

AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

THE PRODUCE PLACE v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 95-1154.

Decided July 23, 1996.

(Cite as: 91 F.3d 173)

Alteration of inspection certificates - Interstate commerce - Administrative sanctions versus criminal sanctions - Fraudulent intent.

The United States Court of Appeals for the District of Columbia Circuit found that Petitioner's challenges to the Department of Agriculture's order lacked merit and, therefore, denied its petition for review. The Secretary suspended Petitioner for 90 days for fraudulently altering inspection certificates. The Court rejected Petitioner's argument that the Secretary has the burden of "proving that a particular shipment of produce was intended for interstate commerce in addition to showing the the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for sale to or by a produce dealer that does a substantial portion of its business in interstate commerce." The Court held that a criminal conviction is not required before administrative penalties may be imposed. Finally, the Court found that fraudulent intent was proven where it was shown that Petitoiner "knowingly misrepresented the temperature recorded by the inspector and intended that others would rely upon his misrepresentation."

Before: GINSBURG, ROGERS and TATEL, Circuit Judges.

**UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT**

GINSBURG, Circuit Judge.

The Produce Place, a wholesale dealer in fruits and vegetables, petitions for review of a Department of Agriculture order suspending for 90 days its license to do business. Having determined that the Petitioner's challenges to the legal and factual bases of this order lack merit, we deny the petition.

I. BACKGROUND

The Perishable Agricultural Commodities Act, codified as amended at 7 U.S.C. §§ 499a *et seq.*, provides that no person may carry on the business of a

commission merchant, dealer, or broker (as defined in the Act) without a license issued by the United States Department of Agriculture. 7 U.S.C. § 499c. The PACA also proscribes certain "unfair conduct," and specifically makes it unlawful for a licensee

to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer . . .

7 U.S.C. § 499b(4). Violation of this provision may result in a 90-day license suspension. 7 U.S.C. §§ 499h(a).

The Produce Place is a wholesale produce dealer located in Los Angeles. A substantial portion of its business involves the interstate purchase and sale of fruits and vegetables. In October and November 1992 the Produce Place purchased six loads of berries from two California growers through the growers' sales agent, Sandy Jurach. These so-called "late-season berries" were weaker than berries harvested earlier in the season and thus were not suitable for shipment over a long distance.

Shortly after each load arrived, a USDA-authorized inspector noted the general condition of the fruit and measured and recorded its temperature on a certificate issued to the Produce Place. Knowing the temperature helps a buyer or seller determine whether produce has been handled properly since it left the seller's hands, an important fact because the seller usually warrants that the produce was in suitable condition when shipped. If the produce arrives in poor condition despite proper handling--including maintenance of the proper temperature--then the seller may be liable to the purchaser under the warranty.

After the berries arrived Ted Kaplan, an employee and one-third owner of the Produce Place, reported to Sandy Jurach that there were problems with their condition and asked for a price reduction. Jurach does not grant such price reductions without a federal inspection certificate documenting the condition in which the shipment was received. Kaplan altered the temperature recorded on the six USDA inspection certificates and faxed her copies of them. He claims that he did this because federal inspectors require that each shipment be removed from coolers for inspection, resulting in a temperature increase and a recorded temperature that does not accurately reflect the temperature at which the shipment was transported and stored. The inspection certificates indicated that

each shipment had sustained bruising and decay, and Jurach did reduce the prices for the various shipments by as much as 75%, for a total reduction of \$9,111.00. She authorized the price reductions based not upon the (altered) temperatures reported, but upon her knowledge the berries were weak and upon the information on the certificates concerning the general condition of the shipments.

During an investigation inspired by an anonymous tip regarding irregularities in the records maintained by the Produce Place, a USDA investigator discovered the altered inspection certificates. The Fruit and Vegetable Division of the Agricultural Marketing Service (USDA) charged the Produce Place with "willful, flagrant and repeated violations" of 7 U.S.C. § 499b(4). After a two-day hearing, an Administrative Law Judge found that the Produce Place had committed the alleged PACA infractions, and the departmental Judicial Officer eventually imposed a 90-day license suspension.

II. ANALYSIS

The Produce Place raises three issues in its petition for review: (1) whether the transactions at issue occurred within "interstate commerce" as that term is used in the PACA, and thus whether the Secretary of Agriculture had jurisdiction over this case; (2) whether 7 U.S.C. § 499h(a)(2) provides the sole authority for administrative sanctions in this case, and thus whether the Secretary was empowered to act against the Produce Place even though it had not been convicted of the misdemeanor set out at 7 U.S.C. § 499n(b); and (3) whether substantial evidence in the record supports the ALJ's finding that Kaplan altered the inspection certificates with fraudulent intent. We find no merit to the Petitioner's argument on any of these issues.

A. "Interstate Commerce"

The Produce Place argues first that the six transactions at the source of this case did not occur in "interstate commerce" as that phrase is used in the Act. (The Petitioner does not argue that the transactions are beyond the constitutional reach of the Congress under the Commerce Clause of the United States Constitution, Art. I §7.) The PACA provides both its own definition of "interstate commerce," 7 U.S.C. § 499a(3), and in § 499a(8) a guide to its interpretation:

A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign

commerce if such commodity is part of *that current of commerce usual in the trade* in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another. . . .

The Produce Place argues that the raspberries and strawberries at issue here were deliberately reserved for intrastate commerce because their weak condition made them unsuitable for interstate shipping and that, therefore, they never entered "the current of [interstate] commerce." According to the ALJ, however, the six shipments of strawberries and raspberries with which we are concerned did enter the current of interstate commerce because (1) strawberries and raspberries regularly move in interstate commerce, (2) the Produce Place regularly engages in interstate purchases and sales of produce, and (3) the Produce Place sold some of these strawberries and raspberries to a national hotel chain. In these circumstances, the ALJ explained, the exclusion of the six shipments from the Secretary's jurisdiction would "greatly burden the administration of the Act."

We must reject the Petitioner's notion that the Congress intended to impose upon the Secretary the burden of proving that a particular shipment of produce was intended for interstate commerce in addition to showing that the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce. The Produce Place does not dispute that this would significantly burden the administration of the Act and concedes that the Secretary's understanding of "current of commerce" is due deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984). Indeed, we have repeatedly held that an agency "can legitimately take into account its administrative burdens when defining an ambiguous term," *National Fuel Gas Supply Corp. v. FERC*, 900 F.2d 340, 345 (D.C. Cir. 1990) (citing cases), and the term "current of commerce" is nothing if not ambiguous.

As a textual matter, the Secretary has offered a reasonable interpretation. In the spirit of the riverine metaphor used by the Congress, we read the Secretary implicitly to suggest that the current of interstate commerce should be thought of as akin to a great river that may be used for both interstate and intrastate shipping; imagine a little raft put into the Mississippi River at Hannibal, Mo., among the big barges bound for Memphis, New Orleans and ports beyond, with St. Louis as the rafter's modest destination. On this view, a shipment of

strawberries can enter the current of interstate commerce even if the berries are reserved exclusively for sale and consumption within the state where they were grown. Or consider the perhaps more contemporary case of a truck that regularly uses an interstate highway to carry shipments of a commodity, one of which shipments is to an intrastate destination.

Contrary to the Petitioner's argument, nothing in *Stafford v. Wallace*, 258 U.S. 495, 42 S. Ct. 397, 66 L.Ed. 735 (1922), precludes the Secretary's interpretation. That case involved the constitutionality of the "current of commerce" provision in the Packers and Stockyards Act of 1921, 7 U.S.C. § 183. Relying upon *Swift & Co. v. United States*, 196 U.S. 375, 25 S. Ct. 276, 49 L.Ed. 518 (1905), an antitrust decision from which the Congress had in fact lifted the "current of commerce" metaphor, the Supreme Court held that even a transaction occurring wholly within an individual stockyard is in the current of interstate commerce: "The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East and from one state to another." 258 U.S. at 516, 42 S.Ct. at 402. The Court did not, however, address the status of a particular stockyard transaction that facilitates only intrastate sales, the case that would be analogous to this one.

Nor can the Petitioner cite any prior disciplinary case in which the Secretary has adopted an interpretation of 7 U.S.C. § 499a(8) that is inconsistent with the interpretation he advances in this case. The Petitioner does cite *C.B. Foods, Inc.*, 43 Agric. Dec. 489 (1981), but it is not on point because the perishable commodities at issue there had traveled interstate before the intrastate sale that gave rise to that case.

We do not understand the Secretary to take the position that the Produce Place could not possibly have demonstrated--perhaps based upon the maintenance of rigid separation between its interstate and intrastate business--that some shipments of strawberries pass through its hands without entering the current of interstate commerce. His main concern appears to be whether the separation between the current of interstate commerce and a separate and distinct stream of intrastate commerce is sufficiently clear that recognizing the distinction would not unduly burden the administration of the Act. As noted, in this case the Produce Place has not even disputed the Secretary's conclusion that he would face a formidable administrative burden if the Petitioner were to prevail here.

B. Administrative vs. Criminal Sanctions

In addition to authorizing the Secretary to suspend the license of a dealer

who "make[s], for a fraudulent purpose, any false or misleading statement in connection with any transaction," 7 U.S.C. § 499h(a)(1) and 499b(4), the PACA authorizes the Secretary to suspend the license of a dealer convicted of a misdemeanor under 7 U.S.C. § 499n(b) ("Whoever shall falsely make, issue, alter, forge, or counterfeit . . . any certificate of inspection . . . shall be guilty of a misdemeanor"). 7 U.S.C. § 499h(a)(2). The Produce Place has not been convicted under § 499n(b), and the Secretary accordingly proceeded against the company under §§ 499h(a)(1) and 499b(4).

The Produce Place argues that because § 499n(b) sanctions the specific offense of "forg[ing] . . . a certificate of inspection," by the principle that *expressio unius est exclusio alterius*, forgery cannot be thought also to come within the more general condemnation of "false [] statements" in § 499b(4). The Produce Place argues also that because § 499b(6) makes it unlawful to "alter . . . any . . . notice placed upon any container" the same principle precludes reading "false [] statement" in § 499b(4) to encompass the purposeful transmission of a fraudulently altered inspection certificate. The first line of reasoning leads to the peculiar conclusion that the Secretary, who has general authority to suspend a licensee for making a false statement must, in the case of a particularly egregious type of false statement, to wit, a forged inspection certificate, await a criminal conviction before he can suspend the miscreant. The second line of reasoning leads to the equally peculiar conclusion that prior to its enactment of the criminal sanction in § 499n(b), the Congress had provided the Secretary with no authority to suspend a licensee who had fraudulently altered an inspection certificate and used it to facilitate a transaction.

In any event, the PACA authorized the Secretary to sanction a dealer for making a false statement long before the Congress added a criminal penalty for forging an inspection certificate. That the Congress found the threat of imprisonment necessary in order to deter that particular type of false statement in no way suggests that the Congress had not already empowered the Secretary to take administrative action against a forger under § 499b(4). Nor does anything in the legislative history provided by the Produce Place suggest that by adding a criminal provision the Congress intended to limit the Secretary's pre-existing administrative authority. Section 499h(a)(2), which authorizes the Secretary to suspend or revoke the license of any dealer convicted under the criminal provision (§ 499n(b)) is therefore better understood as a means merely of relieving the Secretary, when the inculpatory facts have already been found beyond a reasonable doubt in another forum, of the procedural burden entailed in making a factual determination under § 499b(4), and not as creating the exclusive means of suspending the license of a forger.

Moreover, as the Secretary points out, the terms "remove, alter, or tamper with" in § 499b(6) do not reach the full extent of Kaplan's conduct in this case; he not only altered the inspection certificate, he submitted them to Jurach. While one might conclude from the specific terms of § 499b(6) that the Secretary cannot proceed under § 499b(4) against a licensee who has merely altered an inspection certificate without somehow using it in connection with any transaction--indeed, it is not clear that altering a certificate and then putting it in a file counts as a "mak[ing a] statement"--we have no occasion to reach that issue today. For now it is enough to conclude that neither of the Petitioner's *expressio unius* arguments is at all persuasive.

C. Evidence of Fraudulent Intent

Finally, the Produce Place argues that the record does not contain substantial evidence indicating that Ted Kaplan altered the inspection certificates "for a fraudulent purpose." Kaplan admitted at the hearing, and the ALJ found, that Kaplan altered the certificates in case one of the Petitioner's customers, Ralph's Supermarkets, questioned whether the berries had been properly chilled. The ALJ also found that Kaplan had altered the certificates in order to support his request for a price adjustment from his supplier, Sandy Jurach.

The Produce Place does not dispute either finding but argues that they do not establish a fraudulent purpose. According to the Petitioner, Kaplan was merely *trying to correct the information on the certificate in order to compensate for "what he perceived to be a flaw in the inspection process"--namely, that it required removing the berries from the cooler so far in advance of the actual inspection that their temperature would rise between three and seven degrees--rather than to mislead either Jurach or Ralph's as to the actual temperature at which the berries had been transported or stored.*

Even if all this is true, it is wholly beside the point, which is that Kaplan knowingly misrepresented the temperature recorded by the inspector and intended that others would rely upon his misrepresentation. Kaplan's honest belief that the certificates did not reliably indicate the condition of the berries is not a license for him to change them. Those with whom the Produce Place deals may understand quite well the imperfections in the inspection process--Jurach testified that she did--and may adjust for those imperfections when considering the temperature recorded on an inspection certificate; then the unaltered information, even if uncertain, would be valuable within the trade. Indeed, that Kaplan altered the certificates in order to facilitate transactions with Ralph's and Jurach is ample evidence of his belief that the temperatures recorded on those

certificates would matter to them. Whether they did in fact matter (and Jurach testified that they did not matter to her in this case) is not relevant to the validity of the ALJ's conclusion that Kaplan's purpose was fraudulent.

III. CONCLUSION

For the foregoing reasons, the petition for review is *denied*.

POTATO SALES COMPANY, INC. v. DEPARTMENT OF AGRICULTURE.

No. 95-70845.

Decided August 5, 1996.

(Cite as: 92 F.3d 800)

Misrepresenting the place of origin of apples - Willful and flagrant violations - License revocation.

The United States Court of Appeals for the Ninth Circuit denied the petition for review of the Secretary's decision revoking Petitioner's license for misrepresenting the place of origin on 7,554 cartons of New Zealand Apples. Petitioner did not dispute that it violated the PACA, therefore, the Court's determination was limited to whether the violations were flagrant, repeated and willful, and whether license revocation was appropriate. The Court found that the Judicial Officer correctly determined Petitioner's conduct to be flagrant based on the fact that it was intentional, knowing, and deliberate. The Judicial Officer's finding that Petitioner's conduct was flagrant was not arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law. It was therefore, not necessary for the Court to decide whether Petitioner's conduct was also repeated. Petitioner's conduct was willful, as it was done either intentionally or with careless disregard of the regulations. License revocation is consistent with Department of Agriculture policy, and the Judicial Officer considered the appropriate factors when determining the sanction.

Before BRUNETTI and RYMER, Circuit Judges, and Tanner, District Judge.*

*Honorable Jack E. Tanner, Senior United States District Judge, Western District of Washington, sitting by designation.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

RYMER, Circuit Judge

Potato Sales Company, Inc. petitions for review of the decision of the Secretary of the United States Department of Agriculture (USDA),¹ adopting the decision of the administrative law judge that revoked Potato Sales's license under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a *et seq.* for misrepresenting the place of origin on 7,554 cartons of New Zealand apples. We have jurisdiction, 28 U.S.C. § 2342 and deny the petition for review.

I.

Potato Sales holds a license under the PACA. Sometime in March or April 1992, Lynn Chou of TSL Trading, Inc., d/b/a SL International, approached Don Beck, Potato Sales's vice president in charge of fruit sales and son-in-law of Jack Berlin, its president and sole shareholder. Chou wanted to buy New Zealand apples from Beck, but indicated that her customer, Ever Justice Corporation, required them to be repacked so that the lids would not identify the products as New Zealand apples. Beck told Chou that this practice was "not customary trade" and was "not something that Potato Sales ordinarily would do." Nevertheless, Beck agreed to the relidding to "satisfy somebody to do the business and get the order." Potato Sales charged \$33 per carton plus an additional \$5 per carton for the relidding. Beck ordered box lids from a supplier in Washington. Chou and a representative from Ever Justice inspected a sample pallet before paying for the apples.

At some point, SL International asked Potato Sales to peel the stickers from the apples for the last 6 pallets loaded at the tail of each container, but Beck didn't do this. In any event, four Potato Sales employees worked for nine days each to relid the apple cartons ordered by SL International.

During April and May Potato Sales filled three orders and shipped a total of nine trailers with 7,554 relidded cartons of New Zealand gala apples to SL International, which in turn sold them to Ever Justice for shipment to Taiwan

¹Donald A. Campbell, the Judicial Officer (JO) of the USDA, entered the decision and order. The JO's order is deemed to be the final order of the Secretary of the USDA pursuant to 7 U.S.C. § 499j and 7 C.F.R. § 1.142(c).

under an invoice listing the commodity as "U.S. Fresh Apples." Taiwanese officials inspected the second shipment and found that the apples were misbranded. The third shipment was then diverted to a buyer in Hong Kong.

The USDA instituted proceedings against all three entities, alleging "flagrant," repeated," and "wilful" violations of PACA, 7 U.S.C. § 499b(5), and seeking revocation of each entity's PACA, license.² Ever Justice settled before the administrative hearing, agreeing to a 90-day suspension of its PACA license and a \$50,000 penalty.

By the time of the hearing, Potato Sales was out of business. It had filed for bankruptcy, had no employees, and both Beck and Berlin were employed elsewhere.

The Chief ALJ, Victor W. Palmer, concluded that Potato Sales and SL International violated PACA by misbranding the cartons; that the violations were "flagrant," "repeated," and "wilful"; and that Potato Sales's PACA license should be revoked. The ALJ's conclusions were adopted on appeal by the Judicial Officer, Donald A. Campbell. Potato Sales timely filed this petition for review.

II.

The scope of our review of administrative decisions is narrow: administrative agency decisions will be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . ." *Farley and Calfee, Inc. v. U.S. Dept. of Agriculture*, 941 F.2d 964, 966 (9th Cir. 1991) (citation and internal quotation omitted). We are to uphold an agency's findings of fact if they are supported by substantial evidence. *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 215 (9th Cir. 1995). An agency's conclusions of law are subject to de novo review, with deference to the agency's "reasonable construction" of the statute and regulations. *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989).

We may not overturn the Secretary's choice of sanction unless it is "unwarranted in law . . . or without justification in fact." *Farley*, 941 F.2d at 966 (citation and internal quotation omitted). "The fashioning of an appropriate remedy is for the Secretary of Agriculture and not for the court." *Magic Valley*

²Section 499b(5) makes it unlawful for a licensee to misrepresent the State or region of origin of any perishable agricultural commodity. PACA in turn provides that no entity may carry on the business of a commission merchant, dealer, or broker in perishable agricultural commodities without a valid and effective PACA license. 7 U.S.C. § 499c(a).

Potato Shippers, Inc. v. Secretary of Agriculture, 702 F.2d 840, 842 (9th Cir. 1983) (citation and internal quotation omitted). Thus, "[t]he court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in (his) choice of the remedy.'" *Id.* (citation omitted).

III.

PACA, 7 U.S.C. §§ 499a *et seq.*, makes it unlawful for any licensee to misrepresent the origin of a perishable agricultural commodity, 7 U.S.C. § 499b(5), and provides for license revocation for "flagrant" or "repeated" violations, 7 U.S.C. § 499h(a). Where the violation is "willful," license revocation proceedings may be initiated without a prior written warning and opportunity to demonstrate or achieve compliance. 7 C.F.R. § 46.45(e)(5); *see also* 5 U.S.C. § 558(c). Here, the parties do not dispute that Beck's conduct is imputed to Potato Sales, 7 U.S.C. § 499p, and that Potato Sales violated PACA by relidding 7,554 cartons of New Zealand apples. Nor do they dispute that Potato Sales did not receive a written warning or an opportunity to cure prior to the institution of this disciplinary action. Accordingly, we need determine only whether the Secretary properly concluded that Potato Sales's violations were "flagrant" or "repeated" and "willful" and, if so, whether the Secretary acted within his authority by revoking Potato Sales's license.

IV.

Potato Sales argues that the Secretary erred in concluding that its violations were "flagrant" because 7 C.F.R. § 46.45 defines its conduct as either a "serious" or "very serious" violation; the Secretary improperly relied primarily on the number of lots involved; and the Secretary erroneously distinguished other misbranding cases. We disagree.

Examples given in PACA regulations suggest that a "flagrant" violation involves knowing conduct, whereas a "serious" or a "very serious" violation typically involves only accidental or negligent conduct. *Compare* 7 C.F.R. §§ 46.45(a)(3)(i)-(iii) (flagrant violations), with 7 C.F.R. § 46.45(a)(2)(ii) (very serious violations), and 7 C.F.R. §§ 46.45(a)(1)(i)-(iv) (serious violations). Other indicia of "flagrant" rather than "serious" or "very serious" violations are a large number of transactions, committed over a period of time. *See, e.g., In re Stemlit Growers, Inc.*, 49 Agric. Dec. 520 1990 WL 230367 (1990) ("flagrant" violations where grower sold and shipped containers of cherries labeled grade "Washington No. 1" after official inspected and informed grower that cherries failed to make

that grade); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557 (1981) ("flagrant" violation where shipper shipped nine lots of potatoes labeled grade "U.S. No. 1" after official inspected and informed shipper that potatoes failed to make that grade), *aff'd*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers*, 34 Agric. Dec. 773 (1975) ("flagrant" violation where, over the course of four years, grower sold and shipped fourteen lots of potatoes labeled "U.S. No. 1, 50 lbs Net" after officials repeatedly inspected and notified grower after each violation that shipments did not make grade), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *E. J. Harrison & Son, Inc.*, 27 Agric. Dec. 1339 (1968) ("flagrant" violation where shipper shipped six lots of potatoes marked "U.S. No. 1" when they failed at the time of shipment to make the grade). *Accord* 10 Harl, *Agricultural Law* § 72.09[3], p. 72-35 (1995) ("'Flagrant' violations have been stated to be those which are committed with knowledge of their occurrence, involve a large number of transactions, are committed over a period of time, and involve a substantial sum of money.")

Here, the JO found that Beck's conduct was intentional, deliberate, and knowing, that a large volume of produce was involved, and that the shipments spanned a period of a month and a half. These findings are supported by substantial evidence.

Potato Sales faults the JO's conclusion that its conduct was "flagrant" on the footing that his primary rationale was because the "serious" and "very serious" definitions under the regulations use the singular language "[a]ny lot of perishable agricultural commodity." We don't read the JO's decision as turning on the fact that more than a single lot was misbranded, although the quantity of cartons and number of shipments involved were factors that he took into account. Rather, the ruling was based on the JO's finding that Potato Sales's conduct was intentional, knowing, and deliberate.

Potato Sales also contends that the decision was arbitrary because it incorrectly distinguished the Secretary's three most recent misbranding decisions as far less serious than this one. We do not agree. In *In re Magic Valley*, 40 Agric. Dec. 1557, there was a dispute over the grade of the potatoes; the shipper genuinely misapprehended the distinction between shipping point and receiving point inspections; and it was a one-time occurrence involving a small portion of a single day's shipment. Likewise, in *In re Stemilt*, 49 Agric. Dec. 520, the shipper relied upon a 25-year old prior practice by inspection authorities that allowed domestic shipment even after foreign shipment was prohibited due to misbranding. In *In re Maine Potato Growers*, 34 Agric. Dec. at 795, although the grower had received several warnings of past violations over the past four years, the proceeding involved a failure to take steps to assure that no violations

would occur; it did not involve current shipment of misbranded commodities despite knowledge of the current misbranding.

Accordingly, the Secretary's conclusion that Potato Sales's violations were "flagrant" was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. We need not, therefore, decide whether Potato Sales's violations were also "repeated."

V.

Potato Sales further argues that the Secretary erred in concluding that its conduct was "wilful" because "wilfulness" requires a showing of "gross neglect of a known duty"; Potato Sales was unaware of Taiwan's import restrictions; Beck did not believe that he was misleading anyone because the customer knew what was inside the cartons; Potato Sales was at most lax or careless; and Beck was the only person in a position of authority who knew about the relidding. Therefore, Potato Sales claims, the Secretary simply "surmised without a factual basis" that Beck was deliberately deceptive. We cannot agree.

Potato Sales relies on the definition of willfulness in *Capitol Packing v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965)--that it amounts to "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof"--but we are bound by our own definition. In this circuit, a violation is "wilful" if the violator "(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements" *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 773 (9th Cir. 1985) (citation and internal quotation omitted). See also *Agricultural Law* at 72-36.

There is substantial evidence to support the Secretary's finding that the violations were "wilful." Beck charged almost a 20% premium for the relidding, gave a demonstration of the effectiveness of the relidding before payment, was asked to remove stickers only from the last several pallets in each container, expressed doubts about the propriety of his conduct, and loaded nine containers in three separate shipments with more than 7,000 cartons of New Zealand apples relidded to look like Washington apples. As the JO suggested, it is hard to imagine how this doesn't add up at least to acting in "careless disregard" of PACA's misbranding regulations.

Potato Sales points out that it was not an exporter, that Beck knew nothing about Taiwanese import restrictions, and that he could not have acted wilfully because he didn't believe that anyone would be deceived since his customer and its customer had asked for the relidding. Potato Sales also argues that the JO

improperly inferred that its conduct was willful, contrary to *Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985). In *Farrow*, the JO simply "inferred" or "assumed" intent without factual support; here, however, there is substantial evidence supporting the JO's finding that Beck's actions were deliberate and not merely negligent. Even though relidding did not deceive SL International or Ever Justice, it was deceptive. Unlike *Capital Produce Co., Inc. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991), where the evidence showed only a single substitution of products and negligent supervision instead of deliberate action, Beck went to considerable lengths to relid, buying cartons from Washington, devoting substantial work-hours to the project, and charging extra for it. In addition, while Beck did not peel off the New Zealand stickers on apples in cartons packed in the rear of the containers, he did continue to relid despite the clear signal of an effort to hide something from inspection. The JO's findings thus have substantial factual support and were not legally erroneous.

Accordingly, the JO did not arbitrarily conclude that Potato Sales's violations were "wilful." Therefore, neither prior notification nor an opportunity to demonstrate compliance was required. 7 C.F.R. § 46.45(e)(5); 5 U.S.C. § 558(c).

VI.

Potato Sales argues that the order permanently revoking its license is contrary to the USDA's own express policy, articulated in *In re Stemilt Growers Inc.*, 49 Agric. Dec. 520, 1990 WL 320367 not to remove a firm that engages in misbranding from the produce industry. While *Stemilt* did say that "it is not the policy of the Department to remove from the industry a firm that engages in misbranding," *id.* at *7, the JO there was not relying on an official policy statement from the USDA but on two prior cases involving license suspensions, *In re Magic Valley*, 40 Agric. Dec. 1557, and *In re Maine Potato Growers*, 34 Agric. Dec. 773. As none of these decisions considered conduct that put the license itself in jeopardy, the Secretary is not constrained by their statements about policy in a case such as this, where flagrant and willful conduct has been found.

The plain language of § 499h(a) itself allows the Secretary to revoke a license for "flagrant" or "repeated" misbranding violations. It provides that when the Secretary determines that a violation of § 499b has occurred he may "suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." In any event, license revocation is consistent with the

USDA's sanctions policy as it has been construed. In *In re S.S. Farms Linn Country, Inc.*, 50 Agric. Dec. 476 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table), the JO spelled out the USDA's sanctions policy as follows:

each sanction will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

50 Agric. Dec. at 497. Revocation of Potato Sales's license was consistent with this policy.

Potato Sales further maintains that removing it from the industry does not serve either USDA's policy for misbranding violations or the interests of deterrence since Potato Sales had no knowledge of, did not benefit from, and has already been penalized (by going out of business) for the violations. Potato Sales also complains that Ever Justice entered a more favorable settlement with a less severe sanction. It also contends that the Secretary failed to take mitigating factors into account.

We agree that mitigating factors must be considered in determining the appropriate sanction. *Norinsberg Corp. v. U.S. Dept. of Agr.*, 47 F.3d 1224, 1227 (D.C. Cir.) (citing *In re S.S. Farms*, 50 Agric. Dec. at 497), *cert. denied*, --- U.S. ---, 116 S. Ct. 474, 133 L. Ed. 2d 403 (1995). However, the Secretary did consider all relevant circumstances in this case. *Id.* The choice of sanction was based on the key role that Potato Sales played in the misrepresentations; the blatant and deliberate nature of the conduct; the number of transactions involved; the span of time during which the relidding and shipping occurred; and on evidence showing harm to trade with Taiwan, an important customer for United States apples, and to the credibility of the Washington State apple label as well as the trust relationship that is necessary in the produce industry. The JO also considered the need to deter this type of violation in the future. The fact that Potato Sales was already out of business and that the only individuals likely to be affected by the revocation were its shareholders were also noted, as was the fact that this was Potato Sales first brush with the law.

While Potato Sales complains about Ever Justice's disparate treatment, a sanction resulting from negotiation rather than adjudication is not something we can consider. *Agricultural Law* at 72-45 (citing *In re Sol Salins*, 37 Agric. Dec. 1699, 1737 (1978)).

Other mitigating factors that Potato Sales suggests should have influenced the result, but did not, are either not supported by the record or are immaterial. For example, the record does not support Potato Sales's claim that it was an "unwitting repacker," as there was ample evidence that Beck played an integral role, with full knowledge of the deceptive relidding. Nor does the record support Potato Sales's assertion that Beck had a good faith belief that there was no violation, for there is ample evidence that he knew what he was doing. Likewise, the evidence does not support Potato Sales's argument that its actions were attributable to "lax management practices" and the "carelessness" of one employee rather than to the deliberate, wilful, and knowing conduct of a corporate officer.

That Beck and the four employees were the only one involved in the relidding is also not dispositive, as PACA provides that Beck's conduct is imputed to Potato Sales. *See* 7 U.S.C. § 499p. By the same token, the fact that Potato Sales did not realize a profit because SL International ultimately did not pay for the apples does not compel a different result; as Beck conceded, he agreed to relid to get the business.

Revoking Potato Sales's license was within the Secretary's authority, and substantial evidence supports his decision to do so.

PETITION DENIED.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: GARY B. HOPKINS and LAWRENCE F. KRZEWSKI, d/b/a EAT MORE CITRUS CO., AND GARY B. HOPKINS, ANTHONY L. NGUYEN and MARK TATGENHORST, d/b/a EAT MORE CITRUS CO. PACA Docket No. D-95-0525.

Decision and Order filed June 25, 1996.

Failure to make full payment promptly for produce - Failure to obtain license does not alter or negate PACA compliance requirements - Publication.

Judge Hunt published the finding that Respondents Anthony L. Nguyen and Mark Tatgenhorst committed flagrant and repeated violations of the PACA by failing to make full payment promptly for 37 lots of perishable agricultural commodities, totalling \$413,163.33. The failure of Respondent partnership to seek a license does not alter the fact that it was subject to the PACA.

Eric Paul, for Complainant.

Respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst, Pro se.

Michael N. Alexander, Rancho Cucamonga, CA, for Respondent Lawrence F. Krzewinski.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) ("PACA"), the regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.45; hereinafter the "Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151; hereinafter the "Rules of Practice").

The proceeding was instituted by a complaint filed on May 23, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleged failure to make full payment promptly for 37 lots of perishable agricultural commodities totalling \$413,163.33, which had been received and accepted in interstate and foreign commerce from four sellers. The complaint alleged in paragraph IV that four purchase transactions in September 1992 occurred during the period when respondents Gary B. Hopkins and Lawrence F. Krzewinski were doing business as partners as respondent Eat More Citrus Company; and that thirty-two purchase transactions in May, June, and July 1993 occurred while respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst were doing business as partners as respondent Eat More Citrus Company. Copies of the complaint were

served on respondents Gary B. Hopkins, Lawrence F. Krzewinski, and Mark Tatgenhorst. Four attempts were made to serve respondent Anthony Nguyen. The last attempt was returned by the United States Postal Service on July 14, 1995, with the statement "Box Closed-Unable to Forward-Return to Sender."

Separate answers were filed admitting some of the jurisdictional allegations and denying the failure to pay allegations by respondents Gary B. Hopkins and Lawrence F. Krzewinski. Respondent Mark Tatgenhorst filed an answer disputing his responsibility for the violations alleged. On March 7, 1996, an order to show cause was issued directing the parties to show cause why a hearing should not be conducted in this proceeding by telephone. No objections were filed to a hearing by telephone. A hearing was accordingly conducted by telephone on April 22, 1996. Complainant was represented in Washington, D.C. by Eric Paul, Office of the General Counsel. Respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst appeared *pro se* by telephone from different locations in the greater Los Angeles area. Respondent Lawrence F. Krzewinski, represented by attorney Michael N. Alexander, entered into a stipulation with complainant before the hearing concerning his poor health and his lack of participation in the day-to-day operations of the Eat More Citrus Company partnership in September 1992.

The complaint was amended at the hearing on complainant's unopposed motion to delete the four failure to pay transactions in September 1992 alleged in paragraph IV of the complaint. This amendment effectively removed Lawrence F. Krzewinski as a respondent and limited the violations alleged with respect to respondent Gary B. Hopkins to those which occurred during the existence of his Eat More Citrus Company partnership with respondents Anthony L. Nguyen and Mark Tatgenhorst.

Complainant presented testimony from two witnesses, Marketing Specialist Don Wilson, who testified from Tucson, Arizona, and Marketing Specialist Clare Jervis, who testified from Washington, D.C. Testimony was given by respondents Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst. George Viota, a witness called by respondent Gary B. Hopkins, testified from a fourth California location. Respondents introduced no exhibits.

Findings of Fact

1. On August 1, 1987, respondent Gary B. Hopkins, an individual doing business as Eat More Citrus Company, under PACA license number 86145, formed a partnership of the same name with Lawrence F. Krzewinski. (CX-1, pgs. 21-24.)

2. PACA license number 881788 was issued to this partnership, composed of respondents Gary B. Hopkins and Lawrence F. Krzewinski, on August 17, 1988. This license terminated on August 17, 1993, pursuant to section 7(d) of the PACA (7 U.S.C. § 499d(a)) when the partnership failed to pay the required annual renewal fee. (Tr. 70-72.)

3. Eat More Citrus Company ("Eat More"), at all times material herein was a California general partnership. It's mailing and business address at the Los Angeles Produce Market was 778 Market Court, Los Angeles, California.

4. Respondents Anthony L. Nguyen and Mark Tatgenhorst were employed by Eat More as salesmen beginning about 1990.

5. On or about January 1, 1993, Gary B. Hopkins approached Mark Tatgenhorst and Anthony L. Nguyen and asked them to invest and become partners with him in Eat More.

6. Gary Hopkins testified that he, Tatgenhorst, and Nguyen entered into an agreement to become general partners and to use the name Eat More Citrus Company. Mark Tatgenhorst invested \$20,000 in Eat More and received a ten-percent interest in the business. Anthony L. Nguyen invested \$10,000 in Eat More and received a share of the business. (Tr. 81-82.)

7. On or about January 1, 1993, Eat More began operating as a partnership composed of Gary B. Hopkins, Mark Tatgenhorst, and Anthony L. Nguyen. This partnership was reported to the California Department of Food and Agriculture. The partnership did not seek a new PACA license, although it operated subject to the PACA. (Tr. 62, 86.)

8. Tatgenhorst stated in his answer to the complaint filed on June 5, 1995, that "in late 1992 the company was on the verge of bankruptcy. The payables were always 200,000 - 300,000 above the receivables. Everyone was always calling for money. . . ." He explained at the hearing that "I knew very well going into this venture that the company was way upside down but we were hoping that during the January and February months which is Chinese New Year's Eve in there that it would be a good time and we would make a lot of money and somehow get the same quotes where we could keep the operation going." (Tr. 91.)

9. Tatgenhorst testified that the venture did not turn out as he had expected. He said that Eat More immediately got "hit with enormous amounts of bankruptcies" by six or seven of its customers which depleted the money that he and Nguyen had invested. However, the partnership tried to continue because "I saw how that company could be upside down and could go on forever. I mean I almost -- because shippers were willing to ship you products and take a chance on you -- you know -- and we -- you know -- we all knew that we

couldn't pay the people in thirty days -- you know. We tried our best to be a thirty-day company. It wasn't going to happen. It just -- so we would select certain shippers to pay that were important to us at that point in the season and then try our best to make money on the stuff they shipped us in hopes that we could continue to pay down our debt which it didn't happen." (Tr. 101-02.)

10. Between June 18 and July 11, 1993, the partnership, operating as respondent Eat More, purchased and accepted mangoes and limes, perishable agricultural commodities, in eight transactions with Paulmex International, Inc., McAllen, Texas. The total amount past due and unpaid in these transactions was \$94,088.25. (CX-8, 8b.)

11. Between May 17 and July 17, 1993, Eat More purchased and accepted mangoes, grapes, and limes, perishable agricultural commodities, in 25 transactions with Chiquita Frupac, Philadelphia, Pennsylvania. The total amount past due and unpaid in these transactions was \$214,608.58. (CX-8, 8c.)

12. On June 18 and 26, 1993, Eat More purchased and accepted mangoes, a perishable agricultural commodity, in two transactions with London Fruit, Inc., Pharr, Texas. The total amount past due and unpaid in these transactions was \$41,856.00. (CX-8, 8d.)

13. Mark Tatgenhorst ceased being a partner in Eat More on or about July 9, 1993. (CX-2; Tr. 93.)

14. Respondents Gary B. Hopkins and Anthony L. Nguyen filed individual Chapter 7 petitions in the United States Bankruptcy Court, Central District of California, on November 19, 1993. They stated in bankruptcy documents that the Eat More partnership had ceased operations. (CX-3, p. 4; 4, p. 3.)

15. A computer generated Eat More balance sheet as of October 29, 1993, obtained from the bankruptcy trustee, revealed cash, accounts receivable, and inventory totalling \$73,126.56 and accounts payable of \$739,251.44. (CX-5.)

16. During an investigation that he conducted in Los Angeles on August 26 and 27, 1994, Marketing Specialist Don W. Wilson was advised by respondent Gary B. Hopkins that the business records of Eat More had been stolen a short time after it had stopped operations in July 1993. (Tr. 14-17.) Mr. Wilson contacted sellers that had filed trust notices against Eat More with the Secretary, and who were also listed as unpaid creditors with addresses outside the State of California in the bankruptcy schedules (schedule F) that had been filed by respondents Gary B. Hopkins and Anthony L. Nguyen. (CX-3, 4; Tr. 17.) He verified that the amounts set forth on the invoices that he obtained from Paulmex International, Inc., Chiquita Frupac, and London Fruit, Inc., remained unpaid and prepared a schedule of these unpaid purchases of perishable agricultural commodities in interstate commerce. (CX-8, 8b, 8c, 8d; Tr. 57-60.)

17. Prior to the hearing on April 22, 1996, Mr. Wilson contacted each of these three unpaid sellers by telephone and confirmed that the transactions still remained unpaid. (Tr. 60-62.) Although Paulmex International, Inc. and London Fruit, Inc. were able to confirm that the full amount scheduled by Mr. Wilson remained unpaid, Chiquita Frupac was only able to confirm that at least \$182,738.00 remained unpaid. Information as to some of the earlier transactions was no longer included in the data accessible by computer. (Tr. 61.) The total amount confirmed unpaid as of the date of the hearing in this proceeding was, therefore, approximately \$318,682.25.

Law

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; . . .

Section 8(a)1 of the PACA (7 U.S.C. § 499h(a)) provides:

Whenever (1) the Secretary determines, as provided in section 499f of this title that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Discussion

All persons engaged in the interstate produce business as a "commission merchant," "dealer," or "broker" are required to have a PACA license. The term "person" includes partnerships. (7 U.S.C. § 499a(b)(1)).

The Eat More partnership composed of Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst did not seek a PACA license even though it made purchases as a produce dealer in interstate commerce. The failure to seek a license, however, does not alter the fact that a partnership, as alleged in the complaint, was formed on or about January 1, 1993, and that it was subject to the PACA. Hopkins admitted this allegation in his answer and in his testimony, and Tatgenhorst admitted as much by stating that he received a ten-percent interest in the business. There is no evidence to the contrary. I therefore find that Hopkins, Nguyen, and Tatgenhorst formed a partnership doing business as Eat More Citrus Company on or about January 1, 1993, that Tatgenhorst withdrew from the partnership on July 9, 1993, and that Hopkins and Nguyen discontinued the partnership when they filed for bankruptcy on November 19, 1993. The record shows that during the period of Eat More's operation as a Hopkins-Nguyen-Tatgenhorst partnership (January 1 - July 9, 1993), Eat More had 21 unpaid purchases of produce totalling \$185,986.93, and during the period of the Hopkins-Nguyen partnership (July 10 - November 19, 1993), Eat More had an additional 14 purchases of unpaid produce totalling \$164,565.90.

It is USDA's policy that when there is more than one failure to make prompt payment for the purchase of produce and the amount involved is more than *de minimis*, there is a violation of the PACA. The violation is considered repeated and flagrant, regardless of the reason for the non-payment. *The Caito Produce Co.*, 48 Agric. Dec. 611, 629 (1989). The amount of unpaid produce purchases in this proceeding by respondents Hopkins, Nguyen, and Tatgenhorst doing business as partners in respondent Eat More were far in excess of a *de minimis* amount and the purchases were repeated. Accordingly, I find that Gary B. Hopkins, Anthony L. Nguyen and Mark Tatgenhorst, doing business as Eat More Citrus Company, committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusion of Law

Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst, doing business as Eat More Citrus Company, by failing to make full payment for purchases of perishable agricultural commodities as alleged in paragraph IV of

the complaint, have flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Order

Gary B. Hopkins, Anthony L. Nguyen, and Mark Tatgenhorst, doing business as Eat More Citrus Company, have committed flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth above shall be published.

This order shall become final and effective 35 days after service of this Decision and Order on respondents unless appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final as to Respondent Lawrence F. Krzewinski on April 22, 1996, as to Respondent Anthony Nguyen on August 2, 1996, as to Respondent Mark Tatgenhorst on August 5, 1996, and as to Respondent Gary B. Hopkins on August 27, 1996.--Editor]

**In re: QUALITY TOMATO, INC., TOMATO, INCORPORATED and
CARL FIORENTINO.**

PACA Docket No. D-96-0520.

Decision and Order filed July 2, 1996.

Failure to make full payment promptly - Engaging in unfair and deceptive practices - Providing false and misleading information on license application - Alter ego - Excuses for payment violations never sufficiently mitigating - Willful, flagrant, and repeated violations - Publication.

Judge Baker published the finding that Respondents Quality Tomato, Inc., and Carl Fiorentino, the alter ego of Respondent Quality Tomato, Inc., have committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly of the agreed purchase prices of nineteen lots of perishable agricultural commodities, totaling \$101,624.30. Respondent Tomato, Incorporated, a successor to Quality Tomato, Inc., is unfit to be licensed under the PACA because Respondent Fiorentino engaged in practices prohibited by PACA and because its license application contained false and misleading information. Even though a respondent has good excuses for payment violations, such excuses are never sufficiently mitigating to prevent a respondent's failure to pay from being considered flagrant or willful.

Eric Paul, for Complainant.

Respondents, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a Combined Show Cause and disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*, hereinafter sometimes referred to as the "PACA"), the Regulations promulgated thereunder (7 C.F.R. §§ 46.1 through 46.45, hereinafter sometimes referred to as the "Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151, hereinafter referred to as the "Rules of Practice").

This proceeding was instituted by a Notice to Show Cause and Complaint filed on March 15, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United State Department of Agriculture. The Notice to Show Cause and Complaint allege that Respondents Quality Tomatoe, Inc. and Carl Fiorentino willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period April 1993 through February 1995, by failing to make full payment promptly of the agreed purchase prices of nineteen lots of perishable agricultural commodities purchased, received and accepted in interstate commerce from four sellers on which the total amount unpaid and past due was \$101,624.30. The Notice of Show Cause and Complaint alleges that the PACA license issued to Respondent Quality Tomatoe, Inc. on March 31, 1993, was suspended on November 23, 1994, because of failure to pay a reparation award and terminated on March 31, 1995. Complainant seeks publication of a finding of repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) for the payment violations alleged.

The Notice to Show Cause and Complaint further alleges that a PACA license was issued on January 6, 1995, under the name Tomato Co., Inc. which has also terminated for failure to pay the annual renewal fee, and that a new PACA license application sought by Respondent Tomato, Incorporated, under the name Tomato Co., Inc. by application received February 14, 1996, should be denied because of false and misleading statements made in the license application and because Respondent Carl Fiorentino had engaged in practices of a character prohibited by the PACA while directing the operations of Respondent Quality Tomatoe, Inc.

The oral hearing was held in Richmond, Virginia, on April 11, 1996 in accordance with section 4(d) of the PACA (7 U.S.C. § 499d(d)) which requires a hearing on a contested license application within sixty days of the date the application was filed. Respondent Carl Fiorentino filed an Answer denying that he was the alter ego and de facto owner of Respondents Quality Tomatoe, Inc.

and Tomato, Incorporated, denying that he had engaged in practices of a character prohibited by the PACA, and denying that any false and misleading statements were made at his direction in the license application. No Answer was filed on behalf of Respondent Quality Tomato, Inc. and Tomato, Incorporated. However, Respondent Carl Fiorentino acknowledged at the start of the oral hearing held before Administrative Law Judge Dorothea A. Baker on April 11, 1996, that he was also representing Respondent Tomato, Incorporated.¹ Complainant was represented by Eric Paul, Esquire, Office of the General Counsel, Washington, D.C. Complainant presented six witnesses and twenty-two exhibits. Respondent Fiorentino appeared pro-se, cross-examined witnesses and testified. He presented no exhibits. Reference to Complainant's exhibits and specific pages of the transcript will be by the prefixes "CX" and "Tr."

The parties were given the opportunity to file briefs. The Complainant did so; the Respondents did not. The case was referred to the Administrative Law Judge for decision on May 30, 1996.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

- (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section

¹Trans. p. 7 - "Mr. Fiorentino: I'm representing Tomato Company, Incorporated."

499e(c) of this title.² However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides in pertinent part:

- (d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse

²Section 5(c) of the PACA.

to issue a license to the applicant.

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

- (a) Whenever (1) the Secretary determines, as provided in section 499f of this title³ that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title,⁴ or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court or having violated section 499n(b) of this title,⁵ the Secretary may publish the facts and circumstances of such violation and/or, by order, suspended the license of such offender for a period not to exceed ninety days, except that, if the violation is *flagrant or repeated*, the Secretary may, by order, revoke the license of the offender.

Section 8(e) of the PACA (7 U.S.C. § 499h(e)) provides:

- (e) In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title,⁶ that a commission merchant, dealer, or broker has violated section 499b of this title⁷ or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employee, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

³Section 6 of the PACA.

⁴Section 2 of the PACA.

⁵Section 14(b) of the PACA.

⁶Section 6 of the PACA.

⁷Section 2 of the PACA.

Findings of Fact

1. Respondent Quality Tomatoe, Inc., doing business as Quality Tomato Company, Inc. (CX 22), is a corporation which was organized and existing under the laws of the Commonwealth of Virginia between February 5, 1993 and September 1, 1995, when the corporation's existence was terminated by operation of law. (CX 2). The business and mailing address of Respondent Quality Tomatoe, Inc., at all times material herein was 2041-A Midway Avenue, Petersburg, Virginia 23803. (Answer, p. 1).

2. At all times material herein, Respondent Quality Tomatoe, Inc., was licensed under the provisions of the PACA. License number 930938 was issued to Respondent Quality Tomatoe, Inc., on March 31, 1993. This license was suspended on November 23, 1994, for failure to pay a reparation award pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)) and terminated on March 31, 1995, pursuant to the provisions of the Act, when the firm failed to pay the required annual renewal fee.

3. Vernon L. Hatton is the nominal president, director and 100 percent shareholder of Respondent Quality Tomatoe, Inc.. At all times material herein Vernon L. Hatton was a full time employee of the Virginia State Health Department; and he did not perform any corporate duties, receive any compensation from, or have any investment in, Respondent Quality Tomatoe, Inc.. (Answer, pp. 1-2; Tr. 57-63).

4. Respondent Carl Fiorentino has acknowledged that he managed the day-to-day operations of Respondent Quality Tomatoe, Inc. in terms of operating, purchasing, selling, and soliciting customers. (Answer, p. 2). He was not given any instruction with respect to the employment of employees, the duties of employees, and the operations of the firm by its nominal president and sole stockholder, Mr. Vernon L. Hatton. (Tr. 59-60). Respondent Carl Fiorentino did not keep Mr. Hatton advised as to the operations of Respondent Quality Tomatoe, Inc. including the identity of produce sellers, when payments were made for produce, and whether anyone was not paid. (Tr. 60-61; (Hatton)).

5. During the period April 6, 1993, through February 12, 1995, Respondent Quality Tomatoe, Inc. failed to make full payment promptly to D.E. Scott & Son, Onancock, Virginia, for fourteen interstate shipments of potatoes originating in Massachusetts. (CXs 3-4; Tr. 24-26, 53, 54). The amount past due and unpaid for these fourteen transactions, \$57,382.00, remains unpaid. *Id.* Mr. David E. Scott, Jr., the owner of D.E. Scott & Son, testified that Respondent Carl Fiorentino was contacted with respect to these sales and that he had no knowledge of Mr. Vernon Hatton or, with respect to the last transaction, that the

license issued to Quality Tomato, Inc. had been suspended and that a new entity had been licensed as Tomato Co., Inc.. (Tr. 53-55).

6. Respondent Quality Tomato, Inc. purchased, received and accepted three shipments of tomatoes from Six L's Packing Co., Inc., Immokalee, Florida, between September 19, 1993 and October 22, 1993 and failed to make full payment promptly for agreed purchase prices, or balances thereof, totaling \$22,761.30. (CX 5; Tr. 26).

7. On October 18, 1994, a reparation order was issued awarding \$18,597.30 to Six L's Packing Co., Inc. in connection with the last two of these three shipments of tomatoes. (CX 9). Respondent Quality Tomato, Inc. failed to pay this reparation award and, accordingly, its PACA license was automatically suspended. (CX 1, p. 2).

8. Respondent Quality Tomato, Inc. purchased a truckload of tomatoes from Woody's Tomato Corp. on or about May 15, 1994, and has failed to pay the agreed purchase price of \$8,337.50. (CX 6; Tr. 26-27).

9. Respondent Quality Tomato, Inc. purchased a truckload of tomatoes from Taylor & Fulton, Inc., Palmetto, Florida, on or about June 6, 1994, and has failed to pay the agreed purchase price of \$13,143.50. (CX 7; Tr. 27). An unpaid reparation default order awarding Taylor & Fulton, Inc. \$13,143.50 plus interest against Respondent Quality Tomato, Inc. was issued March 1, 1995. (CX 8; Tr. 27).

10. A total of \$101,624.30 remains unpaid to these four produce sellers for the nineteen transactions alleged in paragraph IV of the Complaint.

11. Respondent Tomato, Incorporated, was incorporated under the laws of the Commonwealth of Virginia on December 6, 1994, and was issued PACA license number 950487 under the name Tomato Co., Inc. on January 6, 1995. This license terminated on January 6, 1996, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), when the firm failed to pay the required annual renewal fee. (CXs 11, 12; Tr. 20-21).

12. On February 12, 1996, Mr. Duane Williams, a Marketing Specialist assigned to the Southeast Regional Office, PACA Branch, Fruit & Vegetable Division, Agricultural Marketing Service, conducted an investigation to determine whether Respondent Quality Tomato, Inc., and its principals were complying with the sanctions imposed when its PACA license was suspended for failing to pay the reparation award issued to Six L's Packing Co., Inc.. (CX 9; Tr. 17-18).

13. Marketing Specialist Williams visited the office located at 2041-A Midway Avenue, Petersburg, Virginia 23803, which was the last known business address of Respondent Quality Tomato, Inc. and discovered a wholesale produce business being operated at this same address, using the same telephone and FAX

numbers, and the business name Tomato Company Inc.. (CX 21; Tr. 18-19, 33-34). This was made clear when Respondent Carl Fiorentino produced a business card identifying himself as the manager of Quality Tomato Company, Inc., on which there was lined out the word "Quality" and expressly represented that the information then set forth remained accurate for the new business.

14. Respondent Carl Fiorentino also produced a notice letter dated February 15, 1996, giving Tomato[e] Co., Inc. notice that PACA license number 950487 had terminated on its January 6, 1996 anniversary date, and that it could be reinstated within thirty days following this anniversary date by the paying of a \$550.00 annual fee plus a \$50.00 reinstatement fee. (CX 10, p. 2; Tr. 20). Mr. Williams determined that this reinstatement period had expired and provided Respondent Carl Fiorentino with an application form for a new license and advised him that the license application should be returned immediately after it was completed because operating without a license made the firm subject to penalties. (Tr. 22).

15. On February 14, 1996, the completed application for license that is the subject of the Notice to Show Cause part of this proceeding was handed to Marketing Specialist Williams. (CX 12; Tr. 41).

16. This application, which was submitted using the business name Tomato Co., Inc. instead of the name Tomato[e] Co., Inc., used on the prior license, contained the signature "Debbie H. Taylor" and identified this person as being the president, director and 100% stockholder of the applicant corporation. It also named "Louis J. Wells" as the Secretary-Treasurer of the applicant and stated the home address of both officers as 21517 Warren Avenue, Petersburg, Virginia 23803. Similar information, with the name of the Secretary-Treasurer stated to be "Louise J. Wells", appeared on the application that had been submitted for the license that had terminated on January 6, 1996. (CXs 10, 12). The corporate records obtained from the Commonwealth of Virginia, however, identified the corporate entity as "Tomato, Incorporated" and the officers as "Debbie H. Taylor" and "Louis J. Wells". (CX 11).

17. Both license applications filed for Tomato, Incorporated contain "no" answers checked off for the following questions:

10. Has any person currently employed by applicant been the individual owner, partner, officer, director, or holder of more than 10 percent of the outstanding voting stock of a firm, association, or corporation?

c. Against whom there was unpaid reparation award?

11. Do the business operations of applicant succeed those of another firm?

18. At the time, the name "Debbie H. Taylor" was signed to the application handed to Marketing Specialist Williams, the legal name of this individual had become Debbie H. Perkinson by reason of her marriage on April 7, 1995. (Tr. 63-64). She testified that the signature was signed by her father (Vernon Hatton) who had been given permission by her to sign her name if he had a need to and couldn't get in touch with her. (Tr. 67).

19. Neither Debbie H. Perkinson nor Louise J. Wells, her mother, made any investment in Tomato, Incorporated, or exercised any management of this Respondent, or received any compensation from this Respondent. (Tr. 64-67; (Perkinson)). The incorporation of Respondent Tomato, Incorporated, and the completion of the first license application for this corporation under the name Tomato Co., Inc. was done by Debbie H. Perkinson in response to requests from her father and Respondent Carl Fiorentino. (Tr. 64).

20. Both Mrs. Perkinson and Mrs. Wells were asked by Complainant's counsel whether they had any desire to have a PACA license issued to Tomato, Incorporated. Louise J. Wells answered "No, sir, I do not." (Tr. 70), and Debbie H. Perkinson answered "To be honest with you, I don't want no part of it. No, sir." (Tr. 67).

