach of warrenty found	
No liability by seller's agent for brokerage fee	
Respondent tendered check to complainant in full settlemen	
DUMPING	010
Cartificate not secured	
PAILURE TO PAY PROMPTLY	440
Publication of the facts	854 850 957 850 Ret
Revocation of license	956 381 887
Suspension of license	200
P.O.B. SALE	
Inspection not accepted as accurate	100
INSPECTION	
Lack of good delivery notification delayed	410
Partial only	****
INVOICES	
Ineccurate, virtually without evidentiary value	F20
Proof of contract terms.	414
JURISDICTION	
Clause of action accrusi	501
	40/

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1985 PERISHABLE AGRICULTURAL COMMODITIES ACT 1899. Cont.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1996-Cont.
JURISDICTION—Cont. PAGE
Subject to license under the Act. 456, 475, 481, 489, 495, 563, 569, 515, 692, 536, 547, 554, 559, 568, 597
LICENSE
Causing Hability for payment456, 476, 481, 489, 496, 503, 509, 515, 547, 554, 569, 507
Revocation of
Suspension of
Terminated due to bankruptcy plan
MERCHANTABILITY
Pailure to prove not in merchantable condition
MISREPRESENTATION
Failure to prove
PURCHASE PRICE
Failure to pay314, 316, 330, 331, 335, 352, 254, 355, 357, 359
Increase due to changed pick-up data
RECONSIDERATION/REOPEN
Correction of prior order
Motion to reopen after default, denied
Order reopening after default
Petition for reconsideration, dealed
Petition for reconsideration, dismissed
REJECTION
Wrongful
Wrongful, but accepted by seller
REPARATION AWARDED
Admission of indebtedness
Admission of liability467, 488
Balances due and owing on transactions
Breach of "price after sale" agreement

CUMULATIVE SUBJECT INDEX JANUARY-FEBRUARY 1986

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1920—Cent.

EPARATION AWARDED—Cent. PAGE
Failed to fulfill centract condition
Failure to keep account of sales
Failure to pay 450, 456, 476, 481, 489, 495, 503, 509, 515, 547, 554, 559, 565, 586
Failure to prove breach of warranty
Pailure to prove material misrepresentation
Inspection not accepted as accurate
Lack of good delivery notification delayed
Merchantability cannot be proved due to inspection delay
Oral contract upheld
Respondent bound by broker's actions
Respondent found to be purchaser
Wrengfut rejection 400
SALE
Breach of "price after sale" agreement
Prompt and proper528
AY ORDER
conding filing of an answer to the potition to reopen after de- fault
ending filing of petition to relieser, reargue, and reconsidar
acsted—prior order reinstated
TABLE SHIPPING CONDITION
veraged condition defects
reach of warranty
rulsing/discoloration allowed by contract
sepecting less than half the units insufficient
acts of
024, 828, 819, 866

CUMULATIVE SUBJECT INDEX MARCH-APRIL 1985 PLANT QUARANTINE ACT

3125

CIVIL PENALTY	PAGE
Of \$150.00	686
Of \$350.00.	
Of \$950,00.	
Of \$4,500.00.	
DISMISSAL	
Granted	
IARBAGE	
Uniteded in violation of regulations.	nsa .
ROHIBITED/RESTRICTED ARTICLE	740
Transported from Gypsy Moth high risk area	690

\$126 CUMULATIVE SUBJECT INDEX MARCH-APRIL 1985 AGRICULTURAL MARKETING ACT OF 1946

FEDERAL POULTRY GRADING AND ACCEPTANCE SERVICES PAGE Withdrawal and denial of service.....661 AGRICULTURAL MARKETING AGREEMENT ACT, 1937 ORDER DENYING INTERIM RELIEF ANIMAL QUARANTINE AND RELATED LAWS ANIMAL AND PLANT HEALTH INSPECTION BRUCELLOSIS Exposed cattle moved interstate..... Violation of regulations, interstate movement...670, 678, 680, 683, 686, 686, 688, 689, 691 CIVIL PENALTY Of \$250.00. 683, 688 Of 8400.00.....686 Of \$1,000.00.... 663, 676, 672, 674 Of \$4,690.00.

