

# AGRICULTURE DECISIONS

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Pages 1353 - 1457



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

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

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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**PACKERS AND STOCKYARDS ACT****DEPARTMENTAL DECISIONS**

**In re: IBP, inc.**

**P&S Docket No. D-95-0049.**

**Decision and Order filed July 31, 1998.**

**Discriminatory — Preference — Advantage — Prejudice — Disadvantage — Harm to competitors — Harm to competition — Authority under Packers and Stockyards Act — Weight given administrative law judge findings and credibility determinations — Complaint adequacy — Cease and desist order.**

The Judicial Officer reversed Chief Administrative Law Judge Victor W. Palmer's Decision. The Judicial Officer concluded that Respondent's right of first refusal under an agreement between Respondent and nine feedlots (Beef Marketing Agreement) obviates Respondent's need to bid competitively for cattle at those nine feedlots; and therefore violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because the right of first refusal has the effect or potential effect of reducing competition. The Packers and Stockyards Act gives the Secretary of Agriculture broad power, including the power to regulate Respondent's use of the agreements that it has with feedlots and to impose sanctions against Respondent, if the Secretary finds that Respondent's use of the agreement causes any harm which the Packers and Stockyards Act is designed to prevent. The Judicial Officer is not bound by an administrative law judge's credibility, legal, and factual determinations, but gives great weight to the findings by and the credibility determinations of an administrative law judge. Formalities of court pleading are not applicable in administrative proceedings, and the complaint apprised Respondent that all the terms of the Beef Marketing Agreement were at issue in the proceeding. Respondent's failure to make the terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice, but Complainant failed to prove that Respondent's failure to make the terms available to all feedlots in Kansas is unjustly discriminatory in violation of section 202(a) of the Packers and Stockyards Act (7 U.S.C. § 192(a)). Similarly, while the Beef Marketing Agreement gives nine feedlots a preference and an advantage and subjects other similarly situated feedlots in Kansas to a prejudice and a disadvantage, Complainant failed to prove that the preference, advantage, prejudice, or disadvantage was undue or unreasonable in violation of section 202(b) of the Packers and Stockyards Act (7 U.S.C. § 192(b)).

JoAnn Waterfield, for Complainant.

Charles W. Douglas, William H. Baumgartner, Jr., Sheila B. Hagen, and Nathan A. Hodne, for Respondent.

Initial Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

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

The Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act,

1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; and 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 filing a Complaint and Notice of Hearing [hereinafter Complaint] on August 3, 1995.

The Complaint alleges that, during the period February 1994 through the present, IBP, inc. [hereinafter Respondent], purchased cattle under an exclusive marketing agreement, known as the Beef Marketing Agreement, in violation of section 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) (Compl. ¶ II(a)). Specifically, the Complaint alleges that Respondent's use of the Beef Marketing Agreement gives an undue or unreasonable preference to a group of feedlots located in Kansas [hereinafter the Beef Marketing Group]\* by guaranteeing a high price for livestock purchased from the Beef Marketing Group and subjecting similarly situated feedlots in Respondent's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these similarly situated feedlots under the same terms made available to the Beef Marketing Group (Compl. ¶ II). On August 28, 1995, Respondent filed Answer of IBP, inc. [hereinafter Answer], in which Respondent: (1) admits that it is subject to the Packers and Stockyards Act; (2) admits that beginning in February 1994, and continuing to the present, it purchased cattle placed with the Beef Marketing Group under the Beef Marketing Agreement; (3) admits that it has refused to purchase cattle placed with two feedlots on the same basis as offered by the Beef Marketing Group; and (4) denies that its use of the Beef Marketing Agreement violates section 202(a) and (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) (Answer).

On December 6, 1996, Complainant filed Complainant's Prehearing Memorandum and Respondent filed Prehearing Memorandum of IBP, inc. Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] conducted a hearing in Kansas City, Missouri, from January 29, 1997, through February 7, 1997; in Washington, D.C., from February 12, 1997, through February 21, 1997; in Sioux City, Iowa, from March 10, 1997, through March 12, 1997; and in Washington, D.C., from April 14, 1997, through April 15, 1997. JoAnn

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\*The Complaint alleges: (1) that the Beef Marketing Group consists of (A) Knight Feedlot, Inc., Lyons, Kansas; (B) Ward Feedyard, Larned, Kansas; (C) Barton County Feeders, Inc., Elingwood, Kansas; (D) Golden Belt Feeders, St. John, Kansas; (E) Pawnee Valley Feeders, Inc., Hanston, Kansas; (F) Great Bend Feeding, Inc., Great Bend, Kansas; and (G) Carl Dudrey, St. John, Kansas; and (2) that at one time two additional feedlots were part of the Beef Marketing Group (A) Pratt Feeders, Inc., Pratt, Kansas; and (B) Mull Farms and Feeding, Inc., Pawnee Rock, Kansas. (Compl. ¶ II(a) n.1.)