21. Respondent Carl Fiorentino gave Marketing Specialist Duane Williams a sworn statement on February 14, 1996, stating:

"I Carl Fiorentino run daily operations Tomato Co., Inc. & also ran daily operation of Quality Tomato Co. Inc. until Nov. 94, 2041 A Midway Avenue, Petersburg as manager." (CX 15).

22. Mr. Vernon Hatton gave Marketing Specialist Duane Williams a sworn statement on February 14, 1996 stating:

I Vernon Hatton was not running the day to day operations of Quality Tomato Co. Inc., Petersburg, VA. I worked for the State Department of Health since November 1985. Mr. Carl Fiorentino was in charge of the day to day operations of Quality Tomato Co. Inc., and served as manager until it ceased operation in November 1994. (CX 14).

23. Respondent Carl Fiorentino was the customer in whose name electric service was provided to the business address at 2041-A Midway Avenue since

October 30, 1992. (CX 18). He was licensed as an individual under the PACA doing business as Mohawk Tomato⁸ at this location. (CXs 13, 19, p. 1; Tr. 22). He was personally sued by a produce firm, Thomas E. Moore, Inc. and had an unsatisfied judgment entered against him for the principal sum of \$12,045.29, in connection with a 1992 sale of potatoes to Mohawk Tomato Co. at a former address in Petersburg, Virginia. (CX 16). He has acknowledged that as of the date of the hearing he still owed for produce purchased using the name Mohawk Tomato, has lost his home and \$90,000.00 in the bank, due to debt, and that he is primarily living on social security payments of \$651.00 a month at age eighty-four. (Tr. 86-87).

24. Respondent Carl Fiorentino routinely signed for produce received by Respondent Quality Tomatoe, Inc. (CX 19) and signed checks issued in payment for produce by this Respondent that also contain the stamped signature of Vernon L. Hatton. (CX 30).

25. Respondent Carl Fiorentino was the president of a PACA licensee, Big Chief Tomato and Produce, Petersburg, Virginia, in 1994, when reparation orders were issued against this firm. He became subject to employment sanctions as a result of the nonpayment of these reparation orders which had expired when he obtained a license as an individual doing business as Mohawk Tomato on May 21, 1987. (CXs 13, 22).

Conclusions

Respondent Quality Tomatoe, Inc., doing business as Quality Tomato Co., Inc., under the direction, management and control of Respondent Carl Fiorentino, and Respondent Carl Fiorentino as the alter ego of Respondent Quality Tomatoe, Inc., and as a person subject to the license requirement of the PACA, by failing to make full payment for produce purchases as alleged in paragraph IV of the Complaint, have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA by failing to make full payment for these produce purchases and by failing to satisfy the two reparation orders issued against Respondent Quality Tomatoe, Inc., requiring payments to Six L's Packing Co., Inc., Immokalee, Florida and Taylor & Fulton, Inc., Palmetto, Florida.

Respondent Tomato, Incorporated, is unfit to be licensed under the PACA

⁸Exhibit 19 uses the name Mohawk Tomatoe.

because Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA; and because its license application contained false and misleading representations as to who were the actual officers and owner of the applicant and failed to reveal that the applicant was a successor to Quality Tomato, Inc., against whom there are two unpaid reparation orders.

The PACA was enacted to regulate and control the handling of fresh fruit and vegetables. 71 Cong. Rec. 2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. Accordingly, certain conduct by commission merchants, dealers or brokers was declared to be unlawful. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 858 (9th Cir. 1976). Enforcement is effectuated through a system of licensing with penalties for violations. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930). See also, *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974). It has also been held that Congress intended by enactment of the Perishable Agricultural Commodities Act to establish bars to preclude all but financially responsible persons from engaging in the business subject to the Act. *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.), cert. denied, 389 U.S. 835 (1967).

The Secretary is provided with the authority to refuse to issue a license to an applicant who has committed acts prohibited by the PACA. The making of any false or misleading statements in a license application is made unlawful by section 8(c) of the PACA (7 U.S.C. § 499h(c)).

Section 2(4) of the PACA makes it unlawful for any commission merchant, dealer or broker to fail to "make full payment promptly" of this obligation with respect to transactions involving perishable agricultural commodities made in interstate commerce. (7 U.S.C. § 499b). Insofar as it's pertinent here, "full payment promptly" is defined by the Regulations as requiring payment of the agreed purchase prices for produce within ten days after the day on which the produce is accepted. The provisions of the Act do not allow partial payment of a settlement to constitute full payment promptly. Quality Tomato, Inc., doing business as Quality Tomato Co., Inc., under the direction, management and control of Respondent Carl Fiorentino, and Respondent Carl Fiorentino, as the alter ego of Respondent Quality Tomato, Inc. and as the person subject to the license requirements of the PACA by failing to make full payment for produce purchases as alleged in paragraph IV of the Complaint, have willfully, flagrantly

and repeatedly violated section 2(4) of the PACA (7 U.S.C. 499b(4)). Even though a Respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful. *Atlantic Produce Co., et al.*, 54 Agric. Dec. 701 (1995).

Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA by failing to make full payment for those produce purchases and by failing to satisfy the two reparation orders issued against Respondent Quality Tomato, Inc. requiring payments to Six L's Packing Co., Inc., Immokalee, Florida, and Taylor & Fulton, Inc., Palmetto, Florida.

The alter ego theory applies, as Complainant argues, in those situations where the act of the corporate wrongdoer are committed under the direction, management and control of a corporate stockholder or corporate official or other responsible person who has a high degree of dominion and control over the corporation. Whether an alter ego situation exists in a specific instance, is a question of fact. "In general the corporate form may be ignored whenever an individual so dominates its company as in reality to negate its separate personality." *In re: Ronald Green*, 51 Agric. Dec. 363, 369 (1992). It is clear from the evidence herein that Respondent Carl Fiorentino dominated the corporate entities with which he was associated.

Respondent Tomato, Incorporated, is unfit to be licensed under the PACA because Respondent Carl Fiorentino has engaged in practices of a character prohibited by the PACA; and, because its license application contained false and misleading representations as to who were the actual officers and owner of the applicant, as well as failing to reveal that the applicant was a successor to Quality Tomato, Inc. against whom there are two unpaid reparation orders. The more serious of these offenses was the failure to reveal that Respondent Tomato, Incorporated, was a successor to Quality Tomato, Inc.. The application form did contain names of persons who were nominal officers and as such did reflect the actual names of the persons who were chosen to occupy the titles and positions set forth. However, the failure to reveal the fact that it was a successor to Quality Tomato, Inc. was an act of deception and was a basis of furnishing false information. The making of any false or misleading statements in a license application is made unlawful by section 8(c) of the PACA (7 U.S.C. § 499h(c)) and a license to the applicant should be denied.

The cases arising under section 8(c) of the PACA indicate the Department's policy of holding to a strict interpretation of the Act's requirements. Intent is not a part of the offense. The Department's Judicial Officer has stated in *In re: Perfect Potato Packers Inc.*, 45 Agric. Dec. 338 (1986), as follows: "Respondent

argues that there was no intent to defraud, but intent to defraud is not an issue here. Respondent's license may be revoked if the license was obtained through a false or misleading statement in the application therefor." (7 U.S.C. § 499h(c)). This principle was reiterated by the Judicial Officer in *In re: Midland Banana & Tomato Co., Inc., et al.*, PACA Docket No. D-93-548, 54 Agric. Dec. 1239, appeal pending No. 95-3552 (8th Cir.).

Respondent Fiorentino, by his own admission, indicated that he engaged in the buying and selling of produce, that he gave instructions to the office clerk with respect to the payment of amounts and other matters involved in the management of both Quality Tomato, Inc. and Tomato, Incorporated.

The relevant definition of dealer under the PACA reads:

- "(6) the term 'dealer' means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce." (7 U.S.C. § 499a(6)).

Because the facts establish that Respondent Carl Fiorentino is a dealer, it is appropriate that a finding of repeated and flagrant violations should be issued with respect to this Respondent.

In commenting upon the testimony with respect to the activities of Respondent Carl Fiorentino, Mr. Bruce Summers, Senior Marketing Specialist, categorized Respondent Fiorentino as a dealer.

With respect to the fitness of Carl Fiorentino to engage in business as a dealer under the PACA, the Complainant notes that it is evident that both Carl Fiorentino and Tomato, Incorporated are inadequately capitalized to be considered financially responsible persons under the PACA.

Although Respondent Carl Fiorentino's efforts to pay small amounts on the overdue accounts are admirable, and at his age of eighty-four years, it is commendable that he seeks to do this, nevertheless, he did acknowledge in his own testimony that he is nearly destitute and should the sanctions of the Complainant take effect, he likely would seek discharge under the bankruptcy laws. Respondent, Quality Tomato, Inc. went out of business about November of 1994 with unpaid reparation orders and other produce debt and was not in the position to transfer working capital to its successor Respondent Tomato, Incorporated. It is undisputed that no new capital was put into the new wholesale produce firm by Debbie H. Taylor, whether before or after she became married or by her mother, Louise J. Wells. The existing working capital was so

limited that Respondent Carl Fiorentino tried to get Marketing Specialist Duane Williams to agree to an extension of time to collect receivables before paying the application fee for a new license. It appears from the evidence of record herein that both Quality Tomatoe, Inc. and Tomato, Incorporated, were both under capitalized shells. Moreover, it also appears that in order to obtain potatoes from D.E. Scott & Son for Respondent Quality Tomatoe, Inc., it was first necessary to advance a payment on older transactions. It appears that corporate entities may have been disregarded in the payment for prior obligations incurred by Carl Fiorentino while he was doing business as Mohawk Tomato. In other words, the payments that Respondent Carl Fiorentino made with respect to recent purchases were not with respect thereto but rather all the payments that were made were applied to the prior ones. (Tr. 55, 56).

The evidence shows that the operational decisions concerning the activities of Respondent Quality Tomatoe, Inc., and Tomato, Incorporated, were made by Respondent Carl Fiorentino. He was merely continuing his operation as a dealer behind a series of corporate fronts. He was the alter ego of each entity to the extent that they can be considered the real entity and not mere fictions. Although a finding of willfulness is not necessary in this case because the license issued to Respondent Quality Tomatoe, Inc. has terminated and a finding of willfulness is not necessary to support a revocation of license, nevertheless, it is abundantly clear from the decisions of the Department of Agriculture that the payment violations were willful according to the standards expressed in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961), wherein the Court stated among other things: "We think it is clear that if a person (1) intentionally does an act which is prohibited irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements the violation is willful. See, *Diane Mattes et al. v. United States*, 721 F.2d 1125 (7th Cir. 1983) and *In re: Samuel Esposito*, 38 Agric. Dec. 613 (1979). It is undisputed in this proceeding that the numerous-payment violations alleged in the Complaint were repeated and flagrant.

No Answer was filed by Respondent Quality Tomatoe, Inc. and both Respondent Carl Fiorentino and Mr. Vernon Hatton, the nominal president and sole stockholder of this defunct entity, declined to appear on its behalf when given the opportunity at the start of the hearing. Respondent Carl Fiorentino appeared *pro se* for himself and for his alter ego, Respondent Tomato, Incorporated, whose nominal officers and sole stockholders have disclosed in their testimony as not having any interest in the license application contested in this proceeding.

All contentions of the parties have been carefully considered and to the

extent not adopted herein have been found to be irrelevant, immaterial or not factually or legally sustainable.

Premised upon the entire record evidence it is appropriate that the following Order be issued.

Order

Respondent Quality Tomato, Inc. and Carl Fiorentino have committed repeated and flagrant violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

The fact and circumstances set forth above shall be published.

The application for a license made pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) by Respondent Tomato, Incorporated, is denied.

This Order shall become final and effective thirty-five (35) days after service hereof upon Respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. §§ 1.130, *et seq.*, 1.145).

Copies thereof shall be served upon the parties.

[This Decision and Order became final August 14, 1996.-Editor]

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.

PACA Docket No. D-95-0531.

Decision and Order filed September 12, 1996.

Failure to make full payment promptly — Repeated, flagrant, and willful violations — License revocation — Denial of license application.

The Judicial Officer affirmed in part and reversed in part Judge Hunt's (ALJ) Decision and Order (1) revoking Respondent Fruitland's PACA license (because Respondent Fruitland committed flagrant and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for produce); and (2) denying Respondent AAA Recovery's application for a PACA license (because James A. Andershock, doing business as AAA Recovery, engaged in practices of a character prohibited by the PACA while an officer of Respondent Fruitland). The Judicial Officer reversed both the ALJ's stay of the ALJ's order of revocation, and the ALJ's provision for an automatic rescission of the ALJ's order of revocation, because the stay and automatic rescission do not carry out the remedial purposes of the PACA. Moreover, the factors cited by the ALJ for his decision to stay the revocation of Respondent Fruitland's PACA license are not relevant circumstances under the Department's sanction policy for flagrant or repeated failures to make full payment promptly. Excuses for payment violations and collateral effects of revocation of a PACA license are neither relevant to proceedings to determine whether the Respondent has failed to make full payment promptly, nor relevant to the sanction to be imposed on a Respondent who flagrantly or repeatedly fails to make full payment promptly for produce. The sanction policy in *In re S.S. Farms Linn County, Inc.*, does not alter the doctrine in *In re The Caito Produce Co.* that, because of the peculiar nature of the produce industry, and the congressional purpose that only financially responsible persons should be engaged in the produce industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time. The record does not justify reversing the ALJ's finding, based upon credibility determinations, that Respondent Fruitland paid one of its produce creditors prior to the hearing. The Judicial Officer found that in addition to being flagrant and repeated Respondent Fruitland's violations of 7 U.S.C. § 499b(4) were willful.

Barbara S. Good, for Complainant.

Joseph P. McCafferty, Cleveland, OH, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter PACA), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Notice To Show Cause and Complaint

(hereinafter Complaint) filed on July 14, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that: (1) during the period May 1994 through May 1995, Andershock Fruitland, Inc. (hereinafter Respondent Fruitland), committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 11 sellers of the agreed purchase prices of 113 lots of perishable agricultural commodities in the total amount of \$245,873.41, which Respondent Fruitland had purchased, received, and accepted in interstate and foreign commerce, (Complaint ¶ IV, pp. 4-9); and (2) during the period May 1994 through May 1995, James A. Andershock, as owner of 100 per centum of the outstanding shares of Respondent Fruitland and president of Respondent Fruitland, engaged in practices of a character prohibited by the PACA, (Complaint ¶ V, p. 9). The Complaint requests an order revoking Respondent Fruitland's PACA license and a finding that James A. Andershock, doing business as AAA Recovery (hereinafter Respondent AAA Recovery), is unfit to be licensed under the PACA because James A. Andershock, the sole proprietor of Respondent AAA Recovery, has engaged in practices of a character prohibited by the PACA while an officer of Respondent Fruitland, (Complaint, p. 10).

Respondents filed Respondents' Answer on August 10, 1995, and Respondents' Amended Answer (hereinafter Amended Answer) on September 14, 1995. Respondents: (1) admit that, during the period May 1994 through May 1995, Respondent Fruitland failed to make prompt payment to 11 sellers for 113 lots of perishable agricultural commodities in the total amount of \$245,873.41, which Respondent Fruitland had purchased, received, and accepted in interstate and foreign commerce, but deny that the failure to pay constitutes willful and flagrant violations of the PACA, (Amended Answer ¶ 4, p. 1); (2) deny that, during the period May 1994 through May 1995, James A. Andershock engaged in practices of a character prohibited by the PACA, (Amended Answer ¶¶ 5, 7, pp. 1-2); and (3) raise three affirmative defenses, (Amended Answer ¶¶ 8-10, p. 2).

Administrative Law Judge James W. Hunt (hereinafter ALJ) presided over a hearing on September 21, 1995, in Chicago, Illinois. Complainant was represented by Barbara S. Good, Esq., Office of the General Counsel, United States Department of Agriculture. Respondents were represented by Joseph P. McCafferty, Esq., Martyn and Associates, Cleveland, Ohio. The ALJ filed an Initial Decision and Order on December 15, 1995, in which he found that Respondent Fruitland had committed flagrant and repeated violations of section 2 of the PACA, (7 U.S.C. § 499b). (Initial Decision and Order, p. 8.) The ALJ

revoked Respondent Fruitland's PACA license, but stayed the revocation for 1 year from the date of the Initial Decision and Order. Further, the ALJ provided for the automatic rescission of the revocation if Respondent Fruitland "owes no money for due and unpaid purchases of produce" at that time. (Initial Decision and Order, pp. 8-9.) The ALJ also denied Respondent AAA Recovery's application for a PACA license. (Initial Decision and Order, p. 9.)

On January 16, 1996, Complainant appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).^{*} On March 4, 1996, Respondents responded to Complainant's appeal, and on March 5, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, except that I do not delay for 1 year the revocation of Respondent Fruitland's PACA license, and I do not provide for the potential rescission of the revocation order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions from the Initial Decision and Order are shown by dots, and minor editorial changes to the Initial Decision and Order are not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

. . . .

Facts

Respondent . . . Fruitland is wholly-owned and operated by James A. Andershock. [Respondent Fruitland] buys and sells a full line of fruits and vegetables at its principal place of business in Chesterton, Indiana.

James A. Andershock started [in] the [produce] business when he was 13 by selling fruit from the front yard of his parents' house. A year or two later he moved his operation to a highway fruit stand. About 1975, [Mr. Andershock]

^{*}The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

began operating a fruit stand in Florida in the winter months, returning to his Indiana operation in the summer. Over time, he expanded into wholesaling and received a PACA dealer's license in 1985. Respondent [Fruitland's] sales have grown to between 4 and 6 million dollars a year and it employs 38 people. In 1995, [Mr.] Andershock said he attempted to get his 12-year-old son involved in the business as a licensed produce repacker called AAA Recovery. The application [for a PACA license] was [denied] because James Andershock's name was on the check for the license fee. [Mr.] Andershock then applied for a [PACA] license for AAA Recovery in his name. The record does not indicate any failures by [Respondent] Fruitland or [Respondent AAA Recovery] to comply with the PACA prior to this proceeding.

In the last year or two, Respondent Fruitland began experiencing difficulties when several customers went out of business owing Respondent [Fruitland] money. [United States Department of Agriculture (hereinafter) USDA] officials, in turn, began receiving complaints about Respondent [Fruitland's] failing to make payments to its suppliers. Candace Criss, a USDA marketing specialist, conducted an audit of Respondent [Fruitland's] operations in May 1995. Respondent [Fruitland's] accountant, Veronica Jackson, cooperated with Criss and provided her with copies of Respondent [Fruitland's] invoices. Criss determined that there were 113 transactions involving due and unpaid produce purchases totalling over \$245,000. The largest of these was \$171,268 owed to Thomas Produce Company in Boca Raton, Florida.

Criss conducted a second audit in August 1995. She found that the amount of the "old" unpaid purchases had been reduced to \$191,000, but that, since May [1995,] Respondent Fruitland had "new" due and unpaid purchases of \$46,709.70.

At the hearing on September [21, 1995], Veronica Jackson testified that the following accounts remained unpaid:

Ron's Melon Market	\$ 3,525.20
Durante & Termini	5,428.00
Paul Sinclair Sales	13,527.50
Berrybrook Farms, Inc.	1,125.50
DeGroot's Vegetable Farm	2,030.00
Strube Celery & Vegetable Co.	4,413.55
J. Caruso	1,370.00
Five Star	<u>147.00</u>
Total	\$31,566.75

Jackson also said that [Respondent] Fruitland has an unpaid balance of \$42,662.96 arising from a transaction with a farmer in Michigan. She further testified that [Respondent] Fruitland carries receivables of \$284,179.19 on its books, but of that amount about \$88,000 has been extended as credit and another \$96,000 is in bankruptcy courts, leaving \$99,115.49 as collectible.

John Thomas, president of Thomas Produce Company, which was owed \$171,268 by Respondent Fruitland for produce purchases, testified that the debt to Thomas Produce [Company] was satisfied prior to the hearing through a transaction whereby one of [John] Thomas' companies, called Thomas Investments, Inc., paid Thomas Produce [Company] the amount [Respondent] Fruitland owed. The payment constitutes a loan from Thomas Investments[, Inc.,] to [Respondent] Fruitland, which [Thomas Investments, Inc.,] secured by a mortgage on [Respondent] Fruitland's property.¹ James Andershock testified that at the time of the hearing Respondent Fruitland had an inventory of fruits and vegetables of approximately \$145,150.

Complainant contends that, because [Respondent] Fruitland continued to owe money for its produce purchases as of the time of the hearing, [Respondent Fruitland] was not in compliance with the PACA and that its [PACA] license should be revoked. [Complainant] also contends that, because James Andershock was the owner and operator of Respondent Fruitland, his application for a [PACA] license for [Respondent] AAA Recovery should be denied.

Law

- 1. Section 2(4) of the PACA . . . provides:

[§ 499b. Unfair conduct]

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

- (4) For any commission merchant, dealer, or broker to make, for a

¹Complainant contends that Respondent [Fruitland] failed to produce any records of this loan. However, John Thomas offered to produce the loan check. Complainant did not ask to see it. (Tr. 119-20.)

fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.

7 U.S.C. § 499b(4).]

2. Section 8(a) [of the PACA] . . . provides:

[§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary]

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

[7 U.S.C. § 499h(a).]

3. Section 4(d) [of the PACA] . . . provides . . . :

[§ 499d. Issuance of license

. . . .

(d) Withholding license pending investigation]

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by . . . [the PACA] or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the . . . [PACA] by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by . . . [the PACA] or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the . . . [PACA] by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

[7 U.S.C. § 499d(d).]

Regulations

Section 46.2(aa)[(5) of the regulations issued pursuant to the PACA provides:

§ 46.2 Definitions.]

. . . .

(aa) *Full payment promptly* is the term used in the [PACA] in specifying

the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for the purpose of determining violations of the [PACA], means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.

7 C.F.R. § 46.2(aa)(5).]

Discussion

The primary purpose of the PACA is to protect growers and producers from the "sharp practices of financially irresponsible and unscrupulous brokers" in the produce industry. *In re Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 745 (1992). It is the firmly established policy of USDA that when there is more than one failure to make prompt payment for the purchase of produce and the amount involved is more than *de minimis*, there is a violation of the PACA and the violation is considered repeated and flagrant, regardless of the reason for the non-payment. When a non-complying Respondent fails to make full payment by the time of the hearing, USDA's sanction for the violation is revocation of the Respondent's [PACA] license. *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 611, 629 (1989). In the circumstances here, Respondent Fruitland failed to make prompt payment for more than one purchase of produce, and, notwithstanding its efforts to pay its creditors, there remained a substantial amount (approximately \$74,229) that was due and unpaid at the time of the hearing.² Accordingly, as required by USDA policy, Respondent Fruitland's PACA license shall be ordered revoked and Respondent AAA Recovery's application for a license shall be ordered denied because [James A.] Andershock, [the sole proprietor of AAA Recovery,] as owner and operator of Respondent

²Although Respondent[s admit] in [their Amended] Answer that [Respondent Fruitland] owed money for its purchases, as found by . . . Candace Criss, [Agricultural Marketing Specialist for the Agricultural Marketing Service, Fruit and Vegetable Division, Perishable Agricultural Commodities Act Branch,] Respondent[s suggest[] that Criss' investigation was improper because she allegedly failed to tell Respondent[s] the purpose of her investigation. Criss testified that she did tell Respondent[s] the purpose of her investigation. Whether Criss did or not, I find, after reviewing the record, that in either case she did not engage in any conduct that was prejudicial to Respondent[s].

Fruitland, engaged in conduct of a character prohibited by the PACA.

.....

Findings of Fact

1. Respondent Fruitland is a corporation organized and existing under the laws of the State of Indiana. Its business and mailing address is 921 East U.S. Highway 20, Chesterton, Indiana 46304-1376. (Complaint [¶ II.(a), p. 3; Amended] Answer [¶ 2, p. 1.]

2. Pursuant to the licensing provisions of the PACA, license number 860516 was issued to Respondent Fruitland on January 14, 1986. . . . (Complaint [¶ II.(b), p. 3; Amended] Answer [¶ 2, p. 1.]

3. James A. Andershock is the president and owner of [100 per centum of the outstanding shares of] Respondent Fruitland. [(Complaint ¶ II.(c), p. 3; Amended Answer ¶ 2, p. 1.)]

4. The business and mailing address of . . . James A. Andershock, doing business as AAA Recovery, is 921 East U.S. Highway 20, Porter, Indiana 46304. (Complaint [¶ III.(a), p. 3; Amended] Answer [¶ 3, p. 1.]

5. [Respondent] AAA [Recovery] has never been licensed under the PACA. [(Complaint ¶ III.(b), p. 4; Amended Answer ¶ 3, p. 1.)]

6. During the period May 1994 through May 1995, Respondent Fruitland purchased, received, and accepted 113 lots of perishable agricultural commodities from 11 sellers in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$245,873.41. [(Complaint ¶ IV, pp. 4-8; Amended Answer ¶ 4, p. 1.)]

7. Respondent [AAA Recovery] filed an application for a PACA license on June 22, 1995. [The application of Respondent AAA Recovery lists James A. Andershock as the sole proprietor. (Complaint ¶ VI.(a), (b), p. 9; Amended Answer ¶ 6, p. 2.)]

8. As of the date of the hearing, Respondent Fruitland had paid to its produce creditors a portion of the amounts [alleged] in the Complaint [and admitted by Respondents in their Amended Answer] as having not been promptly paid. However, as of the date of the hearing, Respondent Fruitland had a past-due and unpaid produce debt of approximately \$74,229.

Conclusions of Law

Respondent . . . Fruitland . . . committed flagrant[, willful,] and repeated

violations of section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]). Respondent . . . AAA Recovery is not entitled to a license.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises two issues in Complainant's Appeal Petition and Supporting Brief (hereinafter CAP).

First, Complainant contends that:

[T]he ALJ improperly applied the Department's sanction policy in delaying the effective date of the revocation for one year and providing for automatic rescission of the order of revocation upon condition that [R]espondent has no "due and unpaid" purchases of produce one year from the date of the Initial Decision.

CAP, p. 2.

I agree with Complainant. Failure to pay for perishable agricultural commodities is a very serious violation of the PACA, (7 U.S.C. § 499b(4)).³ The PACA provides for the revocation of a license if the Secretary finds flagrant or repeated violations of the PACA, regardless of whether the firm is unable to pay due to circumstances beyond its control. (7 U.S.C. § 499h(a).) It is the policy of this Department to impose severe sanctions for violations of the PACA that are repeated or are regarded by administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to Respondents, but also to potential violators. Both the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry have referred

³*In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 298 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), reprinted in 46 Agric. Dec. 1105 (1987); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2025 (1985); *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 147 (1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1513 (1983); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1154 (1983); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 410 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

to the PACA as an intentionally "tough" law, as follows:

The Perishable Agricultural Commodities Act is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be many thousands of miles away, and depend for their payment upon his business acumen and fair dealing—and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.

The law has fostered an admirable degree of dependability and fairness in the industry chiefly through the method of requiring the registration of all those who carry on an interstate business in perishable agricultural commodities and denying this registration to those whose business tactics disqualify them. It also provides the procedures and the authority with which complaints within the industry can be settled without resort to courts of law. In spite of the strictness of some of the provisions of the law, the [PACA] and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support.

H.R. Rep. No. 1196, 84th Cong., 1st Sess. 2 (1955).⁴

The Judicial Officer explained the justification for the stringency of the law, as follows:

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the

⁴S. Rep. No. 2507, 84th Cong., 2d. Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701 (quoting H.R. Rep. No. 1196, 84th Cong., 1st Sess. (1955)).

consequences if the violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or by other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to risk resulting from respondent's undercapitalization or bad debt experience.

In re John H. Norman & Sons Distributing, Co., 37 Agric. Dec. 705, 719-20 (1978).

In section 525(a) of the Bankruptcy Code, Congress again recognized the importance of having only financially responsible firms in the perishable agricultural commodities business. In that section, Congress carved out an explicit exception to the anti-discrimination provision of the Bankruptcy Code for the PACA.⁵ Congressman Foley, Chairman of the House Agriculture Committee, explained the need for this exception, as follows:

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

⁵Section 525(a) of the Bankruptcy Code states:

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930[(7 U.S.C. §§ 499a-499s)], . . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act.

123 Cong. Rec. 35,641, 35,672 (1977).

The Department's policy is to revoke the PACA license of any Respondent that has not made full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce, and fails to make such payments by the time of the hearing.⁶ This policy is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also is designed to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.⁷ This admittedly harsh sanction policy has consistently been upheld

⁶*See, e.g., In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 788 (1994), appeal dismissed, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1623 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1441 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 765 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 629-42; *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1467 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Carpenito Bros. Inc.*, 46 Agric. Dec. 486, 506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988); *In re Clarence Miller Co.*, 43 Agric. Dec. 529, 532 (1984); *In re Gilardi Truck & Transportation, Inc.*, *supra*, 43 Agric. Dec. at 123, 149-50.

⁷*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Boss Fruit & Vegetable, Inc.*, *supra*, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, *supra*, 51 Agric. Dec. at 1440; *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, *supra*, 40 Agric. Dec. at 1133; *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable* (continued...)

by the courts.⁸

Respondent Fruitland, relying on *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542 (1971), contends that there is precedent to support a stay or abeyance of a sanction order. (Response of Respondent Andershock's Fruitland, Inc., to Complainant's Appeal Petition (hereinafter Respondent Fruitland's Response), pp. 7-8.) Respondent Fruitland's reliance on *In re American Fruit Purveyors, Inc.*, *supra*, is misplaced. First, the *American Fruit Purveyors* case was decided prior to the adoption of current Department policy, and second, the facts upon which the Judicial Officer based his abeyance of the sanction order in the *American Fruit Purveyors* case are not present in the instant proceeding.

In the *American Fruit Purveyors* case, the Judicial Officer suspended American Fruit Purveyors, Inc.'s, PACA license for 14 days for flagrantly and repeatedly failing to make full payment of the agreed purchase prices of perishable agricultural commodities purchased in interstate commerce. The Judicial Officer held the suspension of American Fruit Purveyors, Inc.'s, PACA license in abeyance for 4 years upon the condition that American Fruit Purveyors, Inc., pay for perishable agricultural commodities in accordance with the regulations issued under the PACA or in accordance with written agreements between American Fruit Purveyors, Inc., and sellers of perishable agricultural commodities. The Judicial Officer specifically based this sanction on the facts of the case, as follows:

In the most recent litigated case under the [PACA] involving a firm's

⁷(...continued)

Co., *supra*, 40 Agric. Dec. at 402; *In re Columbus Fruit Co.*, *supra*, 40 Agric. Dec. at 112; *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977). See also *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

⁸*In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), printed in 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co.*, *supra*; *In re Finer Foods Sales Co.*, *supra*; *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro*, *supra*; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

failure to pay promptly for 48 lots of produce (the delay in payment ranging from 21 to 175 days), the firm's [PACA] license was suspended for 15 days. *In re William D. Bethea*, 22 [Agric. Dec.] 824, 826-827 [(1963)]. However, in the *Bethea* case, there were no mitigating circumstances. As far as the record in that case shows, the respondent intentionally failed to pay promptly. In the present case, on the other hand, as far as the record shows, the respondent not only thought that it had implied agreements which justified delays in payment, but the respondent also notified the complainant of its views on a number of occasions, and there is no evidence in the record that the complainant ever corrected the respondent's misunderstanding.

In these circumstances, rather than impose an active suspension, as was done in the *Bethea* case, I believe that it is more appropriate to suspend the respondent's license for two weeks, but hold the suspension in abeyance for a period of four years, conditioned upon the respondent paying promptly during such period.

In re American Fruit Purveyors, Inc., *supra*, 30 Agric. Dec. at 1597. (Footnotes omitted.)

Ruling on a petition for reconsideration in the *American Fruit Purveyors* case, the Judicial Officer further explained the basis for the lenient sanction, as follows:

The complainant argues that the sanction imposed in this case is too lenient (Petition, pp. 26-28). The complainant states (Petition p. 28):

We submit that if this "sanction" remains, it will only serve to encourage others to violate the [PACA]. This is especially true in this instance since this sanction is the first one imposed by this particular Judicial Officer and the industry will probably interpret his action as a pattern for the type of sanctions they can expect from him in the future when they engage in serious and willful violations of the [PACA] as found by the Judicial Officer to have been perpetrated by this respondent.

If this decision raises expectations in the industry of lenient sanctions for serious or flagrant violations, their expectations will be short-lived. For example, I have just filed a Tentative Decision in a case under another regulatory statute in which I agreed with the Hearing Examiner's findings

as to the violations but increased the recommended suspension of 45 days to three years.

The lenient sanction was issued in this case solely because the complainant failed to prove a convincing case. As explained in the decision, the respondent advised the complainant in writing of its construction of the [PACA] and regulations on a number of occasions and—as far as the record shows—the complainant made no effort to inform the respondent that it disagreed with its construction.

In re American Fruit Purveyors, Inc., 31 Agric. Dec. 122, 127-28 (1972) (Ruling on Complainant's Petition for Reconsideration).

In the instant proceeding, Respondent Fruitland's failures to pay promptly were not based upon a misunderstanding, which Respondent Fruitland brought to Complainant's attention on several occasions, but rather, were flagrant, willful, and repeated failures to make full payment promptly of \$245,873.41 to 11 sellers for 113 lots of perishable agricultural commodities over the course of 1 year.

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent Fruitland by its own admission failed to make full payment promptly to 11 sellers of the agreed purchase prices in the total amount of \$245,873.41 for 113 lots of perishable agricultural commodities during the period May 1994 through May 1995. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even consumers of perishable agricultural commodities who ultimately bear increased industry costs

resulting from failures to pay.⁹ These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.¹⁰

Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently, a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment. In order to carry out the purposes of the PACA, it is imperative that PACA licenses be revoked as quickly as possible from licensees who flagrantly or repeatedly fail to make full payment promptly.

The administrative officials charged with responsibility for administering the PACA have long recommended revocation of PACA licenses where there have been many failures to pay promptly involving lengthy delays in making full payment.¹¹

In the instant proceeding, Ms. Joan Colson, an auditor with the United States Department of Agriculture, Agricultural Marketing Service, Perishable Agricultural Commodities Act Branch, (Tr. 71), testified regarding the administrative officials' policy as to payment violations and the sanction to be imposed upon Respondents, as follows:

⁹Although the PACA is primarily to protect perishable agricultural commodity producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Sam Leo Catanzaro, supra*, 35 Agric. Dec. at 33. See also *In re B.G. Sales Co., supra*, 44 Agric. Dec. at 2026; *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2426; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1169; *In re The Connecticut Celery Co., supra*, 40 Agric. Dec. at 1134; *In re Columbus Fruit Co., supra*, 40 Agric. Dec. at 114.

¹⁰See footnote 7.

¹¹See, e.g., *In re Lloyd Myers Co., supra*, 51 Agric. Dec. at 764; *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons, supra*, 34 Agric. Dec. at 133.

BY MS. GOOD:

Q. Ms. Colson, what, if any, violations of the PACA were uncovered by the investigative materials you reviewed in this case and the testimony that you have heard here today?

[BY MS. COLSON:]

A. That Andershock Fruitland Inc. committed repeated and flagrant violations of Section 2-4 of the PACA and that when the second investigation was conducted the rollover debt existed.

Q. Now, have you yourself conducted any investigation in this case?

A. Yes.

Q. Is there anything unique about the produce industry that makes failures to pay promptly particularly harmful?

A. The industry is very unique because of the items involved are highly perishable. The items have to go from growing areas to other areas of the country in order to reach the consumer at the height of its edible appeal. Because of the short expand time, industry members don't always have time to perform extensive credit checks that may be commonplace in other industries. Therefore, the members have to rely a great deal on trust.

For example, a typical transaction involves a shipper and a receiver. The shipper, usually on the basis of a few phone calls, ships produce, many times worth thousands of dollars, to the receivers on the basis or the promise that they will pay for that produce and pay for it promptly.

The receiver on the other hand, trusts that the shipper will ship the kind, grade and quality that they contracted to.

Q. What is the sanction that the Complainant recommends as a result of Respondent's failures to make full payment promptly in this case?

A. We recommend that a finding be made that Andershock Fruitland Inc. committed repeated and flagrant violations of Section 2-4 of the act and that

the license be revoked.

With regard to James Andershock d.b.a. AAA Recovery, we recommend that their license application be denied.

Q. What were the major factors considered in arriving at the sanction recommendation, with respect to Andershock Fruitland Inc.?

A. There were basically four factors. The number of violations, the number of sellers involved, the amount of money involved and the time period involved. In this particular circumstance, it was 113 transactions that Andershock Fruitland Inc. failed to pay to 11 sellers in the amount of \$246,000 approximately.

The time period was about a year from May of '94 through May of '95. The last one would be the effect that these violations have on the industry.

Q. And what effect do these violations have on the industry?

A. Basically it's a ripple effect. If there's a Firm A and Firm B and Firm C, and they each sell to each other, Firm A sold to Firm B, Firm B sold to Firm C, and Firm C failed to pay Firm B for the produce, then that puts financial harm on that firm and puts them in more distress in order to pay Firm A. So their ripple effect is throughout the industry for any particular transaction.

Q. What effect would the recommended sanction of revocation of the license have on the produce industry?

A. Basically a deterrent effect to the industry.

Q. Is this a strong deterrent effect?

A. Yeah, the Secretary, when he issues a license, he's making the statement to the industry. If a person or a firm has been found to act in the character prohibited by the act or commit violations of the act, then the Secretary is saying that these violations are very serious and that, you know, action will be taken against them or a license won't be issued if they've committed them.

Tr. 75-78.

The ALJ's Initial Decision and Order revoking Respondent Fruitland's PACA license for flagrant and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), which would not have taken effect for 1 year from the date of the Initial Decision and Order and which would have been automatically rescinded if, 1 year from the date of the Initial Decision and Order, Respondent Fruitland "owes no money for due and unpaid purchases of produce," (Initial Decision and Order, pp. 8-9), is not in accord with Department policy, and does not carry out the remedial purposes of the PACA. Rather, the ALJ's Initial Decision and Order would allow, and even encourage, Respondent Fruitland to continue to violate the PACA and the regulations issued pursuant to the PACA.

Section 46.2(aa)(5) of the regulations issued pursuant to the PACA defines *full payment promptly* as payment for produce purchased by a buyer within 10 days after the day on which the produce is accepted. (7 C.F.R. § 46.2(aa)(5).) The ALJ's Initial Decision and Order constructively amends this definition of *full payment promptly* by providing Respondent Fruitland with 1 year from the date of the Initial Decision and Order in which to make payment for produce, rather than the 10-day period provided in 7 C.F.R. § 46.2(aa)(5). Further, the ALJ's Initial Decision and Order allows this financially-unstable PACA licensee to remain in business and, for an additional year, to expose to financial risks the very persons the PACA was designed to protect: producers, sellers, consumers, and other PACA licensees.

If the relaxed sanction imposed by the ALJ in the Initial Decision and Order were to be imposed routinely on PACA licensees who fail to make full payment promptly in accordance with the PACA, financially-troubled PACA licensees would be encouraged to forego prompt payment, because the Department's sanction would be an order allowing the PACA licensee to further violate the PACA by taking up to an additional year to pay for produce.

The ALJ explained the basis for his Initial Decision and Order allowing Respondent Fruitland an additional year in which to pay for perishable agricultural commodities, as follows:

[I]n view of the history of [R]espondent Fruitland's longtime compliance with the PACA, the failure of [R]espondent [Fruitland's] customers to pay it the money it was due that precipitated [R]espondent [Fruitland's] non-compliance, [R]espondent [Fruitland's] apparent good faith efforts to pay its suppliers, the loss these suppliers may incur if [R]espondent [Fruitland's PACA] license is revoked outright, and the loss of employment to thirty-eight persons employed by [R]espondent

[Fruitland], I find that the purpose of the PACA to protect growers and producers, and others in the industry, such as workers, will be better served by affording [R]espondent [Fruitland], who is not shown to be an "unscrupulous" person engaging in "sharp practices," an opportunity to continue to pay the money it owes its suppliers before the order of revocation takes effect.

Initial Decision and Order, p. 7.

Respondent Fruitland contends that the Department's new sanction policy articulated in *In re S.S. Farms Linn County, Inc.*, *supra*, requires that the ALJ weigh mitigating circumstances against Respondent Fruitland's statutory violation, and that the ALJ properly did so. (Respondent Fruitland's Response, p. 6.) I disagree with Respondent Fruitland. The sanction policy in *In re S.S. Farms Linn County, Inc.*, *supra*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra*.¹² The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the articulated congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.

The Department's sanction policy requires an examination of the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent Fruitland's violations were very serious, repeated, flagrant, and willful violations of the PACA. Respondent Fruitland's violations directly contravene one of the primary remedial purposes of the PACA--the financial protection of sellers of perishable agricultural commodities. The administrative officials charged with administering the PACA recommend the revocation of Respondent Fruitland's PACA license.

Ms. Joan Colson testified that the relevant circumstances taken into consideration in making the recommendation that Respondent Fruitland's PACA

¹²*In re Hogan Distributing, Inc.*, 55 Agric. Dec. ___, slip op. at 16 (Apr. 22, 1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1329 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995).

license be revoked were the number of Respondent Fruitland's violations (113); the number of sellers to whom Respondent Fruitland failed to make full payment promptly (11); the amount of money not paid (\$245,873.41); the time period during which Respondent Fruitland violated the PACA (approximately 1 year); and the effect that the violations have on the perishable agricultural commodities industry. (Tr. 77.)

The ALJ cited several mitigating factors for staying Respondent Fruitland's license revocation: previous compliance with the PACA, good faith efforts to pay suppliers, excuses for failure to pay, and collateral effects of revocation. However, these are not *relevant circumstances* under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.¹³ Respondent Fruitland's compliance with the PACA prior to the Complaint's alleged violations and Respondent Fruitland's good faith efforts to pay suppliers are not relevant to the imposed sanction. Rather, the relevant factors are whether the violations found in the instant proceeding are flagrant or repeated failures to pay more than a *de minimis* amount, whether Respondent Fruitland had paid all sellers by the opening of the hearing, and whether Respondent Fruitland is in compliance with the PACA and the regulations under the PACA. Even if a Respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful. Moreover, such excuses are not relevant to the sanction to be imposed on a Respondent who has flagrantly or repeatedly failed to make full payment promptly.¹⁴ Furthermore, collateral effects of a Respondent's license revocation

¹³Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), which provides "alternative civil penalties" for violations of section 2 of the PACA, in lieu of suspension or revocation, requires the Secretary of Agriculture to give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, but only when determining the amount of a civil penalty to be assessed. The factors that must be considered under section 8(e) of the PACA, (7 U.S.C. § 499h(e)), are not required by the PACA to be considered with respect to the revocation or suspension of a PACA license.

¹⁴*In re Moreno Bros.*, *supra*, 54 Agric. Dec. at 1443 (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1424 (1995), *appeal docketed*, No. 95-70906 (9th Cir. Dec. 18, 1995) (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an
(continued...)

¹⁴(...continued)

extended period of time); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990) (failure to pay for produce results in the revocation of Respondent's PACA license, notwithstanding excuses such as failure of someone else to fulfill contractual obligations with Respondent); *In re Carlton Fruit Co.*, 49 Agric. Dec. 513, 519 (1990), *aff'd*, 922 F.2d 847 (11th Cir. 1990) (unpublished) (failure to pay for produce, exceeding a *de minimis* amount, results in the revocation of a Respondent's PACA license, notwithstanding excuses such as the failure of someone else to fulfill contractual obligations with Respondent); *In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 615 (although mitigating circumstances are generally considered in determining sanctions in USDA disciplinary proceedings, all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 (1989) (revocation of Respondent's PACA license is appropriate even though Respondent failed to pay because Respondent's customers ceased doing business with Respondent when the city announced it was taking Respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (excuses such as nonpayment because of bankruptcy resulting after Respondent suddenly lost its largest customer are rejected in the enforcement of the PACA); *In re B.G. Sales Co.*, *supra*, 44 Agric. Dec. at 2028-30 (all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program; thus, it is not relevant that Respondent failed to pay because bank suddenly refused to extend credit as it agreed, and the bank took \$50,000 of Respondent's funds in the bank's possession; as in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations and sanctions under the PACA); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that Respondent was in business for 35 years with no complaints or financial difficulties, and that nonpayment was caused by \$200,000 in losses in 2-year period from theft of produce from Respondent's warehouse are irrelevant); *In re Gilardi Truck & Transportation, Inc.*, *supra*, 43 Agric. Dec. at 129 (fire at Respondent's business for which Respondent was under-insured rejected in determining whether payment violations occurred or whether they were willful); *In re Jarosz Produce Farms, Inc.*, *supra*, 42 Agric. Dec. at 1513-26 (bankruptcy caused by failure of large purchaser from Respondent to comply with its contractual agreement is not a mitigating circumstance in a failure to pay case under the PACA); *In re Oliverio, Jackson, Oliverio, Inc.*, *supra*, 42 Agric. Dec. at 1158-70 (nonpayment because another firm failed to pay Respondent \$248,805.66 is not a mitigating circumstance); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay Respondent, and increased operating costs rejected in determining whether payment violations occurred or whether violations were willful); *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2428, 2442-44 (revocation of Respondent's PACA license is appropriate where nonpayment is caused by Respondent's bankruptcy); *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1171 (nonpayment because of bankruptcy rejected in determining whether payment violations occurred or whether violations were willful); *In re Carlton* (continued...)

are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or

¹⁴(...continued)

F. Stowe, Inc., *supra*, 41 Agric. Dec. at 1129 (nonpayment because of bankruptcy of another firm owing Respondent \$776,459.23 rejected in determining whether payment violations occurred or whether violations were willful); *In re V.P.C., Inc.*, *supra*, 41 Agric. Dec. at 746-47 (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (financial difficulties, including difficulty in collecting from others, is not relevant to a PACA licensee's failure to promptly pay), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re The Connecticut Celery Co.*, *supra*, 40 Agric. Dec. at 1138-40 (Respondent's sudden and unexpected loss of a major sales account is not a mitigating circumstance in a failure to pay case); *In re C.B. Foods, Inc.*, *supra*, 40 Agric. Dec. at 969-70 (Respondent's petition in bankruptcy is irrelevant to the issuance of a sanction under the PACA); *In re United Fruit & Vegetable Co.*, *supra*, 40 Agric. Dec. at 404 (nonpayment because of financial difficulties is not a mitigating circumstance); *In re Columbus Fruit Co.*, *supra*, 40 Agric. Dec. at 113 (nonpayment because Respondent lost a major sales account and a large supplier changed its course of dealing with Respondent, demanding cash on delivery, rejected in determining whether payment violations occurred or whether violations were willful); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (a strike and the failure of others to pay Respondent are not defenses in a disciplinary action under the PACA for failure to pay for produce), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distributing Co.*, *supra*, 37 Agric. Dec. at 709-14 (nonpayment because of failure of others to pay Respondent and Respondent's responsible and honorable conduct are not relevant in a PACA failure to pay case); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re Maure Solt*, 35 Agric. Dec. 721, 723-24 (1976) (bankruptcy of another firm owing Respondent over \$130,000 is not a defense to a violation of the payment provisions of the PACA nor does it negate willfulness); *In re Sam Leo Catanzaro*, *supra*, 35 Agric. Dec. at 31 (a railroad strike causing Respondent's failure to pay is not a defense under section 2 of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (financial difficulty is not an excuse for violating the PACA and does not negate willfulness); *In re George Steinberg & Son, Inc.*, *supra*, 32 Agric. Dec. at 266-68 (Respondent's insolvency does not negate willfulness; a licensee is obligated by the PACA to have sufficient funds to pay for perishable agricultural commodities or not buy them); *In re Cloud & Hatton Brokerage*, 18 Agric. Dec. 547, 549 (1959) (the fact that Respondent has been adjudicated a bankrupt is not a defense in a PACA disciplinary proceeding for failure to pay); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (financial difficulties do not condone Respondent's repeated failures to pay and revocation of Respondent's PACA license should be ordered); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties authorizes revocation of Respondent's PACA license and had Respondent's license not already terminated, it would have been revoked).

repeatedly failing to make full payment promptly.¹⁵

Respondent Fruitland could inflict considerable damage on the perishable agricultural commodities industry during the year the license revocation would have been stayed under the Initial Decision and Order. Such a result is contrary to two of the primary purposes of the PACA; *viz.*, the financial protection of the perishable agricultural commodities industry and consumers; and the removal of financially irresponsible persons from the industry.

It should be emphasized that the revocation order in this case is not being issued for any *punitive* reasons. Respondent Fruitland has done nothing worthy of *punishment*. Respondent Fruitland has committed no action even remotely resembling a crime. The offenses here were *mala prohibita*--not *mala in se*. There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that takes up to a year to pay produce sellers in violation of the PACA.

Second, Complainant contends that:

¹⁵ *In re Hogan Distributing Co.*, *supra*, slip op. at 22 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed wilful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co.*, *supra*, 49 Agric. Dec. at 576 (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, *supra*, 48 Agric. Dec. at 571 (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, *supra*, 46 Agric. Dec. at 177 (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co.*, *supra*, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co.*, *supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

THE ALJ ERRED IN FINDING THAT, AS OF THE DATE OF THE HEARING, RESPONDENT [FRUITLAND] HAD PAST DUE AND UNPAID PRODUCE DEBT OF \$74,229.00 WHEN, IN FACT, RESPONDENT [FRUITLAND'S] PAST DUE AND UNPAID PRODUCE DEBT TOTALLED APPROXIMATELY \$241,847.01

CAP, 12.

The ALJ states that:

John Thomas, president of Thomas Produce Company, which was owed \$171,268 by [R]espondent Fruitland for produce purchases, testified that the debt to Thomas Produce was satisfied prior to the hearing through a transaction whereby one of Thomas' companies, called Thomas Investments, Inc., paid Thomas Produce the amount [Respondent] Fruitland owed. The payment constitutes a loan from Thomas Investments[, Inc.,] to [Respondent] Fruitland which [Thomas Investments, Inc.,] secured by a mortgage on [Respondent] Fruitland's property.

Initial Decision and Order, pp. 3-4. (Footnote omitted.)

Based upon Thomas' testimony, the ALJ found that, as of the date of the hearing, Respondent Fruitland had paid to its produce creditors a portion of the amounts alleged as not having been paid promptly and had a past-due and unpaid produce debt of approximately \$74,229. (Initial Decision and Order, Findings of Fact No. 8, p. 8.) Complainant contends that this is not worthy of belief because the ALJ accepted, without question or documentary proof, both the testimony of John Thomas and Respondent Fruitland's proof that the Thomas Produce Company account balance of approximately \$167,518 had been discharged prior to the hearing. (CAP, p. 13.)

Although the ALJ made no specific credibility determinations as to John Thomas, I find that the ALJ's discussion of the evidence, together with the ALJ's findings, indicate that the ALJ found credible John Thomas' testimony that Respondent Fruitland paid prior to the hearing. It is the consistent practice of the Judicial Officer to give great weight to the findings by ALJs since they have the opportunity to see and hear witnesses testify.¹⁶ However, in some

¹⁶E.g., *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); compare *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426-28 (Remand Order), *final decision*, 38 Agric. Dec.

(continued...)

circumstances, the Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved, *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); (2) the record is sufficiently strong to compel a reversal as to the facts, *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); or (3) an ALJ's findings of fact are hopelessly incredible, *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations, and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *In re William Joseph Vergis*, 55 Agric. Dec. ___, slip op. at 16 (Apr. 1, 1996); *In re Midland Banana & Tomato Co.*, *supra*, 54 Agric. Dec. at 1271-72; *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

While I find the evidence concerning Respondent Fruitland's payment to Thomas Produce Company is not as strong as would normally be expected in these cases, the evidence is not so weak as to justify my making a separate determination of John Thomas' credibility or my reversing the ALJ's finding,

¹⁶(...continued)

1539 (1979) (affirming Judge Baker's dismissal of Complaint on remand where she had originally accepted the testimony of Respondent's wife, Respondent's employee, and Respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

based upon his determination of the credibility of John Thomas, that Respondent Fruitland paid Thomas Produce Company approximately \$167,000 of the \$241,847.01 balance, prior to the date of the hearing. In any event, the remainder that would still be owing (approximately \$74,229) is most assuredly not *de minimis*; therefore, Respondent Fruitland is still liable under the PACA for "no pay" of that amount, which requires revocation.

The distinction between "slow pay," which requires suspension, and "no pay," which requires revocation, is analyzed in *Caito*, as follows:

Prior to the decision in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), it had been the policy of the Judicial Officer to issue lengthy suspension orders in the case of serious "slow payment" cases, usually from 70 to 90 days.

The administrative officials charged with the responsibility for administering the Perishable Agricultural Commodities Act have long recommended revocation of a license where there have been many failures to pay promptly, involving lengthy delays in making full payment. See, e.g., *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). There are strong administrative reasons supporting their revocation recommendation. Just as in the case of the savings and loan industry, if a produce licensee is in financial difficulty (i.e., not able to pay its creditors promptly), the loss to the industry as a whole is frequently much less if the firm is closed down promptly. Furthermore, we are dealing here with an industry that asked for, pays for, and desires a tough regulatory program to insure that only financially responsible licensees are permitted to remain in the industry.

....

In *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 149-54 (1984), the Judicial Officer moved a step closer to the views of the administrative officials, holding that in order for a suspension order to be issued on the basis of a "slow pay" case, rather than a revocation order which would be issued in a "no pay" case, full payment must be made by the time of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent must be in full compliance

with the payment requirements by the time of the hearing.

.....

The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 500-06 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW), by requiring that respondent's present compliance not involve credit agreements for more than 30 days. *Carpenito* also emphasizes that under *Gilardi*, respondent must be in *compliance* with the payment provisions immediately prior to the hearing--i.e., being almost in compliance is not enough!

In re The Caito Produce Co., *supra*, 48 Agric. Dec. at 632-33, 638. (Footnotes and citations omitted.)

The record is clear that Respondent Fruitland was not in compliance when the hearing started. Thus, under the *Caito* doctrine, Respondent Fruitland's license will be revoked.

I agree with the ALJ that Respondent Fruitland committed flagrant and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). (Initial Decision and Order, Conclusions of Law, p. 8.)¹⁷ Moreover, I find that Respondent Fruitland willfully violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)). An action is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Moreno Brothers*, *supra*, 54 Agric. Dec. at 1432; *In re*

¹⁷Complainant and Respondent Fruitland also agree with the ALJ's conclusion that Respondent Fruitland committed repeated and flagrant violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). (CAP, p. 2; Respondent Fruitland's Response, p. 11.)

Samuel S. Napolitano Produce, Inc., *supra*, 52 Agric. Dec. at 1612.¹⁸ See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("‘Wilfully’ could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’")

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Fruitland's PACA license is revoked, effective 30 days after service of this Order on Respondent Fruitland.
2. Respondent AAA Recovery's application for a license is denied, effective upon service of this Order on Respondent AAA Recovery.
3. The facts and circumstances set forth in this decision shall be published.