LICENSE

CUMULATIVE SUBJECT INDEX MARCH-APRIL 1985 ANIMAL WELFARE ACT

CIVIL PENALTY	PAGE
Of \$1,010.00	694
DISMISSAL	
By motion of complainant	698
No violation shows.	689
STANDARDS AND REGULATIONS	
Conse and desist from violating	697
Ordered to comply with concerning the buying, selling, and transporting of live animals.	. 698
Ordered to comply with regarding sanitation.	_762
HORSE PROTECTION ACT	
CIVIL PENALTY	
Of \$750.00	712
Of \$2,001.00	712
SORED HORSE	
Showing and exhibiting of	712
PACKERS AND STOCKYARDS ACT, 1921	
ACCOUNTS OF SALE OR PURCHASE	
Failure to show true and correct weight and/or prices	740
BILLING AND/OR COLLECTING	
Basis other than actual purchase prices and weights	740
BONDING REQUIREMENT	
Violation of	824
CHECKS OR DRAFTS	
Issuing drafts without first obtaining written agreements from sellers authorizing payment by draft	
Issuing insufficient funds checks	855
CIVIL PENALTY	
Of \$400.00,	
Of \$1,000.00	
Of \$1,880.90	
Of \$1,800.60	_824



3129

PACKERS AND STOCKYARDS ACT, 1921-Cont.

SUPPLEMENTAL ORDER PA	AGE
Bending requirements, in compliance with	829
SUSPENSION OF REGISTRATION	
28 days.	828
30 daya	R22
85 days	745
90 days and thereafter until no longer insolvent	108
100 days	21
150 days and thereafter until deficiency eliminated	
180 days and thereafter until in full compliance	
270 daya	
9 months and thereafter until solvent	
1 year	
Until in compliance with bonding requirements	
UNFAIR TRADE PRACTICES	
Robinson-Patman, violation of	
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1030	
AGENT	
Limitation of authority	
BANKRUPTCY	
Not acceptable se defense in failure to pay	
Reparation action continued pending bankruptcy proceeding	
BROKER	
Invoice shows respondent as buyer, not as broker	1
CONSIGNMENT	
Breach of duty	8
Consignee did not receive funds from sale	n
Defined	10
Pallure to pay	vi
CONTRACT	
Breach of:	
Evidence unconvincing	84

CUMULATIVE SUBJECT INDEX MARCH-APRIL 1985 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1939—Cont.

CONTRACT—Cont. PAGE
Failure to pay agreed to price
Failure to prove
Existence of, failure to prove
Modification through alleged misrepresentation
FEES AND EXPENSES
Awarded to respondent
INSPECTION
Considered timely
Obtained 8 days after acceptance
Obtained 12 days after unlending
INTERSTATE COMMERCE
Shipment of produce
MARKET PRICE
Despite over
RECONSIDERATION
Petition for, dismissed
Putition for reconsideration, denied
RECORDS
Loss of
REPARATION AWARDED
Balance due and owing
Order requiring payment
Payment due to complainant880, 886, 897, 915, 923, 923, 904, 945, 961, 965, 967, 974, 977, 682, 762, 764, 768, 1023, 1648, 1044, 1054, 1064,
STAY ORDER
Pending filing of answer to petition for reconsideration1065, 1067, 1070, 1071, 1073, 1074, 1078, 1074, 1078
Pending filing of petition for reconsideration
Pending filing of answer to petition to reopen after dafault
SUITABLE SHIPPING CONDITION
Breach of warranty

CUMULATIVE SUBJECT INDEX MARCH-APRIL 1986 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930...-Cont.

CONTRACT PRICE PAGE	В
Liable for full centract price	4
"Open"	ı
CONTRACT TERM	
F.O.B. anic	,
Sale price disputed	
Unspecified time period for sale	
DEFAULT	
Order reinstating	
Order respensing	
DISMISSAL	
Authorized by complainant	
Complainant did not suffer damages	
Complainant failed to show and amount remaining due from re-	
Conditions not suitable for shipment	
Failure to show breach of contract	
For good cause shown	
Of completent, following settlement	
Of complaint, after reparation vacated	
Parties resched "tenative resolve"	
Payment owed respondent exceeds complainant's damages	
No breach of contract committed by respondent902	
Nothing due from respondent to complainent	
Respondent performed in accordance with contract	
FAILURE TO PAY PROMPTLY	
Publication of the facts	
Breach of warranty, failure to prove	
Failure to prove	
UNDISPUTED AMOUNT	
Order regulating payment	

8182 CUMULATIVE SURJECT INDEX MARCH-APRIL 1986

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1880-Cont.

WARRANTY PAGE
Breach of 96
Breach of, failed to prove
PLANT QUARANTINE ACT
BAGGAGE INSPECTION
Failure to submit
CIVIL PENALTY
Of \$100.00
Of \$150.00.
Of \$252.03
Of \$150.00
Of \$550.00
Of \$725.00 total for 8 respondents
DISMISSAL
For cause
For good cause
Prosecution no longer warranted
GARBAGE 1107
Improper storage of1102, 1108
HOUSEHOLD GOODS MOVEMENT FROM CONTROLLED TO
Failure to inspect
JURISDICTION

CUMULATIVE SUBJECT INDEX MAY-HINE 1985 AGRICULTURAL MARKETING ACT OF 1946

Not an issue that requires an evidentiary hearing for resolu-.....1182

ANIMAL QUARANTINE AND RELATED LAWS CIVIL PENALTY

DISMISSAL

Of \$205.00________1134, 1144

Of \$800.00______1166

Of \$1,500.00______1189 Of \$1.500.00

Of 18.010.00 1135 TMSMISSAT.

SWINE REALTH PROTECTION ACT ANIMAL WELFARE ACT

CIVIL PENALTY Of \$25,400.00______1170

STANDARDS AND REGULATIONS

Ordered to comply with standards dealing with, but not limited

2122

PAGE

3184 CUMULATIVE SURJECT INDEX

HR AND MARKET AGENCY

CUMULATIVE SUBJECT INDEX 3135 MAY-JUNE 1985

PACKERS AND STOCKYARDS ACT, 1921—Cont. DEALER AND MARKET AGENCY—Cont.

DEALER AND MARKET AGENCY-Cont.	PAGE
Failure to pay when doe	1178
Permitting employees to purchase livestock out of consignments.	1206
Suspended as a registrant	1175
INSOLVENCY	
Current liabilities exceeds current assets.	1186
Engaging in business while insolvent	. 1178
PACKER	
Faihare to pay when due	1189
Insufficient funds checks issuing	1189
PAYMENT	
Failure to pay when due	1218
SHIPPERS' PROCEEDS ACCOUNT	
Failure to deposit into1218,	1216
Failure to maintain	1216
Fallure to maintain properly	218
Missuse of funds	216
SUPPLEMENTAL ORDER	
Bending requirements, in compliance with, suspension terminated	220
SUSPENSION OF REGISTRATION	
Suspended fee:	
14 days	106
75 days	
90 days	109
2½ years	76
Until in compliance with bonding requirements	82
Until scivent	75
PERISHABLE AGRICULTURAL CUMMODITIES ACT, 1939	
ADMISSION	
Respondent admits not paying for produce	99

CUMULATIVE SUBJECT INDEX MAY-JUNE 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1910-Cont.

- /	PPEAL PAGE
	Motion denied 1240
	Order denying
E	ANKRUPTCY
	Reparation action continued panding bankruptcy proceeding1871, 1978, 1429
C	ONTRACT
	Breach of, failure to prove
c	ONTRACT PRICE
	Liable for full contract price
c	DRRECTIONS
	Default order corrected
	DUNTERCLAIM
	Dismissal of
	MAGES
	Rosed on percent of defects
	Denied
	Failure to submit aufficient evidence of loss
D	SPAULT
	Default order reinstated
DI	8MISSAL
	Amount of damage equal contract price
	Complainant filed claim in another court
-	Complaint is without merit
1	lo new evidance
	etition for reconsideration denied
1	etition for recensideration dismissed

Respondent tendered check to complainent in full settlement...1870, 1379, 1880.

1429

CUMULATIVE SUBJECT INDEX MAY-JUNE 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1980-Cont.