¹⁸The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent Fruitland's violations would still be found willful in view of its blatant disregard of an express provision in the PACA requiring Respondent Fruitland to make full payment promptly, (7 U.S.C. § 499b(4)), and a regulation expressly defining *full payment promptly*, (7 C.F.R. § 46.2(aa)(5)).

**In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Order Denying Petition for Reconsideration filed October 29, 1996.**

Timothy A. Morris, for Complainant.
Mark A. Amendola, Cleveland, OH, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

Respondents' Petition for Reconsideration of the Decision and Order issued in this proceeding is denied for the reasons previously set forth in the Decision and Order filed on September 12, 1996, and for the reason that Respondents' Petition for Reconsideration neither states specifically the matters claimed to have been erroneously decided nor states briefly the alleged errors, as required by section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.146(a)(3)).

Section 1.146(b) of the Rules of Practice, (7 C.F.R. § 1.146(b)), provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration. Respondents' Petition for Reconsideration was timely filed and automatically stayed my Decision and Order filed on September 12, 1996. Therefore, since Respondents' Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Decision and Order filed September 12, 1996, is reinstated, with allowance for time passed, as follows:

1. Respondent Fruitland's PACA license is revoked, effective 30 days after service of this Order on Respondent Fruitland.
2. Respondent AAA Recovery's application for a license is denied, effective upon service of this Order on Respondent AAA Recovery.
3. The facts and circumstances set forth in this decision shall be published.

**In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.
Decision and Order filed November 15, 1996.**

Failure to make full payment promptly — Repeated, flagrant, and willful violations — License revocation.

The Judicial Officer affirmed Judge Bernstein's (ALJ) Decision and Order revoking Respondent Havana's and Respondent Havpo's PACA licenses because Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make prompt payment for produce. Complainant proved Respondents' violations of the PACA and past-due debt by a preponderance of the evidence. Respondents may not convert a "no-pay" case to a "slow-pay" case by paying all outstanding debts alleged in the Complaint, if Respondents are not in full compliance with the payment provisions of the PACA at the time of the hearing. Produce supplier invoices obtained from Respondents' files and tables of past-due debts prepared by USDA investigators based upon examinations of Respondents' files are highly reliable, probative, and substantial evidence of Respondents' violations of the PACA and Respondents' past-due debt. Respondents' purchases of produce from out-of-state suppliers were in interstate and foreign commerce and Respondent Havana's purchases of produce from in-state produce suppliers involving produce that had been moved in interstate or foreign commerce were in interstate or foreign commerce. The sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, does not change the policy set forth in *In re The Caito Produce Co.* Excuses for failure to pay and collateral effects of revocation are not relevant circumstances under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.

Julie Cook Schuster, for Complainant.

Tab K. Rosenfeld, New York, NY, for Respondents.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (hereinafter PACA), (7 U.S.C. §§ 499a-499s), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.130-.151).

The proceeding was instituted by a Complaint filed on August 1, 1994, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that, during the period February 1993 through January 1994, Respondent Havana Potatoes of New York Corp. (hereinafter Havana) violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of \$1,960,958.74, which Havana purchased, received, and accepted in interstate and foreign commerce and that, during the period August 1993 through December 1993, Respondent Havpo, Inc. (hereinafter Havpo), violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of \$101,577.50, which Havpo purchased, received, and accepted in interstate

commerce. (Complaint ¶ 3.) Respondents filed Answers on August 17, 1994, in which they denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 2-3, 1995, in New York, New York. Complainant was represented by Julie Cook, Esq., Office of the General Counsel, United States Department of Agriculture. Respondents were represented by Tab K. Rosenfeld, Esq., of New York, New York. The ALJ issued an Initial Decision and Order on October 19, 1995, in which he found that Respondent Havana and Respondent Havpo committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), (Initial Decision and Order at 5), and revoked Respondent Havana's PACA license and Respondent Havpo's PACA license, (Initial Decision and Order at 17).

On February 20, 1996, Respondents appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).¹ On March 18, 1996, Complainant responded to Respondents' appeal, and on March 19, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's Discussion.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

.....

Findings of Fact

1. Respondent Havana Potatoes of New York Corp. is a corporation organized and existing under the laws of the State of New York. Its business mailing address is Hunts Point Terminal Market, Row D, Units 449-461, Bronx,

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

New York 10474. (Complaint ¶ 2[; Answer; CX 1; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 1.)

2. At all times material herein, Havana was licensed under the provisions of the PACA. [(Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 2.)] License number 870432 was issued to Havana on December 22, 1986. This license has been renewed annually (CX 1.)

3. Respondent Havpo, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Its business mailing address is 25 Christopher Place, Saddle River, New Jersey 07458. (Complaint ¶ 2[; Answer; CX 2; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 3.)

4. At all times material herein, Havpo was licensed under the provisions of the PACA. [(Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 4.)] License number 930801 was issued to Havpo on March 8, 1993. This license has been renewed annually (CX 2.)

5. During the period of February 1993 through January 1994, Havana failed to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of \$1,960,958.74, which Havana had purchased, received, and accepted in interstate and foreign commerce. (CX 4, 4a-4ppp.) Since the time that the Complaint was filed, this amount has been paid in full. (Tr. 27[, 29-30; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5.)

6. During the period of August 1993 through [January 1994], Havpo failed to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of \$101,577.50, which Havpo had purchased, received, and accepted in interstate commerce. (CX 5, 5a-5f.) Since the time that the Complaint was filed, this amount has been paid in full. (Tr. 27[, 29-30; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5.)

7. In January 1994, [the United States Department of Agriculture (hereinafter USDA) initiated an investigation to determine whether Havana was complying with the prompt payment provisions of the Perishable Agricultural Commodities Act. [Mr. Donald P.] Dutton[, a marketing specialist employed by the USDA, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch,] was assigned to conduct the USDA investigation after over 400 trust notices in excess of \$6 million were filed with USDA against Havana. (Tr. [37-]38).

8. On January 25, 1994, Mr. Dutton travelled to New York and visited Havana's place of business. Mr. Dutton met with [Mr.] Pedro Perez, Havana's president, and explained to [Mr. Perez] that he was conducting an investigation to determine whether Havana was complying with the prompt payment

provisions of the [PACA]. Mr. Dutton requested access to the firm's business records, including the firm's accounts receivable records, accounts payable records, cash disbursement records, and corporate records. Mr. Perez immediately provided Mr. Dutton with access to these records. (Tr. 40-41.)

9. Upon examination of Havana's records, Mr. Dutton uncovered records relating to Havpo, another company owned and operated by Mr. Perez. ([CX 2; Tr. 43[-44.]])

10. On April 5-7, 1995, . . . [Mr.] John A. Koller, [the Assistant Regional Director for the Northeast Regional Office, USDA, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch,] visited Havana's place of business to conduct a compliance investigation of Havana and Havpo. Mr. Koller requested access to the books and records of both firms and was granted access to these records. (Tr. 95-98.) Upon inspection of Havana's books and records, Mr. Koller discovered that, during the period March 1994 through April 3, 1995, Havana failed to make full payment promptly to 2[5] sellers of the agreed purchase prices for 137 lots of perishable agricultural commodities in the total amount of \$1,197,616.35, which Havana had purchased, received, and accepted in interstate and foreign commerce[, and which amount was past-due and unpaid at the start of the hearing]. (CX 6, 6a-6z; Tr. 104.) The compliance investigation also revealed that approximately \$1[68],000 in checks, issued by Havana in purported payment for its produce purchases, were returned unpaid by the bank upon which they were drawn, because Havana did not have and maintain sufficient funds on deposit and available in the account upon which such checks are drawn to pay the checks when presented. (CX 8, 8a-8c.)

11. During his April 5-7, 1995, visit to Havana's place of business, Mr. Koller also inspected Havpo's books and records. That inspection revealed that, during the period August 1994 through November 1994, Havpo failed to make full payment promptly to 1 seller of the agreed purchase prices for 14 lots of perishable agricultural commodities in the total amount of \$58,181, which Havpo had purchased, received, and accepted in interstate commerce[, and which amount was past-due and unpaid at the start of the hearing]. (CX 7, 7a.)

Conclusions

1. The acts of Havana in failing to make full payment promptly of the agreed purchase prices for the 345 lots of perishable agricultural commodities that it purchased, received, and accepted, as more specifically alleged in paragraph III of the Complaint, constitute willful, flagrant, and repeated violations of section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]).

2. The acts of Havpo in failing to make full payment promptly of the agreed purchase prices for the 23 lots of perishable agricultural commodities that it purchased, received, and accepted, as more specifically alleged in paragraph III of the Complaint, constitute willful, flagrant, and repeated violations of section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]).

Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. [No.] 1041, 71st Cong., 2d Sess. [1] (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *O'Day* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. [No.] 1041, 71st Cong., 2d Sess. [3] (1930). See also *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974).

Section 2(4) of the PACA, (7 U.S.C. § 499b(4)), makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to "make full payment promptly" of its obligations with regard to transactions involving perishable agricultural commodities made in interstate [or foreign] commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department, (7 C.F.R. § 46.2(aa)(5)), as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

The \$1,960,958.74 indebtedness of Respondent Havana, which is the subject of the Complaint, was . . . paid in its entirety [before the date of the hearing in this proceeding], and the \$101,577.50 indebtedness of Respondent Havpo, which is the subject of the Complaint, was . . . paid in its entirety [before the date of the hearing in this proceeding]. However, [Respondents' payment of past-due debts does] not . . . alter the fact of the violations. . . . At the time of the hearing, Havana and Havpo had additional outstanding indebtedness of approximately \$1,197,616.35 and \$58,181, respectively, for perishable agricultural commodities purchased in interstate [and foreign] commerce. (CX 6,

6a-6z, 7, 7a.) Furthermore, approximately \$1[68],000 in checks that Havana had issued in purported payment for its produce purchases were returned unpaid by the bank upon which they were drawn because Havana did not maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay the checks when presented. (CX 8, 8a-8c.)

USDA initiated an investigation into Havana's payment practices in January 1994, after over 400 trust notices in excess of \$6 million were filed against Havana with the Department. (Tr. 38.) [Mr.] Dutton, USDA's investigator, testified without contradiction that, when he arrived at Respondent Havana's place of business in January 1994, he requested access to that firm's books and records. (Tr. 40-41.) More specifically, he requested access to those invoices that were past-due and unpaid. Mr. Dutton testified that both Havana's president, [Mr.] Pedro Perez, and the firm's controller[, Mr. Rafael Stipion,] directed him to a filing cabinet that contained the past-due and unpaid invoices. (Tr. 4[1]-45.) During the course of Mr. Dutton's review of Havana's records, he discovered the records of Havpo, Mr. Perez' other company. (Tr. 43[-44.]) These documents from Havana's own records and Havpo's own records were the documents that Mr. Dutton analyzed and utilized to make his determination that both Havana and Havpo were not paying for perishable agricultural commodities in accordance with the [PACA.] (CX 4, 4a-4ppp, 5, 5a-5f.)

During his review of the books and records of Havana and Havpo, Mr. Dutton uncovered no written agreements that would extend the payment time for produce purchases. (Tr. 45.) Further, Mr. Dutton discussed his findings with Mr. Perez at the conclusion of his investigation. At that time, Mr. Perez never disputed the fact that Havana owed almost \$2 million for produce purchases and that Havpo owed over \$100,000 for produce purchases. [(Tr. 46.)] The documents provided by Respondents to USDA reveal both Havana[s] and Havpo's violations of the PACA. At the hearing, Respondents presented no . . . evidence whatsoever to refute the evidence presented by Complainant.

In April 1995, immediately prior to the oral hearing, Complainant initiated a compliance investigation to determine whether Havana and Havpo were, at the time of the hearing, in compliance with the [PACA]. [Mr.] John A. Koller visited Havana's place of business on April 5-7, 1995, to conduct USDA's compliance investigation of Havana and Havpo. Mr. Koller also requested all of the books and records of both Havana and Havpo. [(Tr. 96-97.)] Mr. Koller was directed by both Mr. Perez and Havana's new controller, [Mr.] Hector Paredes, to the invoices that were past-due and unpaid. (Tr. [97-]98.) Upon inspection of Havana's books and records provided to USDA by Respondents, Mr. Koller discovered that, during the period of March 1994 through April 3,

1995, Havana failed to make full payment promptly to 2[5] sellers of the agreed purchase prices for 137 lots of perishable agricultural commodities in the total amount of \$1,197,616.35, which Havana had purchased, received, and accepted in interstate and foreign commerce. (CX 6, 6a-6z; Tr. 104.) The compliance investigation also revealed that approximately \$1[68],000 in checks issued by Havana in purported payment for its produce purchases were returned unpaid by the bank upon which they were drawn because Havana did not have and maintain sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented. (CX 8, 8a-8c.) Mr. Koller's investigation revealed that Havana was not in compliance with the PACA.

The compliance investigation also revealed that, . . . [d]uring the period August 1994 through November 1994, Havpo failed to make full payment promptly to 1 seller of the agreed purchase prices for 14 lots of perishable agricultural commodities in the total amount of \$58,181, which Havpo had purchased, received, and accepted in interstate commerce. (CX 7, 7a.)

. . . Respondents [contend] that their counsel was not given enough time to prepare—prior to the hearing and during the hearing. [(Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 9.) The ALJ] previously ruled upon . . . [Respondents' requests for additional time] and [the ALJ's] rulings are contained in the record of this proceeding. [The ALJ] . . . balance[d] the needs of Respondents' counsel to prepare for the case with the need not to unduly delay the proceedings. . . . [T]he time accorded to Respondents' counsel was appropriate. . . .

As a large part of Complainant's evidence[, Complainant] introduced copies of unpaid invoices to show produce sold to Havana and Havpo, (CX 4[a]-4ppp, 5[a]-5f, 6a-6z, . . . 7a, 8[a]- 8c), and rid[ing] sheets, (CX 9). Complainant obtained these exhibits from Respondents' files. In Respondents' Proposed Findings [of Fact and Conclusions of Law], Respondents argue that the witnesses for Complainant, Donald P. Dutton and John A. Koller, who obtained the documents from Respondents, as well as Complainant's witness, [Ms.] Clare Jervis, could not rely upon these documents. For example, Respondents argue that Mr. Dutton did not know whether the goods were delivered, took no independent steps to confirm the accuracy of the information, did not know the meaning of dates on the shippers' invoices, did not know if the goods arrived, did not know whether the payment amounts were disputed, did not speak to any of the 66 shippers, based his conclusion regarding price upon the invoices, did not know if there were alterations in payment arrangements, did not know if the amounts were disputed, and did not know if the goods were unloaded or sent back to the shippers. Respondents raised similar questions with regard to Mr.

Koller and Ms. Jervis. Essentially, Respondents argue that what appears on the face of the documents may not be the case.

However, the evidence indicates that both Mr. Dutton and Mr. Koller were directed to these documents in Respondents' files by Mr. Perez, Respondents' president, and by Respondent [Havana's controllers]. (Tr. 40-41, 97.) In exit conferences with both Mr. Dutton and Mr. Koller, Mr. Perez confirmed that both Havana and Havpo had unpaid invoices for produce purchases in the approximate amounts uncovered by Mr. Dutton and Mr. Koller. (Tr. 46-47, 106-07.) . . . Mr. Dutton [did not discover] any written agreements extending payment terms for produce transactions[, and Mr. Koller discovered one such agreement which is not relevant to this proceeding]. When asked if there were any [other] such agreements, Mr. Perez said there were [no others]. (Tr. 45, 105[-06.]) . . . [T]he documents prove a prima facie case that the sales alleged were made, that the goods in the alleged amounts were delivered, that payment for these amounts as alleged was not made in a timely fashion, and that no written agreements existed to excuse the failure to make timely payments.

In the face of this evidence, Respondents have chosen to present no contradictory evidence. They have merely adopted an obstructionist stance, trying to pick holes in the evidence which Complainant obtained from Respondents' own files. If this evidence were not correct, Respondents could have introduced evidence to contradict it. Respondents' failure to contradict this evidence leads me to conclude that the evidence is sufficient to prove Complainant's allegations of sales, deliveries, and failure to pay in a timely fashion. I find that Complainant has met its burden of proof. The documentary evidence presented at the hearing was obtained directly from the books of Respondents. Respondents have failed to rebut this evidence. Therefore, I find the evidence proves the allegations in the Complaint.

Although Complainant submitted voluminous exhibits, Respondents submitted no exhibits. The only evidence presented at the hearing by Respondents was testimony of [Mr.] Hector Paredes, a controller of Havana Potatoes, and [Mr.] Robert Reich, an employee of one of Havana's [produce] suppliers.

Respondents' attorney argues . . . that Mr. Koller's testimony is devoid of credibility and no probative weight should be given to this testimony because "Complainant can not dispute Mr. Paredes' testimony that he does not speak English." [(Respondents' Reply Memorandum at 7.)] However, [the ALJ] found Mr. Koller to be a very credible witness, something [the ALJ did not find] with respect to Mr. Paredes. [(Initial Decision and Order at 10.)]

Mr. Paredes testified through an English-Spanish interpreter. He first stated

that he does not speak English but knows words that he needs such as "accounts payable" and "accounts receivable." He has a degree in public accounting and a degree in business administration from Venezuelan universities. (Tr. 285, 287.) [Mr. Paredes] testified that, when Mr. Koller visited Respondents' office in April 1995, at Mr. Perez' request, Mr. Paredes directed Mr. Koller to Respondents' financial files, including [their] accounts payable records. (Tr. 290, 294.) When [the ALJ] questioned Mr. Paredes, he stated that he had been living in the United States for 3 years and 2 months, (Tr. 296), and that he studied English for 3 years in secondary school, (Tr. 297-98). As a result of Mr. Paredes' study of English for 3 years in Venezuela, his residence in the U.S. for over 3 years, and his dealing on a daily basis with records that were in English, [the ALJ found] that [Mr. Paredes] understood more than enough English to direct Mr. Koller to the appropriate financial records. [(Initial Decision and Order at 11.)]

Respondents' only other witness was Robert Reich, sales manager for Red Hawk Farms, one of Havana's [produce suppliers]. Mr. Reich testified regarding his belief as to what payment practices in the produce industry as a whole are. (Tr. 442[-43.]) Mr. Reich also testified regarding ratings of produce firms in a private publication known as "The Blue Book." (Tr. 444-51.) This testimony is not relevant because the law regarding payment for perishable agricultural commodities is set out in the PACA and the regulations promulgated pursuant to the PACA. This matter is not bound by "The Blue Book," but by the law itself. The regulations promulgated pursuant to the PACA define prompt payment. *See* 7 C.F.R. § 46.2(aa). Under the [PACA] and regulations, payment for produce must be made within 10 days after the day on which the produce is accepted, unless there are written payment terms, entered into prior to the transaction, extending the time for payment.

Mr. Reich also testified that Havana had extended payment terms with his firm and that he was sure that Havana had paid Red Hawk Farms in a timely manner. However, Mr. Reich could not identify what the specific payment terms were or when his company was paid. (Tr. 463, 465-67.) Respondents have not submitted any written credit agreements with Red Hawk into evidence. Additionally, Mr. Reich was unable to explain why, if his firm was satisfied with Havana's payment practices, it had filed reparation complaints against Havana and notified USDA of the insufficient funds checks that it had received from Havana in purported payment for produce purchases. (Tr. 464.)

The evidence presented at the hearing demonstrates that Respondents violated the [PACA] as alleged in the Complaint. Respondents' failures to make timely payment, as alleged in the Complaint, are in violation of the prohibitions in section 2[(4)] of the PACA, (7 U.S.C. § 499b[(4)]). . . . Moreover, Havana's

failure to pay promptly and in full for 345 transactions occurring over a period of 11 months, totalling \$1,960,958.74, and Havpo's failure to pay promptly and in full for 23 transactions occurring over a period of 5 months, totalling \$101,577.50, constitute repeated and flagrant violations of section 2 of the PACA. . . .

. . . .

Both the 345 violations [by Respondent Havana] and the 23 violations [by Respondent Havpo] are "repeated" because repeated means more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time periods during which the violations occurred. See . . . *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984), holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA; *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972), finding 26 violations involving \$19,059.08 occurring over 2½ months [to be] repeated and flagrant; and *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967), concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000.

Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102 (8th Cir.), cert. denied, [502 U.S. 860] (1991); *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-69 (1973), aff'd, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974). Respondents knew or should have known that they could not make prompt payment for the large amount of perishable commodities that they ordered, yet Respondents continued to make purchases. Respondents were aware or should have been aware of the PACA's requirements, yet Respondents continued to buy knowing that each purchase would result in another violation. Respondents should have made sure that they had sufficient capitalization with which to operate. They did not [have sufficient capitalization], and, consequently, could not pay their [produce] suppliers. They deliberately shifted the risk of nonpayment to [produce] sellers. The sellers were required to involuntarily and, in some cases, unknowingly extend credit to Respondents. [Respondents' shifting of the risk of nonpayment to produce

sellers] is especially evident in this case where the compliance investigation reveals that Respondents incurred additional roll-over debts in meeting their obligations for the transactions that are the subject of the Complaint. Under these circumstances, Respondents have both intentionally violated the [PACA] and operated in careless disregard of the payment requirements of the PACA. Respondent Havana's and Respondent Havpo's violations were, therefore, willful. *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Complainant seeks revocation of the licenses of both Havana and Havpo. Departmental policy is that where a Respondent is not in compliance [with the payment provisions of the PACA] at the time of the hearing, the appropriate sanction is revocation of Respondent's license. *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (1984); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983). Congress designed the PACA to be an intentionally tough law, and, as a result, support for the Department's sanction policy is well grounded in both precedent and law. *See In re Sam Leo Catanzaro*, 35 Agric. Dec. 26 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

Congress again recognized the importance of having only financially responsible firms in the perishable agricultural commodities business in section 525 of the Bankruptcy Code. In that section, Congress carved out an explicit exception to the anti-discrimination provision of the Bankruptcy Code for the PACA. Congressman Foley, Chairman of the House Agriculture Committee, explained the need for this exception, as follows:

Under the Perishable Agricultural Commodities Act, commission merchants, dealers and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and a flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

The Committee on Agriculture has no quarrel with the "fresh-start"

philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act. . . .

123 Cong. Rec. 35,672 (1977).

In exempting proceedings brought under the PACA from the anti-discrimination provision of the Bankruptcy Code, Congress was well aware of the Department's well-established policy to revoke one's license for failure to pay in full for produce purchases.

Furthermore, this admittedly harsh sanction policy has consistently been upheld by the federal circuit courts. *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co.*, *supra*; *In re Finer Foods Sales Co.*, *supra*; *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro*, *supra*; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, *supra*.

In the case at hand, Havana failed to make full payment promptly for 345 lots of perishable agricultural commodities over a period of 11 months, for a total of \$1,960,958.74, and Havpo failed to make full payment promptly for 23 lots of perishable agricultural commodities over a period of 5 months, for a total of \$101,577.50. Furthermore, since the filing of the Complaint, Havana has incurred new indebtedness, and[, at the time of the hearing, owed] \$1,197,616.35, and Havpo has incurred new indebtedness, and[, at the time of the hearing, owed] \$58,181. Where a Respondent is not currently in compliance, but has . . . roll-over debts, revocation is the appropriate sanction. *In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989); *In re Gilardi Truck & Transp., Inc.*, *supra*. Moreover, the Judicial Officer has recently stated that there is no basis for considering facts in mitigation of the sanction where a Respondent has failed to pay for produce. *See In re Atlantic Produce Co.*, 54 Agric. Dec. 701, 715 (1995). Taking all these factors into consideration, the sanction sought by Complainant is appropriate. *In re J.H. Norman & Sons Distributing Co.*, 37

Agric. Dec. 705 (1978); *In re George Steinberg & Son, supra*.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise three issues in Respondents' Appeal to the Judicial Officer.

First, Respondents contend that:

[W]hen properly analyzed, the proof that Respondents violated PACA's prompt payment rules was utterly insufficient and unconvincing. Respondents were charged in the Complaint with having failed to make full payment promptly with regard to certain lots of perishable agricultural commodities. The only proof submitted by the Complainant concerning those allegations was Dutton's testimony, the invoices which he copied (CX-4a-4ppp, CX-5a-5f), and the table which he created (CX-4). Yet Dutton himself admitted that the results of his investigation were solely based on information derived from his examination of Respondent's [sic] records (Tr. 86). Hence, . . . the Complainant's case stands entirely on unreliable hearsay and double hearsay. For that reason, the A.L.J.'s finding that the Respondents committed the violations charged in the Complaint is clearly erroneous, and must be vacated.

Respondents' Appeal to the Judicial Officer at 21-22. (Footnote omitted.)

I disagree with Respondents, and I agree with the ALJ's conclusion that Respondents violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), as alleged in paragraph III of the Complaint. Complainant proved by a preponderance of the evidence, which is all that is necessary in these proceedings,² that: (1)

²The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, (continued...)

during the period February 1993 through January 1994, Respondent Havana failed to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of \$1,960,958.74, which Havana had purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA, (7 U.S.C. § 499b(4)); (2) during the period August 1993 through January 1994, Respondent Havpo failed to make full payment promptly to 6 sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of \$101,577.50, which Havpo had purchased, received, and accepted in interstate commerce, in violation of section 2(4) of the PACA, (7 U.S.C. § 499b(4)); (3) at the time of the hearing in the instant proceeding, Respondent Havana had additional outstanding indebtedness of approximately \$1,197,616.35 for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce; and (4) at the time of the hearing in the instant proceeding, Respondent Havpo had additional outstanding indebtedness of approximately \$58,181 for perishable agricultural commodities purchased, received, and accepted in interstate commerce.

Each of Respondent Havana's 345 violations of the PACA and Respondent Havpo's 23 violations of the PACA is clearly established by produce supplier invoices obtained from Respondents' files, (CX 4a-4ppp, 5a-5f), the tables of amounts past-due and unpaid by Respondents, prepared by Mr. Donald P. Dutton, a USDA investigator, based upon Mr. Dutton's examination of Respondents' files, (CX 4, 5; Tr. 41, 48-49), and the testimony at the hearing.

Mr. Dutton testified that he obtained the produce supplier invoices from

²(...continued)

No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Respondents' files after informing Respondents' president, Mr. Pedro Perez, that he was conducting an investigation regarding Respondent Havana's failure to pay for perishable agricultural commodities, (Tr. 38-40), and after Mr. Perez and Mr. Rafael Stipion, Respondent Havana's controller and officer manager, directed Mr. Dutton to the files containing unpaid produce supplier invoices. (Tr. 40-50.) Further, Mr. Dutton testified that, at the conclusion of his investigation, he discussed his finding that Respondents violated the PACA with Mr. Perez, who did not disagree with Mr. Dutton's findings, as follows:

[BY MS. COOK:]

Q. What, if anything, did you determine about Havana Potatoes payment practices during your review of their records?

[BY MR. DUTTON:]

A. That at the time of my visit there was a considerable amount of produce invoices which were past due and unpaid.

Q. And do you recall what that total amount of those past due and unpaid invoices were?

A. Approximately \$2 million.

Q. During the course of your review of the records of Havana Potatoes and I guess now the records of Havpo Inc., did you discover anything regarding the payment practices of Havpo Inc.?

A. Yes, ma'am.

Q. And what was that?

A. That they also had past due invoices for produce.

Q. And do you recall the total amount involved in those past due and unpaid invoices?

A. Approximately \$100,000.

Q. During the course of your review of Respondent Havana Potatoes of New York Corp.'s records and Respondent Havpo Inc.'s records Mr. Dutton, did you come across any written credit agreements extending the terms of payment?

A. No.

Q. For produce transactions.

A. No, ma'am I did not.

Q. Did you ask Mr. Perez if any such agreements existed?

A. Yes, I did.

Q. Do you recall what he told you in response?

A. Yes, ma'am. I believe he stated to me that while he had oral agreements with certain of his shippers to extend his payments that they were not committed to writing and he did not have any formal written agreements with his suppliers for extended payment terms.

Q. And when did you complete your investigation of the business records of the Respondent?

A. On or about the 2nd of February, 1994.

Q. Okay. And at the conclusion of your review of the records, did you discuss your findings with Mr. Perez or anybody else at Havana?

A. Yes, ma'am I did.

Q. Who did you discuss your findings with?

A. Mr. Perez.

Q. Do you recall what you told Mr. Perez at that time?

A. I reviewed with Mr. Perez the general findings of my audit, the dollar

amounts that my review showed that the company was past due and unpaid. I discussed with him the possible ramifications of this that it was a violation of the prompt pay provisions of the Act and that it could lead to a disciplinary proceeding being filed against the company's license.

Q. Okay. And do you recall what Mr. Perez told you in response to your findings?

A. Yes, ma'am. He agreed with me that the total dollar amounts that I was reporting to him seemed reasonable in terms of what the company's debt was and then we discussed some steps that he could undertake at that point in time to attempt to resolve these problems that he was having.

Q. Okay. And do you recall what those steps were?

A. Yes, ma'am. He told me that at that time the company between 1991 when the Department had visited him previously and when I was there that the company had paid off a great deal of its notes payables in fact all of its notes payables that it had for its purchases of what it had on the market and that he was at the time diverting as much money as he possibly could into the payment of these past due invoices that he was not taking any money out of the business at that time and that he hoped that in a period of 12 to 18 months that he could return his business to a status of being able to pay on a timely basis.

Q. Okay, thank you. Mr. Dutton, did that conclude your investigation?

A. Yes, ma'am it did.

Tr. 44-47.

Moreover, Respondent Havana's past-due debt that was not paid at the time of the hearing and Respondent Havpo's past-due debt that was not paid at the time of the hearing are clearly established by the produce supplier invoices obtained from Respondents' files, (CX 6a-6z, 7a), the tables of amounts past-due and unpaid by Respondents, (CX 6, 7; Tr. 111-13, 213-14, 274), and the testimony at the hearing. Mr. Koller testified that he obtained the produce supplier invoices from Respondents' files after informing Mr. Perez that he was conducting an investigation of Respondents' compliance with PACA and after Mr. Perez and Respondent Havana's controller, Mr. Hector Paredes, directed Mr.

Koller to Respondents' accounts payable files, as follows:

[BY MS. COOK:]

Q. . . . During April of 1995 Mr. Koller, did you have cause to become aware of the Respondents herein Havana Potatoes of New York Corp. and Havpo Inc.?

[BY MR. KOLLER:]

A. Yes.

Q. Under what circumstances did you become aware of the Respondents?

A. The Regional Director for the Northeast Regional Office Michiko Shaw asked me to or assigned me to conduct a compliance investigation regarding Havana Potatoes of New York and Havpo Inc.

Q. What is a compliance investigation Mr. Koller?

A. A compliance investigation is in which I was asked to go in regarding the table presented by Mr. Dutton when full payment was made on those transactions that were found on there as past due and unpaid as well as look into the present situation of past due and unpaid invoices by Havana and Havpo Inc. in terms of its compliance with the PACA prompt pay provisions immediately prior to the hearing.

Q. Okay. And what was the purpose of the compliance investigation?

A. The purpose of the compliance investigation was to essentially establish Respondents payment of produce and prompt payment of it.

Q. How did you begin your investigation Mr. Koller?

A. I reviewed the license records concerning Havana Potatoes of New York and Havpo Inc. as well as the materials pertaining to Mr. Dutton's investigation?

Q. Okay. And would those be records that are maintained in the ordinary

course of business of your office?

A. Yes.

Q. In the Department of Agriculture.

A. Yes.

Q. Okay. And did you eventually travel to the Respondents place of business Mr. Koller?

A. Yes, I did.

Q. And when was that?

A. April 5, 1995.

Q. And was anyone with you?

A. No.

Q. And when you arrived at Respondents place of business on the 5th of April, 1995, who did you see?

A. Pedro Perez.

Q. Okay. And what did you tell Mr. Perez at that time?

A. I informed Mr. Perez that I had come to visit Havana Potatoes of New York to initiate the investigation the compliance investigation of Havana Potatoes and Havpo Inc.

Q. Okay. And what happened next?

A. Mr. Perez advised me that he was unaware of me coming to do this investigation.

Q. Okay. And did he then grant you access to the premises?

A. No. He asked that he contact his lawyer.

Q. And what did you do next?

A. I provided him that opportunity at which time I notified the Washington, D.C. headquarters office of the circumstances that I had experienced.

Q. Okay. And did there come a time that Washington, D.C. contacted you and informed you that you could return to Havana's place of business?

A. Yes.

Q. Okay. And did you then at some point on April 5th return?

A. Yes.

Q. Approximately what time was that?

A. It was about 11:00 a.m.

Q. Okay. And who did you meet with when you returned at 11:00 a.m.?

A. Pedro Perez.

Q. Okay. And what did you tell Mr. Perez at that time?

A. That again that I was initiating a compliance investigation into the records and business operations of Havana Potatoes of New York and Havpo Inc.

Q. Okay. And did you request access to certain records from Mr. Perez at that time?

A. Yes.

Q. And what records were those?

A. I requested access to the accounts payables. I requested an accounts payable report, accounts receivables, bank records and generally that would

be about it.

Q. Were you granted access to those records Mr. Koller?

A. Yes.

Q. And when were you granted access?

A. At 1:30 p.m. that afternoon.

Q. Okay. And after you were granted access to the records, did you discuss these records with anyone other than Mr. Perez?

A. Yes.

Q. And who would that individual have been?

A. Hector Paredes.

Q. And who is Hector Paredes?

A. He is the controller for Havana Potatoes of New York.

Q. Okay. And was it he who granted you access to the records or Mr. Perez. Who showed you around?

A. Mr. Perez directed me to Hector Paredes who then guided me to where the files and the payables were located and also provided me with the accounts payable report.

Q. Okay. And can you describe how Havana's and Havpo's records were stored?

A. Yes. The unpaid invoices that were directed to me were maintained in a four drawer file cabinet in which the sellers of produce to Havana were ordered alphabetically in the files from A to Z and then behind that were the payable files regarding Havpo Inc. and also adjacent to that were file cabinets that maintained paid produce transactions and also in other parts of the office where the extra paid invoices were stored as well.

.....

BY MS. COOK:

Q. When Mr. Paredes gave you access to the records, did you have any discussion with him regarding Havana's payables records or Havpo Inc.'s payable records?

A. Yes.

Q. What did you tell Mr. Paredes?

A. I instructed him that I needed to be provided the access to all of the unpaid invoices that Havana Potatoes maintained and also access to the transactions that were found on Mr. Dutton's table to look at them to determine when full payment was made.

Tr. 94-98, 100-01.

Further, Mr. Koller testified that at the conclusion of his investigation, he discussed his findings of Respondents' new past-due debt and the payment of the past-due debt found by Mr. Dutton with Mr. Perez who did not disagree with Mr. Koller's findings, as follows:

Q. After reviewing the records of both Havana Potatoes and Havpo Inc. Mr. Koller, did you discuss your findings with Mr. Perez?

A. Yes, I did.

Q. And do you recall when that conversation was?

A. On April 7, 1995.

Q. What did you tell Mr. Perez regarding your findings?

A. That I confirmed that the transactions from Mr. Dutton's table were paid and that I had also found additional unpaid past due transactions that were not in compliance with the PACA prompt pay provision.

Q. What did Mr. Perez tell you with regard to your findings?

A. He acknowledged that the transactions were past due and unpaid.

Tr. 106-07.

Respondents contend that the produce supplier invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, and 7a), and the tables based upon examinations of Respondents' files, (CX 4, 5, 6, and 7), do not constitute substantial evidence of Respondents' violations of the PACA or the new past-due debt incurred by Respondents because they are not reliable. I disagree with Respondents.

In proceedings conducted under the Administrative Procedure Act, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*." (5 U.S.C. § 556(d) (emphasis added).) "*Substantial evidence*" denotes quantity, *Steadman v. SEC, supra*, 450 U.S. at 98, and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

I find that the produce supplier invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and the tables of the amounts past-due and unpaid by Respondents, (CX 4, 5, 6, 7), are highly reliable, probative, and substantial evidence of Respondents' violations of the PACA, as alleged in paragraph III of the Complaint, and Respondents' debt that was past-due at the time of the hearing. USDA investigators obtained the produce supplier invoices from Respondents' files after asking Respondents' president for the accounts payable files and after being directed by Respondents' president and Respondent Havana's controllers to the files. When confronted with the results of the USDA investigators' findings, based upon their examinations of Respondents' files, Respondents' president confirmed that the produce supplier invoices had not been paid timely.

Respondents contend that it is possible that the produce supplier invoices may not mean what they appear to mean, or may have no meaning at all. (Respondents' Appeal to the Judicial Officer at 5-12, 28-30.) Specifically, Respondents contend that produce supplier invoices kept by purchasers of perishable agricultural commodities can contain inaccuracies, can contain iterations and stamps whose meaning is not fathomable to any given reviewer, can be generated by persons other than those whose names appear on the invoices as produce suppliers, and can even refer to produce that has never been received. However, I find nothing in the record to indicate that the produce supplier invoices, which were located in Respondents' files, described by

Respondents' president and Respondent Havana's controllers as the accounts payable files, are anything other than they appear to be; viz., itemized statements of perishable agricultural commodities sold to Respondents by those identified on the invoices.

Not only is there no evidence that any of Respondents' litany of possibilities apply to Respondents' produce supplier invoices, but Respondents' own actions belie their contention that their produce supplier invoices are inaccurate or meaningless. Respondents' president confirmed to both Mr. Dutton and Mr. Koller that the produce supplier invoices represent amounts owed suppliers of perishable agricultural commodities, and that, generally, the amounts found by Mr. Dutton and Mr. Koller to be past-due are correct. (Tr. 46, 106-07.) Further, Mr. Perez discussed with Mr. Dutton the "steps that he[, Mr. Perez,] could take . . . to resolve these problems he was having" and the steps he had taken to "return his business to a status of being able to pay on a timely basis." (Tr. 46-47.) Further still, Respondents stipulated that, by the time of the hearing, they had paid all of the amounts alleged in paragraph III of the Complaint to be past-due and identified in produce supplier invoices obtained from Respondents' files by Mr. Dutton, (Tr. 27; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5). I find it improbable that Respondent Havana would have paid \$1,960,958.74 and Respondent Havpo would have paid \$101,577.50 based on what Respondents contend are inaccurate, unintelligible produce supplier invoices, which invoices could have been sent to Respondents by persons that are not identified on the invoices, for perishable agricultural commodities that had never been delivered to Respondents. Moreover, Respondents' president, in response to Mr. Dutton's findings, "agreed . . . that the total dollar amounts . . . seemed reasonable in terms of what the company's debt was," and, in response to Mr. Koller's finding new past-due debt, "acknowledged that the transactions were past-due and unpaid" and that none of the transactions were in dispute. (Tr. 46, 106-07.)

While it is possible that any given produce supplier invoice may be inaccurate, Respondents have not introduced any evidence to show that any of Respondents' produce supplier invoices in question are inaccurate. I find nothing in the record to indicate that the produce supplier invoices are anything other than they appear to be--reliable, probative, and substantial evidence of past-due debts for perishable agricultural commodities Respondents purchased, received, and accepted in interstate and foreign commerce.

Respondents also contend that Mr. Dutton's testimony and the tables prepared by Mr. Dutton, (CX 4, 5), are unreliable because some of Respondents' documents, which Mr. Dutton reviewed, and the notes, which Mr. Dutton made

based on his review of Respondents' documents, were not introduced into evidence. (Respondents' Appeal to the Judicial Officer at 4-5, 27.) Complainant has no obligation to introduce all of Respondents' documents which Mr. Dutton reviewed or Mr. Dutton's notes of those documents and neither the reliability of Mr. Dutton's testimony nor the reliability of the tables prepared by Mr. Dutton, (CX 4, 5), is affected by the failure to introduce all documents reviewed by Mr. Dutton or Mr. Dutton's notes. While Respondents were not in possession of Mr. Dutton's notes, it was within Respondents' power to introduce any or all of the documents reviewed by Mr. Dutton, but Respondents chose not to do so. Further, Mr. Dutton testified at the hearing in this proceeding and was available for and subject to cross-examination by Respondents' counsel.

Respondents also contend that the tables prepared by Mr. Dutton, (CX 4, 5), are particularly unreliable because they were prepared in anticipation of litigation. (Respondents' Appeal to the Judicial Officer at 27.) Respondents cite *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), as authority for the proposition that documents prepared in anticipation of litigation are unreliable.

The court in *Young* states:

The [Veterinary Medical Officer's] testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. See *Palmer v. Hoffman*, 318 U.S. [109], 63 S.Ct. [477], 87 L.Ed. [645] (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

53 F.3d at 730-31.

In *Young*, the court found that a Summary of Alleged Violations form and the affidavits at issue in the case had limited probative value, in part, because they were only prepared when violations of the Horse Protection Act were found; and therefore, they were prepared in anticipation of litigation. However, the cases relied on by the court in *Young* are clearly distinguishable from the facts in *Young*. In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act

which provided:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

318 U.S. at 111 n.1.

The Court held that the engineer's statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading," (318 U.S. at 114). Specifically, the Court held:

The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for

which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

....

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

318 U.S. at 113-15.

In *Young*, there was no question about the admissibility of the affidavits and Summary of Alleged Violations form, and, in the instant proceeding, there is no question about the admissibility of the tables of amounts past-due and unpaid, (CX 4, 5, 6, 7), under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)).³ The documents were properly admitted. The only issue in *Young* was whether the affidavits prepared by USDA veterinarians and the Summary of Alleged Violations form were inherently unreliable and lacking in probative value, and the issue raised by Respondents in the instant proceeding is whether the tables prepared by Mr. Dutton and Ms. Jervis, (CX 4, 5, 6, 7), are inherently unreliable.

Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the USDA's Agricultural Marketing Service under the PACA is investigating suspected violations of the PACA and litigating PACA cases in those instances in which the agency believes it has *prima facie* evidence of a violation. As law enforcement officers, it is the duty of USDA inspectors to detect violations of the PACA and to initiate the procedure for bringing disciplinary complaints against violators. Hence, litigating is "the inherent nature of the business in question," (318 U.S. at 115), and the preparation of tables of past-due and unpaid debts for perishable agricultural commodities in violation of the PACA is the most important of the "methods systematically employed for the conduct of the business as a business." (*Id.*)

³The Administrative Procedure Act provides:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

None of the parties in the instant proceeding dispute the admissibility of the produce supplier invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and the tables of amounts past-due, (CX 4, 5, 6, 7). (Respondents' Appeal to the Judicial Officer at 26-27; Complainant's Response to Respondents' Appeal at 10.)

This issue is of the utmost importance to the executive branch of the Federal Government. There are undoubtedly law enforcement officials throughout the Federal Government who, like the USDA inspectors, "prepare summary reports . . . only when administrative proceedings are anticipated." (53 F.3d at 730.) Law enforcement in the United States would be severely hampered if all such records, made in contemplation of litigation by agencies whose business is to litigate, are to be regarded as inherently lacking in indicia of reliability.

Stone, also relied upon by the court in *Young*, is similar in nature to *Palmer v. Hoffman*, just discussed. The issue in *Stone* was "whether the government violated the hearsay rule and the defendant's right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession." (604 F.2d at 924.) The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth "the activities of the office or agency." (604 F.2d at 925.) The court held, however, that the affidavit "violates the hearsay rule and the defendant's confrontation right" (604 F.2d at 924), as follows:

This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. See, e.g., *Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official records compiled in prison's "regular course of business"); *United States v. Newman*, 468 F.2d 791, 795-96 (5 Cir. 1972), cert. denied, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency's official records does not apply to Ford's personal statements prepared solely for purposes of this litigation. Ford's statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

604 F.2d at 925-26.

As stated above, under the discussion of *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman* was railroading, not litigating. That was not true in *Young* and is not true in the instant PACA proceeding. Furthermore, we are not concerned with the admission of Mr. Dutton's and Ms. Jervis' tables, (CX 4, 5, 6, 7), since they

were properly admitted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)).

Moreover, even under the Federal Rules of Evidence, it appears that the documents at issue in *Young* would have been admissible and the tables, (CX 4, 5, 6, 7), at issue in the instant proceeding would be admissible, under Rules 803(6) and 803(8)(C), which provide:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(6) Records of regularly conducted activity

A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(6), 803(8)(C).

Tables indicating PACA violations, such as those at issue in the instant proceeding, would be admissible under Rule 803(6) and 803(8)(C) exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that, under appropriate circumstances, a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is the case here. Mr. Dutton and Ms. Jervis have no vested interest in the outcome of this proceeding. They merely prepared a summary in the form of a table of information obtained from Respondents' records in the performance of their duties to enforce the PACA. There was no basis for the court's view in *Young* for finding that the USDA veterinarians' affidavits or the Summary of Alleged Violations forms lacked trustworthiness merely because they were prepared in anticipation of litigation, and there is no basis in the instant proceeding for finding that the tables of past-due and unpaid debts to sellers of perishable agricultural commodities lacked trustworthiness merely because they were prepared in anticipation of litigation.

Second, Respondents contend that:

As a threshold matter, the Complainant failed to prove that the perishables at issue actually moved in interstate commerce. At most, the invoices show that some of Havana Potatoes' suppliers had offices or warehouses outside of the State of New York. While Dutton claimed to have reviewed other records to determine interstate transportation of the goods, those records were not introduced, so the Complainant's proof on that crucial issue was second-level hearsay presented by a witness with a cloudy memory who had not seen the documents on which he relied in over a year.

With regard to Havpo, the lack of a connection to interstate commerce is even clearer. All of the transactions involving Havpo involved suppliers who, according to the Complainant's own evidence (CX-5, CX-5a-5f) are located in New York State. While Havpo is a New Jersey corporation, it was created, according to Dutton's own testimony concerning information provided by Mr. Perez, to create interstate transactions purely on paper so that Havana Potatoes could avoid posting a New York State required bond of approximately \$200,000.00 in connection with goods shipped intrastate to Hunts Point Market (Tr. 43-44). Indeed, most of the invoices relating to Havpo indicate shipment to Havpo, or to Havana Potatoes, or to Havpo care of Havana Potatoes, at the Hunts Point Market, Bronx, New York

(CX-5a, 5b, 5d, 5e and 5f). Accordingly, for this reason alone, the case against Havpo should have been dismissed.

Respondents' Appeal to the Judicial Officer at 31-32.

Section 1(b)(3) of the PACA defines the term "interstate or foreign commerce," as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof, or within the District of Columbia.

7 U.S.C. § 499a(b)(3).

Section 1(b)(8) of the PACA provides:

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

7 U.S.C. § 499a(b)(8).

The produce supplier invoices and table of past-due and unpaid debts introduced by Complainant clearly establish that all of Respondent Havana's transactions alleged in paragraph III of the Complaint were in interstate or foreign commerce. (CX 4, 4a-4ppp.) Fifty-nine of the 66 produce sellers who were not paid promptly by Respondent Havana, a New York corporation whose business address is Hunts Point Terminal Market, Row D, Units 449-461, Bronx, New York 10474, were located outside the State of New York. Further, Complainant proved by a preponderance of the evidence that the seven produce sellers, which were located in New York, shipped produce in interstate or foreign commerce to Respondent Havana. (CX 4, 4a-4ppp.) Mr. Dutton testified that he examined Respondents' records specifically to determine whether produce transactions represented by produce supplier invoices were in interstate commerce, as follows:

[BY MS. COOK:]

Q. And can you just briefly describe for the Court what procedure you followed in order to establish that produce purchased by the Respondent actually moved in interstate commerce?

[BY MR. DUTTON:]

A. When I was reviewing the writing sheets I would look at the origin of the shipment. For instance if the shipper was located in Florida, transactions for that shipper would be considered as interstate commerce because of the physical location of the two companies. If I was looking at vendors who were located within the state of New York, I would examine freight bills, brokers confirmations, invoices which might show an origin other than the state of New York for those transactions and if that was found, then I would consider that invoice to also have traveled in interstate commerce.

Tr. 47-48.

It is well settled that a transaction involves interstate or foreign commerce if it involves a commodity that has previously moved in interstate or foreign commerce. *See In re Full Sail Produce, Inc., supra*, 52 Agric. Dec. at 617; *In re C.B. Foods, Inc., supra*, 40 Agric. Dec. at 967. *Accord In re Fresh Approach, Inc.*, 51 B.R. 412, 424-28 (Bankr. N.D. Tex. 1985), reprinted in 44 Agric. Dec. 1546 (1985). *See also In re Van Buren County Fruit Exchange, Inc.*, 51 Agric.

Dec. 733, 740 (1992) (the mere fact that the buyer and seller are within the same state does not preclude interstate or foreign commerce as defined by section 1(b)(3) of the PACA, (7 U.S.C. § 499a(b)(3)). Such a transaction unquestionably fits the statutory definition of "interstate or foreign commerce," which encompasses "that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another. . . ." (7 U.S.C. § 499a(b)(8).)

The produce supplier invoices and tables of past-due and unpaid debts introduced by Complainant clearly establish that all of Respondent Havpo's transactions alleged in paragraph III of the Complaint were with produce sellers located in New York. (CX 5, 5a-5f.) As Respondents admit, Respondent Havpo is a New Jersey corporation whose business address is 25 Christopher Place, Saddle River, New Jersey 07458. (Respondents' Appeal to the Judicial Officer at 2, 32.) A transaction between a party located in one state and a party located in another state constitutes interstate commerce, and a transaction between a party located in the United States and a party located outside the United States constitutes foreign commerce. Even if, as Respondents contend, the produce that was the subject of the transactions between Respondent Havpo and its produce sellers was bought and sold in New York and never left New York, the transactions alleged in paragraph III of the Complaint between Respondent Havpo, a New Jersey Corporation, and the six sellers located in New York, would be transactions in interstate commerce.

I, therefore, find that all of the transactions alleged in paragraph III of the Complaint between Respondents and sellers of perishable agricultural commodities were in interstate or foreign commerce, that the Secretary has jurisdiction over those transactions under the PACA, and that there is no basis for dismissing the Complaint against either Respondent Havana or Respondent Havpo.

Third, Respondents contend that:

The A.L.J. applied U.S.D.A.'s long-standing "harsh sanctions" policy in imposing the sanction of revocation on Respondents (Decision and Order, pp. 14-16). In doing, so, the A.L.J. plainly erred since that policy no longer exists, having been recently abandon[ed] in favor of a policy of determining the sanction in each case by balancing the nature of the violations proved in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, with the recommendation of the administrative officials involved in the case.

Respondents' Appeal to the Judicial Officer at 34.

I disagree with Respondents' contention that the ALJ applied the wrong sanction policy in the instant proceeding. The ALJ applied the Department's current sanction policy and, in accordance with that sanction policy, imposed the appropriate sanction under the circumstances—revocation of Respondent Havana's and Respondent Havpo's PACA licenses. The circumstances of this proceeding, *sub judice*, are that Respondents paid the past-due amounts alleged in the Complaint before the start of the hearing. However, at the start of the hearing, Respondents owed other past-due amounts, which are identified and established in the record, but which are not alleged in the Complaint.

Thus, our concern herein is the situation where Respondents have paid all past-due amounts alleged in the Complaint, but are not in compliance with PACA, because there are on this record other past-due amounts still owing to produce sellers at the time of the hearing. The decision in *Gilardi, supra*, answers this question of USDA policy on the above-described situation by specifically requiring full compliance with PACA before a "no pay" case can be converted to a "slow pay" case. The Judicial Officer's *Gilardi* policy is very simply that, to receive a PACA license suspension ("slow pay") rather than a license revocation ("no pay"), Respondents must not only make full payment of all the money past-due, as alleged in the Complaint by the start of the hearing, but there must be present compliance with the payment provisions of the PACA and regulations. There can be no "robbing Peter to pay Paul," and no "rolling over" of past-due accounts involved in the case, while continuing to violate the payment requirements, as follows:

Respondent argues that after the hearing in this case, it reduced its debt to about \$30,000, which should be paid within the next 30 days (Appeal Brief at 10). It is established that if a case begins as a "no pay" case, but full payment is made by the time of the hearing, the case becomes a "slow pay" case, which warrants a suspension order rather than a revocation order. *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. [1930 (1983)].

As far as I know, there has been only one case under the Perishable Agricultural Commodities Act treated as a "slow pay" case in which full payment was made after the hearing. *In re L.R. Morris Produce Exchange, Inc.*, 37 Agric. Dec. 1112, 1119-22 (1978). In that case, full payment was made before the initial decision was issued by the Administrative Law Judge. A 90-day suspension order, rather than a revocation order, was imposed, with the following caveat (37 Agric. Dec. at 1121-22):

In view of respondent's flagrant violations extending over a period of several years, and involving delays of up to 23 months in payments for over \$1 million worth of produce, if respondent knowingly violates the payment provisions of the Act or regulations on one more occasion within the next five years as to a contract entered into on or after the effective date of this Order (which does not involve a bona fide dispute as to the contract), respondent's license will be revoked. If further violations occur which are not knowingly committed, a lengthy suspension order will be imposed.

In a pending case under the Perishable Agricultural Commodities Act, *In re Clarence Miller Co.*, PACA Docket No. 2-6394, it is alleged on appeal that full payment was made after the initial decision was issued by the Administrative Law Judge. Since the same issue may arise in the present case, perhaps within a few days after this decision is filed, it is appropriate to set forth the policy that will govern in such situations.

There are substantial reasons for making the final determination as to whether a case is "slow pay" or "no pay" as of the date on which the administrative hearing begins. Any determination made after that time would require a new investigation by complainant which might unduly delay the proceeding. Each day that the payment violations continue results in increased risk and damage to the industry. The increased damage to existing creditors is obvious--they are forced to wait longer for their money. The increased risk to others arises from the fact that a firm in financial difficulty frequently increases its volume significantly, perhaps taking imprudent chances, thereby exposing many other unsuspecting persons to the risk of nonpayment, if the debtor's efforts to regain financial stability are unsuccessful. Since there is a considerable time lag between the violation and the hearing, there is no real justification for not making full payment by the opening of the hearing.

Accordingly, the policy in future cases will be that if full payment is not made by the opening of the hearing, *together with present compliance with the payment provisions of the [PACA] and regulations* (or if no hearing is to be held, by the time the answer is due), the case will be treated as a "no pay" case. There is, of course, no basis for considering as mitigating payments that are made by "robbing Peter to pay Paul," *i.e.*, by "rolling over" the past-due accounts involved in the case, while continuing to vio-

late the payment requirements. (I cannot now conceive of extraordinary circumstances that would warrant further extending the time for making full payment and achieving compliance, but if any exist, they can be considered in a concrete factual setting.)

. . . .

The imposition of a suspension order, rather than a revocation order, in flagrant and repeated "slow pay" cases is not mandated by the [PACA] but, rather, is a self-imposed limitation, which is admittedly experimental. *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-73 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133-34 (1975), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). Where a respondent has committed repeated and flagrant violations of the magnitude involved here, this self-imposed limitation would not be followed if a determination as to whether full payment was finally made (long after the hearing) would require the lengthy delay incident to a reopened hearing, a new Administrative Law Judge's decision, and a further appeal to the Judicial Officer.

In re Gilardi Truck & Transp., Inc., *supra*, 43 Agric. Dec. at 149-50, 152 (footnote omitted, emphasis added).