PURCHASE PRICE—Cont. PAGE
Failure to pay and/or failure to pay when due
Failure to psy in full
Failure to pay promptly
RECONSIDERATION/REOPEN
Correction of prior order1869
Order reopening after default
Petition for reconsideration denied
Petition for reconsideration dismissed
Reinstating default order
REPARATION AWARDED
Admission of liability
Belances due and owing on transactions1265, 1268, 1274, 1278, 1280, 1283, 1293, 1284, 1347, 1358
Failure to pay
Liable for contract price
Method atterbating payment
Respondent admits receiving and accepting produce
STAY ORDER
Pending filing of petition for reconsideration
Pending motion for reconsideration
Pending metion to recons or reconsider
Ponding petition for reconsideration
Pending petition to rehear and reopen
Pending petition to reopen after default1425, 1428, 1428
Pending reply to notice to show good cause1428, 1428, 1424
Pending submission of good cause for not filing1428
Varated1377, 1427
Vacated—prior order reinstated
WARRANTY
Breech of, failure to prove

S158 CUMULATIVE SUBJECT INDEX MAY-JUNE 1985 PLANT QUARANTINE ACT

. 46
143
. 14
145
143
145
144
145
140
144
144
144

3129 PAGE

CIVIL PENALTY1466 00 8200 00 Of \$400.00 Of \$825.00.______1476 Of \$900,00 _______1469 Of \$1,000.60 ________1477 DISMISSAL Granted VETERINARY ACCREDITATION Surrendon PACKERS AND STOCKYARDS ACT, 1921 ACCOUNTS AND DECORDS ACCOUNTS OF SALE OR PURCHASE

Violation of _______1490, 1497, 1596, 1509, 1517, 1635, 1538, 1540

00 \$250.50

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985 ANIMAL GUARANTINE AND RELATED LAWS

BRUCELL Octo

BONDING REQUIREMENT

CHECKS OR DRAFTS

CIVIL PENALTY

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985 PACKERS AND STOCKYARDS ACT, 1921—Cont.

CIVIL PENALTY-Cont. PAGE Of \$1,800.00..... Of \$2,000.00 Of \$10,000.00..... CONSIGNMENT Engaging in any act that would operate as a freud or desait re-DEALER Accounts and records, fully and correctly disclose all transac-DEALER AND MARKET AGENCY Engaging in any act that would operate as a fraud or deceit regarding purchase or sale of livestock..... Failure to deposit into and/or maintain properly "Shippers' Pro-MARKET AGENCY Suspended as a registrant for 14 days and thereafter until custo-

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985 PACKERS AND STOCKYARDS ACT, 1921—Cont.

PAGE NET PROCEEDS PACEED Accounts and records, fully and correctly disclose all transac-PURCHASE PRICE SCALES AND WEIGHING Palling to operate livestock scales in accordance with regula-SHIPPERS' PROCEEDS ACCOUNT Failure to maintain properly..... 1494, 1591, 1506, 1511, 1515, 1518, 1525, 1527, 1536 SUPPLEMENTAL ORDER Bonding requirement, in compliance with, suspension terminat-Suprension provisions medified 1542 SUSPENSION OF BEGISTRATION Suspended for 14 days and thereafter until custodial account deficit is elimi-21 days and thereafter until contodial account deficit is olimi-123 days and thereafter until in compliance with bonding re-

C

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985 PACKERS AND STOCKYARDS ACT, 1921-Cont.

SUSPENSION OF REGISTRATION—Cont.	PAGE
6 months and thereafter until oustodial account it deficit is eliminated	1497, 1527
6 months and thereafter until in full compliance with bonding requirements.	1527
8 menths and thereafter until in full compliance with bending requirements.	
5 years	1499
Until in compliance with bonding requirements.	. 1490, 1585
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1931)
ACCEPTANCE OF COMMODITY	
By unloading	. 1684, 1680
Causing liability for freight	
Mixed trucklead treated as commercial unit	
Untimely rejection	1662
CCOUNTINGS	
Failure to account truly and correctly	1672
ANKRUPTCY	
Reperation action continued pending bankruptcy preceeding	1762
OMPLAINT	
Diaminspi of	1720
ONTRACT	
Breach of, burden of proof on complainant	1648
Byldence necessary in unwritten contract dispute	1630
DNTRACT PRICE	
Linble for full contract price	1662
DNTRACT TERM	
Breach of, grade of produce and shipping condition	1057
Failure to make grade	1714
F.O.B. or delivared sola	1852
Modification of original	1699
DUNTERCLAIM	
Diemissal of	1670

CUMULATIVE SUBJECT INDEX
JULY-AUGUST 1985
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

COUNTERCLAIM-Cont. PAGI	
Dismissal of, complaint was untimely filed	
Dismissal of, failure to prove breach of warranty	
COURT DECISION	
U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division—Payment subject to PACA trust	
U.S. Court of Appeals, District of Columbia Circuit—Motion for stay denied	
DAMAGES	
Breach of suitable shipping condition warranty1662	
Disposition of goods necessary to prove damages	
Failure to prove	
DELIVERED SALE	
Contract terms disputed	
Respondent's claim not supported	
DISMISSAL	
Complainent authorized diamissal of complaint	
Complainant felled to prove existence of normal transportation conditions	
Effective rejection	
Setoff sllowed	
FAILURE TO PAY PROMPTLY	
Publication of the facts	
Revocation of license	
F.O.B. SALE	
Respondent responsible for transportation delay	
Respondent's claim of delivered sale not supported	
Relling acceptance or destination sale	
Suitable shipping condition warranty, not applicable	
INSPECTION	
Delayed inspection cannot confirm earlier condition	
Information on inspection certificate not sufficient to prove com- modify site	

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1990—Cont.

Partisl only
JURISDICTION
Interstate nature of sale upheld
LICENSE
Person licensed as a dealer under the Act is subject to discipline whether or not actually a dealer
Revocation of
MARKET PRICE
Used to determine damages
MARKET PROTECTION
Adjustment for market decline never conveyed
Produce purchased under guarantee of
MISREPRESENTATION
Of selling prices or other charges
PURCHASE PRICE
Pailure to pay in full
Sotoff due to cover purchase
RECONSIDERATION/REOPEN
Motion to reopen after default, denied
Order reopening after default
Petition for reconsideration, denied
Petition for reconsideration, dismissed1782, 1735, 1738, 1741, 1745, 1748, 1751, 1752
Petition to reopen, denied
REJECTION
Effective rejection puts burden of proof on shipper
Failure to notify shipper when shipper unknown
Untimely
Wrongful
REPARATION AWARDED
Admission of liability

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1936—Cost. REPARATION AWARDED—Cost. PAGI

- Conc	PAGI
Dispute regarding which party should receive payment	170
Failure to pay	1674, 1725
Lie detector tests not admissible.	1686
Rules of Practice requirements for respondent's answer	1697
RESALE	
Reasonableness as test for propriety of	1714
STAY ORDER	
Pending filing of an answer to the petition for reconsideration 1734,	1785, 1749
Pending filling of an answer to the petition to reopen after de- fault.	1784
Pending filing of reason for not filing a timely answer	1769
Vacated-prior order reinstated	750, 1766
SUITABLE SHIPPING CONDITION	
Breach of warranty	881, 1717
Breath of warranty, failure to prove	180, 1727
Warranty voided when transportation conditions not normal	1684
TRANSPORTATION SERVICES AND CONDITIONS	
Abnormal, failure to prove	1662
Abnormal temperatures	1626
Burden of proving normal conditions on complainant	1684
UNDISPUTED AMOUNT	
Order requiring payment of	5, 1726
WARRANTY	
Breach of	6, 1727
Breach of, failure to prove	1666
PLANT QUARANTINE ACT	
CIVIL PENALTY	
Of \$260.00	
Of \$275.06	
Of \$401.00	
Of \$500.00	. 1769

3146

CUMULATIVE SUBJECT INDEX JULY-AUGUST 1985 PLANT QUARANTINE ACT-Cont.

CIVIL PENALTY—Cont.	PAGE
Of \$750.60	1776
Of \$1,600.00.	1771
DISMISSAL	
Granted	1, 1782
GARBAGE	
Storage of regulated garbage abourd vessel	6, 1788
PROHIBITED/RESTRICTED ARTICLE	
Disinfecting not done	1771
Pumigation not done	1771
Imported without permit	9, 1778
No. A. D. D. C.	

CUMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985 AGRICULTURAL MARKETING AGREEMENT ACT, 1937

Of interlocutory appeal.....

AGRICULTURAL MARKETING ACT. 1846

SANCTION

Withdrawal and denial of poultry grading and acceptance serv-

ANIMAL QUARANTINE AND RELATED LAWS

AVIAN INFLUENZA

DISMISSAL

BRUCRLLORIS

CIVIL PENALTY

Of \$950.00 1899

Of 8350.00 1828 Of \$375.00 1817

Of 8750.00 1805, 1806, 1830

Of \$10,360.00...