Moreover, subsequent cases have tightened *Gilardi* considerably, most notably, *Carpenito Bros.* and *Caito*, as explained in the *Lloyd Myers* case, as follows:

Of particular relevance to this proceeding are two earlier cases which established the doctrine that a Respondent must be in compliance (full payment) with the payment rules by the time of the hearing, to avoid revocation. The distinction between "slow pay," which requires suspension, and "no pay," which requires revocation, is analyzed in *Caito*, as follows (*id.* at 632-33, 638; slip op. at 43-45, 51) (footnotes and citations omitted):

Prior to the decision in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), it had been the policy of the Judicial Officer to issue lengthy suspension orders in the case of serious "slow payment" cases, usually from 70 to 90 days.

The administrative officials charged with the responsibility for administering the Perishable Agricultural Commodities Act have long recommended revocation of a license where there have been many failures to pay promptly, involving lengthy delays in making full payment. See, e.g., *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975). There are strong administrative reasons supporting their revocation recommendation. Just as in the case of the savings and loan industry, if a produce licensee is in financial difficulty (i.e., not able to pay its creditors promptly), the loss to the industry as a whole is frequently much less if the firm is closed down promptly. Furthermore, we are dealing here with an industry that asked for, pays for, and desires a tough regulatory program to insure that only financially responsible licensees are permitted to remain in the industry.

.....

In *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 149-54 (1984), the Judicial Officer moved a step closer to the views of the administrative officials, holding that in order for a suspension order to be issued on the basis of a "slow pay" case, rather than a revocation order which would be issued in a "no pay" case, full payment must be made by the time of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent must be in full compliance with the payment requirements by the time of the hearing.

.....

The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 500-06 (1987), *aff'd*, 851 F.2d 1500 (D.C. Cir. 1988) (unpublished; text in WESTLAW), by requiring that respondent's present compliance not involve credit agreements for more than 30 days. *Carpenito* also emphasizes that under *Gilardi*, respondent must be in *compliance* with the payment provisions immediately prior to the hearing--i.e., being almost in compliance is not enough!

In re Lloyd Myers, supra, 51 Agric. Dec. at 764-65.

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The sanction policy in *S.S. Farms Linn County, Inc.*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra*.⁴ The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the articulated congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.

The Department's sanction policy requires an examination of the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Respondent Havana failed to make full payment promptly to 66 sellers of the agreed purchase prices in the total amount of \$1,960,958.74 for 345 lots of perishable agricultural commodities, during the period February 1993 through January 1994, and Respondent Havpo failed to make full payment promptly to 6 sellers of the agreed purchase prices in the total amount of \$101,577.50 for 23 lots of perishable agricultural commodities, during the period August 1993 through January 1994. Respondents' violations were very serious, repeated, flagrant, and willful violations of the PACA. Respondents' violations directly contravene one of the primary remedial purposes of the PACA, the financial

⁴*In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 26 (Sept. 12, 1996); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co.*, *supra*, 54 Agric. Dec. at 1329.

protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even consumers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay.⁵ These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.⁶

Just as in the case of the savings and loan industry, if a PACA licensee is in financial difficulty (i.e., not able to pay the agreed purchase prices of perishable agricultural commodities promptly), the loss to the perishable agricultural commodities industry as a whole is frequently much less if the PACA licensee's license is revoked promptly. Allowing a PACA licensee that is in financial difficulty to remain in business increases financial risks to others. Frequently,

⁵Although the PACA is primarily to protect perishable agricultural commodity producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Sam Leo Catanzaro*, *supra*, 35 Agric. Dec. at 33. See also *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2026 (1985); *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2426; *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1169; *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982).

⁶*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, *supra*, 443 F.2d at 588-89; *Zwick v. Freeman*, *supra*, 373 F.2d at 117; *In re Andershock Fruitland, Inc.*, *supra*, slip op. at 16-17; *In re Boss Fruit & Vegetable, Inc.*, *supra*, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc.*, *supra*, 52 Agric. Dec. at 621; *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, *supra*, 40 Agric. Dec. at 1133; *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, *supra*, 40 Agric. Dec. at 112; *In re Sam Leo Catanzaro*, *supra*, 35 Agric. Dec. at 33. See also *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

a PACA licensee in financial difficulty increases its volume significantly, perhaps taking imprudent risks. If the PACA licensee's efforts to regain financial stability are unsuccessful, many other unsuspecting persons are exposed to the risk of nonpayment. In order to carry out the purposes of the PACA, it is imperative that PACA licenses be revoked as quickly as possible from licensees who flagrantly or repeatedly fail to make full payment promptly.

The administrative officials charged with responsibility for administering the PACA have long recommended revocation of PACA licenses where there have been many failures to pay promptly involving lengthy delays in making full payment.⁷

In the instant proceeding, the administrative officials charged with administering the PACA recommend the revocation of Respondent Havana's and Respondent Havpo's PACA license. Ms. Clare Jervis, a marketing specialist employed by USDA, Agricultural Marketing Service, Perishable Agricultural Commodities Act Branch, (Tr. 205), testified regarding the administrative officials' policy as to payment violations and the sanction to be imposed upon Respondents, as follows:

BY MS. COOK:

Q. Ms. Jervis, you previously testified that you are employed by the P.A.C.A. Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, is that correct?

[BY MS. JERVIS:]

A. Yes.

Q. Do you represent the Complainant at this proceeding?

A. Yes.

Q. Are you aware of whether the Complainant has a recommendation that it wishes to make to the administrative law judge on the sanction

⁷See, e.g., *in re Andershock Fruitland, Inc.*, *supra*, slip op. at 22-24; *In re Lloyd Myers Co.*, *supra*, 51 Agric. Dec. at 764; *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171-72, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, *supra*, 34 Agric. Dec. at 133.

he should issue, if he should find that the Respondents herein violated the P.A.C.A., as alleged in the complaint?

A. Yes.

Q. Would you tell Judge Bernstein what that recommendation is?

A. We're seeking revocation of Respondent's licenses.

Q. And can you tell Judge Bernstein what factors were considered by the Complainant in making the recommendation that you have just described?

A. Yes. The factors we consider are the seriousness of the violation, the number of violations, the period of time that the violations cover, the dollar amount, the warning notice that the Respondent was provided with, and the effect of failures to make full and prompt payment in compliance with the Act have upon the industry.

In this particular instance here today, we have two Respondents that, based upon Mr. Dutton's investigation, and as alleged in the complaint, had failed to make full payment for -- specifically Havana Potatoes failed to make full payment for approximately \$2 million during the period of March 1993 to January of 1994, to 66 suppliers. Havpo failed to make full payment promptly of approximately \$100,000 to 26 suppliers during the period of March of 1993 to January of 1994.

Although it has been stated here today that those transactions have, in fact, been paid for by Respondents, they were not paid for promptly in accordance with P.A.C.A. prompt pay provisions.

The compliance investigation conducted by Mr. Koller several weeks ago showed that Respondents were not in compliance with the Act at this time either. It documented that Havana Potatoes had failed to pay approximately a little over \$1 million for transactions that covered the time period of March of 1994 to April of 1995. Hav[p]o failed to pay for approximately \$58,000 to one seller during the period of time of March of 1994 to November of 1994.

The -- we also look at the warning letter Respondent received. He was given ample notice of prompt payment provisions. He was given time to come into compliance with the provisions.

And finally the effect of these violations have on the industry are a very serious effect.

JUDGE BERNSTEIN: What warning letter?

THE WITNESS: There is a warning letter that's Exhibit No. 3 dated -- it's in November of 1991, that was sent to Havana Potatoes.

BY MS. COOK:

Q. You've mentioned the effect that these types of violations have on the industry, Ms. Jervis. Could you explain those effects more fully, please?

A. The failures to make full payment promptly have a serious impact upon the industry. The produce -- the perishable agriculture commodities have a short shelf life. They move from the growing region through middlemen to the wholesaler to reach the consumers very rapidly in order to reach the consumers at the height of their edible appeal.

Because of the quickness with which the produce must be moved to reach the consumers, the industry doesn't have the opportunity to perform extensive credit checks that are so common in other industries.

Businesses enter into contracts on a daily basis, just on -- at face value, having just talked to the buyer a few times over the phone. They trust that each party will live up to the contractual obligations. In other words, the shipper, when he ships the product to the buyer, he trusts that the buyer will in fact receive that produce, handle it promptly and make full payment promptly.

The buyer, on the other hand, is trusting that the shipper will ship the quantity and the quality of the commodity as ordered, so that he may meet its customers' demands.

When you have failures to make full payment promptly, it breaks down this trust relationship, the marketing chain breaks down, and it also can create a financial hardship. It's what we refer to as a domino effect. If A fails to pay B, then B fails to pay C and so on. And this is a hardship on the industry.

Q. Ms. Jervis, what is your understanding of the secretary's role in enforcement of the Perishable Agricultural Commodities Act?

A. The Secretary of Agriculture is charged with enforcing the P.A.C.A., thereby insuring that this trust relationship that the industry operates upon is -- continues to exist in the industry.

This is done in several different ways. One, the Secretary of Agriculture, when he issues a P.A.C.A. license, he's making a statement to the entire produce industry that that firm is -- will operate in compliance with the Act, in that that firm is in a financial position to conduct business.

If, in the course of business, the firm is found to have committed violations of the Act, the Secretary, through evenhanded enforcement, through sanction policy, sends a very, very strong message to the industry that violations will not be tolerated. The firms that have committed the violations will be charged and that -- and through this even-handed enforcement policy that the Secretary issues sanctions through, he's providing a level playing field for the entire industry to operate on.

Now, the other aspect of the Secretary's role is that the effect of the sanctions that are imposed is that it serves as a deterrent effect on the industry. One, it removes a firm that has committed violations of the Act, and it prevents additional violations from being committed.

It also serves as a deterrent to the entire produce industry in that it will deter them from committing similar violations.

MS. COOK: Thank you, Ms. Jervis. I have no further questions.

Tr. 472-77.

Respondents contend that the Department's new sanction policy articulated in *S.S. Farms Linn County, Inc.*, requires that the ALJ weigh mitigating

circumstances, and that, in light of these circumstances, the ALJ should have considered and imposed "a lesser sanction, such as a 30-day suspension" of Respondent Havana's PACA license and Respondent Havpo's PACA license. (Respondents' Appeal to the Judicial Officer at 34-38.) I disagree with Respondents.

Ms. Clare Jarvis testified that the relevant circumstances taken into consideration in making the recommendation that Respondents' PACA licenses be revoked include the number of Respondents' violations (Respondent Havana 345; Respondent Havpo 23); the number of sellers to whom Respondents failed to make full payment promptly (Respondent Havana 66; Respondent Havpo 6); the amount of money not paid (Respondent Havana \$1,960,958.74; Respondent Havpo \$101,577.50); the time period during which Respondents violated the PACA (Respondent Havana 11 months; Respondent Havpo 5 months); and the effect that the violations of the PACA have on the perishable agricultural commodities industry. (Tr. 473-74.)

Respondents cite several "mitigating factors" that Respondents contend the ALJ should have considered when determining the sanction to be imposed on Respondents: an industry-wide crisis that has resulted in few purchasers paying for perishable agricultural commodities within 10 days; the weakness of the evidence of Respondents' roll-over debt; Respondents' excellent payment history relative to others in the perishable agricultural commodities industry; Respondents' good faith efforts to address their payment problems; and the effects of revocation on perishable agricultural commodity suppliers. Even if I found each of Respondents' "mitigating factors" to be supported by the record, which I do not so find, I would not agree with Respondents' contention that those factors should be considered when determining the sanction to be imposed for Respondents' repeated, flagrant, and willful violations of the PACA. The factors cited by Respondents as "mitigating factors" are not *relevant circumstances* under the Department's sanction policy regarding flagrant or repeated failures to make full payment promptly under the PACA.⁸ Rather, the relevant factors are whether the violations are flagrant or repeated failures to pay

⁸Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), which provides "alternative civil penalties" for violations of section 2 of the PACA, in lieu of suspension or revocation, requires the Secretary of Agriculture to give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, but only when determining the amount of a civil penalty to be assessed. See *In re Andershock Fruitland, Inc.*, *supra*, slip op. at 27 n.13 (the factors that must be considered under section 8(e) of the PACA, (7 U.S.C. § 499h(e)), are not required by the PACA to be considered with respect to the revocation or suspension of a PACA license).

more than a *de minimis* amount, whether Respondents had paid all sellers by the opening of the hearing, and whether Respondents are in compliance with the PACA and the regulations under the PACA. Even if a Respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful. Moreover, such excuses are not relevant to the sanction to be imposed on a Respondent who has flagrantly or repeatedly failed to make full payment promptly.⁹

⁹*In re Andershock Fruitland, Inc.*, *supra*, slip op. at 28 (excuses are not relevant to the sanction to be imposed); *In re Moreno Bros.*, *supra*, 54 Agric. Dec. at 1443 (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1424 (1995), *appeal dismissed*, No. 95-70906 (9th Cir. 1996) (excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990), *appeal dismissed*, No. 90-1199 (D.C. Cir. Oct. 15, 1990) (failure to pay for produce results in the revocation of Respondent's PACA license, notwithstanding excuses such as failure of someone else to fulfill contractual obligations with Respondent); *In re Carlton Fruit Co.*, 49 Agric. Dec. 513, 519 (1990), *aff'd*, 922 F.2d 847 (11th Cir. 1990) (unpublished) (failure to pay for produce, exceeding a *de minimis* amount, results in the revocation of a Respondent's PACA license, notwithstanding excuses such as the failure of someone else to fulfill contractual obligations with Respondent); *In re The Caito Produce Co.*, *supra*, 48 Agric. Dec. at 615 (although mitigating circumstances are generally considered in determining sanctions in USDA disciplinary proceedings, all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 567-68 (1989) (revocation of Respondent's PACA license is appropriate even though Respondent failed to pay because Respondent's customers ceased doing business with Respondent when the city announced it was taking Respondent's property by eminent domain); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (excuses such as nonpayment because of bankruptcy resulting after Respondent suddenly lost its largest customer are rejected in the enforcement of the PACA); *In re B.G. Sales Co.*, *supra*, 44 Agric. Dec. at 228-30 (all excuses as to why payment was not made are disregarded in determining the sanction in cases involving failure to pay under the PACA in view of the statutory provisions and the nature and history of the program; thus, it is not relevant that Respondent failed to pay because bank suddenly refused to extend credit as it agreed, and the bank took \$50,000 of Respondent's funds in the bank's possession; as in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored in determining violations and sanctions under the PACA); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1245-46 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the fact that the president and owner of Magic City Produce possesses an excellent reputation, that many perishable agricultural commodity vendors accepted delinquent partial payment, that Respondent was in business for 35 years with no complaints or financial difficulties, and that

(continued...)

⁹(...continued)

nonpayment was caused by \$200,000 in losses in 2-year period from theft of produce from Respondent's warehouse are irrelevant); *In re Gilardi Truck & Transportation, Inc.*, *supra*, 43 Agric. Dec. at 129 (fire at Respondent's business for which Respondent was under-insured rejected in determining whether payment violations occurred or whether they were willful); *In re Jarosz Produce Farms, Inc.*, *supra*, 42 Agric. Dec. at 1513-26 (bankruptcy caused by failure of large purchaser from Respondent to comply with its contractual agreement is not a mitigating circumstance in a failure to pay case under the PACA); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158-70 (1983) (nonpayment because another firm failed to pay Respondent \$248,805.66 is not a mitigating circumstance); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay Respondent, and increased operating costs rejected in determining whether payment violations occurred or whether violations were willful); *In re Melvin Beene Produce Co.*, *supra*, 41 Agric. Dec. at 2428, 2442-44 (revocation of Respondent's PACA license is appropriate where nonpayment is caused by Respondent's bankruptcy); *In re Finer Foods Sales Co.*, *supra*, 41 Agric. Dec. at 1171 (nonpayment because of bankruptcy rejected in determining whether payment violations occurred or whether violations were willful); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982), (nonpayment because of bankruptcy of another firm owing Respondent \$776,459.23 rejected in determining whether payment violations occurred or whether violations were willful), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, *supra*, 41 Agric. Dec. at 746-47 (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (financial difficulties, including difficulty in collecting from others, is not relevant to a PACA licensee's failure to promptly pay), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re The Connecticut Celery Co.*, *supra*, 40 Agric. Dec. at 1138-40 (Respondent's sudden and unexpected loss of a major sales account is not a mitigating circumstance in a failure to pay case); *In re C.B. Foods, Inc.*, *supra*, 40 Agric. Dec. at 969-70 (Respondent's petition in bankruptcy is irrelevant to the issuance of a sanction under the PACA); *In re United Fruit & Vegetable Co.*, *supra*, 40 Agric. Dec. at 404 (nonpayment because of financial difficulties is not a mitigating circumstance); *In re Columbus Fruit Co.*, *supra*, 40 Agric. Dec. at 113 (nonpayment because Respondent lost a major sales account and a large supplier changed its course of dealing with Respondent, demanding cash on delivery, rejected in determining whether payment violations occurred or whether violations were willful); *In re Rudolph John Kafcsak*, *supra*, 39 Agric. Dec. at 685-86 (a strike and the failure of others to pay Respondent are not defenses in a disciplinary action under the PACA for failure to pay for produce); *In re John H. Norman & Sons Distributing Co.*, *supra*, 37 Agric. Dec. at 709-14 (nonpayment because of failure of others to pay Respondent and Respondent's responsible and honorable conduct are not relevant in a PACA failure to pay case); *In re Atlantic Produce Co.*, *supra*, 35 Agric. Dec. at 1632-33 (nonpayment because of financial difficulties rejected in determining whether payment violations occurred or whether violations were willful); *In re Maure Solt*, 35 Agric. Dec. 721, 723-24 (1976) (bankruptcy of another firm owing Respondent over \$130,000 is not a defense to a violation of the payment provisions of the PACA nor does it negate willfulness); *In re Sam Leo Catanzaro*, *supra*, 35 Agric. Dec. at 31 (a railroad strike causing Respondent's failure to pay is not a defense under section 2 of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (financial difficulty is not an excuse

(continued...)

Respondents' payment of all past-due amounts alleged in the Complaint is commendable; but, the operational device of "robbing Peter to pay Paul" still leaves Respondents in non-compliance with the PACA, as follows:

D. Mitigational Aspects

The record should note that respondent's financial difficulties basically arose out of the failure of respondent's customers to pay respondent. Respondent continued to operate selling to Paul in order to pay Peter and had some measure of success. At the time of trial, respondent had paid about \$63,000.00 of the complaint transactions, cutting the complaint obligations to about \$100,000.00

A respondent witness testified that their operations at the time of trial were on a "current basis" (Transcript page 77), e.g., purchases were then being made on a cash basis or were being promptly paid within the terms of their agreement or the regulations.

Respondent's efforts to satisfy the older unpaid obligations are commendable. But, under the strict interpretation of the PACA, and binding precedents cited, there is no discretion allowed here.

In Farm Market Service, Inc., 44 Agric. Dec. 316, 322 (1985) (footnote omitted).

Furthermore, collateral effects of a Respondent's license revocation are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or

⁹(...continued)

for violating the PACA and does not negate willfulness); *In re George Steinberg & Son, Inc.*, *supra*, 32 Agric. Dec. at 266-68 (Respondent's insolvency does not negate willfulness; a licensee is obligated by the PACA to have sufficient funds to pay for perishable agricultural commodities or not buy them); *In re Cloud & Hatton Brokerage*, 18 Agric. Dec. 547, 549 (1959) (the fact that Respondent has been adjudicated a bankrupt is not a defense in a PACA disciplinary proceeding for failure to pay); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (financial difficulties do not condone Respondent's repeated failures to pay and revocation of Respondent's PACA license should be ordered); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties authorizes revocation of Respondent's PACA license and had Respondent's license not already terminated, it would have been revoked).

repeatedly failing to make full payment promptly.¹⁰

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent Havana Potatoes of New York Corp.'s PACA license is revoked, effective 11 days after service of this Order on Respondent Havana Potatoes of New York Corp.
2. Respondent Havpo, Inc.'s, PACA license is revoked, effective 11 days after service of this Order on Respondent Havpo, Inc.
3. The facts and circumstances set forth in this decision shall be published.

¹⁰*In re Andershock Fruitland, Inc.*, supra, slip op. at 28-30 (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co.*, supra, 55 Agric. Dec. at 639 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed wilful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co.*, supra, 49 Agric. Dec. at 576 (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, supra, 48 Agric. Dec. at 571 (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, supra, 46 Agric. Dec. at 177 (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co.*, supra, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co.*, supra, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co.*, supra, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

PERISHABLE AGRICULTURAL COMMODITIES ACT**REPARATION DECISIONS**

**PRODUCE SERVICES & PROCUREMENT, INC. v. MARK J. VESTAL,
d/b/a WESTERN PACIFIC PRODUCE.**

PACA Docket No. R-94-0052.

Decision and Order filed January 22, 1996.

Agency - Broker authorized to invoice, collect and remit for undisclosed principal did not possess sufficient interest in cause of action to allow it to bring reparation action against purchaser where principal was later disclosed.

Where complainant was a broker relative to a transaction in perishables and was authorized by its principal, the seller, to invoice the buyer, collect and remit to the principal, the agency contract did not contemplate that such broker would be enabled to bring a legal action to collect the debt. The fact that the principal was undisclosed at the time of contracting did not alter this rule, where the existence of the principal was later disclosed. Complainant was under no obligation to pay its principal if complainant was not paid, and was not the real party in interest for the purpose of bringing a reparation action against the buyer.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$4,823.05 in connection with a transaction in interstate commerce involving a truckload of celery.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither

party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Produce Services and Procurement, Inc., is a corporation whose address is P. O. Box 690923, San Antonio, Texas.

2. Respondent, Mark J. Vestal, is an individual doing business as Western Pacific Produce, whose address is (b) [REDACTED]. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about January 5, 1993, complainant, acting as broker for Plantation Produce Co., sold to respondent one truck load of celery for a price of \$9,701.00, f.o.b. The truck load of celery was shipped by Plantation Produce Co. to respondent on January 8, 1993.

4. Complainant at all times relevant to the subject transaction acted as an invoice, collect and remit broker for Plantation Produce Co. At the time of the sale of the truck load of celery Plantation Produce Co. was not disclosed to respondent as the seller. Following shipment of the celery complainant invoiced respondent for the load, and such invoice disclosed Plantation Produce Co. as the seller.

5. An informal complaint was filed on March 17, 1993, which was within nine months after the cause of action alleged herein accrued.

Conclusions

It is clear from the record herein that complainant was not the owner of the subject truck of celery, and acted as an invoice, collect and remit broker between Plantation Produce Co. and respondent. In a recent case we held that an invoice, collect and remit broker is not the real party in interest, and has no standing to bring a reparation complaint without an assignment of interest from the seller. In that case we stated:

We note first that being an invoice, collect and remit broker does not establish any primary liability running from complainant to its principal, R. L. Wheatley & Son. As a collecting agent for R. L. Wheatley & Son, complainant is liable to that firm only for what it collects from respondent. [*Forney Fruit & Produce Co., Inc. v. Dixie Brokerage Co.*, 29 Agric. Dec. 1433 (1970).] The Regulations affirm that:

In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer. Agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. [7 C.F.R. § 46.28(c).]

It is obvious, therefore, that complainant does not own the chose in action here, but only has an agency duty to remit any funds collected from respondent to its principal.

Since complainant has no obligation to remit funds which it does not collect, it follows that the existence of an "invoice, collect and remit" contract should not be taken to imply that any extraordinary means of collection will be undertaken. The agency obligation is to "invoice" and collect, not sue and collect. The normal conduct of commerce does not contemplate law suits to collect money due, but rather payment in due course.¹

In this case complainant's principal was undisclosed to respondent at the time the contract was made. In our opinion this fact does not affect the rule enunciated above because the existence of the principal is now disclosed. Warren A. Seavey states:

If the agent discloses or the other party discovers the existence or identity of the principal, the agent is in the position of an agent for a disclosed or partially disclosed principal and can affect relations with the other party only to the extent that his known position gives him power to affect the principal.²

Seavey goes on to say that if an agent for an undisclosed principal should obtain a judgment against the other party after the identity of the principal has become known, the rights of the principal, who took no part in the litigation, would not

¹*PurePac Brokers, Inc. v. Procacci Bros. Sales Corporation*, PACA Docket R-93-250 decided June 15, 1995, 54 Agric. Dec. ____ (1995).

²W. Seavey, *Handbook of the Law of Agency*, §115B, p.203 (1964).

be barred or diminished.³ As we said in *Harrisburg Daily Market, Inc. v. S. Boova & Co.*:

The real party in interest is the person who can discharge the claim upon which the suit is brought and control the action brought to enforce it, and who is entitled to the benefits of the action, if successful, and can fully protect the one paying the claim against subsequent suits covering the same subject matter by other persons. . . . A person who acts merely as a broker or agent in a purchase and sale cannot maintain an action against the buyer for the purchase price in the absence of an assignment from his principal or other legal basis.⁴

We conclude that complainant does not possess a claim against respondent upon which this action may be based. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

**FIRMAN PINKERTON CO., INC. v. BOBINELL J. CASEY d/b/a
INTERNATIONAL PRODUCE EXCHANGE, INC. v. FIRMAN
PINKERTON CO., INC.**

PACA Docket No. R-94-0134.

PACA Docket No. R-94-0169.

Decision and Order filed January 22, 1996.

Shipper's obligations regarding adequacy of transportation vehicle.

In an f.o.b. transaction, the seller gives an implied warranty that it will use reasonable care and judgment in selecting the transportation service and providing shipping instructions to the carrier. The shipper, in accordance with its duty of reasonable care in this instance, had an affirmative obligation to notify respondent that its use of an unrefrigerated truck to transport the produce was

³*Id.*, at § 116.

⁴*Harrisburg Daily Market, Inc. v. S. Boova & Co.*, 19 Agric. Dec. 689 (1960).

inadequate, and its failure to do so was a breach of duty on its part. Complainant will not be later heard to complain about the receiver's choice of transport vehicle as a means of proving abnormal transportation.

Kimberly D. Hart, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). This decision will reflect a decision by the Department to consolidate two separate but integrally related cases which are *Firman Pinkerton Co., Inc. v. Bobinell J. Casey d/b/a International Produce Exchange*, PACA Docket No. R-94-134 [hereinafter referred to as the "**Firman case**"] and *Bobinell J. Casey d/b/a International Produce Exchange v. Firman Pinkerton Co., Inc.*, PACA Docket No. R-94-169 [hereinafter referred to as the "**International Produce case**"]. All parties have been properly notified by certified mail of the Department's consolidation of the two cases.

In the "Firman case", complainant filed a timely formal complaint seeking a reparation award against International Produce Exchange in the amount of \$3,465.00 in connection with a transaction involving yellow onions, a perishable agricultural commodity, in interstate commerce. In the "International Produce case", International Produce filed a timely formal complaint seeking a reparation award against Firman Pinkerton in the amount of \$3,899.40 in connection with a transaction involving yellow onions, a perishable agricultural commodity, in interstate commerce. The same load of yellow onions is the subject of both cases.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaints were served upon the respondents, which filed answers thereto, denying the allegations of the complaints. Since the amount claimed as damages does not exceed \$15,000.00, the procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. §47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence in this case, 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. In the "Firman case", neither party elected to file additional evidence. Neither party elected to file a brief.

In the "International Produce case", neither party elected to file additional evidence. Neither party elected to file a brief.

Findings of Fact

1. Complainant, Firman-Pinkerton Co., Inc., is a corporation whose mailing address is P.O. Box 2216, Wenatchee, Washington 98807.

2. Respondent, Bobinell J. Casey, is an individual doing business as International Produce Exchange whose mailing address is (b) (6)

(b) (6) At the time of the transaction alleged herein, respondent was licensed under the Act.

3. Complainant, on or about July 2, 1993, sold to respondent, by written contract and in the course of interstate commerce, 900 U.S. Commercial medium yellow onions, at the agreed upon f.o.b. contract price of \$3,465.00. The produce was shipped on July 2, 1993, from Othello, Washington to respondent's customer in Hudsonville, Michigan. The produce arrived at respondent's customer on July 7, 1993, but it was not unloaded upon arrival. On July 8, 1993, a federal inspection was obtained with the following results:

Applicant:	Bosgraf Sales Hudsonville, Michigan
Shipper:	Olympic Produce Othello, Washington
Insp. date:	July 8, 1993 at 8:45 a.m.
Carrier type:	Open trailer, tarp covered
Temperatures:	72 to 74 degrees
Product:	Onions, yellow northern
Brand/markings:	"Derby" 50 lbs.
# of containers:	900 sacks

- Average defects: 10% average including 8% serious damage by black mold beneath outer scales (12 to 20%)
- 10% average including 6% serious damage by numerous sunken areas (4 to 16%)
- 40% average including 40% serious damage by decay (10 to 66%)(mostly in early, many in advanced stages affecting 1-3 outer scales, to entire onion)
- 66% checksum including 54% serious damage

Notes: Restricted to all sacks on rear 2 pallets and to upper 3 layers of remainder of load

4. Based on the inspection results, respondent's customer rejected the load and notified respondent of such rejection. Respondent in turn notified complainant of its rejection based on the condition of the produce. Both parties abandoned the load to the trucker who transported the produce to be dumped due to the fact that it had no commercial value.

5. Respondent has failed to pay complainant the full contract price of \$3,465.00. In addition, respondent International Produce has filed a complaint against complainant Firman alleging that complainant is liable to it for damages resulting from the breach of contract. Respondent is seeking to recover the amount of invoice to its customer, \$5,850.00, plus inspection charges of \$74.40 minus freight charges of \$2,025.00 or \$3,899.40 as its damages. Complainant Firman has failed to pay respondent International Produce this alleged amount of damages.

6. In the **Firman case**, the formal complaint was filed on December 1, 1993, which is within nine months from when the cause of action accrued. In the **International Produce case**, the formal complaint was filed on January 12, 1994, which is within nine months from when the cause of action accrued.

Conclusions

Complainant alleges that respondent ordered, received and accepted the produce in conformity with the terms of the f.o.b. contract and thus owes it the full contract price. Respondent denies that it accepted produce in conformity

with the terms of the contract and alleges a breach of contract on complainant's part as proven by the inspection taken. Respondent contends that it is entitled to damages directly resulting from complainant's breach of contract due to its inability to fulfill its contract with its customer. As the moving party, complainant bears the burden of proving its case. *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975); *New York v. Sandler*, 32 Agric. Dec. 702 (1973). The party with the burden of proof must meet the preponderance of evidence test. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969).

The evidence shows that the produce was shipped on July 3, 1993, on a tarped flatbed truck with sides secured by respondent. The produce arrived at respondent's customer's place of business on July 7, 1993, where a visual inspection was taken of the produce. The produce was not unloaded upon arrival and remained on the original transport vehicle. Respondent's customer noticed some potential problems with the load and called for a federal inspection which took place early morning on July 8, 1993. Respondent was notified of its customer's intent to secure a federal inspection. On July 8, 1993, a federal inspection was taken on the load. The inspector noted that the load was intact and still loaded on the original transport vehicle. The inspection report reads in pertinent part:

Applicant:	Bosgraf Sales Hudsonville, Michigan
Shipper:	Olympic Produce Othello, Washington
Insp. date:	July 8, 1993 at 8:45 a.m.
Carrier type:	Open trailer, tarp covered
Temperatures:	72 to 74 degrees
Product:	Onions, yellow northern
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# of containers:	900 sacks

Average defects: 10% average including 8% serious damage by black mold beneath outer scales (12 to 20%)

10% average including 6% serious damage by numerous sunken areas (4 to 16%)

40% average Including 40% serious damage by decay (10 to 66%)(mostly in early, many In advanced stages affecting 1-3 outer scales, to entire onion)

66% checksum including 54% serious damage

Notes: Restricted to all sacks on rear 2 pallets and to upper 3 layers of remainder of load

Upon receiving the inspection results, respondent's customer notified respondent of its rejection of the produce. Respondent, in turn, notified complainant of the inspection results and ensuing rejection and complainant requested that respondent file a claim with the trucking company for mishandling. Respondent released the load to the trucker due to the fact that it had no commercial value. The trucker dumped the produce once it was abandoned by complainant and respondent due to its condition.

It is our opinion that respondent did not accept the produce in this transaction. The produce was never unloaded and the inspection was performed with the load remaining on the transport vehicle. Respondent nor its customer exercised any dominion or control over the produce. Therefore, we conclude that complainant has not carried its burden of proving acceptance on respondent's part.

There is also some discrepancy as to whether the sale was on an f.o.b. basis or a delivered basis. We have reviewed the evidence which indicates that the sale from complainant to respondent was on an f.o.b. basis and the resale from respondent to its customer was on a delivered basis. Since we are only concerned with the contract between complainant and respondent, the produce in question is found to have been sold on an f.o.b. basis.

Respondent alleges a rejection of the produce via its customer and contends that such rejection was promptly communicated to complainant. For a rejection to be effective, it must be made in clear, unmistakable terms. *Farm Market*

Service, Inc. v. Albertson's, Inc., 42 Agric. Dec. 429 (1983). A rejection is not effective unless the buyer seasonably notifies the seller and the burden of proving seasonable notice rests with the buyer. *San Tan Tillage Co., Inc. v. Kap's Foods, Inc.*, 38 Agric. Dec. 867 (1979); *Sun World Marketing v. Bayshore Perishable Distributors*, 38 Agric. Dec. 480 (1979). We have reviewed the evidence and we are persuaded that respondent communicated a clear, timely rejection of the produce to complainant on July 8, 1993. Therefore, we find that respondent has carried its burden of proving a procedurally effective rejection.

After rejecting produce, a receiver has a duty to dispose of the goods in commercial channels upon request of the shipper or in lieu of instructions from the shipper. *Yokoyama Brothers v. Cal-Veg Sales, Inc.*, 41 Agric. Dec. 535 (1982). The evidence indicates that once respondent rejected the produce, the complainant failed to give it instructions as to the disposition of the produce nor did complainant make any efforts to arrange to have the produce returned or transported elsewhere. Therefore, respondent released the produce to the shipper who dumped it due to its lack of commercial value.

The receiver has the burden to show that produce has no commercial value. *Homestead Pole Bean Co-op Inc. v. Jones Produce Co.*, 43 Agric. Dec. 1216 (1984); *Growers Produce v. Star Produce*, 33 Agric. Dec. 693 (1974). We find that the respondent acted properly in allowing the trucker to dump the produce since the inspection results clearly indicate that the produce had little to no commercial value. We are persuaded that respondent has shown that the produce had no commercial value and that dumping was justified.

The next issue is whether complainant breached its contract by providing non-conforming goods as alleged by respondent. When effectively rejected produce is sold f.o.b., the shipper has the burden to show transportation service and conditions were abnormal. *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844 (1979); *Sunset Strawberry Growers v. Luna Co., Inc.*, 46 Agric. Dec. 1701 (1987). When produce has been rejected by a receiver as not meeting contract specifications the shipper has the burden to show that it was in suitable shipping condition when it was loaded at shipping point. *Heggeblade-Marguleas-Tenneco, Inc. v. Fisher Foods, Inc.*, 33 Agric. Dec. 1443 (1974).

There is a warranty of suitable shipping condition in an f.o.b. sale such as the one involved herein (7 C.F.R. § 46.43(i)). Under the warranty, the commodity is warranted to be in a condition "which if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties" (7 C.F.R. § 46.43(j)). The rationale for this rule is the following: "Whether the commodity, at the time of billing, was in good enough condition

to travel to destination without abnormal deterioration can be determined, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at the time of billing." *Anonymous*, 12 Agric. Dec. 694 (1953).

Complainant alleges that abnormal transportation accounted for the condition of the produce upon arrival. In particular, complainant contends that the respondent's use of a tarped flatbed truck caused the abnormal deterioration due to the fact that transporting onions in an unrefrigerated trailer makes the product vulnerable to decay and other defects if the weather turns damp or there is a prolonged period of time during which proper air flow is not maintained. Complainant further contends that the weather conditions, including rain and high humidity, during transit contributed to the abnormal deterioration. Complainant also alleges that the trucker's failure to maintain a transit temperature of 50 degrees fahrenheit contributed to the abnormal deterioration. Finally, complainant contends that only abnormal deterioration can account for such a drastic change in the condition of the produce from shipment to destination since a shipping point inspection showed only 1% decay.

Respondent, on the other hand, alleges that transportation was normal. Respondent contends that there were no weather conditions occurring during transit which contributed to the problems, citing the inspector's notes which state that the dampness was derived from the decay and not rain or water. Respondent also alleges that the use of the tarped flatbed truck was appropriate and there is no proof that the produce was not properly ventilated. Respondent disputes complainant's allegation that the shipping point inspection sufficiently identifies the produce as being the same produce shipped to its customer. Finally, respondent disputes that the trucker failed to maintain proper transit temperatures since it contends that it would have been impossible to maintain a temperature of 50 degrees due to the fact that the transport vehicle was not refrigerated and the transportation took place in July when temperatures are warmer.

We have thoroughly reviewed the evidence regarding these issues and reach the following conclusions. The shipping point inspection report submitted by complainant does not sufficiently identify the produce inspected as being the same produce as was shipped to respondent's customer on July 3, 1993. Therefore, we cannot say that this inspection report provides proof that the produce was in suitable shipping condition at the time of shipment. We find that the transit time of approximately 4 days is acceptable.

In addition, if complainant were of the opinion at the time of shipment that the use of a tarped flatbed truck to transport the produce was unacceptable, it had

an affirmative duty to inform the buyer and/or to refuse to allow the produce to be shipped in that manner. In an f.o.b. transaction, the seller gives an implied warranty that it will use reasonable care and judgment in selecting the transportation service and providing shipping instructions to the carrier. *Progressive Groves v. Bittle*, 31 Agric. Dec. 436 (1972); *A.J. Levy & J. Zentner Co. v. Leaf Brandt Co.*, 21 Agric. Dec. 179 (1962). In the present situation, complainant, in accordance with its duty of reasonable care, should have notified respondent that the unrefrigerated truck was inadequate, and its failure to do so was a breach of duty on its part, not respondent's. See *Teddy Bertucca Company v. The Kunkel Co., Inc.*, 38 Agric. Dec. 580 (1979).

There has been no evidence submitted by complainant to show that transporting onions in this manner is unacceptable in the industry or that it voiced any concerns to respondent about utilizing a tarped flatbed truck to transport the produce. Complainant cannot be heard to complain about respondent's choice of transport vehicle in an attempt to prove abnormal transportation.

As to complainant's contention that weather conditions contributed to the abnormal deterioration, we accord no credibility to this contention as complainant has submitted no proof to show the actual weather conditions during the transit period or that the weather conditions actually contributed to the condition problems. In fact, we have as evidence the inspector's notes which state that the dampness observed was found to be due to the decay and not water. We are not persuaded that weather conditions contributed to the condition of the produce upon arrival.

In addition, complainant cannot hold respondent the trucker responsible for not maintaining the transit temperatures at 50 degrees since it was well aware that the transport vehicle was unrefrigerated thereby making it impossible to control the transit temperatures. As stated earlier, if complainant had concerns about the produce not being maintained at 50 degrees during transit, it had a duty to notify the respondent of its concerns or decline to ship the produce in an unrefrigerated truck. Complainant did neither so its allegation has no merit.

Based on the foregoing, we find that complainant has not carried its burden of proving abnormal transportation thereby voiding the suitable shipping condition warranty. In addition, complainant has failed to carry its burden of proving that the produce was in suitable shipping condition at the time of shipment. The inspection report clearly establishes a breach of contract on complainant's part and we are not persuaded by the evidence that the extensive damage found on inspection resulted from abnormal transportation. The inspection report establishes that the produce had no commercial value and was

appropriately dumped. We find that complainant breached its contract by providing non-conforming produce as shown by the inspection report results.

Respondent is entitled to damages occurring as a result of complainant's breach of contract. Section 2-713 states that the measure of damages for non-delivery by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article, but less expenses saved in consequence of the seller's breach. We would normally determine the market price by resorting to Market News Service reports to obtain an average price for similar produce. However, we have consulted the Market News reports for Detroit, Michigan and Chicago, Illinois area and find that there are no comparable quotes for Washington yellow onions which can be utilized to obtain an average price.

The second best method for determining the market price is to use the delivered price of the commodity (f.o.b. price plus freight). We have reviewed the invoices and freight bills submitted as evidence and determine the delivered price to be \$5,490.00 for the produce involved which is obtained by adding the f.o.b. contract price of \$3,465.00 to the freight costs of \$2,025.00. We must then deduct the contract price of \$3,465.00 from the market price of \$5,490.00 for a value of \$2,025.00. Since respondent was not required to pay freight costs, these were expenses saved as a result of the complainant's breach. Therefore, the freight costs of \$2,025.00 must be deducted with the result that respondent's damages equal 0. Respondent does not recover any sum of money as its damages pursuant to section 2-713 of the U.C.C. Respondent has also requested recovery for incidental damages involving the inspection costs of \$74.40. Respondent will be allowed to recover the inspection costs as reasonable incidental damages. See *Strano Farms v. Shapiro and Cohen*, 49 Agric. Dec. 1227 (1990).

The reparation case filed by respondent International Produce Exchange under PACA docket no. R-94-169 involves respondent's attempts to recover consequential damages incurred in connection with complainant's breach. Respondent alleges that it suffered loss in the form of consequential damages due to the fact that it had already resold the produce at the time of shipment and would have realized a profit on the sale to its customer. Section 2-715(2) states:

Consequential damages resulting from the seller's breach include

- (a) any loss resulting from general or particular requirements and

needs of which the seller at the time of contracting had reason to know and which could have not reasonably be prevented by cover or otherwise

The evidence presented persuades us that complainant had reason to know at the time of contracting that respondent intended to resell the produce to its customer. In addition, we have consulted the market news reports and found that there are no comparable quotes found for the Michigan area during that time frame which leads us to the conclusion that respondent's loss could not have been reasonably prevented by cover. There are no market quotes available for Washington yellow onions. Respondent has carried the burden of proving that the complainant had reason to know of its intent to resell the produce to a customer and that its loss could not have been prevented by cover.

Respondent has submitted evidence showing that it resold the produce to its customer for \$5,850.00 which included freight costs of \$2,025.00. Respondent is entitled to recover the difference between the invoice price to its customer, \$5,850.00, and the contract price negotiated with complainant, \$3,465.00, or \$2,385.00. However, since the invoice price included the freight charges, those must be deducted in order to obtain respondent's losses. The freight costs must be deducted since respondent nor its customer incurred this cost so nothing has been lost to respondent on freight charges. Deducting \$2,025.00 from \$2,385.00 leaves us with a remaining balance of \$360.00. Respondent is entitled to recover consequential damages totalling \$360.00 under the International Produce case (R-94-169).

We have previously concluded that respondent is entitled to recover inspection costs of \$74.40 as incidental damages pursuant to the Firman case (R-94-134) along with consequential damages of \$360.00 pursuant to the International case (R-94-169) which totals \$434.40. In total, complainant is liable to respondent in the amount of \$434.40 in damages as a result of its breach of contract.

Complainant's failure to pay this sum is a violation of section 2 of the Act for which reparation should be awarded. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. See *Perl Grange Fruit*

Exchange, Inc. v. Mark Bernstein Co., 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 28 Agric. Dec. 66 (1963).

Order

Within 30 days from the date of this order, complainant shall pay to respondent, as reparation, \$434.40, with interest thereon at the rate of 10 percent per annum, from September 1, 1993, until paid.

Copies of this order are to be served upon the parties.

**GREEN ACRES TURF FARMS, INC. v. KELLY DISTRIBUTING, INC.,
and SALES KING INTERNATIONAL, INC.**
PACA Docket No. R-93-0313.
Decision and Order filed July 15, 1996.

Arbitration - reparation forum must respect agreement for binding arbitration.

Arbitration - matters falling outside an arbitration agreement may be decided by the reparation forum.

Grower and grower's agent entered into a written "Distribution Agreement" defining terms under which the agent would market grower's garlic, and such Agreement included a paragraph requiring submission of disputes under the Agreement to binding arbitration. The agent, after marketing some of the garlic, refused to market the garlic any further due to alleged quality problems. Thereafter, according to the allegation of the grower, the agent agreed to purchase a quantity of the garlic, and grower brought a reparation complaint for failure to pay according to the terms of the alleged purchase agreement. It was held that under the Federal Arbitration Act the reparation forum was bound to respect the arbitration agreement. It was also stated that the question of whether the Agreement allowed a sale of garlic outside the Agreement to take place between the parties would be a question that could be decided only by an arbitration forum under the Agreement. However, it was stated that if such question were answered in the affirmative, the question of whether there was in fact a sale could not be answered by the arbitration forum since the sale would fall outside the scope of the Agreement between the parties. Therefore, in order to promote efficiency in the administration of justice, the limited factual question of whether a sale of the garlic took place between the grower and agent was considered and decided in the negative by the reparation forum.

George S. Whitten, Presiding Officer.

R. Jason Read, Newport Beach, CA, for Complainant.

Respondent Kelly Distributing, Inc., Pro se.

Respondent Sales King International, Pro se.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$201,896.00 in connection with transactions in interstate commerce involving twelve loads of garlic.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondents which filed a joint answer thereto denying liability to complainant. The amount claimed in the formal complaint exceeds \$15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant, filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Green Acres Turf Farms, Inc., is a corporation whose address is Route 3, Box 7171, Wilcox, Arizona.
2. Respondent, Kelly Distributing, Inc. (hereafter Kelly), is a corporation whose address is P. O. Box 1582, Nogales, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.
3. Respondent, Sales King International (hereafter Sales), is a corporation whose address is P. O. Box 1582, Nogales, Arizona. At the time of the transactions involved herein this respondent was licensed under the Act.
4. On July 27, 1992, complainant and respondent Sales entered into a written agreement whereby Sales undertook to become complainant's exclusive distribution agent for garlic grown on a specified 60 acre plot farmed by complainant in Kansas Settlement, Arizona. The agreement provided in part as follows:

¹Effective November 15, 1995, the threshold for hearings in reparations was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

Exclusive Distribution Agreement

THIS EXCLUSIVE DISTRIBUTION AGREEMENT entered into between Sales King International, Inc. a/an Florida corporation, hereinafter called "DISTRIBUTOR" and Green Acres of Arizona Turf Farm, Inc. hereinafter, (sic) called "GROWER." (DISTRIBUTOR and GROWER sometimes hereinafter referred to as "PARTIES").

...

WHEREAS, GROWER will grow the following crops/produce at the CROP LOCATIONS in the manner set forth below:

Type of Crop/Produce	Season	Acres To Be Planted
GARLIC	1992	60-00-00
TOTAL		60-00-00

(the foregoing hereinafter sometimes referred to as the "produce"), which produce distributor will handle for grower as grower's sole and exclusive distribution agent upon the terms and conditions herein set forth. . . .

NOW, THEREFORE, for good and valuable consideration, . . .

...

2. This agreement shall commence on the date hereinafter set forth and shall continue in effect until all obligations of both PARTIES are fulfilled or one (1) year from commencement, which (sic) is the latter (sic)."

3. DISTRIBUTOR as GROWER'S sole and exclusive sales agent, agrees to exercise reasonably diligent efforts in handling DISTRIBUTOR exclusively all its products. (sic) During the term of this agreement, GROWER will not pack any other produce in GROWER'S shed without written permission of DISTRIBUTOR. GROWER will pack his produce at the shed or packing facility designate (sic) by DISTRIBUTOR. GROWER will not pack under any labels other than the labels designated by DISTRIBUTOR."

4. As GROWER'S agent, DISTRIBUTOR is authorized by GROWER to use its sole discretion as to how, when, where, and to whom the produce is to be sold or distributed. Further, DISTRIBUTOR is authorized to sell through brokers, consign to commission merchants, use auction facilities, make joint account sales, . . .

. . .

9. DISTRIBUTOR shall receive for its service a commission of TEN (10%) percent of the F.O.B. price, . . .

. . .

11. DISTRIBUTOR shall pay on behalf of GROWER the following harvest related costs and expenditures;

ADVANCES (U.S. \$)	TYPE OF PRODUCE
OR .15 CENTS PER LB	#1 PACKED OUT GARLIC

per shipping package received by DISTRIBUTOR (herein sometimes referred to as "PICKING and PACKING"). Said expenses shall be incurred on GROWER'S behalf, (sic) each week and will reduce the GROWER'S LIQUIDATION by a similar amount . . . Advances under this paragraph shall be conditioned upon the produce meeting quality standards set by DISTRIBUTOR. . . . When in DISTRIBUTOR'S judgment market conditions are such that the weekly picking and packing costs, commissions, freight, duties, DISTRIBUTOR'S costs, overhead and commissions exceed the F.O.B. sales price of the produce, DISTRIBUTOR, upon notification to GROWER, shall reserve the right to reduce or suspend all picking and packing activities. Once DISTRIBUTOR determines to its satisfaction that the market has advanced to an acceptable position, DISTRIBUTOR may resume normal picking and packing activities.

. . .

16. In the event that the PARTIES have any dispute with regard to final accounting and reckoning between the PARTIES and the respective

funds due to GROWER and/or DISTRIBUTOR in LIQUIDATION as provided for herein, or have a dispute with regard to any provisions of this Agreement, and said dispute remains unresolved for a period in excess of ten (10) days after the PARTIES have in good faith attempted to resolve the same, then and in that event the PARTIES agree that said dispute or controversy shall be resolved and settled by final and binding arbitration in accordance with the Commercial Arbitration rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having competent jurisdiction thereof. Arbitration shall be commenced by either party by sending notice to the person at the address as provided for herein. Within ten (10) days of mailing notice of said dispute each of the PARTIES to the dispute shall select an arbitrator The venue of any actions between the PARTIES to this Agreement shall be Santa Cruz County, Nogales, Arizona. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

. . .

22. This Agreement shall be binding upon the PARTIES hereto, their heirs, executors, administrators, successors and assigns. This instrument contains all the agreements and conditions made between the PARTIES and may not be altered or modified unless agreed to in writing and signed by all of the PARTIES to this Agreement. . . .

23. The PARTIES acknowledge and agree that the legal doctrine stating that a writing will be construed against the party who prepared it shall not apply to any interpretation of this Agreement, judicial or otherwise, inasmuch as this Agreement has been freely negotiated by the PARTIES hereto.

. . .

5. Between October 10, and December 23, 1992, complainant shipped twelve loads of garlic with a total weight of 504,740 pounds. Complainant issued straight (nonnegotiable) bills of lading as to each of the twelve loads which stated: "SOLD TO: Kelly Produce & Sales King International." In addition the bills of lading stated under the "SHIP TO:" heading as follows: six of the bills of lading — "Gilbert, Az."; two of the bills of lading — "Nogales, Az."; one bill

of lading — "Chandler, Az."; one bill of lading — "Joe Sandino"; as to one bill of lading the entry was illegible, and as to one there was no entry. Under the heading "DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXEMPTIONS" the bills of lading stated "Field Run Garlic As Is Over the scales." Some added "40¢ lb." after the word scales, and the remainder placed the same notation under the column headed "ORDERED."

6. The formal complaint was filed on February 8, 1993, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant seeks to recover the contract price relating to the alleged sale of twelve loads of garlic to respondents. Complainant alleges, through its president, T. Aigaki, that respondent Sales initially handled several loads of garlic pursuant to the July 27, 1992 contract. However, Aigaki asserts that Mr. Joe Sandino, employee of respondent Sales, contacted complainant in July of 1992 by phone and stated that Sales had decided to "stop the garlic deal" altogether because a load had been received which could not be processed for the fresh market due to staining by rain, and in Sales' opinion processing the garlic for the fresh market would cost too much. Complainant's Aigaki states that Sandino told him to try to locate another firm to sell the garlic, and suggested that complainant look into alternative markets such as juice, dehydration and/or seed. Aigaki asserts that in early October of 1992 Sandino contacted him again and offered to purchase garlic for seed at \$.40 per pound, and that the twelve loads were sold to respondents pursuant to this offer.

Respondents submitted an affidavit by Sandino asserting that:

The statement that I agreed to purchase this garlic crop is a positive and outright lie. I have never had the authority to purchase this crop. I have never recommended or discussed with the Defendant's management the purchase of this crop. I would never have considered buying, or recommended (sic) that this crop be purchased having experienced a great deal (sic) trouble and resistance in attempting to sell the garlic that we had agreed to sell.

Sandino further stated that the \$.40 per pound price was the initial purchase price negotiated by respondent Sales with Mexican buyers on behalf of complainant, and that the price "fell thru due to quality." Respondents' president, Kelly T. Larey, made the following assertions relative to the bills of lading, and a

subsequent invoice from complainant:

On all loads going to Freeman Farms (approximately 406,470 gross pounds), the bills of lading were never seen by Co-Respondents. On loads destined for Nogales the notation of .40 cents did not alarm Co-Respondent as Co-Respondent assumed that this was merely a notation made by Complainant to help his memory later on. Since Co-Respondent was then and has always been the sales agent of Complainant, Co-Respondent was not alarmed. However when Complainant sent Co-respondent an invoice which was received mid-December 1992 (Exh. 6A & 6B) Co-Respondent promptly called Complainant and rejected the same. Additionally, shortly thereafter, at a face to face meeting with Complainant, Co-Respondent returned Complainant's invoice as not representing any such transaction between the parties.

A bill of lading is a contract with the carrier, and not the proper or usual place for a memorandum of a contract with the purchaser of the goods being transported. Respondent Kelly was not a party to the grower's agent agreement, and denies any connection with the twelve garlic shipments. We find that complainant has failed to prove by a preponderance of the evidence that respondent Kelly contracted to purchase the twelve loads of garlic which are the subject of the complaint.² The complaint as against respondent Kelly should be dismissed.

The disposition of the complaint as to respondent Sales involves the significance which should be accorded to the "Exclusive Distribution Agreement" (hereafter Agreement), and the scope which should be conferred on the binding arbitration clause thereof. Respondent Sales has argued repeatedly that this matter should be submitted to binding arbitration pursuant to the terms of the Agreement. It could, however, be cogently argued that complainant has alleged a sale of the twelve loads of garlic to respondent Sales, that such a sale falls outside the scope of the "Exclusive Distribution Agreement," and that this forum should first determine as a factual matter whether there was in fact a sale. If it were determined that there was a sale, then presumably reparation could be awarded to complainant, and the arbitration agreement could be bypassed.

On the other hand cogent reasons can be advanced as to why this is not the proper course to follow. First, the arbitration clause provides for arbitration when

²*Carlton Jones v. Samuel S. Barrage*, 16 Agric. Dec. 1142 (1957).

the parties "have a dispute with regard to any provisions of this Agreement" Second, interpretation of the Agreement is required in order to determine whether a sale of the produce outside the terms of the Agreement was legally possible. The Agreement is so strictly drawn as to make this a real question. Respondents point out that the agreement provides in paragraph 2 thereof that the agreement "shall continue in effect until all obligations of both PARTIES are fulfilled or one (1) year from commencement, which (sic) is the latter (sic)." The agreement further provides that: "This instrument contains all the agreements and conditions made between the PARTIES and may not be altered or modified unless agreed to in writing and signed by all of the PARTIES to this Agreement. . . ." On the basis of these provisions it might be argued that a sale of the garlic by complainant to respondent Sales was legally impossible, and respondent Sales has, in effect, made this argument.

Legal questions cannot always be neatly and precisely decided. Our task here is to give as full effect as possible to the contract between the parties, and at the same time promote efficiency in the administration of justice. The Federal Arbitration Act³ provides in part:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁴

The Federal Arbitration Act establishes a liberal federal policy favoring arbitration agreements, and questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.⁵ Section 3 of the Act, however, further provides:

If any suit or proceeding be brought in any of the courts of the United

³9 U.S.C. § 1 *et seq.*

⁴9 U.S.C. § 2.