DISMISSAL.

41

PAG

... 180

... 1881. 188[©]

CUMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985 ANIMAL WELFARE ACT

CIVIL PENALTY PAGE
Of \$500.001839
Of \$1,000.00, suspended
Of \$2,000.00, suspended
DISMISSAL
Granted
No longer operating business
LICENSE
Revoked
SALE OR TRANSPORTATION
Of any snimal without obtaining a license
STANDARDS AND REGULATIONS
Coase and desist from violating
RGG RESEARCH AND CONSUMER INFORMATION ACT
DISMISSAL
For good cause, without prejudice
FEDERAL MEAT INSPECTION ACT
INSPECTION SERVICES
Withdrawel and denial of
BANCTION
Withdrawal and denial of meet and poultry grading and accept- ance corvices
HORSE PROTECTION ACT
CIVIL PENALTY
Of \$2,000.091918
PACKERS AND STOCKYARDS ACT, 1021
ADVERTISING AND PROMOTIONS
Proportionally equal terms to all customers
AGENT (REPARATION)
Agent transacted unguid-for purchases for himself, not in capacity as agent

CUMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985 PACKERS AND STOCKYARDS ACT, 1921—Cont.

BONDING REQUIREMENT	PAGI
Violation of	1999 199
CHECKS OR DRAFTS	
Issuing insufficient funds checks 1923, 1925, 1927, 1928, 1965,	1867, 1978, 1997
CIVIL PENALTY	,,,
Of \$2,500.60	1097 1992 1998
Of \$5,000.00	
Of \$10,000.00	
Of \$10,010.00, following court's remand	9909
Of \$20,060.00	1989
DEALER	
Cense and desist from any business requiring bonding under the	1990 1079
Failure to pay and/or failure to pay when dua	29 1004 1002
Issuing insufficient funds checks	R 1094 1007
Suspended as a registrant 192	5, 1004, 1007
DEALER AND MARKET AGENCY	0, 1001, 1007
Pailure to deposit into and/or maintain properly "Shippers' Pro- ceeds Account	
Failure to pay when duc.	1969
Issuing insufficient funds checks	1000, 1907
Ordered not to engage in business for specified period	1907, 1978
Sespended as a registrant	1000 1000
Weighing violations	1900, 1978
NSOLVENCY	
Gense and desist from engaging in business as a dealer or market agency while insolvent.	1000
Engaging in business while insolvent	1007
MARKET AGENCY	
Come and desist from any business requiring bonding under the	000 1004
Prohibited from business for specified period	1001
Saspendad as a registrant	1999

CUMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985 PACKERS AND STOCKYARDS ACT, 1921—Cont.

NET PROCEEDS PAGE
Fallure to remit when dea
Using funds received to pay for livestock for their own pur-
PACKER
Failure to pay and/or failure to pay when due
Praudulently sitering weights and collecting payment on that hasks
Insufficient funds checks, issuing
Purchase price, failing to pay in full
PURCHASE CONTRACTS OR AGREEMENTS
Agent transacted unpaid-for purchases for himself, not in capac- ity as agent
SCALES AND WEIGHING
Francisiently eltering weights
SHIPPERS' PROCEEDS ACCOUNT
Pellure to deposit into
Pellure to maintela properly
SUPPLEMENTAL ORDER
Bording requirements, in compliance with, suspension terminated. 2808, 2004
Civil penalty assessed following court's remand
No longer insolvent
SUSPENSION OF REGISTRATION
Suspended for:
21 days and thereafter until shortage eliminated
28 daya
45 days and thereafter until deficit eliminated
120 days
126 days and thereafter until solvent
4 months
§ months and thereafter until in full compliance with bonding

CUMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985 PACKERS AND STOCKYARDS ACT, 1921—Cont. SUSPENSION OF BEJSEPLATION. ACT.