⁵*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.⁶ (emphasis supplied)

We are not satisfied that the issue of whether there was in fact an agreement between the parties for the sale of the garlic could be determined by an arbitration panel. We will not refer to the issue of whether a sale could be legally made, for this involves the determination of whether the Agreement would allow such a sale, and such determination is clearly within the province of an arbitration panel under the Agreement. If the Agreement were interpreted by the arbitration panel to not prohibit a sale of garlic between the parties, the panel would, nevertheless, have no authority under the terms of the arbitration clause to decide the issue of whether there was, in fact, an agreement for a sale, since such a sale would likely be determined to fall entirely outside the scope of the Agreement. Accordingly we will determine this factual issue.

Sandino, who is admitted by Aigaki to have been the person involved directly in all dealings between the parties concerning the subject twelve loads, has stated in the most clear terms, under oath, that he did not agree to a purchase of the garlic by Sales. The bills of lading are contracts with the carrier⁷, are not the usual and proper document for a memorandum of any contractual agreement between the parties, and were not the place to which respondent Sales should be expected to look for such. That only two or three of the bills of lading should have come to the attention of any responsible party at Sales, and that the notations on those should have been dismissed as references to the expected

⁶9 U.S.C. § 3. This forum is not a "court of the United States." However, the decisions of this forum are appealable, by an adversely affected party, to the district court of the United States for the district in which the hearing was held or, in shortened procedure cases such as this, the district in which the party complained against is located. The parties are there entitled to a trial de novo, and the pleadings in this forum shall constitute the pleadings upon which the trial de novo shall proceed. (7 U.S.C. §499g(c).) It is appropriate, therefore, that we apply the Federal Arbitration Act in the manner in which we anticipate that the district court would apply it.

⁷See Uniform Commercial Code § 1-201(6).

return from sales negotiated on complainant's behalf with purchasers other than Sales is understandable and credible. We find that complainant has failed to prove by a preponderance of the evidence that it agreed with Sales that Sales would purchase the twelve loads of garlic.

Although complainant in its brief alleges that "Respondent wrongfully breached the terms of the Distribution Agreement and, therefore, is liable to Complainant for the fair market value of all garlic subject to that agreement," and requests, in the alternative that we do not find that the garlic was sold to respondents, that we award the fair market value of the garlic to complainant (stated to be \$411,600.00), the complaint is based squarely, and only, upon the allegation of a sale to respondents. In an affidavit made a part of the supplemental report of investigation T. Aigaki stated that:

. . . this complaint is not based upon the exclusive distribution agreement This complaint is based upon the fact that after being advised by Joe Sandino of Sales King International that the garlic crop could not be sold, a new agreement was entered into with the undersigned whereby in October 1992 the garlic crop was purchased by Sales King International and/or Kelly Distributing, Inc. for seed (emphasis in original)

If the complaint had sought relief on the alternative grounds of breach of the Agreement, or of failure to account under the Agreement, we would be required by the Federal Arbitration Act to stay this proceeding pending the results of arbitration. In our opinion nothing remains of this matter to stay. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

GOLDEN GEM GROWERS, INC. v. ORYAL TRADING COMPANY.
PACA Docket No. R-96-0099.
Decision and Order filed July 16, 1996.

Accord and Satisfaction - Florida law, in conformity with recent changes in the Uniform Commercial Code, provides that restrictive endorsements will not defeat an otherwise valid

accord and satisfaction.

Accord and Satisfaction - necessary elements of an accord and satisfaction, including existence of a bona fide dispute and payment in full, were evident from the record.

Respondent claimed that grapefruit shipped by complainant and received by respondent's customers had condition problems. After several meetings were held with complainant to discuss these problems, respondent wrote a check to complainant for \$116,096.84 with the notation "Clear Account" on the front. Complainant's endorsement and cashing of the check, after crossing out the notation "Clear Account" and writing on the back "accepted as partial payment only," found to be an accord and satisfaction. Florida law, in conformity with recent changes in the Uniform Commercial Code, provides that restrictive endorsements will not defeat an otherwise valid accord and satisfaction. Necessary elements of an accord and satisfaction, including the existence of a bona fide dispute and payment in full, were evident from affidavits provided by complainant. Complainant's \$228,480.41 claim was thus dismissed.

Andrew Y. Stanton, Presiding Officer.

Mike Bess, Orlando, FL, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

Order of Dismissal

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$228,480.41 in connection with several shipments of grapefruit sold and shipped in the course of foreign commerce. Respondent filed an answer to the complaint, denying liability.

Respondent filed a motion to dismiss, claiming that complainant, by cashing respondent's May 9, 1995, check for \$116,096.84 containing the notation "Clear Account" on the front, entered into an accord and satisfaction. A copy of respondent's motion was served upon complainant, which filed a response thereto, denying the occurrence of an accord and satisfaction.

An accord and satisfaction requires the existence of a bona fide dispute and a tender of payment which is clearly made as payment in full. *Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979). We have recently addressed the question of the requirement for a bona fide dispute in *A. Sam & Sons Produce Company, Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, at 1053 n. 13 (1991), as follows:

[T]he requirement of good faith, as well as the overriding purposes of the Act, require the presence of a *bona fide* dispute for the effectuation of an

accord and satisfaction. This is true for several reasons. First, a dispute puts the creditor on notice so that the payment may not be accidentally processed in a routine manner. Second, and more importantly, a good faith dispute furnishes a reason for compromising, or failing to pay according to the original agreement, an indebtedness otherwise valid on its face. This latter reason coincides with the very important requirement of 'full payment promptly' imposed by the Act and this Department's regulations. See 7 U.S.C. § 499b(4) and 7 C.F.R. § 46.2(aa).

Respondent claims that all requirements for an accord and satisfaction have been met. Respondent contends that its \$116,096.84 check was issued pursuant to a settlement agreed to at a May 8, 1995, meeting between representatives of the parties concerning respondent's claims regarding the condition of the grapefruit received by its customers. Respondent states that it received a letter from the Department's PACA Branch, dated June 9, 1995, asking whether respondent would agree to release the check as the undisputed amount. Respondent asserts that, in a letter sent to the PACA Branch and received by them on July 7, 1995, respondent expressed its refusal to release the check as the undisputed amount and fully explained its version of the dispute between the parties, the alleged settlement agreement, and its issuance of the check to complainant. Respondent also noted that it had been contacted by complainant's representative, Mike Bess, who asked it to remove the "Clear Account" language, but that respondent refused to do so. Respondent claims that complainant cashed the \$116,096.84 check in early June 1995, after crossing out the words "Clear Account" and writing on the back of the check "accepted as partial payment only."

Respondent argues that, under Florida law, 39 Florida Statutes Annotated, sections 671.207 and 673.3111, which incorporated recent amendments to the Uniform Commercial Code, complainant's attempt to accept respondent's check as partial payment by making a restrictive endorsement was ineffective, and an accord and satisfaction occurred when complainant cashed the check. Sections 671.207 and 673.3111 state as follows, in relevant part:

671.207. Performance or acceptance under reservation of rights

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are

sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

673.3111. Accord and satisfaction by use of instrument

(1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) applies [inapplicable herein], the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

Complainant acknowledges that it cashed respondent's \$116,096.84 check on either June 9 or June 12, 1995, after crossing out the notation "Clear Account" and writing on the back "accepted as partial payment only." Under section 671.207(2), as set forth above, complainant's attempt to restrictively endorse respondent's check did not prevent an accord and satisfaction from otherwise occurring. However, complainant contends that the necessary elements of an accord and satisfaction are not present, as it denies that the check was tendered in good faith, that there was a bona fide dispute, and that the check contained a clear notation showing that it was tendered as payment in full.

Complainant has submitted affidavits from its sales agent, Mary Houston, and vice-president, Hosea Walls, who were involved in the transactions with respondent, as well as the affidavit of Mr. Bess, and argues that such affidavits show that there was no dispute between the parties at the May 8, 1995, meeting. However, Ms. Houston acknowledges in her affidavit that she met with respondent's representatives in March and April 1995 to discuss respondent's claims that the grapefruit arrived in a decayed condition. Mr. Walls states in his affidavit that he attended the March meeting, and that he and the other representatives of complainant "expressed our surprise as well as disappointment to additional claims after many months had passed." Mr. Walls also states that, at the May 8, 1995, meeting, "I expressed my disappointment as well as being shocked to hear Tim [respondent] wanted a credit of \$276,290.16 in addition to

the adjustment of \$26,460.00 granted for the shipment on the Lilly Everett and \$11,512.00 on the Goose Bay shipments."

It is evident that, for months prior to and during their May 8, 1995, meeting, the parties were engaged in a serious dispute concerning the condition of the grapefruit and its effect on the liability of either party. We thus find that there was a bona fide dispute in existence at the time respondent tendered its May 9, 1995, check.

Complainant denies that the May 9, 1995, check contained a clear indication that it was tendered as payment in full. However, the actions of complainant's representative, Mr. Bess, show that complainant was aware that the notation "Clear Account" meant that the check was intended to be full payment. In his affidavit, Mr. Bess states that in a May 11, 1995, telephone conversation with respondent's principal, Tim Martin, "I then told Tim that on his last payment to complainant, the check was marked "clear account". I then asked if he would release this check as the undisputed amount, and advised that I would fax the statement over to him to be filled out." Mr. Bess further states that "several days later" he again asked Mr. Martin about a release form for the check, and then spoke to a P.A.C.A. Branch official about the notation "Clear Account" written on the check. The great concern expressed by Mr. Bess to respondent and the P.A.C.A. Branch regarding the notation on respondent's check, and his efforts to convince respondent to release the check as the undisputed amount, are very strong evidence that complainant knew the check was being offered as payment in full and not just as partial payment.

We conclude that, by cashing respondent's May 9, 1995, check for \$116,096.84, complainant entered into an accord and satisfaction, thereby discharging any further claim. Therefore, the complaint must be dismissed.

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

BIG SKY v. S & H, INC.**PACA Docket No. R-94-0225.****Decision and Order filed August 19, 1996.**

Growers' agents — failure to enter into written agreement, or furnish written statement to grower.

Growers' agents — unauthorized allowances.

Where a grower's agent failed to enter into a written agreement with the grower, or furnish a written statement of the terms under which it would handle grower's potatoes, allowances granted by the grower's agent were disallowed. However, the fact that the agent was not authorized to make allowances, and nevertheless made allowances, was said to not render the agent liable for the allowances made if, and to the extent that, the allowances were found to coincide with deductions from invoice cost which were supported by damages resulting from breaches of the contract of sale on the part of complainant.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$147,794.04 in connection with transactions in interstate commerce involving potatoes.

Copies of the report of investigation prepared by the Department were 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, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Don and Carol McFarland, Lori and Kelly Human, Suzanne Vance, Maurisa McFarland, Kristi Lucas, and McFarland Agricultural Co., doing business as Big Sky, whose address is P. O. Box 268, Eden, Idaho.

2. Respondent, S & H, Inc., is a corporation doing business as Ida-Pride Potato Co., whose address is P. O. Box 68, Hazelton, Idaho. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about August 14, through September 11, 1992, respondent, acting as a grower's agent relative to complainant's potatoes, sold such potatoes under 70 invoices for prices totaling \$577,628.53. The invoices were numbered consecutively, 1 through 69, with the last being numbered 106.

4. Eight of the invoices, 14, 24, 34, 40, 47, 55, 62, and 68, represented sales of potatoes for prices totaling \$10,785.25, concerned transactions which were wholly intrastate, and were classed as "culls and eliminators."

5. Respondent charged complainant a \$6.00 per cwt. handling fee, or a total of \$215,157.00, freight in the amount of \$14,311.40, and an advertising tax in the amount of \$2,565.84. Respondent granted adjustments to buyers against 64 of the original 70 invoices. These adjustments totaled \$169,769.90 and included adjustments as to each of the eight intrastate invoices referred to in finding 4 above. These latter adjustments totaled \$407.90.

6. Respondent paid complainant \$196,963.52. Complainant applied \$10,785.25 of this amount to the 8 intrastate transactions.

7. On or about August 14, 1992, under invoice number 5, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
40	80 CC	20	\$27.00	\$ 540.00
120	90 CC	60	24.00	1,440.00
120	100 CC	60	20.00	1,200.00
120	110 CC	60	19.00	1,140.00
120	50LB Box Bakers	60	19.00	1,140.00

320	10/5 Poly	160	14.00	<u>2,240.00</u>
				\$7,700.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., by truck, on August 14, 1992.

8. On August 20, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading, with results as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 45°F	Mostly (illegible)some long Russet Potatoes	"Ida-Pride" "80,""90," "100,""110"	ID		400 Ctns	N
B		Long Russet Potatoes	"Ida-Pride" "10/5 lbs"	ID		320 Ctns	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Quality (bruises,cuts)	
	04	% 00	%	% internal black spot	
	04	% 00	%	% internal brown discoloration	
	04	% 00	%	% sunken discolored areas with underlying flesh being discolored	
	02	% 00	%	% sunken discolored areas	
	- 1/2	% -1/2	%	% soft rot	
	17	% 00	%	% checksum	
B	01	% 00	%	% QUALITY (bruises,cuts)	
	07	% 00	%	% internal black spot (4 to 10%)	
	04	% 00	%	% internal brown discoloration	
	03	% 00	%	% sunken discolored areas	
	02	% 00	%	% sunken discolored areas with underlying flesh discolored	
	01	% 01	%	% soft rot	
	18	% 01	%	% checksum	

GRADE: Each lot: Fails to grade US No 1, 80,90,100,110 Size and 2 inch or 5 (illegible minimum, respectively, account of condition.

9. On or about August 19, 1992, under invoice 18, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
200	70 CC	100	\$27.00	\$2,700.00
280	80 CC	140	27.00	3,780.00

680	90 CC	340	24.00	8,160.00
800	100 CC	400	20.00	8,000.00
400	110 CC	200	18.00	3,600.00
40	50LB Box Bakers	20	19.00	<u>380.00</u>
				\$26,620.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 454886, on August 19, 1992.

10. On August 26, 1992, one lot of potatoes was federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 454886. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	42 to 44°F	Potato	"Ida-Pride 50 lbs 70.80. 90,100,110	ID	MIXED VARIETY	2400 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	01	% 00	%	% Quality defect; misshapen.	
	01	% 00	%	% sunken areas underlying flesh being chalky.	
	03	% 03	%	% Soft Rot. (0 to 8%) early stages.	
	05	% 03	%	% checksum	

Grade: Fails to grade US No 1 account condition.

11. On or about August 20, 1992, under invoice number 20, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
1,400	10/5 POLY	700	\$14.00	\$ 9,800.00
280	70 CC	140	26.00	3,640.00
240	80 CC	120	26.00	3,120.00
240	90 CC	120	23.00	2,760.00
240	100 CC	120	20.00	<u>2,400.00</u>
				\$21,720.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in

railcar UPFE 455536, on August 20, 1992.

12. On September 1, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 455536. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 66 °F	Russett Potatoes	"Ida-Pride" U.S. No. 1, Mixed Variety		ID size 100, 80, 90,70	800 cartons	
B	51 to 61 °F	Russett Potatoes	"Ida-Pride" U.S. No. 1, Mixed Variety		ID 10-5 LB. Bags	1400 cartons	

LOT	AVERAGE DEFECTS	including SER DAM	including V. S DAM	OFFSIZE/DEFECT	OTHER
A	01	% 00	%	% Quality (misshapened, old cuts and bruises)	size: meets size as marked
	01	% 00	%	% Sunken Discolored Areas	
	01	% 00	%	% enlarged lenticles	
	01	% 00	%	% external brown discoloration	
	03	% 00	%	% internal discoloration	
	- 1/2	% -1/2	%	% soft rot	
	07	% 00	%	% checksum	
B	01	% 00	%	% QUALITY (old cuts and bruises)	size ranges: 2 inch or 4 oz minimum to 12 oz maximum
	01	% 00	%	% Sunken Discolored Areas	
	02	% 00	%	% Internal Discoloration	
	03	% 03	%	% Soft rot (0% to 9%)	
	07	% 03	%	% checksum	soft rot: some in early stages, mostly in moderate to advanced stages

GRADE: Lot A: US No 1, size 100, size 90, size 80 and size 70, respectively
 Lot B: Fails to Grade U.S. No. 1 on account of condition, 2 inch or 4 oz. minimum.

13. On or about August 21, 1992, under invoice number 28, respondent sold 800 50LB sacks of 10/5 poly bags of potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., for \$14.00 per cwt. or a total of \$5,600.00. Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., by Godfrey truck, license number GU511901, on August 20, 1992.

14. On August 26, 1992, one lot of potatoes was federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., after unloading. The inspector was told by the applicant that the potatoes had been unloaded from a Godfrey truck,

license number GU511901. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	60 to 62 °F	Potatoes (illegible) Russet	"Ida-Pride" 10-5lb bags	ID		800 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	01	% 00	%	% Quality(Bruises)	
	04	% 00	%	% Brown External Discoloration	
	01	% 00	%	% Sunken Discolored Areas	
	02	% 02	%	% Soft Rot (0 to 5%)	
	08	% 02	%	% checksum	

GRADE: Fails US No 1 2 inch or 4 ounce minimum account of condition.

15. On or about August 24, 1992, under invoice number 29, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
1,200	10/5 POLY	600	\$14.00	\$ 8,400.00
280	70 CC	140	24.00	3,360.00
80	80 CC	40	24.00	960.00
520	90 CC	260	22.00	5,720.00
320	100 CC	160	20.00	<u>3,200.00</u>
				\$21,640.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 461809, on August 24, 1992.

16. On September 4, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., after partial unloading from railcar UPFE 461809, with results as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 45 °F	Potato Russet	"Ida-Pride" 70, 80, 90, 100 Size	ID	50lbs net wt	800 cartons	N
B	45 to 46 °F	Potato Russet	"Ida-Pride" 10-5lb Bags, US#1	ID	50lbs net wt	1200 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality (cuts, Bruises)	meets size as marked.
	08	% 00	%	% Brown External Discoloration (5 to 11%)	
	02	% 00	%	% Sunken Discolored Areas	
	- 1/2	% -1/2	%	% Soft Rot	
	14	% 00	%	% checksum	
B	02	% 00	%	% Quality (cuts, Bruises)	Lot B = Some to many cartons crushed 1 to 4 inches from top to bottom, few cartons wet
	02	% 00	%	% Brown External Discoloration	
	06	% 06	%	% Soft Rot (0 to 40%)	
	10	% 06	%	% checksum	

GRADE: Lot A = Fails US No 1, size 70, size 80, size 90, size 100, account of condition

Lot B = Fails US No. 1 2 inch or 4 oz. minimum account of condition

REMARKS: Lot B = Restricted to 500 cartons Being unloaded During time of Inspection.

17. On or about August 25, 1992, under invoice number 39, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
800	10/5 POLY	400	\$13.00	\$ 5,200.00
200	70 CC	100	24.00	2,400.00
280	80 CC	140	24.00	3,360.00
600	90 CC	300	22.00	6,600.00
520	100 CC	260	19.00	<u>4,940.00</u>
				\$22,500.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 462821, on August 26, 1992.

18. On September 9, 1992, two lots of potatoes were federally inspected, following unloading, at the place of Morris Okun, Inc., in Bronx, N.Y. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 462821. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
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A	63 to 64°F	Long Russet Potatoes	"Ida-Pride" 50 LBS SIZE 70,80,90,100 MIXED VARIETY	ID	1644 cartons	N
B	56 to 56°F	Long Russet Potatoes	"Ida-Pride" 10-5 LB Bags	ID	756 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 00	%	% Quality (sunburn, old cuts)	Lot A Size: meets size as marked.
	02	% 00	%	% Sunken Areas	
	00	% 00	%	% Soft Rot	
	04	% 00	%	% checksum	
B	01	% 00	%	% Quality (sunburn)	Lot B Size: minimum 2 inch or 4 ounce maximum 8 ounce no offsize
	01	% 00	%	% Sunken Areas	
	00	% 00	%	% Soft Rot	
	02	% 00	%	% checksum	

GRADE: Lot A US No 1, size 70, 80, 90, 100, respectively

REMARKS: Lot A most Cartons Have Some Contents Showing Sprouts Not affecting grade.

Lot B many Cartons Are Slightly Crushed From Approximately 1 to 3 inches

19. On September 10, 1992, one lot of potatoes was federally inspected at the place of business of Morris Okun Co., Inc., Bronx, N.Y., following unloading, with the following results:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	50 to 62 °F	Russet Potatoes	"Ida-Pride" US No. 1 Net Wt. 5 LBS		ID	600 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Quality (old cuts & Bruises, misshapen, sunburn)	
	02	% 02	%	% Soft Rot (0 to 6%)	
	05	% 02	%	% checksum	

GRADE: Fails US No 1 2 inch or 4 ounce minimum only account condition.

20. On or about August 27, 1992, under invoice number 42, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
720	10/5 POLY	360	\$13.00	\$ 4,680.00

160	80 CC	80	24.00	1,920.00
720	90 CC	360	22.00	7,920.00
480	100 CC	240	19.00	4,560.00
80	110 CC	40	17.00	680.00
240	50LB BOX BAKERS	120	17.00	<u>2,040.00</u>
				\$21,800.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 455293, on August 27, 1992.

21. On September 1, 1992, two lots of potatoes were federally inspected at the place of Morris Okun, Inc., in Bronx, N.Y., following unloading. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 455293. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 46°F	russet potatoes	"Ida-Pride" 80, 90, 100 (illegible)	ID		1608 cartons	N
B	44 to 45°F	russet potatoes	"Ida-Pride" 10-5 lbs bags	ID		720 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality Defects, old cuts and bruises misshapen	
	04	% 00	%	% Brown Skin discoloration	
	04	% 00	%	% Sunken pitted discolored areas	
	02	% 00	%	% Dry type fusarium tuber Rot	
	01	% 01	%	% Soft Rot	
	15	% 01	%	% checksum	each lot: shows some potatoes, sprouts barely visible not affecting the Grade
B	04	% 00	%	% Quality Defects, old cuts and bruises misshapen	
	05	% 00	%	% Brown Skin discoloration	
	03	% 00	%	% Sunken pitted discolored areas	
	01	% 00	%	% Dry type fusarium tuber Rot	
	02	% 02	%	% Soft Rot (0 to 5%)	
	15	% 02	%	% checksum	

GRADE: Lot A: Fails to Grade US No 1, 80, 90, 100, 10 ounce minimum account condition

Lot B: Fails to Grade US No 1 2 inch or 4 ounce minimum account of condition.

22. On or about September 1, 1992, under invoice number 65, respondent sold potatoes on complainant's behalf to Morris Okun, Inc., in Bronx, N.Y., as follows:

Quantity	Description	Weight	Price	Amount
800	10/5 POLY	400	\$12.00	\$ 4,800.00
120	70 CC	60	22.00	1,320.00
200	80 CC	100	22.00	2,200.00
120	50LB BOX BAKERS	60	16.00	960.00
600	90 CC	300	20.00	6,000.00
560	100 CC	280	18.00	<u>5,040.00</u>
				\$20,320.00

Respondent shipped the potatoes to Morris Okun, Inc., in Bronx, N.Y., in railcar UPFE 462824, on September 1, 1992.

23. On September 14, 1992, two lots of potatoes were federally inspected, following unloading, at the place of Morris Okun, Inc., in Bronx, N.Y. The inspector was told by the applicant that the potatoes were unloaded from railcar UPFE 462824. The results of the inspection were as follows:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	46 to 48°F	Russet Potato	"Ida-Pride" US No 1, 10-5	ID	Mixed Variety	800 cartons	N
B	46 to 50°F	Russet Potato	"Ida-Pride" US No 1, 70 80 90 100	ID	Mixed Variety	1450 cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	03	% 00	%	% Quality	Each lot Quality: Cuts and Bruises Size: 2 inches or 4 to 8 ounces
	04	% 04	%	% Soft Rot (0 to 10%)	
	07	% 04	%	% checksum	
B	04	% 00	%	% Quality	Size: Meets size as marked
	02	% 02	%	% Soft Rot (0 to 5%)	
	06	% 02	%	% checksum	

GRADE: Each lot: fails to grade US No 1 2 inch or 4 ounce minimum or US No 1 70, 80, 90, or 100 size respectively only Account of Condition.

24. An informal complaint was filed on February 24, 1993, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant brings this action to recover balances alleged due from respondent in connection with multiple shipments of potatoes between August 14, and September 11, 1992. It is evident that respondent acted in regard to the shipments as a grower's agent. Respondent issued 70 invoices showing sales of complainant's potatoes to respondent's customers in amounts totaling \$577,628.53. Such amount included eight invoices totaling \$10,785.25 which were intrastate transactions over which we have no jurisdiction.²

Respondent contends that complainant authorized it to make adjustments to the original sale prices reflected by its invoices. The record makes it apparent that respondent did make adjustments, in favor of its customers, which totaled \$169,769.90 as to the 70 invoices.

The Regulations provide in regard to growers' agents that:

The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot .

...³

Respondent submitted a copy of an alleged written agreement, or contract, as an

²See *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991); *Chester Ruter v. C. H. Robinson Company and Sol Sieff Produce Company*, 44 Agric. Dec. 2135 (1985); *Mendelson-Zeller Co. v. Pyramid Produce*, 36 Agric. Dec. 941 (1977); *Wide World of Foods v. Trinity Valley Foods Co.*, 34 Agric. Dec. 423 (1975); *P. C. Kellam v. Virginia Tomato Corporation*, 29 Agric. Dec. 835 (1970); *S. Water Mkt. Credit v. Treasure Island Foods and/or Ben Klein*, 28 Agric. Dec. 1168 (1969); *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967); *Conway, Inc. v. Ben F. Line*, 16 Agric. Dec. 387 (1957); and *E. S. Harper Co. v. B. Osborne*, 8 Agric. Dec. 1027 (1949).

³7 C.F.R. § 46.32(a).

exhibit to its answer. The spaces for the amount of acreage, or potatoes, were not filled in, and the spaces for the signatures of the grower and for Ida-Pride Potato Co. were also blank. In addition the document was not dated. Complainant denied being furnished with a copy of this document, and we conclude that respondent did not comply with the regulations quoted above. Moreover, the document does not contain a provision authorizing respondent to make adjustments. Respondent has the burden of showing that it was authorized to grant adjustments.⁴ We conclude that respondent has not met this burden, and the adjustments claimed by respondent will, therefore, not be allowed.⁵

While the adjustments claimed by respondent will be disallowed, as to some of the transactions respondent submitted evidence in the form of federal inspections in an apparent effort to show a breach of contract by complainant. Since respondent acted as an agent, and not as purchaser, respondent would be liable to complainant only for the amounts for which the ultimate purchaser would be liable absent the unauthorized allowances. However, the fact that respondent was not authorized to make allowances, and nevertheless made allowances, should not render respondent liable for the allowances made if, and to the extent that, the allowances coincide with deductions from invoice cost which are supported by damages resulting from breaches of the contract of sale on the part of complainant. It is appropriate, therefore, that the relevant evidence submitted by respondent as to these transactions should be examined to determine if damages should be allowed as to such transactions so as to diminish the amount for which respondent is liable as a result of its unauthorized allowances. Respondent also claimed other justifications for many of the deductions, such as falling market price, and that the potatoes were too round. Falling market price is not a justification for an adjustment unless the grower has explicitly agreed to adjustments for this reason. We find no evidence of any such agreement in this case. There is also insufficient evidence of any agreement between the parties that the potatoes would be any particular shape.

Invoice 5; findings 7 and 8.

⁴See *Newmiller Farms v. Nicolls*, 36 Agric. Dec. 1230 (1979); and *Walker & Hagan Packing House v. Amato Bros. Tomato Distributors, Inc.*, 27 Agric. Dec. 1543 (1968).

⁵As will later appear, respondent will gain the benefit from the claimed adjustments as to the eight invoices covering intrastate transactions. However, this results from our lack of jurisdiction over such transactions, and not from our allowance of the claimed adjustments.

Although the potatoes covered by invoice 5 were federally inspected at shipping point and graded U.S. No. 1, there is no indication on any of the documentation relative to the sale of these potatoes (or as to the potatoes covered by any of the other invoices) that they were sold as U.S. No. 1 potatoes. The invoice indicates that these potatoes were sold on an f.o.b. shipping point basis. The Regulations,⁶ in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,⁷ in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations⁸ which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery,"⁹ are based upon case law predating the adoption of the Regulations.¹⁰ Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b.

⁶7 C.F.R. § 46.43(i).

⁷7 C.F.R. § 46.43(j).

⁸7 C.F.R. § 46.43(j).

⁹7 C.F.R. § 46.44.

¹⁰See Williston, *Sales* § 245 (rev. ed. 1948).

under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.¹¹ This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination.¹² If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.¹³

The inspection at destination in Bronx, N.Y. was made on August 20, 1992, following shipment by truck from Idaho on August 14, 1992. This is a distance of approximately 2,500 miles, and the transport should have taken three to four days. Assuming the inspection should have been made within one day after arrival, the inspection was one to two days late. This is not too late for us to make use of the inspection to determine the condition of the goods on arrival.¹⁴ The lot designated A on the inspection certificate contained 14.5 percent condition defects, or 2.5 percentage points higher than what we would normally allow on a coast to coast shipment. However, the lot contained only 400 of an original 520 cartons of potatoes. Accordingly, the uninspected part of the load

¹¹See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

¹²As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional "2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce." Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 11, *supra*.

¹³See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

¹⁴See *Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (1975); and *D.L. Piazza Co. v. Stacy Distr. Co.*, 18 Agric. Dec. 307 (1959).

should be assumed to have no condition defects and be averaged with the portion that does contain such defects.¹⁵ If we assume that the absent 120 cartons had no condition defects, the lot as a whole had 11.15 percent condition defects. The United States Standards for Grades of Potatoes provide a tolerance of eight percent for condition defects, including not more than one percent for decay.¹⁶ On a coast to coast shipment we would increase this to a 12 percent tolerance, including not more than two percent for decay, in order to make good delivery under the suitable shipping condition warranty.¹⁷ Thus, this lot of potatoes would have made good delivery. However, we must look at the load as a whole.

The second lot of potatoes had a total of 17 percent condition defects, or five percentage points in excess of what would be allowed for good delivery. When this lot is averaged with the other lot, we arrive at an average of 13.38 percent for the load, or more than our expanded tolerance for good delivery would allow. We conclude, therefore, that complainant breached the warranty of suitable shipping condition as to this load.

The record did not contain an accounting of the resale of these potatoes from respondent's customer, Morris Okun, Inc. Absent an accounting, the value of accepted goods may be shown by use of the percentage of condition defects disclosed by a prompt inspection.¹⁸ The average of 13.38 percent condition defects should be allowed as a deduction against the value the potatoes would have had if they had been as warranted. Destination market reports covering the type potatoes sold by complainant were not available. The best available indication of the value the potatoes would have had if they had been as

¹⁵See *Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1471 (1992); *Western Vegetable Exchange v. R. Moyers & Sons Wholesale Produce*, 50 Agric. Dec. 1001 (1991); *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982); *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); and *Mario Saikhon v. Russell Ward Co., Inc.*, 34 Agric. Dec. 1940 (1975). See also 7 C.F.R. § 46.43(ii).

¹⁶7 C.F.R. § 51.1546(a)(2).

¹⁷See *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co., and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990).

¹⁸*South Florida Growers Association, Inc. v. Country Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

warranted is, therefore, the f.o.b. cost plus freight.¹⁹ The record contained no indication as to the freight cost associated with this load. However, records kept by the Agricultural Marketing Service of this Department, of which we take official notice, indicate that throughout the period in question the lowest truck cost between Idaho and New York was \$2,580.00.²⁰ Using this figure, the value of this load, if it had been as warranted, was \$10,280.00. Therefore, allowable damages applicable to this load amount to 13.38 percent of such amount, or \$1,375.46.

Invoice 18; findings 9 and 10.

The potatoes covered by invoice 18 were shipped by rail on August 19, 1992, and were inspected at destination in New York on August 26, 1992. Rail shipments between Idaho and New York should take six to eight days. Therefore, this was a timely inspection for a rail shipment. The inspection at destination shows that soft rot was present in the potatoes in an average amount of three percent. This exceeds the two percent allowable under the suitable shipping condition warranty, and we find therefore that complainant breached the contract of sale as to this load. An accounting from Morris Okun, Inc., which purported to cover this load, was submitted by respondent. However, the number of cartons sold of each size does not in each case match the number shown on the invoice, the loading manifest, and the bill of lading. The amounts shown on the accounting versus the amounts shown on the shipping documents is as follows:

SIZE	SHP. DOC	ACCOUNTING
70 count	200	241
80 count	280	220
90 count	680	679
100 count	800	762
110 count	400	423

¹⁹*Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983).

²⁰We use the lowest cost because respondent, as the party which had the burden of furnishing evidence of its damages, but which failed to do so, should bear the adverse consequences resulting from any uncertainty as to the proper cost.

50 lb. Bakers	<u>40</u>	<u>45</u>
Total	2,400	2,370

There was no explanation for the discrepancies in the accounting. Furthermore the accounting furnished no dates for the resales that were made. On the whole we do not think it would be appropriate to rely on an accounting such as this. Accordingly we will use the percentage of condition defects, four percent as shown on the applicable inspection, as a method of allowing some damages as to this load.

In the absence of market price quotes for the potatoes we will again use the f.o.b. price plus freight. No records are kept by the Department of costs of transport by rail. However, although, for the reasons stated in the preceding paragraph, we are refusing to use the accounting from Morris Okun, Inc. as accurately representing the resales of the potatoes, we will use the freight cost shown by the accounting for the following reasons. For each of the six rail shipments set forth in detail in the findings, Morris Okun, Inc. issued an accounting showing that the freight cost for the 1,200 cwt. of potatoes transported was \$5,750.00. This represents a cost of \$4.79 per cwt., or substantially less than the \$6.14 per cwt. which we found to be the lowest cost of transport by truck in regard to the shipment covered by findings 7 and 8. The cost of transit by rail is typically less than the cost of transit by truck, and we find that the use of the cost shown by Okun's accountings is reasonable. The value of the potatoes covered by invoice 18, if they had been as warranted, was therefore \$32,370.00. Okun's allowable damages as to this load would, therefore, have been four percent of this amount, or \$1,294.80. Respondent should be allowed this amount as a deduction from the original invoice cost of this load.

Invoice 20; findings 11 and 12.

The potatoes covered by invoice 20 were inspected at destination on the twelfth day after shipment. Transport by rail between Idaho and New York should have taken no longer than six to eight days. Although the lot of polybags had three percent decay, or slightly more than we would allow for good delivery, the remaining potatoes had only one-half of one percent decay. Thus the load as a whole contained only 1.54 percent decay, and even had the inspection been timely we would find no breach of contract as to this load.²¹

²¹See 7 C.F.R. § 46.43(ii).

Invoice 28; findings 13 and 14.

The potatoes covered by invoice 28 contained only seven percent condition defects, including two percent decay. This does not exceed what we would allow for good delivery, and we find no breach of contract as to this load.

Invoice 29; findings 15 and 16.

The potatoes covered by invoice 29 were shipped on August 24, by rail, and were inspected at destination on September 4. The inspection was, therefore, made three to five days after what would be considered timely arrival, and was, thus, two to four days late. The destination inspection shows six percent decay in the 1,200 poly-bag cartons, and one-half of one percent decay in the remaining 800 cartons of potatoes, or an average for the load of 3.16 percent decay. While this exceeds the amount we would allow for good delivery under the suitable shipping condition warranty, we are unable to say that the load as a whole would have had excessive decay at the time of arrival. We are unable to find a breach of contract as to this load.

Invoice 39; findings 17, 18, and 19.

The inspections as to the potatoes covered by invoice 39 were made 14 and 15 days after shipment, and were therefore much too late to show the condition at the time of arrival. Moreover, such inspections do not show a breach even if they had been timely.

Invoice 42; findings 20 and 21.

The inspection as to this load of potatoes was timely. If the sale of the potatoes had been on a U.S. No. 1 basis the amount of quality defects would be sufficient, together with the condition defects, to show a breach of contract by complainant. However, as we have already stated, the documentation does not show that the parties sold the potatoes with any grade designation. We find that there was no breach of contract as to these potatoes.

Invoice 65; findings 22 and 23.

The potatoes covered by invoice 65 were shown by the destination inspection to contain 2.54 percent decay for the load as a whole. However, the inspection

was made on the thirteenth day following shipment, which is much too late to show a breach of contract as to this load.

The net usable weight of potatoes that respondent sold to its customers was 42,265 cwt. The sales were made at the following original prices as shown by respondent's invoices to its customers:

\$ 10,785.25	6,163 cwt. of culls /eliminators sold within Idaho
<u>\$566,843.28</u>	<u>36,102</u> cwt. that moved in interstate commerce 42,265 cwt.

From the \$566,843.28 the following deductions were proper according to the agreement between the parties:

\$ -216,612.00	\$6.00 per cwt. handling fee
- 2,565.84	advertising tax
<u>- 14,311.40</u>	freight for transport of potatoes to respondent
\$ 333,354.04	

The parties agree that respondent made payments to complainant which totaled \$196,345.25. Complainant applied \$10,785.25 of this amount to the culls which were sold intrastate, and over which we have no jurisdiction. Complainant had a legal right to apply the payments made by respondent to any of the invoices, as long as respondent had not directed how they should be applied. Since we do not have jurisdiction over the eight intrastate invoices we cannot adjudicate disputes relating to these invoices, *i.e.* whether the small adjustments made to each of these invoices were proper. However, the notations of adjustments on these invoices show that respondent exercised its prior right to direct how payment as to these invoices would be directed, *i.e.* that no payment could be applied to the adjustment portion of such invoices. These adjustments totaled \$407.90. This amount must be credited to respondent. This means that only \$10,377.35 was legally applied by complainant to the intrastate transactions and not \$10,785.25. Accordingly, instead of \$185,560.00 in payments being available to apply against the interstate transactions, \$185,967.90 is available.

\$ 333,354.04
<u>-185,967.90</u>
\$ 147,386.14

From this amount we must deduct the damages to which respondent's customers were entitled as a result of breaches of contract by complainant, or \$2,670.26. This leaves \$144,715.88 still due from respondent to complainant. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.²² Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.²³ We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$144,715.88 with interest thereon at the rate of 10% per annum from October 1, 1992, until paid.

Copies of this order shall be served upon the parties.

MARTORI BROS. DISTRIBUTORS v. HOUSTON FRUITLAND, INC.
PACA Docket No. R-94-0295.
Decision and Order issued October 31, 1996.

Breach of Contract - Meaning of term "material breach."

Warranty of Merchantability - Standard for showing breach by inspection made after shipment.

Parties concluded an f.o.b. contract that called for shipment of a load of cantaloupes to Houston, Texas as the contract destination, but trucker disclosed to seller prior to loading that load was destined for Los Angeles. Seller then informed buyer through the broker that diversion to any other destination than Houston would result in contract terms being changed to "Acceptance Final, No

²²*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

²³See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Recourse." Buyer agreed, but shipped the load to Los Angeles where a federal inspection showed substantial condition defects. Buyer's defense that load was en route to Houston through Los Angeles was found to lack credibility. It was stated that the acceptance final terms of the contract abrogated the warranty of suitable shipping condition, but left the seller liable for any material breach of the contract. A material breach, as the term is used in the Regulations, refers to all substantial breaches of contract other than a breach of the warranty of suitable shipping condition. The inspection in Los Angeles could be used to show a breach of the warranty of merchantability, applicable at shipping point, but would have to show condition defects so severe as to render it self-evident and certain that the commodity was nonconforming at shipping point. The certainty required was, however, stated to be reasonable certainty, not certainty that excludes all fanciful doubt. It was found that although the results of the inspection rendered it improbable that the cantaloupes were conforming at shipping point, it was not reasonably certain that they were nonconforming.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, CA, for Complainant.

Edward L. Noah, Houston, TX, for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$5,406.50 in connection with a transaction in interstate commerce involving cantaloupes.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent's answer included a counterclaim in the amount of \$4,206.00 arising out of the same transaction. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds \$15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement,

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant is a partnership composed of Anthony F. Martori, Arthur J. Martori, Edward J. Martori, and Stephen A. Martori, doing business as Martori Bros. Distributors, whose address is 15029 North 74th Street, Scottsdale, Arizona. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Houston Fruitland, Inc., is a corporation whose address is 7010 Pryon Way, Houston, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about July 14, 1993, respondent, through Eric Ho its President, asked Michael Ohanesian of Penny Produce Distributing of Nogales, Arizona, to book a load of 1,050 cartons, #15 cantaloupes, being offered by complainant, Martori Bros. of Scottsdale, Arizona. The load was booked at \$3.80 per carton, plus \$1.35 per carton for cooling, \$.20 per carton brokerage, and \$15.00 for air bags, f.o.b., with a contract destination of Houston, Texas, and respondent requested an additional 5 loads for later in the week.

4. The truck hired by respondent Houston arrived at complainant's cooler in Scottsdale on July 14, 1993, to pick up the melons, and the truck driver informed cooler personnel that the load was going to Los Angeles. The cooler personnel informed Martori's salesman, Harry Ram, and Harry called Penny Produce and talked with Elaine Ohanesian, Michael Ohanesian being out of town at the time.

5. Harry Ram informed Elaine that he had "exclusives" with other wholesalers in Los Angeles and did not want to compete with his own label in the area. Harry informed Elaine that if Houston Fruitland still wanted the melons the destination had to be Houston, Texas, and that if the melons were diverted to any other city the terms of sale would be changed to "Acceptance Final, No Recourse."

6. Elaine Ohanesian then called Eric Ho, who asked her to call Kent Huckabay. Elaine called Kent, thinking at the time that Kent was an associate of Ho. Kent was in fact with Cal Sierra of Visalia, California, the firm to which Ho had sold the melons on behalf of respondent. Elaine was assured by Kent that the load would be going to Houston Fruitland, Houston, Texas. After receiving this assurance Elaine again called Ho and informed him of what Kent had said. Ho then agreed that the load would be going to Houston, Texas. Elaine informed Ho that in the event the load would be diverted to any other city such as Los

Angeles, Martori Bros. would be seeking payment in full. Elaine then called Harry and informed him that the load would be going to Houston, Texas. The load was then shipped, on July 14, 1993, at 6:17 p.m., under a bill of lading stating that the destination was Houston, Texas.

7. The load was diverted to Los Angeles, California. At 11:35 a.m. on July 15, 1993, following unloading at the place of business of Davalon Sales, 1320 E. 6th Street, Los Angeles, California, a load of cantaloupes was federally inspected with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 52 °F	Cantaloupes	"Bimbo"	AZ	15 Count	1050 Cartons	N
LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER		
A	08	% 00	%	% Quality (Not well Netted)(0 to 13%)	Mostly firm to ripe and firm. some hard.		
	11	% 00	%	% Black Mold (0 to 27%)	Mostly Turning To Yellow, some light green.		
	10	% 04	%	% Numerous sunken areas (0 to 20%)			
	01	% 01	%	% Soft			
	01	% 01	%	% Bruising			
	09	% 09	%	% Decay (0 to 20%)	Decay in early stages.		
	40	% 15	%	% CHECKSUM	Good Internal Quality.		

GRADE: Fails to grade U.S. No 1 only account Condition.

The load was sold in Los Angeles for substantially less than the market price for good quality cantaloupes.

8. An informal complaint was filed on September 20, 1993, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant has shown by a preponderance of the evidence that prior to shipment of the cantaloupes it was made clear to respondent that diversion of the load to any other destination than Houston, Texas would result in liability for the full purchase price of the melons. Respondent's defense centers upon a claim that the destination of the load was never altered from Houston, Texas. Respondent asserts that the load was "routed" through Los Angeles on its way to Houston, Texas. Respondent would thus have us believe that the load was sent approximately 375 miles in the opposite direction from Houston, or 750 miles round-trip, in order that the customer of Houston Fruitland, Cal Sierra Produce

Inc., of Visalia, California, could have the melons inspected in Los Angeles before sending them on their way to its customers in Houston, Texas. Under other circumstances we might be prone to swallow our credulity on the basis that bizarre things do happen. However, if the purpose of shipping the melons to Los Angeles was for inspection en route to Houston, then why were the melons unloaded prior to inspection? Indeed, why were the melons not subjected to a shipping point inspection in Arizona? Prior to the shipment of these melons it was specifically called to the attention of respondent that the melons must not go to Los Angeles. Respondent had the opportunity to state to complainant at that time that the melons would be "routed" through Los Angeles on their way to Houston, for whatever reason, and if that was respondent's intent at the time it obviously should have made that clear to complainant. Instead it agreed that the goods would be shipped to Houston, and the parties also agreed to the consequences of their not being shipped to Houston. Accordingly, as the trier of the facts, we do not believe that the melons were "routed" through Los Angeles on their way to Houston, but were diverted to Los Angeles contrary to the agreement between the parties.

When respondent diverted the goods to Los Angeles the acceptance final terms of the altered contract came into effect. The Regulations provide, in relevant part, that:

"F.o.b. acceptance final" or "Shipping point acceptance final" means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.

The words "material breach" in the Regulations do not imply that a breach of the warranty of suitable shipping condition, applicable in f.o.b. sales, is not "material" in the usual sense of that term. Rather the term "material breach," in the context of the Regulations, is used to describe all substantial breaches of

contract other than a breach of the warranty of suitable shipping condition.²

The suitable shipping condition provisions of the Regulations,³ applicable in f.o.b. sales, which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery,"⁴ are based upon case law predating the adoption of the Regulations.⁵ Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that

²See *Yales King International v. Danny & Sons, Inc.*, 52 Agric. Dec. 715 (1993). See also *Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810 (1994); *Raymond "Mickey" Cohen & Son, Inc. v. Great Lakes Fruit & Produce, Inc.*, 52 Agric. Dec. 1686 (1993); *Horticulture Producers Federated Assn., Inc. M/T/N Federation Produce Sales v. A Sams & Sons Produce Co., Inc.*, 51 Agric. Dec. 1460 (1992); *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991); *Derrick Ranches, Inc., v. Purity Supreme, Inc.*, 46 Agric. Dec. 1245 (1987); *Colendich Farms, Inc. and Vukasovich Farms, Inc., d/b/a C. & V. Vegetable Farms v. Finest Fruits, Inc.*, 46 Agric. Dec. 986 (1987); *L-Shang's, Inc. v. Gwin, White & Prince, Inc., and/or Cascoa Growers*, 44 Agric. Dec. 1322 (1985); *National Farmers Organization, Inc. v. Western Iowa Farms Co.*, 44 Agric. Dec. 844 (1985); *Genbroker Corporation a/t/a General Brokerage Company v. Havana Potatoes Corp.*, 43 Agric. Dec. 587 (1984); *Rushton & Co. Inc. v. Evergood Enterprises*, 43 Agric. Dec. 255 (1984) and 42 Agric. Dec. 629 (1983); *Genbroker Corporation a/t/a General Brokerage Company v. Bronia Inc a/t/a J & J Produce*, 42 Agric. Dec. 281 (1983); *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982); *Genbroker Corporation d/b/a General Brokerage Company v. Stevco, Inc.*, 40 Agric. Dec. 1360 (1981); *Tri-Boro Fruit Co., Inc., v. Dino Distributors, Inc.*, 40 Agric. Dec. 155 (1981); and *L. Gillarde Company v. Joseph Martinelli & Company, Inc.*, 168 F.2d 276 (1st Cir. 1948) and 169 F.2d 61 (1st Cir. 1948). Cf. *L. Gillarde Sons Company v. I. Meltzer & Sons, Inc.*, 23 Agric. Dec. 481 (1964) and *Jerome Kantro Company v. McDonnel & Blankfard*, 20 Agric. Dec. 984 (1961).

³7 C.F.R. § 46.43(j).

⁴7 C.F.R. § 46.44.

⁵See Williston, *Sales* § 245 (rev. ed. 1948).

we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.⁶ This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.⁷

It must be remembered that the warranty of suitable shipping condition is an extension of the common law warranty of merchantability. The warranty of merchantability is applicable only at shipping point. The suitable shipping condition warranty allows us to look at the condition of *perishables* at contract destination and to conclude on the basis of their condition at destination whether there was a breach [when they were loaded at shipping point]. The question is always: were the perishables, at shipping point, in suitable condition for shipment to a specific destination? If no destination was specified in the contract the warranty does not apply because the seller is deemed to be giving a warranty only that the perishable goods will last so as to arrive at the agreed destination without *abnormal* deterioration. It is a given that perishables deteriorate. Under the warranty we must consider whether the deterioration was normal in degree or abnormal.⁸

Historically, under the warranty of merchantability one could only look at the condition of the goods at the time of shipment to determine if there was a breach

⁶See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

⁷See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

⁸*Lookout Mountain Tomato & Banana Co., Inc. v. Consumer Produce Co., Inc. of Pittsburgh*, 50 Agric. Dec. 960 (1991).

of warranty. The suitable shipping condition warranty does not merely enable us to look back, from the point of destination, at the *manifest* condition at time of shipment. Under the suitable shipping condition warranty the burden is on the seller to select goods that will arrive at contract destination without abnormal deterioration. It is understood that arrival at destination with abnormal deterioration does not necessarily entail that the goods were not in *apparent* good condition when shipped.

. . . suitable shipping condition requires delivery without abnormal deterioration *at the contract destination*. Therefore, the inspection at destination rather than the inspection at shipping point is of much greater importance in determining whether a commodity was in suitable shipping condition.⁹

As we stated earlier, it is possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point.

The abrogation of the warranty of suitable shipping condition by the f.o.b. acceptance final terms of the contract still leaves in place the warranty of merchantability. Accordingly, if there is some way of showing that the goods, in an f.o.b.a.f. contract, were unmerchantable when shipped, a material breach may be proven, and damages for that breach may be awarded. In a similar situation we have stated that:

Respondent contends that even if we find that the contract was f.o.b. acceptance final, the condition of the strawberries as revealed by the federal inspection report at destination shows that the strawberries were not merchantable at time of shipment. Respondent thus seeks to show that there was a material breach of the contract, even though the suitable shipping condition rule does not apply. See 7 CFR 46.43(m). However, the use of condition at destination to show condition at time of shipment is exactly the function of the suitable shipping condition warranty. See *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 AD 703 (1980). In this case, where the suitable shipping condition warranty is specifically negated by

⁹*Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, at 707 (1980).

the terms of the contract, we would not be justified in finding a breach of the warranty of merchantability unless condition at destination, in the light of transportation history, were such as to make it self-evident and certain that the commodity was nonconforming at shipping point.¹⁰

The certainty required is not certainty in some absolute sense, but reasonable certainty.¹¹ To understand what this means we may analogize to the reasonable doubt standard used in criminal trials. There it is commonly said that the doubt necessary for an acquittal is not a fanciful doubt, but a reasonable doubt. So here, we are seeking a certainty that is in accord with reason, not a certainty that excludes all fanciful doubt.

In the present case there was no grade designation involved in the contract between the parties. In fact, even if the cantaloupes had been sold as U.S. No. 1, the federal inspection at Los Angeles shows that the melons would have met the quality requirements, as distinguished from condition requirements, of the grade.¹² The inspection in Los Angeles discloses a total of 32 percent condition defects. The temperatures were higher than normal, but the transit time was less than 24 hours. We have no hesitation in stating that we believe that it is probable that the cantaloupes were unmerchantable at time of shipment. But probability is not the test. The test is can we say with reasonable certainty that there was a breach of the warranty of merchantability when the melons were shipped. For a coast to coast shipment we would allow a total of 15 percent condition defects at destination, and still find no breach of the warranty of suitable shipping condition. Fifteen percent condition defects in a load of cantaloupes would therefore not indicate a breach of the warranty of merchantability. The inspection

¹⁰*Genbroker Corporation a/t/a General Brokerage Company v. Bronia Inc. a/t/a J & J Produce*, 42 Agric. Dec. 281 (1983).

¹¹*North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982)

¹²"'Quality' and 'condition' are terms of art as used in inspection certificates, U. S. Grade Standards, and within the produce industry. Generally 'condition' defects are those which are subject to change due to a worsening of the defect. All decays are condition defects. 'Quality' or 'permanent grade' defects are generally not subject to change. The U.S. Grade Standards for a commodity will generally have tolerances specified for both quality and condition defects. 'Grade' is often, but not always, used as a synonym for 'quality.'" *Yales King International, v. Danny & Sons, Inc.*, 52 Agric. Dec. 715 (1993), at note 3. See also 10 N. Harl, Agricultural Law § 72.10[4][b] at note 82.

report does not disclose the specific pathologies which caused the black mold, the numerous sunken areas, or the decay. The Department's publication on market diseases of cantaloupes lists 12 different types of rot or decay.¹³ Several of these are possible candidates for the cause of the major problems listed on the inspection certificate. Some of these develop with great rapidity. The "decay" in the cantaloupes was stated to be in "early stages." On the whole we do not think that it is unreasonable to suppose that the subject cantaloupes may have been in merchantable condition at shipping point in Arizona, although such is deemed improbable. Since respondent accepted the melons it was entitled to attempt to show a material breach of the contract. We conclude that it has not shown a material breach.

Since respondent accepted the cantaloupes, and has not shown a breach of contract by complainant, it is liable for the full purchase price thereof, or \$5,632.50. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act. The counterclaim should be dismissed.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.¹⁴ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.¹⁵ We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$5,632.50, with interest thereon at the rate of 10% per annum from August 1, 1994, until paid.

¹³*Market Diseases of Cabbage, Cauliflower, Turnips, Cucumbers, Melons, and Related Crops*, Agriculture Handbook No. 184, Agricultural Research Service, United States Department of Agriculture, pp.26-35 (1961).

¹⁴*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

¹⁵See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SHARYLAND L.P. d/b/a PLANTATION PRODUCE v. C.H. ROBINSON COMPANY.

PACA Docket No. R-94-0235.

Decision and Order filed November 4, 1996.

Open Sales - Losses sustained by the buyer.

In an open sale, title passes from seller to buyer. Since the contract is one of a "sale," the buyer assumes responsibility for earning either a profit or taking a loss. As the seller can not expect to share in the distribution of any profit the buyer may earn through its efforts, neither can the buyer expect the seller to absorb any losses it may incur. Therefore, any losses the buyer may sustain through this type of transaction are for its own account.

Patrice H. Harps, Presiding Officer.

Complainant, Pro se.

Thomas G. Rock, Esquire, Minneapolis, MN, for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 informal complaint was filed with the Department on September 10, 1993 and a formal complaint was filed on March 4, 1994, in which complainant seeks a reparation award against the respondent in the amount of \$1,650.00 in connection with two trucklots of onions shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying the allegations of the complainant.

Since the amount claimed in the formal complaint does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the

¹Effective November 15, 1995, the threshold for oral hearings was raised to \$30,000 by Public Law 104-48.

case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Complainant filed a verified opening statement. Respondent filed a verified answering statement. Complainant filed a verified statement in reply. Complainant and respondent both filed briefs.

Findings of Fact

1. Complainant, Sharyland L.P., d/b/a Plantation Produce Company, hereinafter referred to as Plantation, is a limited partnership whose post office address is P.O. Box 1043, Mission, Texas, 78573-1043. At the time of the transaction involved herein, Plantation was licensed under the Act.

2. Respondent, C.H. Robinson Company, hereinafter referred to as Robinson, is a corporation whose post office address is 8100 Mitchell Rd., Suite 200, Eden Prairie, Minnesota. At the time of the transactions involved in this proceeding, Robinson was licensed under the Act.

3. On or about June 30, 1993, complainant sold and shipped to respondent, on invoice number D01486, 200 sacks of fifty lb. jumbo white onions. The onions were inspected on July 6, 1993, and as a result of the inspection the term of sale was amended to open.

4. On or about June 30, 1993, complainant sold and shipped to respondent, on invoice number N00453, 210 sacks of fifty lb. jumbo white onions. The onions were inspected on July 6, 1993, and as a result of the inspection the term of sale was amended to open.

5. The formal complaint was filed on March 4, 1994, which was within nine months after the causes of action alleged therein accrued.

Discussion

This proceeding involves a dispute as to respondent's liability to the complainant for the two trucklots of onions it received and accepted through the actions of its customers.

Plantation alleges in its formal complaint, that the value of the onions Robinson purchased is \$3.00 per sack on the 200 sacks of onions it shipped on invoice number D01486-1, and \$5.00 per sack on the 210 sacks of onions shipped on invoice number N00453. As proof of the onions' value, Plantation refers to its exhibits numbered 1 and 2 of the formal complaint. The aforementioned exhibits are invoices Plantation generated to Robinson, which substantiate the terms of sale to be "open" for these two transactions. Plantation

does not include any calculations or Market News Service prices in its exhibits to support how it arrived at the \$3.00 and \$5.00 figures assigned to the onions it sold on an open basis.

Robinson, on the other hand, includes within its documentation an invoice, numbered 881505 and 881509, which accounts for \$641.00 it claims it lost in handling the onions it purchased from the complainant. Both parties go into detailed analysis of temperature conditions at the time of shipment, type of truck, when the product was inspected and when notification of a problem with the product was given in their opening statements and briefs, which is totally irrelevant to the problem of establishing financial liability for the final disposition of the onions.

Plantation sold and shipped, and Robinson purchased the two partial trucklots of onions involved in this dispute. The record establishes these onions were the subject of U.S.D.A. inspections. Upon completion of the inspections, the original contracts were renegotiated from purchase and sale at a fixed price, to a sale on an open basis. "Open Price" assumes parties will negotiate a price after the goods are sold. If they do not, the reasonable value of the goods should be imputed. PACA Docket No.4456, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979). In this instance the parties were unable to negotiate a price for the onions. The complainant feels an equitable price should be derived by looking at Market News Service prices; however, complainant has not included any market quotes in its documentation. Respondent, on the other hand, is basing the amount it feels is reasonable on the accounts of sale received from its customer. These accountings show respondent to have incurred a deficit through the purchase and resale of both trucklots.

Since the two parties were unable to determine an amicable settlement price for the onions, we must determine a reasonable value for the onions. Complainant has failed to submit adequate market news reports to substantiate its computations for the value assigned to the onions, as alleged in its formal complaint. The record shows that we are left with respondent's resales as the best evidence of the reasonable value of the subject onions, especially as the onions were received in poor condition. *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990).

Since the respondent accepted the loads, it is liable to complainant for the agreed contract price, which in this case is a reasonable price. For the reasons previously discussed, market quotes cannot be consulted in determining the reasonable value. We will look to the accountings of sale respondent submitted as evidence to the reasonable value.

Included within the report of investigation are copies of accountings of sale respondent received from its customer. Respondent's customer reported sales totaling \$810.00 for the lot of 200 onions it received which corresponds to the shipper's invoice number D01486. This lot of onions was inspected at respondent's customer's place of business on July 7, 1993, showing 26 per cent decay. The accounting is broken down by individual sales which all occurred on July 7, 1993, which is deemed timely. When Robinson accounted back to Plantation with gross figures, Robinson reported average sales for this lot to be \$3.15 for a total of \$630.00. Robinson is claiming \$3.15 per sack freight charges and a \$52.00 inspection fee for a total of \$682.00, or a total deficit of \$52.00 for this particular lot.

Robinson also submits an account sale for the lot corresponding to the shipper's invoice number N00453. This lot was also inspected at respondent's customer's place of business on July 7, 1993 where it was found to have a total of 56 per cent condition defects of which 54 per cent was decay. The accounting it received from its customer for this lot shows a total of \$329.50 in sales for the 210 cartons it received. Robinson accounted back to Plantation showing \$.90 per sack for the 210 sacks it purchased, or a total of \$189.00. Out-of-pocket freight charges total \$661.50. Adding freight to market charges of \$52.50 and inspection charges of \$64.00, for a total of \$778.00 in costs, or a total loss of \$589.00 for this transaction. The difference between the gross proceeds reported by respondent's customer and the proceeds as reported by respondent is noted. However, taking into consideration an allowance for profit by both parties, the difference is allowed.

In this particular case, respondent is attempting to pass back to the complainant the deficit it incurred from the resale of the onions. Ultimately, respondent, after agreeing to renegotiate the contracts to open price, lost the right to pass back to the shipper any losses it incurred, whereas had the contracts been changed to consignment, or had the loads been rejected outright, the shipper could have been held liable for any damages incurred by the receiver.

Based upon the preceding discussion, we find Plantation has failed to carry the burden of proof with regard to its complaint. Plantation's complaint is dismissed. Robinson's countercomplaint is also dismissed.

Order

The complaint is dismissed.

The countercomplaint is dismissed.

Copies of this order shall be served on the parties.

PHOENIX VEGETABLE DISTRIBUTORS v. RANDY WILSON, CO.
PACA Docket No. R-95-0167.
Decision and Order filed November 4, 1996.

Acceptance - Precludes subsequent rejection by intermediate parties to their seller.
Rejection - Does not preclude subsequent acceptance by intermediate parties.

Where A sold to B, B sold to C, and C sold to D, a rejection by D to C was effective even though it occurred following C's acceptance of the lot of produce, because lot was accepted by unloading at C's warehouse, and D was on hand to reject when the lot was unloaded. However, following C's acceptance C could not reject to B, nor could B reject to A. It was found that in fact no such rejection had been attempted, but that C and B had merely communicated the fact that D had rejected to C. A's subsequent repossession of three-fourths of the lot of produce was wrongful, and precluded A from entitlement to the contract price as to more than the one-fourth of a lot left in C's possession, even though the entire lot had been accepted.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$3,504.75 in connection with a transaction in interstate and foreign commerce involving rappini.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Phoenix Vegetable Distributors, is a corporation whose address is P. O. Box 7, Tolleson, Arizona.

2. Respondent, Randy Wilson Co., is a corporation whose address is 2348 West Whitendale, Suite G, Visalia, California. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 3, 1994, complainant sold to respondent one truck lot of rappini, consisting of 336 cartons, at \$10.00 per carton, plus \$32.00 for top ice, or a total of \$3,392.00, f.o.b. On or about the same date respondent sold the rappini to Sure-Way International, in Toronto, Ontario, Canada, who had previously sold the rappini to a chain store outside Toronto.

4. On or about March 4, 1994, complainant shipped the rappini from Arizona to respondent in Toronto. The rappini arrived at Sure-Way's warehouse in Toronto on March 8, 1994, and was unloaded from the truck into cold storage. Sure-Way's customer was on hand at time of arrival, looked at the rappini, and gave notice to Sure-Way that the rappini was rejected. Sure-Way promptly gave notice to respondent that the rappini had a quality problem the chain store had rejected it, and that Sure-Way had called for a Canadian inspection. Respondent then promptly gave notice to complainant, by telephone, that the rappini had a quality problem, that the chain store had rejected it, and that a Canadian inspection had been requested. On the same day, March 8, 1994, respondent sent complainant a faxed "Trouble Report" covering the rappini. The trouble report was on a pre-printed form and stated that the rappini had trouble due to quality, and that an inspection had been requested. The trouble report had a blank beside the words "REJECTED TO:", but the blank was not filled in. Sure-Way then proceeded to sell two pallets (84 cartons) of the rappini.

5. On the morning of March 9, 1994, after receiving the notice of trouble and of the rejection by the chain store, complainant was told by a broker in Toronto that two pallets of its rappini were for sale by "So-Oh Fresh," a produce firm in Toronto. Complainant also, at about the same time, contacted the broker to have the remaining rappini removed to another produce firm in Toronto, Rite Pak. This was accomplished during the morning of March 9, 1994.

6. Respondent, following the removal of the rappini, sent complainant the following faxed message:

To: Phoenix Veg Distor
Attn
Don McGaffee

From: Ivan Schaefer
Time:
Date: 3/9/94

Number of pages including this cover sheet: 1
Remarks:

Tried to Reach you after I finished my telephone call with Sure-way but you had left for lunch.

Sure-way is prepared to accept Responsibility for the outcome of the Agriculture Canada Inspection provided the Product is brought back in their custody (i.e.) T.B.I. Cold Storage.

Moreover, the Agriculture Inspection is slated for T.B.I. Cold Storage as the site of the Inspection. If Rite Pak only now Requests the Inspection, another 48 - 72 hours will elapse.

Also, Sure-way is questioning - if the pallets are removed to another site, how can they be responsible?

Don, since I wish to resolve this matter as effectively as possible, and Sure-way is prepared to abide by the Inspection provided the product is under their control, perhaps it is a viable option to have 1) Rite Pak bring back the pallets of Rappini back (sic) to the Cold Storage 2) have Sure-way complete the Inspection by no later than to-morrow.

Please advise.

7. Complainant's Don McGaffee replied immediately to the above faxed message with a faxed letter, quoted below in relevant part:

This is to acknowledge receipt of your faxed message dated 3/9/94 concerning the above referenced shipment of rappini.

Please be advised that your fax is not correct. The contract between Phoenix Vegetable Distributors and Randy Wilson has not been changed. The terms of sale were FOB no grade contract. It is my understanding that two of the pallets have been accepted by one or your customers in Toronto, Ontario, Canada. As you are aware, partial acceptance constitutes acceptance in full of the entire trucklot shipment. Also please be advised that a timely Agriculture Canada inspection has not yet been secured on any of the rappini in question.

Therefore, at this time, Phoenix Vegetable Distributors is expecting payment in full as invoiced. Your relationship with your customers in

Toronto has no bearing on the contract between Phoenix Vegetable Distributors and your firm, Randy Wilson Company. Therefore, inasmuch as the rappini has been accepted, the original terms of this contract are still in force.

8. An informal complaint was filed on September 2, 1994, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant seeks to recover the full purchase price of the rappini sold to respondent on the basis that the rappini was accepted on arrival in Toronto. Respondent does not deny acceptance of the rappini, but seems to focus its defense on complainant's repossession of the six flats of rappini which remained after the sale of two of the flats by respondent's customer. Complainant justifies this repossession as an effort to "mitigate any further potential losses due to the mishandling by respondent and/or its customer(s)." Complainant also states that "[w]hen the rappini finally arrived in Toronto [complainant] was notified by respondent that the chain store rejected the rappini because of discoloration" and that "[b]ased on this rejection [complainant] advised respondent that the rappini would be picked up" However, prior to picking up the rappini, complainant was aware that two of the flats had been removed, and complained at the time, and throughout this proceeding, that this amounted to an acceptance of the entire lot of eight flats. It is apparent from the record herein that the rappini was never rejected by Sure-Way to respondent, or by respondent to complainant. It is certainly true that respondent and complainant were informed that the rappini had arrived showing trouble, and were also informed that the chain store had rejected the rappini to Sure-Way. However, rejections must be made by each buyer to their own seller, and must be clearly communicated as such.² Furthermore, it is even more abundantly clear that Sure-Way did not have the right to reject the rappini to respondent, nor did respondent have the right to reject to complainant, following the rejection by the chain store to Sure-Way. This is obviously the case because Sure-Way had already accepted the rappini

²See *Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429 (1983); *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867 (1979); *Sun World Marketing v. Bayshore Perishable Distributors*, 38 Agric. Dec. 480 (1979); and *Beamon Brothers v. California Sweet Potato Growers*, 38 Agric. Dec. 71 (1979).

vis-à-vis respondent and complainant when it unloaded the rappini into the warehouse. Sure-Way's customer, the chain store, was able to reject to Sure-Way because such customer never exercised any dominion and control over the rappini prior to rejecting it. The customer was on hand when the rappini arrived, and the unloading of the rappini was the act of Sure-Way, not the act of the chain store. The rejection was therefore effective against Sure-Way, but could not have been effective had Sure-Way attempted to pass on the rejection to respondent, or had respondent sought to pass it on to complainant. The effective rejection by the chain store had, in effect, been intercepted by the acceptance of the produce by Sure-Way. An acceptance is operative all the way up the line to the ultimate seller,³ and does not even have to be communicated to be effective.⁴ This is true because any act contrary to the seller's ownership, or a failure to make a timely rejection, operates as an acceptance, and if Sure-Way's act of acceptance was contrary to respondent's ownership, it was of necessity also contrary to complainant's ownership. There was nothing that respondent could do that would neutralize the acts of Sure-Way that were contrary to its own or complainant's ownership. Sure-Way was, in effect, respondent's agent as to such acts of acceptance, and the acts of the agent are imputed to the principal. Thus Sure-Way's acceptance not only precluded any subsequent rejection by Sure-Way, but also precluded any rejection by respondent.⁵ This overriding operation of an acceptance precludes the intervention of a rejection anywhere in the chain of purchase, but since a rejection does not have this overriding effect, where there has been a rejection an acceptance may subsequently intervene anywhere in the chain, and will intervene if any party in

³This discussion applies, of course, only as to a shipment of goods, i.e., between shipment and arrival, or between possession by the seller and possession (or rejection) by the purchaser who receives (or is the intended receiver of) the goods from the hands of the carrier.

⁴There is one minor, and likely insignificant, exception to this statement. UCC § 606(1)(a) provides that "[a]cceptance of goods occurs when the buyer (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity. . ." For such notice of acceptance to be effective as against each seller up the chain of purchase it must be communicated up the chain of purchase. However, if it is not communicated the same result is shortly obtained by the failure to communicate a rejection (see UCC § 606(1)(b)). Also the failure to communicate the acceptance may be made irrelevant by the performance of an act inconsistent with the seller's ownership (see UCC § 606(1)(c)). Such an act does not have to be communicated for the acceptance to be effective.

⁵See *Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991).

the chain fails to reject to its seller. Obviously, to inform the seller of a rejection of another buyer somewhere down the chain is not the same thing as rejecting to the seller. Communication of trouble, or of a down-chain buyer's rejection, should be taken as merely notice of breach, unless such notice is accompanied by a clear notice that a rejection is also intended. If a seller has any doubt as to the significance of a communication of a down-chain buyer's rejection, inquiries should be made by the seller to clearly establish the exact intent of any notice conveyed by the seller's immediate purchaser.

In this case, complainant did not have any notice that respondent was rejecting. None of the descriptions of what occurred given by the parties indicates that there was any such notice, and if any doubt were entertained on the point, the trouble report faxed by respondent to complainant on the day of arrival should remove that doubt. Instead, complainant was clearly aware that the rappini had been accepted. It was accepted by being unloaded,⁶ and doubly accepted by the subsequent resale of two flats of the rappini.⁷ Complainant is certainly correct when it points out that the sale of those two flats amounted to an acceptance of the whole lot.⁸ Therefore, complainant's subsequent acquisition of the rappini was an acquisition of produce which did not belong to complainant, and was wrongful as against respondent.

Respondent complains that complainant's acquisition of the balance of the lot precluded respondent's customer getting an inspection of the rappini by the Canadian Department of Agriculture. Respondent offered evidence that under the normal procedures of such Department the remaining seventy-five percent of the lot would have been considered representative of the lot as a whole, and that, as an inspection had been requested on the day of arrival, the rappini would have been inspected had it been left in place. We offer no comment as to whether we would give credence to an inspection of seventy-five percent of a lot, but it is certainly true that complainant precluded inspection of the lot in question. It is also true that complainant did not have the remainder of the lot inspected after it wrongfully regained control of it.

⁶*Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980); *Crown Orchard Co. v. Mid - Valley Prod. Corp.*, 34 Agric. Dec. 1381 at 1385 (1975); *Conn & Scalise Co., Inc. v. Frank J. Crivella & Co., Inc.*, 20 Agric. Dec. 415 (1961).

⁷*Dave Walsh Co. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 2085 (1983).

⁸*Salinas Lettuce Farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991).

Respondent accepted the entire lot of produce, and normally would be held liable for the full purchase price thereof, less damages flowing from any breach of contract. However, complainant's repossession of 252 cartons of the rappini makes it inequitable to hold respondent liable for the purchase price of more than the 84 cartons which were left in its possession. Therefore, as to such cartons, respondent is liable to complainant for \$10.00 per carton, plus the portion of the \$32.00 top ice charge applicable to such cartons, or \$8.00, or a total of \$848.00. In addition, respondent paid the freight and duty charges applicable to the entire lot of 336 cartons, or \$684.75. Respondent should be chargeable only with the portion of this freight that is applicable to the 84 cartons of rappini which it resold, or \$171.19. The remainder of the freight paid by respondent, or \$513.56, should be deducted from the \$848.00, leaving \$334.44 as the amount owing from respondent to complainant. Respondent has already paid complainant \$187.25, which leaves \$147.19 still owing from respondent to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.⁹ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.¹⁰ We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$147.19, with interest thereon at the rate of 10% per annum from April 1, 1994, until paid.

Copies of this order shall be served upon the parties.

⁹*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

¹⁰See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer W. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

C.J. PRETTYMAN, JR., INC. v. AMERICAN GROWERS, INC.**PACA Docket No. R-94-0164.****Decision and Order filed November 14, 1996.****Damages - Percentage of defects.****Open Price - Computation of reasonable value.**

Where contracts called for the sale of U.S. No. 1 product, shipper breached the warranty of suitable shipping condition, and neither market reports nor a proper accounting were available, damages and reasonable value were computed on the basis of the percentage of the total of condition and quality defects shown by a timely federal inspection.

George S. Whitten, Presiding Officer.

William J. Fair, Springfield, PA, for Complainant.

Thomas W. Johnston, Pompano Beach, FL, for Respondent.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$40,797.23 in connection with transactions in interstate commerce involving eight shipments of mixed perishable produce.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Respondent also filed a counterclaim in the amount of \$9,120.42 arising out of expenses allegedly incurred by respondent in connection with the eight shipments which were the subject of the complaint. Complainant filed a reply to the counterclaim denying any liability to respondent.

Respondent attached to its answer a motion to dismiss the complaint, and renewed the motion following submission of its brief. The sole basis for the motion to dismiss is that the contracts concerning the eight transactions were negotiated by respondent's president Glenn C. Thomason with the individual C. J. Prettyman, Jr. (as a representative of the corporation) but that the complaint was signed by C. J. Prettyman, III. Respondent states that "the execution of the Complaint having been by someone other than C. J. Prettyman (C. J. Prettyman III, whoever that is) and not by someone, as required by the law and the Act, to have personal knowledge of the facts alleged in the Complaint causes the action to fail for lack of jurisdiction." Respondent is misinformed. There is no

requirement of the Act, Regulations, Rules of Practice, or of the law that requires a pleading to be signed by someone with personal knowledge of the facts. It is true that the formal complaint was signed by C. J. Prettyman, III, vice president of complainant corporation, and that there was no showing that such person had any personal involvement in the negotiation of the eight transactions. Indeed, the statement in reply, signed by C. J. Prettyman, Jr., president of complainant corporation, agrees with respondent's president Glenn C. Thomason that the contracts were negotiated between C. J. Prettyman, Jr. and Glenn C. Thomason. It is obvious, therefore, that the formal complaint, though in evidence under the shortened procedure because verified, should be accorded no evidentiary weight in regard to matters alleged therein not within the scope of the knowledge of C. J. Prettyman, III. However, the evidentiary value of the formal complaint has nothing to do with whether the formal complaint qualifies as a pleading herein. Indeed, formal complaints signed only by an attorney with no knowledge of the facts, and not verified, still constitute valid pleadings under the Rules of Practice, and serve to join the issues between the parties.¹ Respondent's motion is denied.

The amount claimed in the formal complaint exceeds \$15,000.00, however, the parties waived oral hearing and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, C. J. Prettyman, Jr., Inc., is a corporation whose address is P. O. Box 665, Exmore, Virginia. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent, American Growers, Inc., is a corporation whose address is Hooker Highway, SR 3019 SR 15, Belle Glade, Florida. At the time of the

¹*Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991); *Chapman Fruit Co., Inc. v. Tri-State Sales Agency*, 44 Agric. Dec. 1366 (1985). See also *Perell, Inc. v. Anthony Abbate Fruit Distributors*, 32 Agric. Dec. 1900 (1973) and *H. & M. Fujishige v. Mike Phillips Enterprises, Inc.*, 30 Agric. Dec. 1095 (1971).

transactions involved herein, respondent was licensed under the Act.

3. On or about December 12, 1992, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
196	Squash, Butternut	\$12.00	\$2,352.00
72	Cucumbers	9.25	666.00
1,280	Cucumbers, Ctn 24's	3.25	4,160.00
	Ryan recorder		<u>23.50</u>
			7,201.50

4. On December 14, 1992, complainant issued invoice number 4509 as to the load of produce covered by finding 3. Complainant granted an adjustment on the butternut squash in the amount of \$3,129.60. Respondent has paid \$3,175.80 on this load.

5. On or about February 5, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
98	Bell Peppers, Ex. Lg.	\$12.50	\$1,225.00
324	Cucumbers	5.25	1,701.00
336	Eggplant, 18's	5.50	1,848.00
120	Squash, Zucchini Medium	9.50	1,140.00
196	Squash, Acorn	5.50	1,078.00
144	Squash, Spaghetti	5.50	<u>792.00</u>
			\$7,748.00

6. On February 6, 1993, complainant issued invoice number 4611 as to the load of produce covered by finding 5. Following arrival of the load respondent noted problems and called for a federal inspection. The inspection, made on February 9, 1993, showed 8 percent quality defects and 4 percent bruising in the 336 cartons of eggplants. Respondent's Glenn C. Thomason reported this to complainant's C. J. Prettyman, Jr. and secured his permission to handle the load on a consignment basis. Respondent issued an accounting of the resale of the eggplant showing as follows:

50 @ 12.50	625.00
80 @ 9.50	760.00
19 @ .6750	12.83
187 lost to repack	0.00
Repack 336 @ 1.00	336.00
Cooler 336 @ .35	117.60
Freight 336 @ 1.70	571.20
USDA 174.00	<u>174.00</u>
	199.03

7. On or about February 22, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
140	Bell Peppers, Red, XLG.	\$14.25	\$ 1,995.00
196	Bell Peppers, Red, XLG	20.25	3,969.00
165	Bell Peppers, Red, XLG	12.25	2,021.25
107	Bell Peppers, Red, LG	12.25	1,310.75
98	Bell Peppers, Red, MED	18.25	1,788.50
322	Cucumbers, Plain	00.00	00.00
81	Cucumbers, Select	00.00	00.00
19	Cucumbers, Small	00.00	00.00
1	Temp. Recorder	23.50	<u>23.50</u>
			\$11,108.00

8. On February 23, 1993, complainant issued invoice number 4629 as to the load of produce covered by finding 7. Following arrival of the load on February 25, respondent noted problems and called for a federal inspection. The inspection was made on February 26, 1993, at 1:00 p.m., at the place of business of respondent in Belle Glade, Florida, while the produce was still loaded on the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 47 °F	Sweet Peppers	"Tricar" 1 1/9 Bu	MX	Exlarge/ Large	271 Cartons	N
B	45 to 46 °F	Cucumbers	"MMC Brand," 1 1/9 Bu	MX	-	422 Cartons	N
C	47 to 48 °F	Sweet Peppers	"Signature Brand," 15 lbs. Exlarge	MX	-	140 Cartons	N
D	48 to 50 °F	Sweet Peppers	"Signature Brand," Net Wt 25 lbs.	MX	Exlarge/ Medium	295 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality (Scars & misshapen)	A: Size: No OFFSIZE. Decay mostly early, some moderate stages including 27% affecting walls & calyxes (sic), remaining stems.
	04	% 04	%	% Crushed & Broken Pods	
	11	% 00	%	% Shriveled (6 to 15%)	
	28	% 28	%	% Decay (16 to 35%)	
	47	% 32	%	% CHECKSUM	
B	10	% 00	%	% Quality (8 to 14%) (Scars & Misshappen)	B: Size: No offsize.
	10	% 01	%	% Shriveled ends (2 to 18%)	
	-1	% -1	%	% Decay	
	21	% 02	%	% CHECKSUM	
C	25	% 00	%	% Quality (17 to 36%) (Scars & Misshappen)	C & D: No offsize C: Decay early stages affecting walls & calyxes.
	04	% 04	%	% Decay (3 to 6%)	
	29	% 04	%	% Checksum	
D	11	% 00	%	% Quality (8 to 15%)(Scars)	D: Decay early stages affecting walls & calyxes 10% Remainder & Stems.
	12	% 12	%	% Decay	
	23	% 12	%	% CHECKSUM	

GRADE: LOT A: Fails to Grade U.S. NO1 only account condition. B: Fails to grade U.S. NO1 only account condition: Lots C & D Fail to Grade U.S. NO1 account Quality defects.

Condition of Containers: 4 pallets nearest Rear Doors of Trailer Shifted left to Right Approximately 1 inch Bottom layer to 6 inches top layer. Few cartons bottom layer crushed downward approximately 1 to 3 inches..

9. On or about February 26, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, one load containing 840 cartons of cucumbers on an open basis.

10. On February 26, 1993, complainant issued invoice number 4631 as to the load of produce covered by finding 9. Following arrival of the load on March 2, 1993, respondent noted problems and called for a federal inspection. The inspection was made on March 2, 1993, at 8:10 a.m., at the place of business of

respondent in Belle Glade, Florida, after the produce had been unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	43 to 43 °F	Cucumbers	"The Boss Brand", 1 1/9 Bushel	MX		840 Cartons	N
LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER		
A	10	% 05	%	% Quality (Scars & Misshapen)	Size: None under 6 inches (6 to 16%) in length, Average 2% over 2 3/8 inch Diameter		
	04	% 03	%	% Shriveled ends			
	03	% 03	%	% Decay (0 to 4%)	Decay Early Stages		
	17	% 11	%	% Checksum			

GRADE: Fails to Grade U.S. No 1 only Account Condition.

11. Respondent rendered an accounting showing that 112 cartons were lost in repacking and the remainder resold as follows:

127 Plain	@ \$.1751 = \$	22.24
110 Selects	@ 1.5702 =	172.72
15 "	@ .1751 =	2.63
160 "	@ 5.75 =	920.00
60 "	@ 6.25 =	375.00
150 "	@ 5.75 =	862.50
21 Super Selects	@ 16.00 =	336.00
85 " "	@ 12.50 =	<u>1,062.50</u>
		\$3,753.59
less freight		2,200.00
less Repack 840 @ 1.00		840.00
less Cooler 840 @ .35		294.00
less USDA		71.00
less USDA Reinspection		<u>71.00</u>
Net Return		\$ 277.59

12. On or about February 27, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
168	Squash, Spaghetti	\$ 7.50	\$ 1,260.00
168	Squash, Acorn	10.50	1,764.00
78	Squash, Butternut	21.00	1,638.00
126	Cucumbers, Super Select	9.50	1,197.00
480	Squash, Zucchini Medium	5.25	2,520.00
216	Squash, Zucchini Fancy	6.25	1,350.00
1	Temp. Recorder	23.50	<u>23.50</u>
			\$ 9,752.50

13. On February 28, 1993, complainant issued invoice number 4632 as to the load of produce covered by finding 12. Following arrival of the load on or about March 2, 1993, respondent noted problems and called for a federal inspection. The inspection was made on March 3, 1993, at 3:25 p.m., at the place of business of respondent in Belle Glade, Florida, after the produce was unloaded from the truck. Due to the number of lots contained in the load the inspection was recorded on two certificates which disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 46 °F	Acorn Squash (w)	"Big Chuy Brand", 18 count	MX	65126	168 Cartons	N
B	48 to 49 °F	Green Squash (s)	"Nu Brand", 4/7 Bushel	MX	Zucchini	126 Cartons	N
C	47 to 50 °F	Butternut Squash (w)	"Big Chuy Brand", M	MX	63426	42 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	04 00 04	% 00 % 00 % 00	% % %	% Quality (Scars) % Soft Rot % Checksum	A: <u>Size:</u> Fairly uniform
B	02 39 41	% 00 % 39 % 39	% % %	% Quality (cuts) % Decay (34 to 42%) % Checksum	B: <u>Size:</u> Fairly uniform. Decay Early stages.
C	07 00 07	% 00 % 00 % 00	% % %	% Quality (4 to **%) (Scars) % Soft Rot % Checksum	C: <u>Size:</u> uniform.

GRADE: Lots A & C U.S. No. 1. Lot B fails to Grade U.S. No 1 only Account Condition.

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 45 °F	Cucumbers	"The Boss Brand", 1 1/9 Bushel	MX	Super Select	126 Cartons	N
B	46 to 47 °F	Green Squash (s)	"The Great 44", Size XXX	MX	Zucchini	480 Cartons	N
C	46 to 48 °F	Spaghetti Squash (W)	"Big Chuy Brand," M	MX	65327	168 Cartons	N
D	47 to 49 °F	Butternut Squash (W)	"Palo Alto"	MX	Medium	36 Crates	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 00	%	% Over 2 3/8 Diameter	A: <u>Size</u> : 6 to 9 inches in length 1 3/4 to 2 3/8 inches in Diameter. Decay early stages.
	12	% 07	%	% Quality (8 to 14%) (Scars & Misshapen.)	
	08	% 04	%	% Shriveled ends (7 to 10%)	
	03	% 03	%	% Decay (2 to 4%)	
	25	% 14	%	% CHECKSUM	
B	04	% 00	%	% Quality (Scars & Cuts)	B: <u>Size</u> : fairly uniform
	00	% 00	%	% Decay	
	04	% 00	%	% CHECKSUM	
C	17	% 00	%	% Quality (Scars)	C: <u>Size</u> : fairly uniform
	00	% 00	%	% Soft Rot	
	17	% 00	%	% Checksum	
D	03	% 00	%	% Quality (Scars)	D: <u>Size</u> : uniform.
	00	% 00	%	% Soft Rot	
	03	% 00	%	% CHECKSUM	

GRADE: LOTS A & C Fail to Grade U.S. NO1 Account Quality Defects. LOTS B & D: U.S. No.1

14. On or about March 13, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
711	Bell Pepper, large	\$ 7.25	\$5,154.75
420	Bell Pepper, large	7.25	3,045.00
84	Cucumbers, Select	12.25	<u>1,029.00</u>
			\$9,228.75

15. On March 14, 1993, complainant issued invoice number 4649 as to the load of produce covered by finding 14. Following arrival of the load on or about

March 17, 1993, respondent noted problems and called for a federal inspection. The inspection was made on March 17, 1993, at 10:50 a.m., at the place of business of respondent in Belle Glade, Florida, while the produce was being unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 50 °F	Sweet Pepper	"The Boss Brand" 1 1/9 Bushel	MX	Large	711 Cartons	N
B	49 to 50 °F	Cucumbers	"The Boss Brand" 1 1/9 Bushel	MX	See Remarks	84 Cartons	Y
C	51 to 53 °F	Sweet Pepper	"King Louiz Brand," 1 1/9 Bushel	MX	XXX—	420 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	07	% 01	%	% Quality (Misshapen & Scars) (6 to 10%)	A. <u>Size Ranges:</u> 2 1/2 to 4 inch length. No offsize. Decay early stages affecting walls.
	02	% 00	%	% Discoloration	
	02	% 00	%	% Bruising	
	08	% 03	%	% Shriveled (6 to 12%)	
	03	% 03	%	% Decay (0 to 6%)	
	22	% 07	%	% Checksum	
B	03	% 00	%	% Under 6 in length	<u>Size B</u> 5 1/2 to 9 inch length, 1 1/2 to 2 3/8 inch Diameter. Decay moderate stages.
	12	% 00	%	% Quality (8 to 20%)(Scars)	
	02	% 00	%	% Shriveled	
	03	% 03	%	% Decay	
	20	% 03	%	% Checksum	
C	08	% 00	%	% Quality (Scars & Misshapen)(6 to 10%)	C <u>Size Ranges</u> 2 1/2 inch to 3 1/2 inch Diameter. 2 1/2 to 4 1/4 inch length. Decay early stages affecting walls.
	05	% 00	%	% Shriveled	
	06	% 00	%	% Bruising (4 to 6%)	
	02	% 02	%	% Decay (0 to 4%)	
	21	% 02	%	% Checksum	

GRADE: LOT's A & C Fails to Grade U.S. NO1 only account condition. LOT B Fails to grade U.S. NO1 account Quality Defects.
REMARKS: Inspected during unloading. Lot B Remarks 1 pallet marked large other pallet few cartons marked large, remaining cartons no mark.

16. On or about March 17, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
840	Squash, Zucchini Medium	\$ 9.25	\$ 7,770.00
84	Cucumbers, Super Sel.	20.25	1,701.00
108	Cucumbers, Select	18.25	1,971.00
126	Cucumbers, Small	16.25	2,047.50
72	Cucumbers, Large	14.25	<u>1,026.00</u>
			\$14,515.00

17. On March 18, 1993, complainant issued invoice number 4656 as to the load of produce covered by finding 16. Following arrival of the load on or about March 22, 1993, respondent noted problems in the large cucumbers and called for a federal inspection. The inspection was made on March 22, 1993, at 3:50 p.m., at the place of business of respondent in Belle Glade, Florida, after the produce had been unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	52 to 55 °F	Cucumbers	"MMC Brand", 1 1/9 Bushel	MX	Large	41 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	12	% 00	%	% under 2 1/4 inch Diameter (10 to 13%)	Size Ranges 1 7/8 to 2 1/2 inch Diameter. 6 to 9 inch length.
	13	% 08	%	% Quality (Scars & Misshapen) (8 to 16%)	
	05	% 00	%	% Shriveled ends	
	00	% 00	%	% Decay	
	30	% 08	%	% Checksum	

GRADE: Fails to Grade U.S. No 1 Large Account Quality Defects & Min. Diameter.

18. On or about March 17, 1993, complainant sold to respondent, and shipped from Nogales, Arizona, to respondent in Belle Glade, Florida, a load of mixed perishable produce as follows:

Quantity	Description	Price	Total
180	Squash, Zucchini Med.	\$ 9.25	\$1,665.00
288	Squash, Zucchini	9.25	2,664.00

360	Cucumbers, Plain	14.50	<u>5,130.00</u>
			\$9,459.00

19. On March 18, 1993, complainant issued invoice number 4631 as to the load of produce covered by finding 18. Following arrival of the load on March 22, 1993, respondent noted problems and called for a federal inspection of the cucumbers. The inspection was made on March 22, 1993, at 5:00 p.m., at the place of business of respondent in Belle Glade, Florida, after the produce had been unloaded from the truck, and disclosed in relevant part as follows:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	44 to 48 °F	Cucumbers	"MMC Brand", 1 1/9 Bushel	MX		360 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V.S. DAM	OFFSIZE/DEFECT	OTHER
A	03	%	%	% under 5 inch length.	<u>Size:</u> Ranges 4 3/4 to 8 1/7 inches in length. 1 1/2 to 2 3/8 inch Diameter
	07	%	%	% Quality (Scars & cuts) (4 to 10%)	
	05	%	%	% Soft & Shriveled ends	
	01	%	%	% Decay	
	16	%	%	% Checksum	

GRADE: Fails to Grade U.S. No 2 only Account Condition.

REMARKS: Based on U.S. No 2 at Applicants Request.

20. The informal complaint was filed on May 24, 1993, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant brings this action to recover the balance of the purchase price of eight shipments of mixed perishable produce sold to respondent between December 14, 1992, and March 18, 1993. The total of the invoice prices of the eight shipments was \$69,021.15, and respondent is alleged to have paid complainant \$28,223.72, leaving balances due totaling \$40,797.43. Respondent denies owing the amounts claimed (although respondent does admit that some amounts are still due as to some of the transactions), and in addition alleges set-offs totaling \$9,120.42. There are several matters which should be discussed before we discuss each load individually.

First, the parties are in disagreement as to the basic nature of the contractual agreement that applied to the eight transactions. This dispute is complicated by the paucity of testimonial evidence submitted on behalf of complainant from the party directly involved in the transactions, and by affidavits submitted on behalf of respondent which are often unintelligible.

Respondent contends that the contracts between the parties called for the produce to be U. S. No. 1 grade on arrival. During the informal stages of this proceeding respondent submitted copies of ten handwritten messages (included as exhibits 5-C, 5-G, 5-H, 5-K, 5-O, 5-S, 5-Y, 5-AA, 5-FF, and 5-II to the report of investigation) which Glen Thomason asserts were faxed to complainant at various times between December 18, 1992, and March 23, 1993. Complainant's C. J. Prettyman, Jr. asserted during the informal stages of the proceeding, in a letter to Prettyman's lawyer which is included as exhibit 8-A to the report of investigation, that he had no record of receiving these faxes, and enclosed two other faxes from Thomason which he admitted receiving (exhibits 8-B and 8-C to the report of investigation). Thomason later asserted in sworn statements that the faxes had been sent, and these assertions were never rebutted in any sworn statement by Prettyman. Since the only denial of receipt is contained in the unverified letter from Prettyman to his attorney we conclude that the messages were sent by respondent and received by complainant. Many of the faxed messages contain objections to the failure of the produce, especially the cucumbers, to grade U.S. No. 1. Thomason urged in an early letter to this Department that these communications indicate that the contract between the parties called for the produce to be U. S. No. 1.:

... If continued fax transmission and phone conversation do not establish a firm contract, and if our explicit faxes of December 29, 1992 and January 29, 1993 do not set forth the guidelines and criteria for all future purchases, then we need to know the alternate way of doing it correctly.

...

The faxes of December 29, and January 29, read as follows:

12 - 29

Uncle C.J.

As per our phone conversation 2-day — lets take a vacation on anymore product from the Mexican side, until we are sure that the grade and quality are what we need!! We don't need to get into another "Mexican Standoff"

like last year!! Remember, grade and condition standards are not the same thing — And, especially on cukes, when you ship us "off-grade" product (like select or plain cukes), that refers to size and shape and appearance, not condition or grade quality. They still must make US# 1 grade standards for grade & condition!!! As soon as we have this clear, and your "Mex" boys can deliver what we need give us a call, and we'll try again

—
Glen

1 - 29

Uncle C.J. —

Pat says that she just talked to you when you called and I was "out to lunch"! She says that you miss us, and have "a new roll of paper" in your fax, and are ready to start-up shipping again!! I say that's good, but I want you to be sure that your grower/shippers are really ready to give us what we need quality wise — especially on Cukes — Those guys are notorious for "topping-off" those wonderful strapped pallets, and putting less than #1 grade merchandise down on the inside layers of the pallets. That made it impossible for us to work the product so that you and I can make some money!

With the market and weather conditions being what they are here — we could start bringing mixed loads in from you right away! But, you've gotta make sure that these guys (Mex shippers & growers) understand that we have absolutely got to have product that meets US# 1 grade standards on quality & condition when it gets here, regardless of what size or "grade" you ship— especially on cukes — Whether you ship supers, selects, plains or whatever, they must make a US#1 on grade and condition — Their idea that a select or plain can arrive with any and all grade and/or quality defects and still be ok is not accurate or acceptable!! Our customers need #1 product, and I don't want to go through the expense of repacking, etc. With that in mind, call me, and we'll get started again!

Thanx Glen

C. J. Prettyman, Jr. submitted his only affidavit in this proceeding as complainant's statement in reply. In this affidavit Prettyman asserts that:

All of the shipments were sold FOB Nogales, Arizona, no grade specified.

All of the invoices which were mailed to the respondent made no reference to being US # 1.

However, complainant's invoices were stripped of everything other than quantity, item and price. There is no reference in any of the invoices as to the contract terms, which complainant contends were f.o.b. If this important information was left off the invoices, we should not be surprised that other important information, i.e. that the goods were to be U.S. No. 1, was also left off the invoices. Also, in his affidavit, Prettyman made no reference to the faxes, from which we quoted above, wherein Thomason pleads with Prettyman before the second load was shipped to send only U.S. No. 1 product. In view of this omission, we are unable to accord any credibility to Prettyman's denial of receipt of the faxes in the double hearsay letter which was made a part of the Department's report of investigation.

A question still remains as to whether the parties contemplated that the product would be U.S. No 1 at time of shipment, or at time of arrival. There is one sentence in one of the eleven faxes sent by respondent to complainant that speaks specifically of an expectation that the product would make U.S. No. 1 grade on arrival. This is the statement contained in one of the faxes quoted above that "we have absolutely got to have product that meets US# 1 grade standards on quality & condition when it gets here" The remainder of the references to grade expectation in the faxes are consistent with either view. Complainant's C. J. Prettyman, Jr. stated in his sworn statement that the contracts called for f.o.b. sales, which would be inconsistent with a requirement that the product meet U.S. No. 1 grade requirements on arrival. Respondent's Thomason stated in the initial response that ". . . C. J. Prettyman quoted all of this merchandise on a delivered basis, (F. O. B. plus freight)" Moreover, Thomason repeatedly referred to the contracts between the parties as "f.o.b. delivered." This is not a term that is defined in the Regulations, and is also not a term current in the trade. Respondent nowhere attempts to define this term, but the term in the Regulations which approximates "f.o.b. delivered" most closely is "f.o.b. sale at delivered price." Certainly, respondent contended throughout this proceeding that the cost of freight was to be borne by complainant, and protests the fact that the loads often arrived freight collect. This contention is consistent with the "delivered" part of the alleged "f.o.b. delivered" term. The only way we can ascribe any meaning to the "f.o.b." portion of the term is to infer that the U.S. No. 1 grade requirement applied at shipping point, and that Thomason's reference in one of the faxes to an expectation that the product should grade U.S. No. 1 on arrival was meant to

refer to the need that the product make good delivery for product sold as U.S. No. 1. We conclude that the contract terms intended by the parties were the equivalent of "f.o.b. sale at delivered price," or, where the price was "open," were intended to mean that the contract was f.o.b., but that complainant would bear the cost of freight. We also conclude that the contract called for the sale of U.S. No. 1 product.

Under this term product is expected to be f.o.b. as to grade, quality, and condition, and delivered as to price. The Regulations, in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined, in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations, which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery," are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale as to grade,

quality and condition rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.

Load 1

We now turn to a consideration of each transaction individually. As to load 1, covered by invoice 4509 (Findings of Fact 3 and 4), complainant claims that a balance is due of \$896.10. Respondent in its answer asserts that the only item in dispute as to this load is the 72 cartons of cucumbers which were invoiced at \$666.00. In its answering statement respondent asserts:

During the transmission that I sent him, both via the call on December 17, 1992, and the fax on December 18, 1992, Mr. Prettyman was in acknowledgement of the fact that the product was not up to our standards, did not grade #1, had problems and that we would, indeed, be working them on open account because of the breach of contract caused by either him or his grower/shipper in not meeting the grade standards upon arrival.

Thus respondent seems to be claiming that there was an agreement between the parties that the produce could be handled on an open basis. However, the fax of December 18, 1992, says nothing about the produce being handled on an open basis, and we conclude that there was no new contract as to the cucumbers. There was, however, at least an allowance as to the butternut squash. Complainant states that it agreed to a deduction of \$3,129.80. Apparently, respondent took more than this amount, and this accounts for the difference between the \$896.10 claimed due by complainant and the \$666.00 price for the 72 cartons of cukes. Respondent has not given any reason for withholding the additional \$230.10, and since no such reason is apparent from the record, we conclude that this amount is due from respondent to complainant.

Respondent asserts that the \$666.00 is not due because the Federal inspection made on December 18, 1992, showed the cucumbers to have shriveled ends, bruising and yellowing, and 20 percent average condition problems. The inspection certificate in question shows that four lots of cucumbers were inspected: one 137 carton lot of "Santa Anita" brand large size from Mexico; one 180 carton lot of "Santa Anita" brand "select's" from Mexico; one 49 carton lot of "Diamond" brand large size from Arizona; and one 147 carton lot of "Diamond" brand medium size from Arizona. In an internal document attached as an unnumbered exhibit to respondent's answer, respondent clearly refers to the

lot of 72 cucumbers as "selects." However, the only lot of "selects" shown on the inspection was a lot of 180. Even assuming that the lot of 180 cucumbers contained the lot of 72 which is in issue (an assumption for which there is no evidence), the mixing in of 108 cartons of cucumbers from some unknown source with complainant's cucumbers obviously makes the inspection worthless. Moreover, complainant asserted several times that the lot of 72 cucumbers shipped were "Carmelina" brand, and submitted a bill of lading in support of this assertion. Respondent, however, made no reply to this assertion. We conclude that respondent has failed to meet its burden of proving by a preponderance of the evidence that there was a breach of contract as to this load by complainant. The entire balance of \$896.10 is due from respondent to complainant as to invoice 4509.

Load 2

As to load 2, covered by invoice 4611 (Findings of Fact 5 and 6), complainant claims that a balance is due of \$1,648.97. Respondent agrees that this is the amount in dispute, and asserts that such amount was correctly deducted from complainant's invoice because the 336 cartons of eggplants arrived in poor condition, and complainant agreed "that it was okay to work it on an open consignment basis." Since the term "open" refers to a sale as to which no price is agreed, and a "consignment" is not a sale, but rather an agreement by the consignee to become the consignor's agent to sell goods that remain the shipper's property until sold by the consignee, there can be no such thing as an "open consignment." In view of the way in which respondent dealt with the eggplant we conclude that respondent meant a simple consignment. Complainant did not address this assertion by respondent, and we therefore conclude that the parties agreed to the eggplant being handled by respondent for complainant on a consignment basis. Complainant did, however, complain about the way in which the eggplant was handled. The United States Standards for Eggplant² allow a tolerance of 10 percent for eggplant that does not meet the standards of the grade, including 1 percent for decay. Under the suitable shipping condition rule we would allow an expansion of this tolerance, on a coast to coast shipment, to approximately 15 percent including approximately 3 percent for decay. Accordingly, the federal inspection indicates that the eggplant made good delivery for eggplant sold as U.S. No. 1. Although we allow wide latitude to

²7 C.F.R. § 51.2190 *et. seq.*

consignees acting in their agency capacity,³ there can be no justification for the dumping of over half of a lot which makes good delivery. We will assign a value to this lot based on the average value of the cartons which were sold, or \$9.38, or total constructed gross proceeds of \$3,151.68. From this should be deducted the cost of freight, or \$1.70, cooler expense, or \$.35 per carton, and profit and handling in the amount of 20 percent, or \$1.88 per carton. In view of the conversion of this lot to a consignment the cost of the federal inspection, \$174.00, or \$.52 per carton, should also be allowed. After the deduction of these amounts the value of the eggplants was \$4.93 per carton, or \$1,656.48. Complainant's recovery will be limited to the balance requested in the complaint, or \$1,648.97.

Load 3

The 3rd load, covered by invoice 4629 (Findings of Fact 7 & 8), was shipped on February 22, 1993, and subjected to prompt federal inspection while still on the truck, on February 26, 1993. The results of that inspection clearly show a breach of the warranty of suitable shipping condition as to each lot of produce. Respondent rendered an accounting relative to this load, but the accounting cannot be given our full credence for the following reasons. Respondent's answering statement, contains the sworn affidavit of Glenn C. Thomason, respondent's president. On page 14 of the 42 page affidavit Thomason makes the following statement in reference to the accounting for the third load:

. . . I will refer to our master jacket concerning this load, the front of which states that C.J. Prettyman apparently tried to change the freight to collect while the truck was in route and I again told him not to do this and you will see my instructions to Karin Churchill, who was American Grower's bookkeeper at the time, that we were using the Jack Bunting repack crew so that we could get through these as soon as possible due to the poor quality on the cukes and the heavy, soft and decay on the red pepper. I advised her to see Jack's worksheets as soon as available for the

³See *Tex-Sun Produce v. International Produce Distributors, Inc.*, 48 Agric. Dec. 1111 (1989); *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420 (1972); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); and *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956).

pack outs for actual costs. But, I told Karin Churchill in this note that I would give her a separate sheet pay from (sic) as Uncle C.J. Prettyman asked for us to figure the returns to show that the Tri Car label had the highest return because apparently the son of the gentleman at the Tri Car label packing house was working for C.J. Prettyman at the time.

The actual handwritten note on the face of the "jacket" reads in relevant part as follows:

Karen — We are using Jack Bunting Repack Crew (mexicals[?] only) so we can get through these Asap Due to poor quality on cukes & Heavy Soft and decay on Red [illegible] Please see Jack's Work sheets as soon as Available for Packouts for Actual costs — But, I will give you separate sheets to pay from, as uncle C. J. asked for us to figure Returns to show "tricar" label with Highest Return. I think the guy's son works for C.J. .
..

At the top of a typed accounting dated 3/10/93, apparently received from one of respondent's customers (exhibit 3-40 to the answering statement), is the following hand written note:

Karin — Charge Back Pepper as shown in schedule belowe (sic) — You'll notice the lions share on the Red Goes to Uncle C.J. — We'll try to make him look good! also charge 1.35 freight to Franks 1 1/9 return on all 249 Cases sent to Finer — as uncle C.J. wants the Tricar Return to look Better!

The record shows clearly that "Franks" refers to what is designated on the inspection as the "Signature Brand" peppers, and it is evident that such peppers originated from one grower, and the "Tricar" brand from another. All of this appears to us to be a clear admission of a willingness to render a fraudulent accounting, and on this basis we will not give full credence to any of respondent's accountings herein, but will utilize sales figures from such accountings to the minimal extent necessary to avoid detriment to complainant when appropriate market reports are not available.

Other problems with respondent's accountings should be noted. Often respondent mingled produce with identically described produce from other shippers. It is therefore often impossible to see how, or on what basis, respondent allocated returns in its accountings. Moreover, much of the product was shipped to distant markets and incurred significant additional freight charges.

Much of the product thus shipped was distressed merchandise that respondent had caused to be reworked. As an example of the many perplexing aspects of respondent's accountings, in respondent's answering statement, respondent states as to load 3 that ". . . Complainant changed the freight arrangement from none to a collect basis while the truck was in route." Respondent then refers to:

. . . a check for the freight number 011979 in the amount of \$1,778.00 (note that the freight checks are all handwritten and not machine written because they had to be done dock side, as the Respondent was not anticipating being charged C.O.D. when the truck arrived).

This check, made out to West Florida Truck Brokers, and dated 2/27/93, is attached as an exhibit to the answering statement. However, on its accounting, respondent charges complainant with freight totaling \$2,657.00. This total does not include freight incurred in shipping the produce to distant customers. Such additional freight was also charged to complainant as follows:

To Finer in Philadelphia:

101 Sel Cukes	\$2.45 per ctn.	\$247.45
131 Sel (plane) Cukes	2.45 " "	294.75
40 Lg Red Pep (Tricar)	1.45 " "	58.00
87 " " " "	1.45 " "	126.15
60 Med Red Pep (Franks)	1.45 " "	87.00
62 Xlg Red Pep (Tricar)	1.45 " "	89.90

To Central in Jacksonville:

100 Sel Cukes	\$.75 per ctn.	<u>\$ 75.00</u>
		\$978.25

We were unable to determine the reason for the charge back to complainant of \$2,657.00 in freight, when the freight paid by respondent was apparently only \$1,778.00.

In situations such as this, where there is no useable accounting, we have often used the percentage of condition defects shown by a timely neutral inspection as

a basis for computing damages.⁴ In employing this method we are seeking to approximate the damages encountered by a party who has failed to prove damages in the normal manner due to a failure by such party to account properly. Therefore, we exercise caution so as to not risk harm to the party who was entitled to the absent or inadequate accounting.⁵ In the past we have used only condition defects as a basis for computing damages because in most instances we were dealing with product which was sold without reference as to grade,⁶ or were dealing with a situation in which the inspection was only for condition. In this case we have inspections that disclose both quality and condition defects, and we have determined that the contracts were for U.S. No. 1 product. If a receiver of goods, required by contract to be a U.S. grade, were to recondition the goods because of a breach, such receiver would discard not only product with condition defects but also product with any quality defects severe enough to affect the grade. In addition the receiver, if a proper accounting were rendered, would be allowed the expense incurred due to the reconditioning process. In our opinion, where the product has been sold with a U.S. grade description, we can in most cases allow both condition and quality defects to enter into the computation of damages without any risk of awarding excessive damages. If in any future case we should have reason to fear that damages may be too high as a result of following this policy we will adjust the policy accordingly. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.⁷ The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by Market News Service Reports. The

⁴See *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

⁵See *Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981).

⁶Product sold without reference to grade can have any amount of quality defects so long as such defects are not so extensive as to cause the goods to be unmerchantable.

⁷See UCC § 2-714(2).

second method of ascertaining the value the goods would have had if they had been as warranted is to use the delivered price of the commodity, that is the f.o.b. price plus freight.⁸ For the 140 cartons of 15 pound carton extra large red peppers [lot "C" on the federal inspection certificate] there are no appropriate market reports, and we will therefore use the delivered price contained on complainant's invoice, or \$1,995.00, as the value these peppers would have had if they had been as warranted. In the absence of a useable accounting we can arrive at a value for the goods accepted by multiplying the combined quality and condition defects shown on the inspection report by the value of the peppers if they had been as warranted, and deducting the product from the \$1,995.00 figure. The combined defects amounted to 29 percent, and this multiplied by \$1,995.00 equals \$578.55. This amount deducted from \$1,995.00 yields \$1,416.45, which we determine to be the value of the goods accepted. The value of the goods accepted deducted from the value of the goods had they been as warranted yields respondent's damages, which amount to \$578.55.⁹ Since respondent accepted the peppers it became liable for the full purchase price thereof, or \$1,995.00. Respondent's damages of \$578.55 deducted from this amount yields a balance of \$1,416.45. Using a 25 pound figure for the 566 cartons of 1 and 1/9 bushel peppers, 15 pounds for the 140 15 pound peppers, and 55 pounds for the 422 cartons of cucumbers, the total weight of the load was 39,460 pounds. At a total freight cost of \$1,778.00 the load cost \$.045058286 per pound to transport to respondent's place of business in Florida. The freight applicable to the 140 cartons of peppers was therefore \$94.62. This amount deducted from the balance of \$1,416.45 leaves \$1,321.83 as the amount still owing from respondent to complainant on this lot of peppers.

There are no applicable market quotations for the 196 cartons [a part, along with the 98 cartons of medium red bell peppers, of lot "D" on the federal inspection certificate] of extra large red bell peppers. Accordingly we will use the delivered price of \$3,969.00 as the value of these peppers if they had met contract requirements, and allow respondent as damages the combined quality and condition defects shown on the inspection report. Such defects amount to 23 percent, and accordingly respondent's damages as to this lot amount to

⁸*Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983).

⁹This figure is, of course, the same as that derived from multiplying the percentage of defects by the value the goods would have had if they had been as warranted, and when the percentage of defects method of computing damages is used such will always be the case. We have set forth all the steps so as to clarify the methodology, but will refrain from doing so in subsequent computations.

\$912.87. Since respondent accepted the load it is liable for the purchase price of \$3,969.00, less its damages of \$912.87, and freight in the amount of \$220.79, or \$2,835.34.