ACCUPATION OF REGISTRATION—Cont.	PAGE
9 months	1007
l year	1919
5 years and thereafter until solvent	
Datil in couplinace with heading requirements	
UNFAIR AND/OR DECEPTIVE PRACTICES	
Fraudulent weights, collecting payment on that busis	1082
PERISHABLE AGRICULTURAL COMMODITIES ACT, 193	
ACCEPTANCE OF COMMODITY	
By ankeding	2146
By signing ticket evidencing receipt	
Shipment by respondent of portion constitutes accuptance of entire land.	
ACCORD AND SATISFACTION	
Bona fide dispute not present	2124
ACCOUNTINGS	
Weight discrepantes	
AGREEMENT	
Protection, not applicable because price did not decilito	2128
BANKRUPTCY	
Complaint dismissed, matter "undoubtedly resolved" by Bunk- rupky Churt.	2180
Official notice taken of respondent's bankruptcy ploadings	2021
Reparation action continued pending bankruptcy proceeding	2158
сикскя	
Tendered in full settlement of disputed amount	
Negotiating checks does not prove accord and satisfaction	2124
COMPLAINT	
Dismissed of	
CONTRACT	
Assignment claimed following dissolution of partnership	
Breach of, undersized commodity	2110

CUMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985 PERISHABLE AGRICULTURAL COMMODITIES ACT, 1939—Cont.

CONTRACT—Cont. PAGE
Contractual relationship proved
F.O.B. assumed absent term explicitly allocating less
Modification of2188
CONTRACT TERM
F.O.B. sale, grade condition
Protection agreement 2128
COUNTERCLAIM
Dismissal of 2017
DAMAGES
Fallure to prove
Pailure to ship goods in suitable shipping condition
DISMISSAL
Complainant authorized dismissal of complaint
Complainant did not file timely complaint
Complainant filed claim in another court
Of complaint, matter "undoubtedly resolved" by Bankruptcy Court
Of counterclaim, failure to prove breach of contract
Secretary lacks jurisdiction
Short weight verified
DUMPING
Certificate not secured
FAILURE TO PAY PROMPTLY
Publication of the fects
Revocation of license
F.O.B. SALE
F.O.B. contract assumed absent term explicitly allocating loss
INSPECTION
Neutral third party must inspect scientific sampling
URISDICTION
Failure to prove goods in interstate commerce. 2135

CHMULATIVE SUBJECT INDEX
SECTEMBER-OCTORER 198
PERISHABLÆ AGRICULTURAL COMMODITIES ACT, 1810—Conl. JURISDICTION-Cont

artistric rion	- Cont.
Statute of limitations	PAGE
Statute of limitations exceeded	
Application for donied	
Application for deniral	2543
Memoration of	2010, 2021
Househ of warranty, and mouse	
Breach of warranty, not proved	2ISS
Protection agreement not applicable, price RECONSIDERATION/RECORDS	
RECONSIDERATION/REOPEN	dist not decline2128
Petition to reconsider, denied.	
Petition to propen, denied	2154, 2157
Ontinuely	
Admission of Emidity	
ment inch evidentiary volue	2001
Resonable cure in minimizing loss	0400
Product filing of motion for reconsistention	2160
r rannog titing of prtition to reupon after defer	lt
remaining meetings to reconsider	9141
Frinding proceedings for Judicial review	2000 2001
Vircated - prior unfor refustated	2167, 2161
SUITABLE SRIPPING CONDITION	
Breach of warranty	
Breach of warranty, failure to pane	2967, 2078
Warranty applicable only at contract destination	2110

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930-Cont.

PAGE TRANSPORTATION SERVICES AND CONDITIONS Respondent liable in F.O.B. sale for damage of produce while in transit..... UNDISPUTED AMOUNT Order correcting prior order. 9159 WARRANTY

PLANT QUARANTINE ACT

CIVIL PENALTY

2201 Of \$270.00.....

Of \$875.00______2184, 2187

2188, 2190, 2196, 2214 Of \$2,100.00...

Of \$2,000.00. 9915

DISMISSAL GARBAGE PROHIBITED/RESTRICTED ARTICLE Imported with mitigating circumstances not relevant......

COMULATIVE SUBJECT INDEX SEPTEMBER-OCTOBER 1985

PROBERTED/RESTRICTED ARTICLE-Cont. RULES OF PRACTICE

Completeant not required to soud courtesy copy of completes to proposition's attornoys.

INSPECTION SERVICES

PLANT QUARANTINE ACT-Cont.

POULTRY PRODUCTS INSPECTION ACT

PAG