As to the 98 cartons of medium red bell peppers which were also a part of federal inspection lot "D" the Federal-State Market News Fruit and Vegetable Reports for Miami on March 3 through 5, 1993, show medium size red bell peppers from Mexico selling for \$20.00 to \$22.00 per 1 and 1/9 bushel carton. Applying the average of these prices the 98 cartons of peppers had a value, if they had been as warranted, of \$2,058.00. Using the 23 percent defects applicable to this lot respondent's damages amount to \$473.34. The freight which should be allocated to this lot is \$110.39. These amounts deducted from the purchase price of \$1,788.50, leaves \$1,204.77 as the amount still owing from respondent to complainant on these peppers.

The 165 cartons of extra large red bell peppers were a part, along with the 107 cartons of large red bell peppers, of federal inspection lot "A." There are no applicable market reports for the 165 cartons. Accordingly we will use the delivered price of \$2,021.00 as the value of these peppers if they had met contract requirements, and allow respondent as damages the combined quality and condition defects shown on the inspection report. Such defects amount to 47 percent, and accordingly respondent's damages as to this lot amount to \$949.99. Since respondent accepted the load it is liable for the purchase price of these peppers, or \$2,021.25, less its damages of \$949.99, and freight in the amount of \$185.87, or \$885.39.

As to the 107 cartons of large red bell peppers which were also a part of federal inspection lot "A" the Federal-State Market News Fruit and Vegetable Reports for Miami on March 4 and 5, 1993, show large size red bell peppers from Mexico selling for prices of \$26.00 to \$28.00 per 1 and 1/9 bushel carton. Applying the average of these prices the 107 cartons of peppers had a value, if they had been as warranted, of \$2,889.00. Using the 47 percent defects applicable to this lot respondent's damages amount to \$1,357.83. Respondent is also entitled to be credited for freight on this lot in the amount of \$120.53. Since respondent accepted the load, it became liable for the \$1,310.75 purchase price. Respondent's damages exceed the purchase price for this lot by \$167.61.

The cucumbers were shipped open, and in the absence of market prices for similar cucumbers, we are forced to use respondent's highest reported resale price for a portion of the cucumbers, or \$6.25 per carton, as the value of the goods if they had been as warranted. At this price the 422 cartons of cucumbers would have had a value, if they had been as warranted, of \$2,637.50. Against this amount we will allow the 21 percent defects, or \$553.88. In addition

respondent is entitled to \$1,045.80 in freight. Under "open" sales we also allow for profit and handling of 20 percent, which in this case would amount to \$527.50. The total amount due on the cucumbers is therefore \$510.32. A deduction for the load of the \$134.00 inspection fee should also be allowed. The total of the amounts which we have found to be still due as to load 3 is \$6,456.04.

Load 4

The 4th load is covered by Findings of Fact 9, 10, and 11. Complainant issued three different bills or invoices as to this load. They each bear the same date, so it is impossible to tell which was issued first. One, which appears to be a bill of lading, has no price for the 840 cartons of cucumbers. A similar document contains the additional statement that the cucumbers are sold on the basis: "Joint Shipment, Price After Sale," and the invoice (submitted as an exhibit to the complaint) states a price of "\$6.50" and adds: "F.O.B. No grade." Complainant gave no explanation for the differences in these documents, and we therefore except respondent's statement that the original price was "open," that this was later changed to "Joint Shipment, Price After Sale," and that this change was ratified by respondent.

The federal inspection shows that the cucumbers did not make good delivery for cucumbers sold as U.S. No. 1, but the defects exceeded what we would allow for good delivery by only 2 percentage points. Under the price after sale terms of the joint account agreement the parties should have conferred and agreed on a price following completion of respondent's sales. This was not done, and accordingly we must assign a reasonable price to the cucumbers.¹⁰ There are no applicable market reports, and for the reasons stated earlier we will not make unqualified use of respondent's accounting. Respondent claims to have reworked the cucumbers and resold them for prices ranging from 17.5 cents per carton to

¹⁰See *Eustis Fruit Co., Inc. v. The Auster Co., Inc.*, 51 Agric. Dec. 865, at 877 (1991) where we said: "The term 'price after sale' usually contemplates the parties agreeing to a price following the prompt resale of the produce. See also *Bonanza Farms, Inc. v. Tom Lange Co., Inc.*, 51 Agric. Dec. 839, at 846 (1991); and *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990). In *Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-1228 (1980) we said "[t]he term is a subcategory of 'Open Price.'" "Open Price" assumes the parties will negotiate a price after the goods are sold. If they do not the reasonable value of the goods should be imputed. PACA Docket No. 4456, 5 Agric. Dec. 494 (1946). See also *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979).

\$16.00 per carton. We will discount the extremes of these prices and use the figure of \$5.83 which is an average of the middle range of prices. Using this amount the value the cucumbers would have had if they had been as warranted was \$4,896.98. Against this amount we will allow an offset of freight in the amount of \$2,024.00, and the cost of one of the federal inspections, or \$71.00, leaving a net amount of \$2,801.98.¹¹ Under the joint account terms complainant is entitled to \$1,400.99 on this load, less the amount of \$277.50 already paid, or \$1,123.49.

Load 5

The 5th load is covered by Findings of Fact 12 and 13. Complainant's invoice for this load totals \$9,752.50. Respondent, by complainant's admission, has paid \$6,578.02 of this amount, which leaves a balance in dispute of \$3,174.80. Respondent asserts that as a consequence of the problems on this load complainant agreed to the entire load being handled on an open basis. Respondent claims that complainant has admitted this, and cites as evidence exhibit 17 attached to the complaint. However, there is no exhibit 17 to the complaint. There is an exhibit 17 to complainant's reply to respondent's counterclaim, but it is an invoice sent by respondent to its customer Al Finer in Philadelphia covering a shipment made March 28, 1993, of 220 cucumbers, 94 select peppers and 61 red gourmet peppers. The invoice shows that the sale to Finer was open, but has no apparent connection to the subject load. We conclude that there was no agreement for load five to be handled on an open basis.

Respondent paid in full for the items shipped in load five except for the 126 cartons of super select cucumbers, and the 216 cartons of fancy zucchini squash. As to these two items respondent's accounting records deficits of \$442.64 as to the cucumbers and \$184.84 as to the zucchini. Complainant claims that respondent failed to account accurately as to these items. For the reasons stated earlier we will not give full credence to respondent's accounting. The highest sale price shown for the super select cucumbers on respondent's accounting was \$12.50 per carton. We will take this as reflecting the value of these cucumbers if they had

¹¹The freight in the amount of \$2,024.00 is the amount of the check for freight attached by respondent as an exhibit to the answer. No explanation is given as to why respondent charged \$2,200.00 for freight on its accounting. Only the cost of the first inspection is allowed since the second inspection applied to only half of the load, and was therefore worthless as an indication of whether there was a breach.

been as warranted. The 126 cartons thus had a value, if they had been as warranted, of \$1,575.00. The federal inspection showed a total of 25 percent defects present in these cucumbers, and we conclude that respondent's damages as to the cucumbers amount to \$393.75. In addition respondent should be allowed freight. Assuming the spaghetti, acorn, and butternut squash weighed 50 pounds per carton, the cucumbers 55 pounds per carton, and the zucchini 21 pounds per carton, the total weight of the load was 42,246 pounds. The freight cost was \$2,024, or \$.047909861 per pound. The 126 cartons of cucumbers weighed 6,930 pounds, and the freight allocable to such cucumbers amounts therefore to \$322.02. Respondent's damages and freight deducted from the invoice cost of \$1,197.00 leaves \$481.23 as the correct amount due on the cucumbers.

The inspection of the fancy zucchini shows 126 cartons inspected, with the count not having been made by the inspector. It appears likely that this number was an inversion of the actual number in the lot — 216 cartons. Accordingly we will use the total of 41 percent defects shown on the inspection as applicable to this load. There are no applicable market reports, and respondent's accounting shows that the lot was not reworked but was sold "as is" for \$1.4941 per carton. We will therefore use the delivered price of \$6.25 per carton, or \$1,350.00, as the value this lot of produce would have had if it had been as warranted. Respondent's damages are therefore \$553.50. In addition respondent should be allowed freight. The 216 cartons of zucchini weighed 4,536 pounds, which at \$.047909861 per pound, yields freight costs of \$217.32. These amounts deducted from the invoice cost of \$1,350.00, leaves \$579.18. The amounts due on the cucumbers and zucchini total 1,060.41. Respondent should be allowed the cost of the federal inspection, or \$199.00, as a deduction from this amount. The total remaining due from respondent to complainant on load 5 is therefore \$861.41.

Load 6

Load 6 was covered by Findings of Fact 14 and 15. Respondent contended that this load was shipped open, on an "f.o.b. delivered" basis, and attached as an exhibit to its answer a copy of a handwritten bill dated March 13, 1993, that shows the product listed without a price. However, this bill appears to us to be a bill of lading. At the bottom of the bill are the words:

**THE ABOVE MERCHANDISE RECEIVED IN GOOD ORDER AND THE
OWNER OF THE TRUCK GUARANTEES TO DELIVER LOAD FREE**

FROM DAMAGE BY HEAT FROST OR RAIN.

Beneath the above quoted words is a place for the name of the "TRUCK OWNER," "BROKER," "LICENSE NO.," "AMOUNT TO COLLECT," and a place designated "DRIVER SIGN." Respondent admits receiving the invoice showing the prices listed in the findings of fact, but there is no indication that a prompt written objection was made to such invoice. We conclude that the produce on load 6 was sold at the prices listed on complainant's invoice as reflected by Finding of Fact 14.

The federal inspection shows that neither of the lots of peppers nor the lot of cucumbers made good delivery. There are no applicable market reports for the peppers or cucumbers. Respondent's accounting shows that the highest price received for the sweet peppers was \$12.00, and the highest price received for the cucumbers was \$13.00. We will take these amounts as reflecting the value these items would have had if they had been as warranted. Accordingly, the 711 cartons of large sweet peppers would have had a value of \$8,532.00. Considering the 22 percent defects respondent's damages for this lot amount to \$1,877.04. The 420 cartons of large sweet peppers would have had a value if they had been as warranted of \$5,040.00. Respondent's damages, considering the 21 percent defects applicable to this lot, amount to \$1,058.40. The 84 cartons of cucumbers would have had a value if they had been as warranted of \$1,092.00. The 20 percent defects applicable to this lot results in damages of \$218.40. In addition to its damages respondent should be allowed the freight on this load, or \$2,000.00. Respondent's damages and freight should be deducted from the \$9,228.75 invoice price. There remains due from respondent to complainant on load 6 the sum of \$4,074.91.

Load 7

Load 7 was covered by Findings of Fact 16 and 17. Respondent contends that this load was shipped open, on an "f.o.b. delivered" basis, and attached as an exhibit to its answer a copy of a handwritten bill dated March 17, 1993, that shows the product listed without a price. However, the bill is like that referred to in our discussion above relative to load 6. Moreover, respondent's answer states that:

The amount invoiced on this load was \$12,835.50 and the amount paid by the Respondent was \$11,640.25, and the amount in controversy is \$1,195.25.

Respondent's Glen C. Thomason, after stating in his affidavit that the load was open, states that a \$2.00 per box allowance was granted by complainant on the zucchini. We conclude that this load was sold at the prices listed in finding 16.

Respondent has paid complainant a total of \$11,640.25 on this load, and asserts that the \$1,195.25 balance sought by complainant is attributable only to the large cucumbers. Complainant made no reply to this assertion and we conclude that such is the case.

The inspection covers only 41 cartons out of the 72 shipped, and cannot be taken as representative of the entire 72 carton lot.¹² The uninspected part of the load will be assumed to have no defects and will be averaged with the inspected portion. The 72 cartons will therefore be assumed to have contained a total of 17 percent defects. This exceeds what can be allowed under the terms of the contract.¹³ Respondent states that the 72 cartons were repacked into 25 cartons of 24's, 41 cartons of selects, and that 19 cartons were dumped. There are no applicable market reports. The average sale price reported for the 41 select cucumbers was 8.02.¹⁴ The 25 carton lot of 24's were reported sold at \$7.75. If we assign the \$8.02 price to the 19 cartons reported dumped, we arrive at \$674.95 as the value the large cucumbers would have had if they had been as warranted. Applying the 17 percent defects figure to this amount yields \$114.74 as respondent's damages. Respondent's freight cost on this load was \$2,024.00. Assuming the zucchini weighed 21 pounds per carton and the cucumbers weighed 55 pounds per carton, the load weighed 39,090. The freight cost per pound was thus \$.051777948. The freight applicable to the 72 cartons of cucumbers was therefore \$205.04. Respondent's damages and freight deducted from the \$1,026.00 invoice price for the large cucumbers, results in a net amount still due to complainant of \$706.22.

¹²See *Western Vegetable Exchange v. R. Moyers & Sons Wholesale Produce*, 50 Agric. Dec. 1001 (1991); *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990); *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982); *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); and *Mario Saikhon v. Russell Ward Co., Inc.*, 34 Agric. Dec. 1940 (1975).

¹³The lot, after averaging the uninspected portion with the inspected portion, does not exceed contract requirements as to either quality or condition, but only as to size. See 7 C.F.R. § 51.2227(a)(2).

¹⁴The average sale price is used because the 41 cartons were sold as a part of a 220 carton lot of selects, and the highest and lowest reported prices applied to only a few cartons.

Load 8

Load 8 was covered by Findings of Fact 18 and 19. Since respondent accepted the produce on load 8 it had the burden of proving by a preponderance of the evidence that complainant breached the contract of sale. Respondent had only the cucumbers from this load inspected, and these were inspected, not against the U.S. No. 1 grade, but against the U.S. No. 2 grade standards. Respondent makes much of the fact that the cucumbers did not "even make U.S. No. 2." Apparently, respondent's thinking was that it would thus be shown how very bad the cucumbers were. This is unfortunate, because if the cucumbers had been inspected against the U.S. No. 1 standards we might have been able to find a breach of contract. However, we have no way of knowing on the basis of the inspection against U.S. No. 2 standards whether there was in fact a breach. It is clear that the inspection of the cucumbers submitted by respondent, which was on the basis of the U.S. No. 2 grade standards, does not show a breach of the contract between the parties. This is true for the following reasons. The United States Standards for Cucumbers¹⁵ allow a tolerance for defects of "10 percent for cucumbers in any lot which fail to meet the requirements of the grade, including therein not more than 1 percent for decay,"¹⁶ and in a separate paragraph¹⁷ an additional 10 percent tolerance is allowed for off-size cucumbers. Although the 3 percent under 5 inch length was listed on the federal inspection certificate as a defect, this was for information purposes only, and off-size cucumbers are not scored as a defect against the grade, but rather against the separate size requirement of the grade. This means that in the expansion of quality and condition tolerances which we allow under the suitable shipping condition rule off-size product is not considered. If there were sufficient off-size cucumbers to exceed the tolerance for the grade the cucumbers would obviously not have graded at shipping point and there would be a material breach of contract, just as there would be a material breach for quality defects in excess of the published grade tolerance, regardless of the expansion of defects allowed

¹⁵7 C.F.R. § 51.2220 *et seq.*

¹⁶7 C.F.R. § 51.2227(a)(1).

¹⁷7 C.F.R. § 51.2227(a)(2).

under the suitable shipping condition rule.¹⁸ In the case of the cucumbers the federal inspection showed 7 percent total quality defects, which does not exceed the tolerance allowed for U.S. No. 1, and a total of 6 percent condition defects (including 1 percent decay), which, coupled with the quality defects, does exceed the tolerance for U.S. No. 1. However, under the suitable shipping condition rule we would allow an expansion to a total of 15 percent defects, including 3 percent for decay. We conclude that respondent has failed to meet its burden of proving by a preponderance of the evidence that complainant breached the contract as to load 8. Since respondent accepted the produce on load 8 it became liable to complainant for the full purchase price thereof, less a price allowance of \$1.50 per carton because of market conditions allowed by complainant on the 468 cartons of squash, or a net amount of \$8,757.00.

The total of the amounts we have found due from respondent to complainant on the eight loads is \$24,524.14. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.¹⁹ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.²⁰ We have determined that a reasonable rate is 10 percent per annum.

Respondent's counterclaim was based upon amounts claimed due as to the eight transactions which were the subject of the complaint, and the claims have been disposed of in our treatment of such transactions herein. The counterclaim should be dismissed.

Order

Within 30 days from the date of this order respondent shall pay to

¹⁸See discussion of the suitable shipping condition rule at pages 20-21 *supra*.

¹⁹*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

²⁰See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

complainant, as reparation, \$24,524.14, with interest thereon at the rate of 10% per annum from March 1, 1993, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

**CONTINENTAL GROWERS v. FISHER PROCUREMENT, INC., and
ALBERT FISHER SALES/NOGALES, INC.
PACA Docket No. R-94-0195.
Decision and Order filed November 20, 1996.**

Interstate or Foreign Commerce - Contract concerning the movement of commodity in bond.

Where commodities, which were the subject of a contract between parties in the same or separate states of the United States, never entered the commerce of the United States because the commodities moved through the United States from one foreign country to another foreign country, in bond, it was held that there was no interstate or foreign commerce within the meaning of the Act.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent Fisher Procurement, Inc., Pro se.

Respondent Albert Fisher Sales Nogales, Inc., Pro se.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$26,300.83 in connection with three container loads of mangoes shipped from one foreign country to another, in bond, through the United States.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondents which filed answers thereto denying liability to complainant.

The amount claimed in the formal complaint exceeds \$15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn

statements. Complainant filed an opening statement, and respondent Albert Fisher Sales/Nogales, Inc., filed an answering statement. Complainant filed a statement in reply. None of the parties filed a brief.

Findings of Fact

1. Complainant, Continental Growers, is a corporation whose address is 766 Market Ct., Los Angeles, California.

2. Respondent, Fisher Procurement, Inc. (hereafter "Procurement"), is a corporation whose address is 201 Monterey-Salinas Hwy., Suite G., Salinas, California. At the time of the transactions involved herein, this respondent was licensed under the Act.

3. Respondent, Albert Fisher Sales/Nogales, Inc. (hereafter "Albert"), is a corporation whose address is P. O. Box 4206, Rio Rico, Arizona. At the time of the transactions involved herein, this respondent was licensed under the Act.

4. On or about June 18, 1993, complainant sold to one of respondents one load of Mexican mangoes consisting of 3,328 cartons, mixed sizes, at \$3.50 per carton f.o.b. The load of mangoes travelled from Mexico through the port of Laredo, Texas, in bond, and, after loading onto a Sealand container, was transported in bond through the port of Houston, Texas, to a destination in the Netherlands.

5. On or about June 18, 1993, complainant sold to one of respondents one load of Mexican mangoes consisting of 3,328 cartons, mixed sizes, at \$3.35 per carton f.o.b. The load of mangoes travelled from Mexico through the port of Laredo, Texas, in bond, and, after loading onto a Sealand container, was transported in bond through the port of Houston, Texas, to a destination in the United Kingdom.

6. On or about June 21, 1993, complainant sold to one of respondents one load of Mexican mangoes consisting of 3,456 cartons, mixed sizes, at \$2.65 per carton f.o.b. The load of mangoes traveled from Mexico through the port of Laredo, Texas, in bond, and, after loading onto an H & R Transport truck, was transported in bond through the port of Sweet Grass, Montana, to a destination in Canada.

7. The formal complaint was filed on January 28, 1994, which was within nine months after the causes of action alleged herein accrued.

Conclusions

In this case we are confronted with three shipments of perishable agricultural commodities. Two of these shipments moved from Mexico to Europe, and one

moved from Mexico to Canada. Although in each case the commodities moved by truck through the United States, in each case the commodities moved through the United States in bond. In regard to transportation of goods through a country in bond an early United States Attorney General's Opinion found that the entering of merchandise for immediate exportation without any intent that it enter into commerce is not an importation.¹ Accordingly, we must conclude that the mangoes which were the subject of the three transactions did not enter the commerce of the United States.

This conclusion, however, does not necessarily dispose of the question whether we have jurisdiction over the subject transactions. The jurisdiction of the Secretary is tied by statute to interstate or foreign commerce. Section 2 of the Act provides in relevant part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce--

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail without reasonable cause, to perform any specification or duty express or implied, arising out of any undertaking in connection with any such transaction . . .² (underlining supplied)

The Act contains a very specific definition of when a "transaction" is to be considered "in interstate or foreign commerce."

A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of

¹27 Op. Att'y Gen. 440 (1909).

²7 U.S.C. § 499b(4).

that current of commerce usual in the trade in that commodity whereby such commodity and or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including in addition to cases within the above general description all cases where sale is either for shipment to another State or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.³ (underlining supplied)

Thus an interstate or foreign commerce "transaction" is not viewed as existing apart from a commodity that is a part of the current of commerce, or expected to be part of such current. "Interstate or foreign commerce" is defined as meaning:

. . . commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.⁴

The definition of "interstate or foreign commerce," quoted above from section 1(b)(3) of the Act, encompasses basically "commerce between any State . . . and any place outside thereof; or between points within the same State . . . but through any points outside thereof; . . ." It is clear that no foreign commerce is involved in this case in the sense of the term as used in the Act. The commodities moved from Mexico to Canada, and to Europe. Legally the commodities at no time entered the commerce of the United States. Therefore, there was no "commerce between any State . . . and any place outside thereof" in the sense of a foreign place outside of any State. The question remains, however, whether there was interstate commerce.

In this case the contract was made between American nationals, who at the time of contracting were within the United States. According to complainant the initial business meeting was between representatives of complainant, respondent

³7 U.S.C. §499a(b)(8).

⁴7 U.S.C. § 499a(3).

Albert, and "Buy Fresh Inc." at an office in Nogales, Arizona. Apparently the shipments were later scheduled by phone between California and Arizona. Complainant states that it was told by representatives of respondent Albert to invoice respondent Procurement. Complainant now wants us to decide whether the contract was between complainant, a company located in California, and respondent Procurement, also located in California, or between complainant and respondent Albert, located in Arizona.

There is no question that under the current concept of the constitutional meaning of interstate commerce Congress would have power to regulate the parties' contracting, whether viewed as between the two parties in California, or as between complainant in California and respondent Albert in Arizona. The question is whether Congress has sought to reach the contracting undertaken by these parties, divorced as it was from any movement, or contemplated movement, in interstate or foreign commerce, of a perishable agricultural commodity.⁵ We think that in view of the evident close tie that exists in the Act between the concept of commerce, and the movement, or contemplated movement, of commodities in, or to, or from one of the several states, the answer must be in the negative. The situation is legally no different from the hypothetical sale by a firm in California to a buyer in New York, of perishables, which remain at all times in a warehouse in Germany, or which transfer, due to the sale, from a warehouse in Germany to one in France. In this hypothetical there is an interstate sale and a foreign sale, but there is no interstate or foreign commerce as defined by the Act, because there is no movement, or contemplated movement, of a perishable commodity, into, or out of, one of the United States, and there is no current of commerce in such commodity into, or out of, one of the United States. We conclude that we lack jurisdiction over the subject matter of the complaint. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

⁵In *Tulelake Potato Distributors, Inc. v. John M. Giustino*, 52 Agric. Dec. 752 (1993), the commodity moved entirely intrastate, but was found to be a part of the current of interstate commerce. This interstate current may contain transactions in which the perishable commodities physically move only within one state, but are, on that account alone, no less a part of the general interstate movement usual in the commodities. See *The Produce Place v. United States Department of Agriculture*, 90 F.3d ____ (D.C. Cir. 1996).

JOHN F. AREKLET v. STOKELY USA, INC.
PACA Docket No. R-95-0177.
Decision and Order filed November 26, 1996.

Jurisdiction - Definition of dealer.

Jurisdiction - Definition of transaction.

Complainant, a farmer with acreage in Michigan, contracted with respondent, a canner of vegetables in Michigan, to produce green beans on 37 acres of land. The contract provided that title to the seed, and the beans produced from the seed, would at all times remain in respondent. Respondent harvested the beans as required by the contract, and then rejected them at the cannery due to the alleged presence of worms, but did not notify complainant of the rejection until after the beans were dumped. Complainant alleged that the rejection was improper, and sought to recover the value set by the contract for the beans. It was held that the transfer of the beans from complainant to respondent under the contract could fit within the meaning of the term "transaction" used in section 2 of the Act, that respondent was a dealer under section 1(b)(6) of the Act, because it purchased beans on the open market from time to time, and because the canner exception of section 1(b)(6)(C) was inapplicable due to respondent having elected to secure a license under the Act. However, respondent did not fall within the definition of dealer in section 1 vis-a-vis complainant, nor did respondent participate in a transaction covered by section 2(4), because no sale of the beans took place between complainant and respondent.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

Decision and Order issued by William G. Jenson, Judicial Officer.

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 in the amount of \$12,474.00, in connection with an alleged transaction in interstate commerce involving green beans.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00, and therefore the shortened method of procedure provided in the Rules of

Practice (7 C.F.R. § 47.20) is applicable.¹ Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Respondent did not file an answering statement. Neither party filed a brief. However, respondent's answer was accompanied by a cover letter containing extensive legal argument.

Findings of Fact

1. Complainant, John F. Areklet, is an individual whose address is (b) (6).
2. Respondent, Stokely USA, Inc., is a corporation whose address P. O. Box 248, Oconomowoc, Wisconsin. At the time of the matters involved herein respondent was licensed under the Act.
3. On April 5, 1994, complainant and respondent entered into a contract whereby complainant undertook to grow green beans which would be used in respondent's canning facility located in Michigan, the same state where the beans would be grown. The contract was a pre-printed form contract under the stylized letterhead of respondent, and provided in relevant part as follows:

1994 SNAP BEAN CONTRACT

GROWING AREA: Scottsville, Michigan Date: April 5, 1994

The undersigned Producer (herein called "Producer") and Stokely, USA, Inc. (herein called "Company") agree as follows:

During the 1994 season, Producer will plant 37 acres of snap beans from seed furnished by Company as directed and on land approved by Company.

Producer will prepare the soil, plant, fertilize and cultivate this crop in a husbandlike manner. Land is located in Section 34 Town

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

of Riverton, County of Mason
COMPENSATION: Company will pay Producer for the production of suitable snap beans according to the Schedule of Compensation and Deductions based upon the pay weight of the beans. Pay weight will be determined by deducting 8% minimum tare from the weight of the beans delivered to Company. Payment will be to Producer, as Producer hereafter designates, and will be mailed on November 3, 1994, unless Producer elects the Deferred Compensation Option.

SCHEDULE OF COMPENSATION AND DEDUCTIONS

<u>COMPENSATION</u> (Per Ton of Pay Weight)		<u>Deductions</u>
<u>Bean Size</u>	<u>Price</u>	Tare.....8% Minimum
2-4	\$140.00	Harvesting.....No Charge
5	\$ 75.00	Hauling.....No Charge
		Seed Charge.....\$1.40 per pound
		Unharvested Acreage....See Below

IRRIGATION BONUS: . . .

EARLY PLANTING BONUS: . . .

DEFERRED COMPENSATION: . . .

HARVESTING AND HAULING: Company will furnish, without charge, labor and equipment to mechanically harvest the beans and haul them to the factory, . . .

TITLE TO SEED AND CROP: Producer's interest in the seed and crop is that of a bailee of the Company. Producer has no right, title or interest in or to the seed provided by Company nor in the crop grown therefrom. All suitable acreage produced pursuant to this contract shall be delivered to Company for harvesting.

INDEPENDENT CONTRACTOR: Producer undertakes the production hereunder as an independent contractor and not as an employee of Company. Likewise, all persons employed by Producer for the purpose of this contract are employees of Producer and not of Company.

SUCCESSORS: . . .

DESIGNATION OF PAYMENT: . . .

The terms and conditions on the front and back of this contract are the entire agreement of the parties. No oral statements shall bind either of the parties. No waiver of any term or condition is effective unless expressed in writing and delivered to the other party.

In addition, the contract contained extensive provisions on the back governing, among other things, the circumstances under which respondent could abandon and reject beans that had been harvested.

4. On September 18, 1994, respondent harvested approximately 22 acres of the 37 under contract, and transported them to its canning facility. On September 19, 1994, respondent rejected the green beans due to the alleged presence of Corn Borer worms in the beans, but did not give complainant any notice of the rejection until after the green beans had been dumped on the property of another grower where they were disked into the ground before complainant could examine them.

5. An informal complaint was filed on September 30, 1994, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Respondent contends that the Secretary is without jurisdiction in this case, and also offers a defense on the merits, namely, that it acted correctly in rejecting complainant's beans because they contained an impermissible Corn Borer worm count. Respondent's first defense is that it is not a "dealer" because it's operation falls within the canner exception to the definition of "dealer" in section 1(b)(6) of the Act.²⁷ This section provides as follows:

The term "dealer" means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such

²⁷ U.S.C. § 499a(b)(6).

commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph (4) of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a "dealer".

Respondent's reliance on the canner exception is obviously misplaced because respondent has elected to secure a license, and the last sentence of the paragraph quoted above obviates the canner exception for those who elect to secure a license. However, respondent does not need to rely upon the canner exception vis-à-vis complainant. The definition of "dealer," from which respondent seeks exclusion by means of the canner exception, already excludes respondent's relationship with complainant. "The term 'dealer' means any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce," Complainant did not sell the beans to respondent because the contract provided that title to the seed from which the beans were grown, and well as the beans themselves, always resided in respondent.

While it is undoubtedly true that the lack of applicability of the canner exception makes respondent a "dealer" in some of its relationships, such as occasional purchases of beans on the open market,³ the fact that respondent is thus be classed as a dealer does not help complainant. Section 2(4) of the Act⁴ provides:

It shall be unlawful in or in connection with any transaction in interstate

³Respondent's plant manager alleged, during the informal stage of this proceeding (exhibit 3 to the Department's report of investigation), that, as a result of the rejection of complainant's beans, respondent "had to go to an outside broker for additional beans to meet our budget at a higher cost for both raw product and trucking."

⁴7 U.S.C. § 499b(4).

or foreign commerce:

- (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (underlining supplied)

The underlined words of the section are very broad. In addition, the term "transaction," standing alone, would be broad enough to cover the contracted bean transfer between complainant and respondent. Also, the record certainly suggests that respondent failed to live up to both express and implied duties arising out of the "undertaking" contained in the contract. However, such failures must arise out of an undertaking in connection with what is termed "any such transaction." The "transaction" referred to is one "involving any perishable agricultural commodity which is . . . bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer . . ." The bean transfer here, even though it qualifies as a transaction, and even though respondent is considered a dealer, was not one involving a perishable commodity which was bought or sold. We conclude that the Secretary does not have jurisdiction over the contract between complainant and respondent. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: EAST COAST PRODUCE, INC.

PACA Docket No. D-96-0516.

Order Dismissing Notice to Show Cause and Complaint filed July 18, 1996.

Julie C. Schuster, for Complainant.

Luis A. Espino, Miami, FL, for Respondent.

Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to complainant's motion to withdraw its notice to show cause and complaint, it is ordered that they be dismissed.

In re: QUALITY FIRST MARKETING, INC.

PACA Docket No. D-95-0519.

Dismissal filed July 19, 1996.

Kimberly Hart, for Complainant.

Melinda Vaughn, Fresno, CA, for Respondent.

Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon the motion of Complainant and for good cause shown, the complaint in the above-captioned proceedings is hereby dismissed.

In re: MARK TATGENHORST.

PACA APP Docket No. 96-0004.

Order Dismissing Appeal filed August 23, 1996.

Eric Paul, for Complainant.

Respondent, Pro se.

Order issued by James Hunt, Administrative Law Judge.

On April 23, 1996, petitioner Mark Tatgenhorst filed a petition seeking review of a determination that he was responsibly connected with Eat More Citrus Company under section 1(9) of the Perishable Agricultural Commodities

Act.

Pursuant to a telephone conference on June 25, 1996, with petitioner and respondent's attorney, Eric Paul, it was agreed that a telephone hearing would be conducted on August 6, 1996, beginning at 1 p.m. Eastern Time and 10 a.m. Pacific Time. A formal notice of the hearing was sent to petitioner on July 15, 1996.

Petitioner did not appear at the time scheduled for the hearing. An order was sent to petitioner directing him to show cause by August 19, 1996, why his petition should not be dismissed because of his failure to appear for the hearing. Petitioner did not respond.

Accordingly, it is ordered that the petition be dismissed with prejudice.

In re: J. MIRANDO PRODUCE CORPORATION.

PACA Docket No. D-96-0529.

Order of Dismissal-Cancellation of Hearing filed August 26, 1996.

Eric Paul, for Complainant.

Mark C.H. Mandell, Annandale, NJ, for Respondent.

Order issued by Edwin S. Bernstein, Administrative Law Judge.

On August 20, 1996, Respondent filed a notice of withdrawal of its license application and requested that Complainant's Notice to Show Cause be dismissed. With the concurrence of Complainant's counsel, Respondent's motion is granted. As stated in Complainant's response, filed August 26, 1996, Respondent's license application fee will be refunded.

Respondent's license application is withdrawn and it is ordered that the Notice to Show Cause, filed herein on July 26, 1996, be dismissed.

The hearing scheduled for November 26, 1996, in New York City is canceled.

In re: JOHN J. CONFORTI, d/b/a C & C Produce.

PACA Docket No. D-94-0524.

Order Lifting Stay filed October 29, 1996.

Andrew Y. Stanton, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondent.

Order issued by William G. Jenson, Judicial Officer.

On February 28, 1995, the Judicial Officer issued a Decision and Order herein which, *inter alia*, suspended Respondent's Perishable Agricultural Commodities Act (hereinafter PACA) license. Respondent filed an appeal with the United States Court of Appeals for the Eighth Circuit, and, on March 28, 1995, Respondent requested a stay pending the outcome of proceedings for judicial review, which the Judicial Officer granted on April 3, 1995. The Eighth Circuit affirmed in part and reversed in part the Judicial Officer's Decision and Order. *Conforti v. United States*, 74 F.3d 838 (8th Cir.), *cert. denied*, ___ U.S. ___, 65 U.S.L.W. 3256 (1996). Respondent filed a petition for a writ of certiorari with the United States Supreme Court, which the Court denied on October 7, 1996.

On October 22, 1996, Complainant filed a Motion to Lift Stay Order stating that Respondent's counsel has indicated that Respondent will not seek further judicial review and has requested that Complainant move to lift the April 3, 1995, Stay Order. Accordingly, the Stay Order issued April 3, 1995, is lifted. In accordance with *Conforti v. United States*, *supra*, 74 F.3d at 843, the Judicial Officer's Decision and Order issued February 28, 1995, is effective, except that the sanction imposed by the Judicial Officer is vacated and the sanction imposed by Administrative Law Judge James W. Hunt in the Initial Decision and Order filed in this proceeding, PACA Docket No. D-94-524 (July 28, 1994), is reinstated. Therefore, Respondent's PACA license is suspended for 30 days effective on the 30th day after service on Respondent of this Order Lifting Stay.

In re: SCAMCORP, INC., d/b/a GOODNESS GREENESS.

PACA Docket No. D-95-0502.

Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal filed November 7, 1996.

Kimberly D. Hart, for Complainant.

Michael J. Keaton, Naples, FL, for Respondent.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Ruling issued by William G. Jenson, Judicial Officer.

On August 19, 1996, Respondent filed Respondent's Motion to Dismiss Appeal as Untimely Under 7 C.F.R. § 1.145 and to Enlarge Time to File Response Until After Resolution of this Motion (hereinafter Respondent's Motion to Dismiss Appeal), and on September 10, 1996, Complainant filed Complainant's Response to Respondent's Motion to Dismiss Complainant's

Appeal as Untimely Filed (hereinafter Complainant's First Response). On September 18, 1996, I issued a Ruling on Respondent's Motion to Dismiss Appeal in which: I found that Complainant was served with the Initial Decision and Order in this proceeding on June 25, 1996; I found that Complainant's Notice of Petition of Appeal and Appeal Brief (hereinafter Complainant's Appeal Petition), filed July 24, 1996, was filed timely; I denied Respondent's Motion to Dismiss Appeal; and I extended the time for filing Respondent's response to Complainant's Appeal Petition to October 9, 1996.

On September 27, 1996, Respondent filed Respondent's Motion for Reconsideration of Order Denying Motion to Dismiss Appeal as Untimely (hereinafter Respondent's Motion for Reconsideration), and on October 22, 1996, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration of the Order Denying Motion to Dismiss Complainant's Appeal Petition as Untimely (hereinafter Complainant's Second Response).

Respondent raises four issues in Respondent's Motion for Reconsideration. First, Respondent contends that I erroneously found in the Ruling on Respondent's Motion to Dismiss Appeal that Complainant was served with the Initial Decision and Order in this proceeding in accordance with section 1.147(c)(3)(i) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.147(c)(3)(i)). (Respondent's Motion for Reconsideration at 2-3.)

Respondent's premise is that Complainant is either the Secretary or an agent of the Secretary. Consequently, Complainant could not have been served with the Initial Decision and Order in accordance with section 1.147(c) of the Rules of Practice, (7 C.F.R. § 1.147(c)), because 7 C.F.R. § 1.147(c) provides methods of service on any party to a proceeding, other than the Secretary or an agent of the Secretary. However, Respondent posits no alternative provision in the Rules of Practice by which Complainant was served with the Initial Decision and Order. (Respondent's Motion for Reconsideration at 3.)

As an initial matter, I find that Complainant must be served with the Initial Decision and Order in accordance with section 1.147 of the Rules of Practice, (7 C.F.R. § 1.147), in order to begin the period within which Complainant's appeal of the Initial Decision and Order may be filed. Section 1.145(a) of the Rules of Practice establishes service of the Initial Decision and Order as the commencement of the period within which an appeal may be filed, as follows:

§ 1.145 Appeal to the Judicial Officer.

- (a) *Filing of petition* Within 30 days after receiving service of the

Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Section 1.142(c)(3) of the Rules of Practice provides that the parties, which term includes the Complainant herein,¹ must be served with any written Initial Decision and Order in accordance with section 1.147 of the Rules of Practice, as follows:

§ 1.142 Post-hearing procedure.

....

(c) *Judge's decision.* . . .

....

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in § 1.147.

7 C.F.R. § 1.142(c)(3).

The Initial Decision and Order filed in this proceeding is in writing. (See Chief Administrative Law Judge Victor W. Palmer's Decision and Order, PACA Docket No. D-95-502 (June 18, 1996).) Therefore, the Initial Decision and Order must be served on Complainant in accordance with section 1.147 of the Rules of Practice, (7 C.F.R. § 1.147), and the period in which Complainant may appeal the Initial Decision and Order begins when Complainant receives service of the Initial Decision and Order, in accordance with section 1.147 of the Rules of Practice, (7 C.F.R. § 1.147).

Complainant contended in Complainant's First Response that Complainant had been served with the Initial Decision and Order issued in this proceeding in accordance with section 1.147(c)(1) of the Rules of Practice, (7 C.F.R. §

¹Section 1.132 of the Rules of Practice, (7 C.F.R. § 1.132), defines the word *Complainant* as the party instituting the proceeding.

1.147(c)(1)), as modified by a practice established by the Office of the Hearing Clerk, (Complainant's First Response at 2-4). Complainant has abandoned this position and now contends that Complainant, as an agent of the Secretary, was served in accordance with section 1.147(d)(2) of the Rules of Practice, (7 C.F.R. § 1.147(d)(2)). (Complainant's Second Response at 5-8.)

Section 1.147(d)(2) of the Rules of Practice provides, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(d) *Service on another.* Any subpoena, written questions for a deposition under § 1.148(d)(2), or other document or paper, served on any person other than a party to a proceeding, the Secretary or agent thereof, shall be deemed to be received by such person on the date of:

. . . .

(2) Delivery other than by mail to any responsible individual at . . . any such location[.]

7 C.F.R. § 1.147(d)(2).

Even if I were to find that Complainant is the Secretary or the Secretary's agent for the purposes of service under the Rules of Practice (which I do not so find), section 1.147(d) of the Rules of Practice would not apply to service on Complainant, because Complainant is a party to the proceeding,² and section 1.147(d) specifically applies to any person *other than a party to a proceeding*. Further, I find that the language in the introductory provision of section 1.147(d) of the Rules of Practice, (7 C.F.R. § 1.147(d)), specifically excludes from the scope of section 1.147(d), not only parties to the proceeding, but also the Secretary and the Secretary's agents.³

Moreover, the supplementary information in the rulemaking document adding section 1.147(d) to the Rules of Practice specifically states that the rulemaking

²See note 1.

³I read the words *other than* in the introductory provision of section 1.147(d) to refer to: (1) a party to the proceeding; (2) the Secretary; and (3) agents of the Secretary.

document is not designed to change the method by which the Secretary or the Secretary's agents are served, and that the Secretary and the Secretary's agents are served when documents are received by the Hearing Clerk, as follows:

SUPPLEMENTARY INFORMATION:

....

... No change is made in the method of filing, or service on the Secretary or agent thereof, and service of such documents will be considered made when the documents are received by the Hearing Clerk.

55 Fed. Reg. 30,673 (1990).

Therefore, I find that Complainant was not served with the Initial Decision and Order in accordance with section 1.147(d) of the Rules of Practice, (7 C.F.R. § 1.147(d)). Since section 1.142(c)(3) of the Rules of Practice requires service of the Initial Decision and Order in accordance with section 1.147, and the only method by which service can be made under section 1.147 of the Rules of Practice, other than that provided in section 1.147(d), is in section 1.147(c), I find that, for the purposes of the service provisions in section 1.147 of the Rules of Practice, Complainant is not the Secretary or the agent of the Secretary and that Complainant was served with the Initial Decision and Order in accordance with section 1.147(c) of the Rules of Practice, (7 C.F.R. § 1.147(c)). More specifically, and for the reasons in the Ruling on Respondent's Motion to Dismiss Appeal filed September 18, 1996, I find that Complainant was served in accordance with 7 C.F.R. § 1.147(c)(3)(i).

Second, Respondent contends that Complainant admitted in Complainant's First Response that Complainant was served with the Initial Decision and Order on June 21, 1996, as follows:

[T]he JO's Ruling effectively ignored the fact the Complainant expressly admitted the Initial Order was received in the principal place of business of its counsel of record on Friday, June 21, 1996. See Complainant's Response, p. 4. Under the plain language of § 1.147(c)(3)(i), the service provision under which the JO determined service here was made, requires three things for "any document" to be "deemed received by such party", these are:

- 1) "[d]elivery to any responsible individual...";

- 2) "at,... the last known principal place of business of";
- 3) "the party,... (or) the attorney or representative of record of such party."

Respondent’s Motion for Reconsideration at 3-4. (Footnote omitted.)

Complainant’s statement, which Respondent characterizes as Complainant’s express admission, reads, as follows:

While complainant’s attorney readily admits that its copy of the decision and order arrived in the main office on Friday, June 21, 1996 as indicated by the date stamped on the cover letter, the fact remains that no one signed for the decision and complainant’s attorney was not aware of the arrival of the decision and order until Tuesday, June 25, 1996 which is the date on which complainant’s attorney verified receiving said decision and order by signing and dating the cover sheet and returning same to the Hearing Clerk’s Office. Despite respondent’s implication that complainant’s attorney purposely chose to leave the decision and order in the "in box" until Tuesday, June 25, 1996 when she had the time to "pull it out", the facts clearly show that respondent’s scenario has no basis in reality. Complainant’s attorney was on approved sick leave on Friday, June 21, 1996 and out of the office the entire day of Monday, June 24, 1996 which made it impossible for her to have any notice of the arrival of the decision and order in the main office until her return on Tuesday, June 25, 1996 as indicated by the records.

Complainant’s First Response at 4.

Section 1.147(c)(3)(i) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

.....

(c) *Service on party other than the Secretary.* . . .

.....

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at . . . the . . . last known principal place of business of the attorney or representative of record of such party. . . .

7 C.F.R. § 1.147(c)(3)(i).

I do not find that Complainant's statement that the Initial Decision and Order arrived in the main office on June 21, 1996, constitutes an admission that the Initial Decision and Order was delivered to a *responsible individual at the last known principal place of business of the attorney or representative of record*, on June 21, 1996. Rather, the statement referenced by Respondent as Complainant's admission that Complainant was served with the Initial Decision and Order on June 21, 1996, appears to be a denial of that fact and an assertion that the Initial Decision and Order was first delivered to a *responsible individual at the last known principal place of business of the attorney of record* on June 25, 1996.

Further, the proof of service in the record establishes that Complainant was served with the Initial Decision and Order on June 25, 1996. Section 1.147(e) of the Rules of Practice provides:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(e) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature;

(2) An official record of the postal service;

(3) An entry on a docket record or a copy placed in a docket file by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;

(4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided* that such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record of such party, or an official or employee of the United States or of a State or political subdivision thereof.

7 C.F.R. § 1.147(e).

A copy of the service letter, which accompanied the Initial Decision and Order to Respondent, was signed and dated by Complainant's counsel and placed in the record of this proceeding. (See Appendix.) While it is apparent from the face of the service letter signed and dated by Complainant's counsel that it constitutes proof of service of the Initial Decision and Order on Complainant on June 25, 1996, as provided in section 1.147(e) of the Rules of Practice, reference to section 14 of the Hearing Clerk's Office Procedures Manual makes transparent the import of Complainant's counsel's signature and date of Complainant's counsel's signature, as follows:

ALJ's DECISION AND ORDER (INITIAL DECISION)

Instructions

1. Serve Decision giving the parties 30 days to file an appeal and advising them how many copies of the appeal will be needed. Parties should submit an original and two copies. If there are more than two parties, an additional copy should be submitted for each additional party. (See **SAMPLE LETTER**)
 - The Decision should be served on the Respondent's Attorney by **certified mail**. If Respondent does not have an attorney, serve on Respondent by **certified mail**.
 - Make an extra copy of the service letter and put this stamp on it.

COPY OF THIS LETTER AND/OR ATTACHMENT
 RECEIVED THIS DATE _____
 Month Day Year

SIGNATURE OF/FOR GOVERNMENT ATTORNEY

When internal distribution is made to the OGC attorney, the extra copy should be dated, signed and returned to this office for computation of the due date for complainant's appeal.

Hearing Clerk's Office Procedures Manual § 14 (Aug. 1995). (Emphasis in the original.)

Third, Respondent contends that:

The JO's reference [in the Ruling on Respondent's Motion to Dismiss Appeal] to the internal publication identified as the Hearing Clerk's Office Procedures Manual is improper as such information is not generally known to litigants appearing before the USDA and such pronouncements are not subjected to the type of public notice and comment as are the regulations promulgated under the Act. See Exportal LTDA v. United States, et al., 902 F.2d 45, 50 (D.C. Cir. 1990).

Respondent's Motion for Reconsideration at 4 n.4.

The Hearing Clerk's Office Procedures Manual is an employee handbook that provides guidance to employees of the Office of the Hearing Clerk, not members of the public. Therefore, the Hearing Clerk's Office Procedures Manual is not required to be published in the *Federal Register*, in accordance with notice-and-comment procedures in 5 U.S.C. § 553. *See Lake Mohave Boat Owners Ass'n v. National Park Service*, 78 F.3d 1360, 1368 (9th Cir. 1996) (National Park Service agency staff manual containing rate-setting guidelines, not required to be published in the *Federal Register*); *Capuano v. National Transp. Safety Bd.*, 843 F.2d 56 (1st Cir. 1988) (Federal Aviation Administration enforcement staff manual regarding sanction policies, not required to be published in the *Federal Register*); *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1983) (Occupational Safety and Health Administration inspection program, an internal procedure for selecting establishments to be inspected, not required to be published in the *Federal Register*); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 760 (D.C. Cir. 1978) (United States Attorney's staff manuals relating to the exercise of prosecutorial discretion by the United States Attorney for the District of Columbia, not required to be published in the *Federal Register*); *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1306 (8th Cir. 1978) (Drug Enforcement Administration staff manual, not required to be published in the *Federal Register*).

Section 14 of the Hearing Clerk's Office Procedures Manual, which was quoted in the Ruling on Respondent's Motion to Dismiss Appeal, does not amend the Rules of Practice and specifically does not change the method, date, or proof of service provisions in the Rules of Practice. Respondent is not affected by section 14 of the Hearing Clerk's Office Procedures Manual, and I do not find that the reference to section 14 of the Hearing Clerk's Office Procedures Manual in the Ruling on Respondent's Motion to Dismiss Appeal was improper.

Fourth, Respondent contends that the Ruling on Respondent's Motion to

Dismiss Appeal is contrary to the "plain language of § 1.145" to the extent that I held therein that I would not have granted Respondent's Motion to Dismiss Appeal even if I had found that Complainant had been served with the Initial Decision and Order on June 21, 1996. (Respondent's Motion for Reconsideration at 5-8.)

Section 1.145(a) of the Rules of Practice provides:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

As I stated in the Ruling on Respondent's Motion to Dismiss Appeal, even if I had found that Complainant was served with the Initial Decision and Order on June 21, 1996, I would not have granted Respondent's Motion to Dismiss Appeal because Complainant's Appeal Petition, although filed more than 30 days after June 21, 1996, was filed before the Initial Decision and Order became effective.

Section 1.142(c)(4) of the Rules of Practice provides:

§ 1.142 Post-hearing procedure.

....

(c) *Judge's decision.* . . .

....

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145. . . .

7 C.F.R. § 1.142(c)(4).

The written Initial Decision and Order was served on Respondent on June 25, 1996, and, in accordance with section 1.142(c)(4) of the Rules of Practice, (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order was to become effective 35 days later, July 30, 1996.⁴ Complainant filed Complainant's Appeal Petition on July 24, 1996.

The former Judicial Officer, Donald A. Campbell, who assisted with drafting the Rules of Practice, explained the reason for providing that an initial decision does not become final and effective until after the time for appeal, as follows:

Since I reviewed various drafts of the . . . Rules of Practice issued in 1977, and discussed them with attorneys drafting the rules, I am familiar with the reason for providing that the initial decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. That was done so that if an appeal was inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for filing a late appeal.

In re William T. Powell, 44 Agric. Dec. 1220, 1222 (1985). *See also In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished).

Therefore, consistent with the Rules of Practice and Department precedent,⁵

⁴Moreover, the Initial Decision and Order specifically provides:

This decision and order shall become final and effective thirty-five days after Respondent receives service of it, subject to the right of either party to appeal it to the Judicial Officer as provided in 7 C.F.R. § 1.145.

Initial Decision and Order at 17.

⁵*In re Sandra L. Reid*, 55 Agric. Dec. ___, slip op. at 5 (July 17, 1996) (2-day extension of time granted to Respondent for filing an appeal 32 days after service of the Default Decision on Respondent but prior to the effective date of the Default Decision); *In re William T. Powell*, *supra*, 44 Agric. Dec. at 1222 (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Rinella's Wholesale, Inc.*, *supra* (if the appeal is filed before the Initial Decision and Order becomes effective,

even if I had found that Complainant was served with the Initial Decision and Order on June 21, 1996, (rather than June 25, 1996, which was the date the Initial Decision and Order was served on Complainant), and Complainant had filed Complainant's Appeal Petition 33 days after receiving service of the Judge's decision, I would have granted a 3-day extension of time to Complainant to file Complainant's Appeal Petition, because Complainant's Appeal Petition was filed 5 days before the day the Initial Decision and Order was to become final and effective.

Respondent further states that the Judicial Officer's proffered reason for acceptance of late-filed appeals, filed prior to the effective date of Initial Decisions and Orders, is the potential for delay in the mail. Respondent contends that, since Complainant did not use the mail to file Complainant's Appeal Petition, there is no potential for a delay in the mail; and therefore there is no basis for acceptance of Complainant's late-filed appeal. (Respondent's Motion for Reconsideration at 7 n.6.)

Neither the Rules of Practice nor Department precedent restricts the Judicial Officer as to the circumstances that may be considered in determining whether to accept a late-filed appeal. The Judicial Officer has consistently held that a late-filed appeal may be accepted if the appeal is inadvertently filed late, as long as the late-filed appeal is filed prior to the effective date of the Initial Decision and Order.⁶ The references to a delay in the mail in the Judicial Officer's previous decisions regarding this issue were by way of example only and do not constitute a self-imposed limitation on the Judicial Officer's jurisdiction to accept a late-filed appeal that is filed prior to the effective date of an Initial Decision and Order.

Further still, Respondent, relying on *In re Mary Fran Hamilton*, 45 Agric.

the Judicial Officer may grant an extension of time for filing a late appeal); *In re Palmer G. Hulings*, *supra* (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Toscony Provision Co.*, *supra* (if the appeal is filed before the Initial Decision and Order becomes effective, the Judicial Officer may grant an extension of time for filing a late appeal); *In re Miguel A. Machado* (Decision as to Respondent Cozzi), 42 Agric. Dec. 1454, 1455 n.3 (1983) (in accordance with the practice of this Department, Complainant's appeal of an Initial Decision and Order, 32 days after service of the Initial Decision and Order on Complainant, accepted late since it was filed before the Initial Decision and Order became final), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

⁶See note 5.

Dec. 2395 (1986) and *In re Yankee Brokerage Inc.*, 42 Agric Dec. 427 (1983), contends that the Judicial Officer has never allowed a party to escape dismissal of its appeal due to a delay in the mail. (Respondent's Motion for Reconsideration at 7 n.6.) I do not find Respondent's argument relevant to this proceeding, because, as Respondent contends, the record does not indicate that Complainant filed Complainant's Appeal Petition by mailing it to the Hearing Clerk. Moreover, Respondent's contention that the Judicial Officer has not accepted a late-filed appeal based upon delay in the mail is incorrect and Respondent's reliance on *Hamilton* and *Yankee Brokerage* is misplaced. In *Hamilton* and *Yankee Brokerage*, each Respondent therein filed an appeal on the day the applicable Initial Decision and Order became final and effective. It has continuously been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed on the day the Initial Decision and Order becomes final and effective or on any day after the Initial Decision and Order becomes final and effective.⁷ Unlike *Hamilton* and *Yankee Brokerage*,

⁷*In re Field Market Produce, Inc.*, 55 Agric. Dec. ___, slip op. at 10 (July 10, 1996) (Judicial Officer has no jurisdiction to consider Respondent's Appeal Petition filed more than 35 after service of a Default Decision); *In re Ow Duk Kwon*, 55 Agric. Dec. 78, 83 (1996) (Judicial Officer has no jurisdiction to consider Respondent's Appeal Petition filed more than 35 after service of a Default Decision); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton*, *supra* (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell*, *supra* (it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Yankee Brokerage, Inc.*, *supra* (Judicial Officer has no jurisdiction to hear Respondent's appeal received by the Hearing Clerk on the day the Initial Decision and Order became final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider

Complainant filed Complainant's Appeal Petition 5 days before the date on which the Initial Decision and Order was to become final and effective. The Judicial Officer has jurisdiction to grant extensions of time to allow parties to file appeals before the Judge's Initial Decision and Order becomes effective, including in those instances in which an appeal is filed late due to delay in the mail.⁸

Finally, Respondent contends that, assuming that the Judicial Officer has jurisdiction to accept a late-filed appeal, not only must the appeal be filed before the Initial Decision becomes final and effective, but also the Judicial Officer must accept the appeal before the Initial Decision and Order becomes final and effective. (Respondent's Motion for Reconsideration at 7 n.5.) Neither the Rules of Practice nor Department precedent provides any basis for Respondent's contention. Generally, the Judicial Officer will not know of a late-filed appeal, filed before the Initial Decision and Order becomes final, until after the date the Initial Decision and Order was to become final and effective. In my tenure as Judicial Officer, one case has been appealed to me in which a late-filed appeal was filed before the Initial Decision and Order became final and effective. See *In re Sandra L. Reid, supra*. In *Reid*, Respondent was served with a Default Decision on May 3, 1996, and on June 4, 1996, 32 days after Respondent was served with the Default Decision, Respondent filed an appeal with the Hearing Clerk. The *Reid* case was referred to me and I first learned of the case on July 3, 1996, well after the Default Decision would have become final and effective, but for my acceptance of Respondent's late-filed appeal. Nonetheless, I granted Respondent a 2-day extension of time for filing her appeal and deemed her appeal petition to have been timely filed. *In re Sandra L. Reid, supra*, slip op. at 5.

For the reasons set forth in my Ruling on Respondent's Motion to Dismiss

Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (since Respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

⁸See note 5.

Appeal filed September 18, 1996, and the foregoing reasons, Respondent's Motion for Reconsideration is denied, and, in accordance with my Informal Order of August 22, 1996, the time for filing Respondent's response to Complainant's Appeal Petition is extended to November 29, 1996.

APPENDIX

APPENDIX

RECEIVED
6/21/96



United States
Department of
Agriculture

Office of
the Hearing Clerk

Room 1081
South Building

Washington, D.C.
20250-9200

Telephone: 202/728-4443
Fax No.: 202/728-9776

CERTIFIED RECEIPT REQUESTED

June 20, 1996

Mr. Michael J. Keaton
Meurs & Associates, P.A.
Attorneys at Law
2590 Golden Gate Parkway
Suite 109
Naples, Florida 33942



Dear Mr. Keaton:

Subject: In re: Scamcorp, Inc., dba Goodness Greeness, Respondent -
PACA Docket No. D-95-502

Enclosed is a copy of the Decision and Order issued in this proceeding by Chief Administrative Law Judge Victor W. Palmer on June 18, 1996.

Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,

Joyce A. Dawson
JOYCE A. DAWSON
Hearing Clerk

DATE OF THIS ORDER AND/OR AGREEMENT
MAILED & THIS DATE 6/25/96
Kimberly P. Hart
DIRECTOR OF TRADE PRACTICES DIVISION

Enclosure

cc: Kimberly Hart, Trade Practices Div., OGC
Jane Servais, F&V, AMS

PMWright: 6/20/96

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEFAULT DECISIONS**

In re: MICHAEL A. GABOLDI d/b/a NEVADA FRESH.

PACA Docket No. D-96-0509.

Decision and Order filed May 17, 1996.

Failure to file an answer - Operating without a license - Failure to make full payment promptly for produce - Making false and misleading statements to induce potential sellers to sell on a credit basis - Willful, flagrant and repeated violations - Publication.

Andrew L. Stanton, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (PACA), instituted by a complaint filed on December 8, 1995, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 27 sellers of the agreed purchase prices totaling \$459,672.11 in connection with 78 transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period October 11, 1995, through November 28, 1995.

The complaint also alleged that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) in connection with transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce, by making false and misleading statements for the fraudulent purpose of inducing potential sellers to sell to respondent numerous lots of perishable agricultural commodities on a credit basis.

The complaint requested that the Administrative Law Judge issue a finding that respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499(b)(4)) and order such finding published.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of complainant for the issuance of a decision without hearing by reason

of default, the following decision and order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

(1) Michael A. Gaboldi is an individual doing business as Nevada Fresh (hereinafter, "respondent"), whose mailing address is (b) (6), (b) (6) and whose business address is 3149-A Rancho Drive, Las Vegas, Nevada 89106.

(2) At all times herein, respondent was not licensed under the PACA but was operating subject to license under the PACA.

(3) As more fully set forth in paragraph III of the complaint, respondent failed to make full payment promptly to 27 sellers of the agreed purchase prices totaling \$459,672.11 in connection with 78 transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce during the period October 11, 1995, through November 28, 1995.

(4) As more fully set forth in paragraphs IV and V of the complaint, respondent, in connection with transactions involving perishable agricultural commodities which respondent purchased, received and accepted in interstate commerce, made false and misleading statements for the fraudulent purpose of inducing potential sellers to sell to respondent numerous lots of perishable agricultural commodities on a credit basis.

Conclusions

Respondent's actions, as set forth in Findings of Fact 3 and 4 above, were in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent, Michael A. Gaboldi d/b/a Nevada Fresh, is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

This Order shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this

Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 11, 1996.-Editor]

**In re: NATIONWIDE PRODUCE CO., d/b/a NATURAL CHOICE.
PACA Docket No. D-96-0511.
Decision and Order filed May 31, 1996.**

Admission of material allegations - Failure to make full payment promptly for produce - Willful, repeated and flagrant violations - License revocation.

Kimberly Hart, for Complainant.

John A. Lapinski, Los Angeles, CA, for Respondent.

Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on January 22, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of October 1994 through July 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 39 sellers, 207 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$805,269.39. Complainant contended that respondent's failures to make full payment promptly constituted willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and requested that respondent's license be revoked.

In respondent's answer, it admitted that it failed to make prompt payment for perishable agricultural commodities which it received and accepted in interstate and foreign commerce. Specifically, respondent admits that it currently owes 28 of the 39 sellers for the transactions described above in the amount of \$567,062.49. Although respondent denies liability for some of the transactions

and alleges partial payment for other transactions, respondent has admitted that at least 71% of the produce debt, or \$567,062.49 is still owed to its produce creditors. Respondent generally denies that it willfully violated Section 2(4) of the PACA based on its assertion that it executed a General Assignment for the Benefit of Creditors to Credit Managers Association of California on September 18, 1995. Respondents admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (*In re The Caito Produce Co.*, 48 Agric. Dec. 602 (1989)). Further, respondents admission that at least \$567,062.49 of the \$805,269.39 in produce debt alleged in the complaint is still owed warrants the immediate imposition of a license revocation, as excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time (*In re Atlantic Produce Co. and Joseph Pinto*, 54 Agric. Dec. ____ (March 23, 1995)).

In view of respondent's admission of liability, the issuance of a Decision Without Hearing by Reason of Admissions is appropriate pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent, Nationwide Produce Co., doing business as Natural Choice, is a corporation organized and existing under the laws of the State of Minnesota. Its business mailing address is 1995 E. 20th Street, Los Angeles, California 90058.

2. Respondent was issued PACA license number 931511 on July 20, 1993. This license has been renewed annually and is next subject to renewal on or before July 20, 1996.

3. As more fully set forth in paragraph 3 of the complaint, during the period of October 20, 1994 through July 16, 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 39 sellers, 207 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$805,269.39. Respondent admits that it currently owes \$567,062.49 to 28 of the produce sellers contained in the complaint.

Conclusions

Respondent's failure to make full payment promptly with respect to the

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

Respondent's license is hereby revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 11, 1996.-Editor]

In re: SHARP FARMS, INC.
PACA Docket No. D-96-0513.
Decision and Order filed June 13, 1996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to make full payment promptly for produce - Willful, repeated, and flagrant violations - Publication.

Mary Hobbie, for Complainant.

Sheila Tamez, Dallas, TX, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on January 30, 1996, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of November 1994 through March 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 16 sellers, 234 lots of perishable agricultural commodities, but failed to

make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$390,704.30.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Sharp Farms, Inc., is a corporation organized and existing under the laws of the State of Texas. Its business mailing address is 815 South Good Latimer, Dallas, Texas 75226.

2. Respondent was issued PACA license number 721364 on February 22, 1972. This license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), on February 22, 1996, when it failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, during the period of November 1994 through March 1995, respondent purchased, received and accepted, in interstate and foreign commerce from 16 sellers, 234 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$390,704.30.

Conclusions

Respondent's failure to make full payment promptly with respect to the 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, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 23, 1996.-Editor]

**In re: FIELD MARKET PRODUCE, INC. d/b/a THE PRODUCE PLACE.
PACA Docket No. D-95-0516.
Decision and Order filed February 12, 1996.**

Admission of material allegations - Failure to pay annual renewal fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andrew Stanton, for Complainant.

Cari Drew, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

In this disciplinary proceeding under the Perishable Agricultural Commodities Act (7 U.S.C. § 499a *et seq.*) (PACA), a Complaint was filed on February 21, 1995, alleging that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 15 sellers for purchases of 62 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$304,814.40 during the period June 1993 through September 1993. Complainant requested that a finding be made that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that such finding be published.

Respondent's Answer consisted of a general denial and assertions that the Complaint was defective due to lack of subject matter jurisdiction, estoppel and the statute of limitations. No explanation was offered in support of these assertions.

In a September 21, 1995, conference call involving Complainant's counsel, Andrew Stanton, Esq., Respondent's counsel, Leighton Clark, Esq., and the undersigned Administrative Law Judge, Mr. Clark stated that Respondent

disputed the amount alleged to be owed by the Complaint, although he did not deny that Respondent owed money for produce purchases. Mr. Clark did not explain Respondent's allegations of a lack of subject matter jurisdiction, estoppel and the statute of limitations. Mr. Clark made no claim that Respondent had paid the amounts alleged in the complaint. I ordered Mr. Stanton to send Mr. Clark copies of Complainant's proposed evidence and witness list by November 1, 1995. Mr. Clark was ordered to reciprocate on or before November 15, 1995. Courtesy copies of the witness lists were ordered to be filed with the undersigned.

In compliance with the Order, Mr. Stanton sent Mr. Clark Complainant's proposed evidence and witness list on October 27, 1995, and filed a copy of its witness list with the undersigned. However, Mr. Clark did not provide Respondent's evidence and witness list by November 1, 1995, as ordered, and has never provided such documents.

At about 12 noon on February 8, 1996, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions together with a Proposed Decision and Order. Copies of the motion and the proposed order were immediately telefaxed to Respondent's counsel and were received by that office. The telefax transmittal sheet stated that, because the hearing was scheduled to commence within a week, Respondent's counsel was directed to transmit a written response by telefax by the close of business on February 9, 1996. It is now 3 P.M. Eastern Time on February 12, 1996. Respondent has failed to file any opposition to the motion. Therefore, the motion is granted and the proposed findings of fact, proposed conclusions of law and proposed order submitted by Complainant are adopted.

Findings of Fact

1. Respondent, Field Market Produce, Inc., doing business as The Produce Place, is a corporation organized and existing under the laws of the State of Arizona. Its business mailing address is 863 Avenue B., Yuma, Arizona 85364.

2. PACA license number 921261 was issued to Respondent on June 2, 1992. This license terminated on June 2, 1994, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period June 1993 through September 1993, Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 15 sellers for purchases of 62 lots of perishable agricultural commodities in the course of

interstate or foreign commerce in the amount of \$304,814.40.

Conclusions

Respondent's failures to make full payment promptly, as more fully set forth in paragraph III of the Complaint, constitute willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and such finding is ordered published.

This Order shall take effect 14 days after this Decision becomes final. This Decision will become final and effective without further proceedings 35 days after service upon Respondent, unless appealed to the Judicial Officer within 30 days after service, as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final August 2, 1996.-Editor]

**In re: FIELD MARKET PRODUCE, INC., d/b/a THE PRODUCE PLACE.
PACA Docket No. D-95-0516.
Order Denying Late Appeal filed July 10, 1996.**

Late appeal — Attorney-client — Double jeopardy — Petition to reopen — Petition for reconsideration.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Edwin S. Bernstein's Decision Without Hearing by Reason of Admissions became final. Respondent is bound by the acts and omissions of its attorney. The double jeopardy clause cannot be interposed to bar this administrative disciplinary proceeding. Respondent's petition to reopen the hearing filed pursuant to 7 C.F.R. § 1.146(a)(2) is denied because no hearing preceded Respondent's petition to reopen hearing. Respondent's petition to reconsider filed pursuant to 7 C.F.R. § 1.146(a)(3) before the Judicial Officer issued a decision is denied as prematurely filed.

Andrew Stanton, for Complainant.

Leighton P. Clark, Phoenix, AZ, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter PACA), instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By The Secretary Under Various Statutes, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by a Complaint filed on February 21, 1995, by the Acting Director of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that Field Market Produce, Inc., d/b/a The Produce Place (hereinafter Respondent), willfully, flagrantly, and repeatedly violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 15 sellers of the agreed purchase prices in the total amount of \$304,814.60 for 62 lots of fruits and vegetables that Respondent purchased, received, and accepted in interstate and foreign commerce during the period June 1993 through September 1993. (Complaint, pp. 2-6.) On April 3, 1995, Respondent, represented by counsel, Mr. Leighton P. Clark, filed an Answer denying each and every allegation in the Complaint that Respondent willfully violated the PACA, asserting three affirmative defenses (lack of subject matter jurisdiction, estoppel, and statute of limitations), and requesting a hearing. (Answer.)

On April 18, 1995, Complainant filed a Motion To Set Oral Hearing stating, in relevant part, that:

[T]he [C]omplaint and [A]nswer in this action having been filed and the issues having been joined, [C]omplainant requests that a prehearing conference be held and that this case be assigned a date certain for oral hearing.

Motion To Set Oral Hearing, p. 1.

On May 10, 1995, Respondent filed a Reply To Motion To Set Oral Hearing stating, as follows:

Respondent hereby submits that this matter is not ready to proceed to oral hearing on the grounds that certain discovery matters are necessary in order to adequately prepare for the hearing and to ensure that all issues have been joined.

Reply To Motion To Set Oral Hearing.

The proceeding was then assigned to Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) who, in a Prehearing Order issued May 16, 1995, among other things, states, as follows:

Also, in Respondent's May 10 Reply To Motion to Set Oral Hearing, counsel stated: ". . . this matter is not ready to proceed to oral hearing on the grounds that certain discovery matters are necessary in order to adequately prepare for the hearing and to ensure that all issues have been joined." The Rules of Practice governing this proceeding, 7 C.F.R. §§ 1.130-.151, do not provide for discovery. . . .

However, [section] 1.140(a)[(1)](iii) and (iv) of the Rules of Practice[, (7 C.F.R. § 1.140(a)(1)(iii), (iv)),] provide[s] that at the [J]udge's discretion, in connection with prehearing conferences, parties may be directed to exchange lists of anticipated witnesses and copies of documents that they intend to introduce at the hearing. Therefore, Respondent's request for discovery is denied, but in a prehearing telephone conference to be held at a later date, a schedule will be established for the parties' exchange of proposed hearing exhibits and witness lists.

Prehearing Order, p. 2.

On September 15, 1995, and September 21, 1995, the ALJ conducted telephone conferences with counsel for Complainant and Respondent. After the September 21, 1995, telephone conference, the ALJ filed a written Summary of Telephone Conference which provides, in part, as follows:

It was agreed and decided that the hearing would commence on February 2, 1996, at 9 a.m., in a Phoenix, Arizona location to be designated by subsequent notice. . . .

On or before November 1, 1995, Mr. Stanton[, counsel for Complainant,] will send Mr. Clark[, counsel for Respondent,] copies of Complainant's proposed hearing exhibits and witness list, including brief summaries of the testimony the witnesses will present. On or before November 15, 1995, Mr. Clark will send Mr. Stanton similar documents with respect to Respondent's proposed hearing exhibits and witnesses. Courtesy copies of the parties' witness lists, but not their exhibits, should be sent to the undersigned when copies are sent to opposing counsel.

Summary of Telephone Conference, pp. 1-2. (Emphasis in original.)

On October 27, 1995, based upon agreement of counsel for Complainant and Respondent, the ALJ rescheduled the hearing to commence at 9 a.m., February 15, 1996, (Order Rescheduling Hearing), and on December 12, 1995, the ALJ filed a notice stating the location of the hearing to commence at 9 a.m., February 15, 1996. (Notice of Hearing.)

On October 31, 1995, in accordance with the ALJ's Order of September 21, 1995, (Summary of Telephone Conference), Complainant filed Complainant's Notice of Witnesses, which contains a list of witnesses that Complainant intended to call at the hearing and summaries of the testimony Complainant expected the witnesses to present.

On February 5, 1996, Complainant filed a Motion For Prehearing Telephone Conference, stating, as follows:

Complainant hereby moves for a prehearing telephone conference so that it can be determined (1) whether [R]espondent still desires to contest the [C]omplaint in this matter, and (2) whether [R]espondent or its counsel, Leighton P. Clark, Esq., will be appearing at the February 15, 1996, hearing in Phoenix, Arizona.

....

In a September 21, 1995, telephone conference call with [C]omplainant's counsel and Judge Bernstein, Mr. Clark stated that he would be presenting evidence at the hearing disputing [C]omplainant's allegations. Judge Bernstein ordered [C]omplainant to send Mr. Clark copies of [C]omplainant's proposed hearing exhibits and a witness list by November 1, 1995, and ordered [R]espondent to reciprocate by November 15, 1995. Complainant complied with Judge Bernstein's order. However, [C]omplainant has not received any response whatsoever from [R]espondent or Mr. Clark.

Complainant's counsel has called Mr. Clark twice during the month of January 1996, and left a message on the answering machine, but has not received a return call.

Based on the above record, there is good reason to doubt (1) that [R]espondent continues to contest the allegations of the [C]omplaint, and (2) that [R]espondent, or Mr. Clark, will be appearing at the February 15,

1996, hearing. Therefore, [C]omplainant moves that a prehearing telephone conference call be held, as soon as possible, to examine these issues.

Motion For Prehearing Telephone Conference, pp. 1-2.

On February 8, 1996, Complainant filed a Motion for Decision Without Hearing By Reason of Admissions and Supporting Memorandum (hereinafter Motion for Decision Without Hearing) and a Decision Without Hearing by Reason of Admissions (hereinafter Proposed Decision). The Motion for Decision Without Hearing, in part, states:

In a September 21, 1995, conference call involving [C]omplainant's counsel, [R]espondent's counsel, Leighton Clark Esq., and Administrative Law Judge Edwin S. Bernstein, Mr. Clark stated that [R]espondent disputed the amount alleged to be owed by the [C]omplaint, although he did not deny that [R]espondent owed money for produce purchases. Mr. Clark did not explain [R]espondent's allegations of a lack of subject matter jurisdiction, estoppel and statute of limitations. Mr. Clark made no claim that [R]espondent had paid the amounts alleged in the [C]omplaint. Judge Bernstein ordered [C]omplainant's counsel to send Mr. Clark copies of [C]omplainant's proposed evidence and witness list by November 1, 1995. Mr. Clark was ordered to reciprocate on or before November 15, 1995. Courtesy copies of the witness lists were ordered to be filed with Judge Bernstein.

In compliance with Judge Bernstein's order, [C]omplainant's counsel sent Mr. Clark [C]omplainant's proposed evidence and witness list on October 27, 1995, and filed a copy of its witness list with Judge Bernstein. However, Mr. Clark did not provide [R]espondent's evidence and witness list by November 1[5], 1995, as ordered, and has never provided such documents. This failure to submit evidence and a witness list is an indication that [R]espondent does not seriously dispute the facts of this case as alleged by [C]omplainant.

There can be no legitimate dispute with respect to subject matter jurisdiction, as this is a typical disciplinary [C]omplaint alleging failure to make full payment promptly in violation of the PACA, involving perishable agricultural commodities shipped across state lines. Further, as [R]espondent has offered no explanation regarding its bare assertions of estoppel and the statute of limitations, it is clear that these assertions are

lacking in merit.

So long as there is no real dispute that [R]espondent has failed to make full payment promptly for produce purchases, [R]espondent must be found to have committed willful, flagrant and repeated violations of the PACA, for which the appropriate sanction is a license revocation or its equivalent, a finding of the commission of such violations and publication thereof.

Motion for Decision Without Hearing, pp. 2-3.

On February 8, 1996, the ALJ sent Complainant's Motion for Decision Without Hearing and Proposed Decision and a cover page to Respondent's counsel by facsimile transmission. The cover page states:

Date: February 8, 1996

To: Leighton Clark

Office:

Fax Number: (602) 274-0001

Total Number of Pages Including Cover: 9

Comments:

At approximately 12 noon today these items were delivered to my office by Complainant's counsel, Andrew Stanton (a Motion for Decision w/o Hearing by Reason of Admissions and Supporting Memorandum and a [P]roposed Decision Without Hearing by Reason of Admissions). Copies are being transmitted herewith. In view of the fact that the hearing is scheduled to commence within a week[,] please transmit your written response by telefax by close of business on February 9, 1996.

From: Judge Edwin S. Bernstein

Facsimile transmission cover page dated February 8, 1996.

Respondent did not respond to the ALJ's February 8, 1996, facsimile transmission and on February 12, 1996, the ALJ issued an Order canceling the hearing scheduled for February 15, 1996, (Order Canceling Hearing), and a

Decision Without Hearing by Reason of Admissions (hereinafter Decision and Order) in which the ALJ found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and ordered that this finding be published. The Office of the Hearing Clerk sent the Decision and Order and a cover letter from the Hearing Clerk dated February 13, 1996, to Respondent's counsel by certified mail,¹ but it was returned marked by the postal service as "ATTEMPTED NOT KNOWN." On March 13, 1996, the Office of the Hearing Clerk served the Decision and Order and the February 13, 1996, cover letter from the Hearing Clerk by ordinary mail on Respondent² in accordance with the Rules of Practice. (7 C.F.R. § 1.147(c)(1).)³ The Decision and Order, provides, in pertinent part, that:

This Order shall take effect 14 days after this Decision becomes final. This Decision will become final and effective without further proceedings 35 days after service upon Respondent, unless appealed to the Judicial Officer within 30 days after service, as provided in Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Decision and Order, p. 4.

A letter from the Office of the Hearing Clerk accompanying the Decision and Order informed Respondent that:

Subject: **In re: Field Market Produce, Inc., dba The Produce**

¹The envelope containing the Decision and Order and the February 13, 1996, cover letter from the Hearing Clerk was addressed to Mr. Leighton P. Clark, Attorney at Law, Suite 1000, 3550 N. Central, Phoenix, AZ 85012.

²The envelope containing the Decision and Order and the February 13, 1996, cover letter from the Hearing Clerk was addressed to Mr. Leighton P. Clark, Attorney at Law, Suite 1000, 3550 N. Central, Phoenix, AZ 85012.

³Section 1.147 (c)(1) of the Rules of Practice provides, in relevant part, that an initial decision "shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last know[n] residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address. (7 C.F.R. § 1.147(c)(1).)

Place, Respondent - PACA Docket No. D-95-516

Enclosed is a copy of the Decision and Order issued in this proceeding by Administrative Law Judge Edwin S. Bernstein on February 12, 1996.

Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Letter from Joyce A. Dawson, Hearing Clerk, to Mr. Leighton P. Clark, dated February 13, 1996.

The Rules of Practice provide that:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

On April 25, 1996, Ms. Cari Drew, on behalf of Respondent, appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has

been delegated. (7 C.F.R. § 2.35.)⁴

Respondent's Appeal to the Judicial Officer states:

Respondent, Field Market Produce, Inc. d/b/a The Produce Place, Appeals to the Judicial Officer to Reopen this action for a Hearing or in the alternative the action be reconsidered for the following reasons[:]

1. Leighton Clark is no longer the attorney representing Field Market Produce, Inc. because of the following.

- a. Mr. Clark failed to inform us of the status of this case.
- b. Mr. Clark made decisions for us without our consent or knowledge.
- c. Mr. Clark failed to make timely answers to the USDA/PACA.

2. Respondent, Field Market Produce, Inc., ha[s] not had a chance to present [its] case because of [its] attorney's failure to comply with the Administrative Law Judge's Orders. Respondent has no other remedy to present [its] case unless it is reopened.

3. Respondent, Field Market Produce, currently i[s] under restrictions due to the fact that our old attorney, Leighton Clark, failed to answer -2-reparation complaints filed as RD-94-631 and LP-94-221 copies of the reparation awards are attached here. The sanctions began September 8, 1994. These cases are part of the current Disciplinary proceeding. With both sanctions the total time under restrictions would be 3 years and 6 months. This seems to be double jeopardy.

Wherefore, Respondents, [sic] Field Market Produce, Inc., respectfully request[s] that this case be reopened for the purpose of an oral hearing; or in the alternative the Judicial Officer find the effective date of sanctions would start September 8, 1994, for the purpose of this disciplinary action.

Respectfully submitted this 25 day of April, 1996.

⁴The position of the Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Respondent's Appeal to the Judicial Officer, pp. 1-2.

On May 15, 1996, Complainant filed Complainant's Opposition To Respondent's Petition To Reopen The Hearing Or Reconsider The Decision and Order, and on May 16, 1996, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, Respondent's Appeal to the Judicial Officer must be rejected as untimely. However, even if I had jurisdiction to consider Respondent's Appeal to the Judicial Officer, which I do not, Respondent has not stated a basis in its Appeal to the Judicial Officer upon which relief could be granted.

Respondent's Appeal to the Judicial Officer, filed April 25, 1996, was not filed within 35 days after service of the ALJ's Decision and Order on Respondent which occurred on March 13, 1996. In accordance with 7 C.F.R. § 1.139, the ALJ's Decision and Order became final 35 days after service on Respondent, *viz.*, on April 17, 1996, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's appeal. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final. *In re Ow Duk Kwon*, 55 Agric. Dec. ____, slip op. at 6-7 (June 6, 1996) (Judicial Officer has no jurisdiction to consider Respondent's Appeal Petition filed more than 35 after service of a Default Decision); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (it has consistently been held that, under the Rules of Practice, the

Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (since Respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

Fed. R. App. P. 4(a)(1).

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory

and jurisdictional prerequisite which this court may neither waive nor extend. See, e.g., *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .

Accord Bundinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after the Initial Decision and Order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal. (Rule 4(a)(5).) The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after the Initial Decision has

become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after the Initial Decision becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.

Accord Jem Broadcasting Co. v. FCC, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

Thus, even though the instant proceeding contains procedural irregularities,⁵

⁵Section 1.139 of the Rules of Practice, in relevant part, provides that: "[t]he failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. . . ." (7 C.F.R. § 1.139.) Although Respondent later admitted the allegations in the Complaint, Respondent filed an answer denying "each and every allegation contained in the [C]omplaint which alleges that Respondent willfully violated the P.A.C.A." (Answer.) Moreover, Respondent was not provided with 20 days after service of Complainant's Motion for Decision Without Hearing and Proposed Decision in which to file objections.

Respondent's appeal must be denied, since it is too late for the matter to be further considered.

Moreover, even if Respondent had filed a timely appeal, none of the issues raised in Respondent's Appeal to the Judicial Officer serves as a basis to reverse the ALJ's finding that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and the ALJ's order that this finding be published.

First, Respondent contends that its former attorney,⁶ Mr. Leighton P. Clark, failed to inform Respondent of the status of the case, made decisions without Respondent's consent or knowledge, failed to file "timely answers to the USDA/PACA," and deprived Respondent of "a chance to present [its] case because of [his] failure to comply with the Administrative Law Judge's Orders." (Respondent's Appeal to the Judicial Officer, p. 1.)

As a general rule, a client is bound by the acts and omissions of its attorney. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Link v. Wabash R.R.*, 370 U.S. 626 (1962); *United States v. 7108 West Grand Ave., Chicago, Ill.*, 15 F.3d 632 (7th Cir.), *cert. denied sub nom. Flores v. United States*, 114 S.Ct. 2691 (1994); *Cotto v. United States*, 993 F.2d 274 (1st Cir. 1993).

As stated by the Supreme Court in response to the argument that a party should not be required to suffer harm for an attorney's derelictions:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." [Footnote omitted. Citation omitted.]

Link v. Wabash R.R., *supra*, 370 U.S. at 633-34.

Even if Mr. Clark's conduct is deemed to be grossly negligent, Respondent

⁶Respondent's Appeal to the Judicial Officer is the first time Respondent indicates that Mr. Leighton P. Clark no longer represents Respondent in this proceeding. (Respondent's Appeal to the Judicial Officer, p. 1.)

cannot avoid the consequences of its attorney's acts and omissions. As stated by the United States Court of Appeals for the Seventh Circuit:

Yet why should the label "gross" make a difference to the underlying principle: that the errors and misconduct of an agent redound to the detriment of the principal (and ultimately, through malpractice litigation, of the agent himself) rather than of the adversary in litigation? We know how to treat both ends of the continuum: negligence and wilful misconduct alike are attributed to the litigant. When the polar cases are treated identically, intermediate cases do not call for differentiation. Holding that negligence and wilful misconduct, but not gross negligence, may be the basis of a default judgment would make hay for standup comics. . . .

United States v. 7108 West Grand Ave., Chicago, Ill., supra, 15 F.3d at 634.

Respondent's attorney may have failed to keep Respondent informed of the status of the instant proceeding, made decisions for Respondent without Respondent's consent or knowledge, failed to make "timely answers to the USDA/PACA," and failed to comply with the ALJ's orders, as Respondent contends, and Respondent may have a cause of action against its attorney for these acts and omissions. Nonetheless, Respondent cannot avoid the consequences of the acts or omissions of its attorney and the Decision and Order cannot be overturned based upon the quality of the representation Respondent's attorney provided to Respondent in this proceeding.

Second, Respondent contends that:

Respondent, Field Market Produce, currently i[s] under restrictions due to the fact that our old attorney, Leighton Clark, failed to answer -2-reparation complaints filed as RD-94-631 and LP-94-221 copies of the reparation awards are attached here. The sanctions began September 8, 1994. These cases are part of the current Disciplinary proceeding. With both sanctions the total time under restrictions would be 3 years and 6 months. This seems to be double jeopardy.

Respondent's Appeal to the Judicial Officer, p. 1.

I disagree with Respondent's contention that the imposition of a sanction in the instant proceeding would violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution (hereinafter the Double Jeopardy Clause) because Respondent has previously been sanctioned in two reparation proceedings.

The Double Jeopardy Clause provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb" (U.S. Const. amend. V.) The Double Jeopardy Clause protects a defendant in a criminal proceeding against multiple or repeated prosecutions for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *United States v. Dinitz*, 424 U.S. 600, 606 (1976).

The reparation actions referred to by Respondent in its Appeal to the Judicial Officer are not criminal proceedings. Respondent, in its Appeal to the Judicial Officer, refers to reparation proceedings which it identifies as RD-94-631 and LP-94-221 and states that copies of the reparation awards are attached to its Appeal to the Judicial Officer. (Appeal to the Judicial Officer, p. 1.) The documents attached by Respondent to its Appeal to the Judicial Officer relate to two reparation proceedings identified as *Seacoast Distributing Inc. v. Field Market Produce Inc.*, PACA Docket RD-94-631 and *Jack Cancellieri & Fernando Vargas d/b/a Francisco Distributing Co. v. Field Market Produce Inc.*, PACA Docket RD-94-605,⁷ and clearly establish that both of these proceedings are civil actions between private litigants regarding alleged damages arising from transactions involving perishable agricultural commodities. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties, *United States v. Halper*, 490 U.S. 435, 452 (1989); *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989), and such proceedings are not the type to which jeopardy attaches.

Moreover, this administrative disciplinary proceeding is not a criminal proceeding. See generally *United States v. Bizzell*, 921 F.2d 263, 266 (10th Cir. 1990) (administrative proceedings in which defendants were debarred from Department of Housing and Urban Development (hereinafter HUD) programs, and one defendant agreed to make payment to HUD, were not prosecutions within the meaning of the Double Jeopardy Clause); *In re Terry Horton*, 50 Agric. Dec. 430, 440 (1991) (double jeopardy is not applicable to administrative proceedings for the assessment of a civil monetary penalty); *In re Leonard McDaniel*, 45 Agric. Dec. 2255, 2264 (1986) (administrative proceeding to assess a civil monetary penalty is civil in nature and not subject to the Double Jeopardy Clause). Therefore, jeopardy attaches neither to the reparation proceedings

⁷There is no indication in Respondent's Appeal to the Judicial Officer of the nature of the reparation proceeding referenced by Respondent as "LP-94-221," and I infer, based on the Respondent's attachments to its Appeal to the Judicial Officer, that Respondent's reference to a reparation proceeding identified in Respondent's Appeal to the Judicial Officer as "LP-94-221" is in error.

referenced by Respondent, nor to the instant administrative proceeding. Thus, the Double Jeopardy Clause cannot be interposed to bar the instant proceeding.

Respondent's Appeal to the Judicial Officer includes a request "to Reopen this action for a Hearing." (Respondent's Appeal to the Judicial Officer, p. 1.) Section 1.146(a)(2) of the Rules of Practice governing this proceeding provides:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite* -

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

The Rules of Practice define the word "hearing" as follows:

§ 1.132 Definitions.

As used in this subpart, [7 C.F.R., pt. 1, subpart H, (7 C.F.R. §§ 1.130-.151)], the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Hearing means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

7 C.F.R. § 1.132.

A petition to reopen a hearing and take further evidence may only be granted if a hearing in the proceeding in question has preceded the petition to reopen the hearing. There has been no hearing in the instant proceeding and no evidence

was previously submitted before the Judge for the record in this proceeding. Rather, the Decision and Order in this proceeding was issued by reason of admissions without hearing. Therefore, Respondent's petition to reopen the hearing must be denied. *See In re Ow Duk Kwon, supra*, slip op. at 6 n. 2 (Respondent's petition to reopen the hearing to take further evidence denied because no hearing had previously been conducted in the proceeding). Moreover, even if a hearing had been conducted in this proceeding, Respondent's petition to reopen the hearing would be denied because Respondent has not stated the nature and purpose of the evidence to be adduced at the reopened hearing, as required by section 1.146(a)(2) of the Rules of Practice. (7 C.F.R. § 1.146(a)(2).)

Respondent's Appeal to the Judicial Officer also contains a request that "the action be reconsidered." (Respondent's Appeal to the Judicial Officer, p. 1.)

Section 1.146(a)(3) of the Rules of Practice governing this proceeding provides:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite -*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Petitions for reconsideration under the Rules of Practice relate to reconsideration of the Judicial Officer's decision. Since the Judicial Officer had not, at the time Respondent filed its petition for reconsideration, issued a decision in the instant proceeding, Respondent's petition to reconsider is denied as prematurely filed.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's petition to reopen hearing, Respondent's petition to reconsider, and Respondent's Appeal to the Judicial Officer, filed April 25, 1996, are denied. The Decision Without Hearing by Reason of Admissions issued and filed by the ALJ on February 12, 1996, is the final Decision and Order in this case. This Order shall take effect upon service of this Order on Respondent. The Decision and Order issued and filed by the ALJ on February 12, 1996, shall take effect 14 days after service of this Order on Respondent.

In re: CALLIS PRODUCE, INC.
PACA Docket No. D-96-0522.
Decision and Order filed July 8, 1996.

Failure to file an answer - Failure to pay reparation award - Failure to make full payment promptly - Willful, repeated and flagrant violations - License revocation.

Kimberly Hart, for Complainant.
Respondent, Pro se.

Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on March 21, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of March 1994 through June 1995, respondent purchased, received and accepted, in interstate commerce from 14 sellers, 208 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$652,848.67.

A copy of the Complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Callis Produce, Inc., is a corporation organized and existing under the laws of the State of Maryland. Its business address is Maryland Wholesale Produce Terminal Market, Conowingo Drive, Building B, Jessup, Maryland 20794 and its mailing address is P. O. Box 844, Mathews, Virginia 23109.

2. At all times material herein, respondent was licensed under the provisions of PACA. License number 891708 was issued to respondent on August 17, 1989. This license has been renewed annually and is next subject to renewal on or before August 17, 1996. However, on March 26, 1996, this license was suspended for failure to pay a reparation award in accordance with section 7(d) of the PACA (7 U.S.C. § 499g(d)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of March 1994 through June 1995, Respondent purchased, received and accepted, in interstate commerce from 14 sellers, 208 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$652,848.67.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the license of respondent is hereby revoked.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 20, 1996.-Editor]

In re: BILLY NEWSOM PRODUCE CO., INC.
PACA Docket No. D-96-0508.
Decision and Order filed July 22, 1996.

Admission of material allegations - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Andrew Stanton, for Complainant.
Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the "PACA"), instituted by a Complaint filed on November 7, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the Complaint that Respondent had committed wilful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly to 12 sellers for purchases of 80 lots of perishable agricultural commodities in the course of interstate and foreign commerce in the amount of \$279,850.14 during the period August 9, 1993, through August 9, 1994. The Complaint also alleged that on October 18, 1994, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Western District of Tennessee pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*), designated Case No. 94-30627B. Complainant requested that, as a result of Respondent's violations of the PACA, an order should be issued finding that Respondent has committed wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and ordering publication of such finding.

Respondent submitted an Answer in which it neither admitted nor denied filing for bankruptcy. Respondent also claimed that it had made full payment to two of the sellers set forth in the Complaint, Johnston Brokerage Company and Val Verde Vegetable Co., Inc., and claimed that it had extended payment terms with the other 10 sellers listed in the Complaint.

On June 18, 1996, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions. On July 15, 1996, Respondent filed written objections

to the motion. Complainant's motion is granted.

Findings of Fact

1. Respondent Billy Newsom Produce Co. Inc., is a corporation organized and existing under the laws of the State of Tennessee. Its business mailing address is P.O. Box 1189, Dyersburg, Tennessee 38024.

2. Pursuant to the licensing provisions of the PACA, license number 841816 was issued to Respondent on August 6, 1984. This license automatically terminated on August 6, 1994, due to Respondent's failure to pay the required annual license fee.

3. On or about October 18, 1994, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Western District of Tennessee pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 700 *et seq.*), designated Case No. 94-30627B.

4. Respondent failed to make full payment promptly of at least \$222,668.10 of the \$279,850.14 set forth in the Complaint to 10 of the 12 sellers in the Complaint for purchases of numerous lots of perishable agricultural commodities in the course of interstate and foreign commerce during the period from August 1993 through August 1994.

Conclusion

Respondent has failed to make payment for purchases of produce, as alleged in the Complaint, and currently owes at least \$222,668.10. Respondent's failures to make payment constitute wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

Complainant attached to its motion as Exhibit 1, a photocopy of what appears to be a voluntary petition in the United States Bankruptcy Court for the Western District of Tennessee pursuant to Chapter 7 of the Bankruptcy Code filed on or about October 18, 1994, as Case No. 94-30627-B. The petition appears on its face to be authentic and Respondent has failed to deny its authenticity and accuracy. Therefore, I take official notice of the petition and accept its statements as admissions by Respondent.

Respondent, in Schedule F of its Chapter 7 bankruptcy petition, admits that it owes 10 of the sellers set forth in the Complaint at least \$222,668.10 of the

\$279,850.14 which the Complaint alleges Respondent has failed to fully and promptly pay, as shown in the following table:

CREDITOR	COMPLAINT	SCHEDULE F	COMPLAINT AMOUNT REFLECTED IN SCHEDULE F
L&M Companies, Inc.	\$42,256.60	\$42,617.00	\$42,256.60
Baker Produce, Inc.	3,041.80	3,041.00	3,041.00
Bushwick Comm. Co., Inc.	3,523.25	3,300.00	3,300.00
Grand Prairie Fruit & Vegetable Brokers, Inc.	108,700.21	92,610.00	92,610.00
Sound Commodities, Inc.	7,587.50	7,588.00	7,587.50
VG Kyle & Associates, Inc.	3,991.50	3,691.00	3,691.00
Ryan Potato Company	3,062.50	3,063.00	3,062.50
United Fruit & Produce Co.	60,347.88	56,092.00	56,092.00
Banacol Marketing Corp.	6,240.00	17,472.00	6,240.00
Harvest Valley Produce	4,787.50	4,788.00	4,787.50
TOTAL	\$243,538.74	\$234,262.00	\$222,668.10

The listing of these 10 sellers in Respondent's bankruptcy schedule is an admission that Respondent has failed to pay these sellers the amounts alleged in the Complaint, to the extent the amounts in the Complaint do not exceed those in the bankruptcy schedule, for a total of \$222,668.10. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 606-607 (D.C. Cir. 1987); *United Fruit & Veg. Co. v. Director of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), cert. denied, 456 U.S. 1007 (1982); *Potato Sales Co., Inc.*, 54 Agric. Dec. (1995); *National Produce Co., Inc.*, 53 Agric. Dec. 1622 (1994).

Respondent's admitted failure to pay \$222,668.10 of the \$243,538.74 alleged in the Complaint to 10 of the 12 sellers set forth in the Complaint for purchases of numerous loads of perishable agricultural commodities in interstate and foreign commerce during the period August 1993 through August 1994, constitutes wilful, flagrant and repeated violations of the PACA.

Respondent's violations were wilful, as "[u]nder PACA, an action is wilful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 646 (1989); *In re B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021

(1985). That Respondent's failure to pay was intentional is clearly demonstrated by the long period of time over which the violations occurred. Respondent knew or should have known that it could not make payment for the large number of perishables it ordered, yet continued to make purchases. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and consequently could not pay its suppliers. Therefore, Respondent committed wilful violations of the PACA. *In re B.G. Sales Co., Inc.*, *supra*, at 2028-2042. Respondent's violations were flagrant and repeated because of the large amount of money, \$222,668.10, which Respondent admittedly failed to pay in numerous transactions during the period August 1993 through August 1994. *In re The Caito Produce Co.*, *supra*, at 611.

Respondent asserts a defense that it had extended payment terms with 10 of the sellers specified in the Complaint. However, payment terms agreed to after the produce transactions take place do not conform to the requirement of the Department's regulations that agreements for a payment period different from those established in section 46.2(aa) of the regulations (7 C.F.R. § 46.2(aa)) must be in writing and agreed to prior to the time of the transactions (7 C.F.R. § 46.2(aa)(11)). Another reason why payment agreements after the transaction are not considered a defense is that the bargaining power of the parties is unequal once the buyer has the produce. *In re The Caito Produce Co.*, *supra*, at 609.

The essence of Respondent's opposition to Complainant's motion is a concern that as a result of this decision James D. Newsom will be found to have been responsibly connected with Respondent Billy Newsom Produce Co., Inc. Respondent refers to a "companion case" of *In re James D. Newsom*, PACA D-1784. However, that case is not before me for decision at this time, and although I stated in a telephone conference in this matter on June 7, 1996, that "it appears that Mr. James D. Newsom was responsibly connected with Respondent during the time of most of the violations" since that issue was not litigated before me in this matter, I do not decide that issue.

The proper sanction for Respondent's failure to make full payment promptly for produce purchases is a license revocation or, when a respondent's license has terminated, as it the case here, a finding of the commission of wilful, flagrant or repeated violations of section 2(4) of the PACA and publication of such finding.

Order

Respondent has committed wilful, flagrant or repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

These findings are ordered published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after its service upon Respondent, unless it is 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 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final September 3, 1996.-Editor]

In re: SUPERIOR POTATO CHIP CO.
PACA Docket No. D-96-0501.
Decision and Order filed March 27, 1996.

Failure to file an answer - Failure to pay required annual license renewal fee - Failure to pay reparation award - Failure to make full payment promptly for produce - Willful, repeated and flagrant violations - Publication.

Julie Cook Schuster, for Complainant.
Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on October 2, 1995, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of November 1994 through April 1995, Respondent purchased, received and accepted, in interstate commerce, from 4 sellers, 66 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$244,573.38. Three of the four sellers participated in a distribution of trust assets which reduced respondent's produce debt to \$186,962.56.

A copy of the Complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Superior Potato Chip Co., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of Michigan. Its business address is 352 Fail Road, Laporte, Indiana 46350, and its mailing address is 12620 Newburgh, Livonia, Michigan 48150.

2. Pursuant to the licensing provisions of the PACA, license number 930091 was issued to respondent on October 16, 1992. This license terminated on October 16, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499b(a)), when respondent failed to pay the required annual renewal fee. Furthermore, respondent's license previously had been suspended as of July 27, 1995, pursuant to Section 7(d) of the PACA (7 U.S.C. § 499d(a)) when it failed to satisfy a reparation award.

3. As more fully set forth in paragraph 3 of the complaint, during the period of November 1994 through April 1995, Respondent purchased, received and accepted, in interstate commerce, from 4 sellers, 66 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$244,573.38. Three of the four sellers protected their trust rights under Section 5c(3) of the PACA (7 U.S.C. § 499e(c)) by filing timely trust notices. As a result, they participated in a distribution of trust assets which reduced respondent's produce debt to \$186,962.56.

Conclusions

Respondent's failure to make full payment promptly with respect to the 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, repeated and flagrant violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this

Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 16, 1996-Editor]

In re: HEE FARM, INC.
PACA Docket No. D-96-0526.
Decision and Order filed August 9, 1996.

Failure to file an answer - Failure to make full payment promptly - Failure to pay reparation award - Willful, flagrant, and repeated violations - License revocation.

Timothy Morris, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on April 22, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of May through November 1995, respondent purchased, received, and accepted, in interstate commerce from 12 sellers, 63 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$347,784.51.

A copy of the Complaint was served upon respondent, which has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Hee Farm, Inc., is a corporation organized and existing under the laws of the District of Columbia. Its business and mailing address is 1270-1274 5th Street, N.E., Washington, DC 20002.

2. At all times material herein, respondent was licensed under the provisions of PACA. License number 950093 was issued to respondent on October 18, 1994. This license has been renewed annually and is next subject to renewal on or before October 18, 1996. However, on March 29, 1996, this license was suspended for failure to pay a reparation award in accordance with section 7(d) of the PACA (7 U.S.C. § 499g(d)).

3. As more fully set forth in paragraph III of the complaint, during the period of May through November 1995, respondent purchased, received, and accepted, in interstate commerce from 12 sellers, 63 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$347,781.51.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated, and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, repeated, and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the license of respondent is hereby revoked.

This order shall take effect on the eleventh (11th) day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceedings within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final September 19, 1996.-Editor]

**In re: ALISON FRUIT CO., INC.
PACA Docket No. D-96-0514.
Decision and Order filed August 8, 1996.**

Failure to file an answer - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Sharlene Deskins, for Complainant.
Respondent, Pro se.

Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on February 1, 1996, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period October 1994 through April 1995, respondent purchased, received, and accepted, in interstate and foreign commerce, from 22 sellers, 103 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$1,577,782.07.

A copy of the complaint was served upon respondent Alison on or about February 1, 1996, which has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Alison Fruit Co., Inc., is a corporation, whose address is 5-1/2 Mile S. 23rd, Hidalgo, Texas 78557.

2. Pursuant to the licensing provisions of the Act, license number 921899 was issued to respondent on September 30, 1992. This license was renewed annually, but terminated on September 30, 1995, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph IV of the complaint, during the period September 1994 through April 1995, respondent purchased, received, and

accepted in interstate and foreign commerce, from 22 sellers, 103 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$1,577,781.07.

Conclusions

Respondent's failure to make full payment promptly with respect to the 103 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. § 499b), 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 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 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final September 26, 1996.-Editor]

In re: TAVILLA FOODSERVICE, INC.
PACA Docket No. D-96-0523.
Decision and Order filed November 5, 1996.

Failure to file an answer - Failure to pay required annual renewal fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

JoAnn Waterfield, for Complainant.

Spencer Fox, Coral Gables, FL, for Respondent.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the "PACA,"

instituted by a complaint filed on April 5, 1996 by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that the respondent corporation failed to make full and prompt payment for 246 lots of produce purchased during June through December, 1994 from 48 sellers for which it owed \$646,089.09. The complaint further alleged that the respondent corporation's license terminated on June 1, 1995, when it failed to pay the required annual renewal fee. The complaint seeks an order publishing the facts of the alleged violations and the entry of findings that respondent's violations were willful, flagrant and repeated. Upon entry and publication of such findings, all persons responsibly connected with the respondent corporation are barred from employment by any PACA licensee for one year and a bond acceptable to the Secretary must be posted for them to be employed the following year. (7 U.S.C. § 499h(b)).

An attempt was made to serve the complaint on the respondent at 1930 N.W. 23rd Street, Miami, Florida 33142. The letter and complaint was received at that address on April 15, 1996 by a person who signed the Post Office certified receipt as respondent's agent. However, the law firm of Mishan, Sloto & Greenberg, by letter of April 19, 1996, advised the Hearing Clerk that it represented an assignee of the corporation pursuant to Florida State law, and the service of the complaint should be accomplished by sending it to Paul Tavilla's home address or his attorney, Candis Trusty. The complaint was then sent by certified mail to both locations. Ms. Trusty signed a receipt on June 24, 1996; the letter and complaint sent to Mr. Tavilla at (b) (6)

(b) (6) was returned unclaimed. However, the address of (b) (6) was listed on a yellow card sent back to the Hearing Clerk and the certified letter was sent on to Mr. Tavilla at that address where it too was subsequently returned to the Hearing Clerk. The complaint was then posted by regular mail on July 29, 1996, to Paul Tavilla at (b) (6)

Under the controlling Rules of Practice, 7 C.F.R. § 1.136, an answer must be filed within 20 days after the service of the complaint. Failure to file an answer is deemed to be an admission of the allegations in the complaint and a waiver of hearing which permits the complainant to file a proposed decision and a motion for its adoption under 7 C.F.R. § 1.139. The respondent has 20 days after service of the motion to file objections to it, and an administrative law judge is required to enter a decision without further procedure or hearing unless meritorious objections are filed.

In this proceeding, no answer was ever filed. A proposed decision and

motion for decision were duly filed on September 24, 1996 and were served on respondent at (b) (6) on September 30, 1996. An objection to the proposed decision was filed on respondent's behalf by Spencer Fox, attorney, on October 23, 1996, one day past the October 22, 1996 due date.

Inasmuch as the objections were only one day late they have been considered as if timely received. On October 31, 1996 complainant filed a response to respondent's objection which has also been considered.

The objection states that pursuant to an Assignment of Assets for the Benefit of Creditors filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (Case No. 94-21649 CA 29), \$550,000.00 of the \$646,089.09 debt specified in the complaint has been paid on PACA trust claims.

Complainant's response to respondent's objection correctly points out that the objection cannot substitute for the answer which respondent failed to timely file. Complainant, however, concedes that respondent has correctly reported that monies were paid on trust claims under the PACA in reduction of the \$646,089.09 indebtedness. Complainant contends though that its review of the trust distribution shows \$311,889.65 is still outstanding.

Even if respondent's assertion is correct and the \$646,089.09 debt had been reduced by \$550,000.00, over \$90,000.00 would still be owed which would constitute a flagrant violation of the PACA. This fact together with the undenied obligations of the complainant showing the violations of the PACA to have been repeated, requires that the following findings and order be entered.

Findings of Fact

1. Respondent Tavilla Foodservice, Inc., is a corporation, which was officed at 1930 N.W. 23rd Street, Miami, Florida 33142.
2. Pursuant to the licensing provisions of the PACA, license number 931245 was issued to respondent on June 1, 1993. The license was renewed annually until it terminated for failure to pay the required renewal fee on June 1, 1995.
3. During the period June through December, 1994, respondent purchased, received and accepted in interstate and foreign commerce, from 48 sellers, 246 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total of \$646,089.09. As of the date of this Decision's issuance, at least \$96,000.00 remains unpaid.

Order

A finding is hereby made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh (11th) day after the Decision becomes final.

Pursuant to the governing Rules of Practice (7 C.F.R. § 1.142(c)(4), this Decision will become final without further proceedings thirty-five (35) days after the date of service upon the respondent unless appealed to the Judicial Officer within thirty (30) days after service as provided in 7 C.F.R. § 1.145.

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 17, 1996.-Editor]

In re: SUPREME PRODUCE, INC.
PACA Docket No. D-96-0515.
Decision and Order filed October 30, 1996.

Failure to file an answer - Failure to make full payment promptly - Failure to pay required annual renewal fee - Failure to pay a reparation order - Willful, repeated and flagrant violations - Publication.

Julie C. Schuster, for Complainant.

Respondent, Pro se.

Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on February 7, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of July through November 1994, respondent purchased, received and accepted, in interstate commerce from 14 sellers, 33 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of

\$148,063.10.

A copy of the Complaint was served upon Respondent, which has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Supreme Produce, Inc., is a corporation organized and existing under the laws of the State of Florida. Its business and mailing address was 1285 W. Atlantic Boulevard, Pompano Beach, Florida 33069.

2. At all times material herein, respondent was licensed under the provisions of PACA. License number 940303 was issued to respondent on November 23, 1993. This license terminated on November 23, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when the firm failed to submit the required annual renewal fee. In addition, this license was suspended on March 9, 1995, for failure to pay a reparation order pursuant to Section 7(d) of the PACA (7 U.S.C. §499g(d)). This order, and the three subsequent orders issued, remain unpaid.

3. As more fully set forth in paragraph 3 of the complaint, during the period of July through November 1994, respondent received and accepted, in interstate commerce from 14 sellers, 33 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$148,063.10. During May through July 1996, five of the sellers received payment in an amount totaling \$11,081.75, the full amounts set forth as owed to those five sellers in the complaint. There still remains past due and unpaid to the 9 remaining sellers, \$136,981.35.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and

flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)). Such finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 23, 1996.-Editor]

**In re: TRI-COUNTY PRODUCE CO., INC. and LEE D. EFFENSON.
PACA Docket No. D-96-0528.
Decision and Order as to Tri-County Produce Co., Inc. filed October 28,
1996.**

Failure to file an answer - Failure to submit required annual renewal fee - Failure to make full payment promptly - Willful, repeated and flagrant violations - Publication.

Julie C. Schuster, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on May 26, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period of February through September 1994, Tri-County Produce Co., Inc., under the direction, management, and control of Lee D. Effenson, purchased, received and accepted, in interstate and foreign commerce from 10 sellers, 61 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$106,020.05.

A copy of the Complaint was served upon Respondents, which has not been

answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Tri-County Produce Co., Inc., (hereinafter "Tri-County"), is a corporation organized and existing under the laws of the State of Florida. Its business and mailing address was 1285 W. Atlantic Boulevard, Pompano Beach, Florida 33069.

2. At all times material herein, Tri-County was licensed under the provisions of PACA. License number 940718 was issued to Tri-County on February 25, 1994. This license terminated on February 25, 1995, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when the firm failed to submit the required annual renewal fee.

3. Respondent, Lee D. Effenson, (hereinafter "Effenson"), is an individual whose address is (b) (6).

4. At all times material herein, Effenson was the manager of Tri-County and responsible for the direction, management and control of the firm.

5. At all times material herein, Kathleen A. Effenson, the wife of Effenson, was reported as the sole principal of Tri-County. Kathleen A. Effenson was not responsible for the direction, management and control of Tri-County.

6. As more fully set forth in paragraph 3 of the complaint, during the period of February through September 1994, Tri-County, under the direction, management and control of Effenson, purchased, received and accepted, in interstate and foreign commerce from 10 sellers, 61 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$106,020.05.

Conclusions

Respondents' failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 6, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondents have committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). Such finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 23, 1996.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Boyd Acquisition Company, Inc. d/b/a Boyd Potato Chips and State Line Snacks Corp. PACA Docket Nos. D-96-0525 & D-96-0524. 7/26/96.

U.S. Produce Co., Inc. PACA Docket No. D-94-0547. 8/2/96.

BT Network, Inc. and Mushroom Growers Association Sales Co., Inc. PACA D-96-0517. 8/30/96.

Michigan Re-Packing and Produce Company. PACA Docket No. D-95-0529. 9/24/96.

Crown Tomato Sales, Inc. PACA Docket No. D-96-0534. 11/1/96.

Pick Pack Produce Co., Inc. PACA Docket No. D-96-0533. 12/4/96.