Waterfield, Esq., and Timothy Morris, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Charles W. Douglas, Esq., and William H. Baumgartner, Jr., Esq., of Sidley & Austin, Chicago, Illinois, and Lonnie O. Grigsby, Esq., and Nathan A. Hodne, Esq., of IBP, inc., Dakota City, Nebraska, represented Respondent.

On June 17, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order and Respondent filed IBP, inc.[.]'s Proposed Findings of Fact and Post-Hearing Memorandum. On July 22, 1997, Complainant filed Complainant's Reply Brief and Respondent filed IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order. On September 25, 1997, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] concluding that Respondent did not violate section 202(a) or (b) of the Packers and Stockyards Act (7 U.S.C. § 192(a)-(b)) and dismissing the Complaint (Initial Decision and Order at 10, 30).

On November 5, 1997, Complainant appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).\*\* On November 28, 1997, Respondent filed Response of IBP, inc. to Agency's Appeal Petition and Brief [hereinafter Respondent's Response] and Request of IBP, inc. for Oral Argument.

On April 24, 1998, I issued a Ruling Granting Motions for Oral Argument. On June 8, 1998, oral argument was heard in Washington, D.C. JoAnn Waterfield, Esq., appeared on behalf of Complainant. William H. Baumgartner, Jr., Esq., appeared on behalf of Respondent. On July 1, 1998, Respondent filed Motion of IBP, INC. To Correct Record [hereinafter Motion to Correct Transcript], and on July 2, 1998, Complainant filed Complainant's Proposed Corrections to the Transcript. On July 20, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Correct Transcript and Complainant's Proposed Corrections to the Transcript and a decision.

On July 22, 1998, I issued a Ruling Granting in Part and Denying in Part Respondent's Motion to Correct Transcript and Complainant's Proposed

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\*\*The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

### Corrections to Transcript.

Based upon a careful consideration of the record in this proceeding, I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because Respondent's right of first refusal has the effect or potential effect of reducing competition. While I disagree with the Chief ALJ's conclusion that Respondent did not violate the Packers and Stockyards Act, I agree with most of the Chief ALJ's findings of fact and discussion. Therefore, except with respect to the Chief ALJ's conclusion and order, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order in this proceeding. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and transcript references are referred to as "Tr."

## APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

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### CHAPTER 9—PACKERS AND STOCKYARDS

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### SUBCHAPTER II—PACKERS GENERALLY

#### § 191. "Packer" defined

When used in this chapter the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.

**§ 192. Unlawful practices enumerated**

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer or any live poultry dealer, or buy or otherwise receive from or for any other packer or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

**§ 193. Procedure before Secretary for violations****(a) Complaint; hearing; intervention**

Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this subchapter, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. . . .

**(b) Report and order; penalty**

If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this subchapter covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

. . . .

**§ 223. Responsibility of principal for act or omission of agent**

When construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or

employed by any packer, any live poultry dealer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, any live poultry dealer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

7 U.S.C. §§ 191, 192, 193(a), (b), 223.

**CHIEF ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS MODIFIED)**

. . . . [Footnote 1 omitted.]

**Findings of Fact**

1. Respondent, IBP, inc., is a Delaware corporation with its headquarters located in Dakota City, Nebraska. [Respondent's mailing address is Box 515, Dakota City, Nebraska 68731.] Respondent is, and at all times material to this proceeding was, a packer within the meaning of the Packers and Stockyards Act [and subject to the provisions of the Packers and Stockyards Act] (Answer).

2. Respondent began operations in 1961 with one plant in Denison, Iowa. Subsequently, Respondent added 10 fed cattle packing plants in the United States and entered the pork and non-fed cattle businesses as well. (Tr. 3352-55.)

3. [Respondent typically ranks between 80 and 95 on the *Fortune* 500 list of the 500 largest corporations in the United States.] In 1996, Respondent had total sales of approximately \$13 billion. Sales of products derived from fed cattle account for approximately 80 percent of Respondent's sales. (Tr. 3357-58.)

4. Respondent's primary competitors . . . are Monfort, Inc. (a subsidiary of Conagra, Inc.), Excel Corporation (a subsidiary of Cargill, Inc.), and National Beef Packing Company (a subsidiary of Farmland Foods). Together with Respondent, these packers collectively account for between 70 and 80 percent of the fed cattle slaughtered in the United States. (Tr. 3364.)

5. [Respondent maintains two packing facilities in Kansas. Respondent's Holcomb plant, also known as the Finney County plant, is located in the western portion of Kansas (Tr. 511).] Respondent purchased its Emporia plant in eastern Kansas in 1968 and began operations there in 1969. Since [1969,] the plant's capacity has increased from 2,800 cattle per day to 4,000 cattle per day. (Tr. 2890, 3499-3500.) Respondent's Emporia, Kansas, plant generally operates 11 shifts

[each week], two shifts each day[, Monday through Friday,] and one shift on Saturday. To operate a packing plant at a profit, a packer must generally operate the plant at near capacity. (Tr. 3368-69.) Respondent's Emporia, Kansas, plant employs between 2,500 and 2,600 workers. Each person is guaranteed 40 hours of work per week, even if Respondent is unable to acquire enough cattle to run complete shifts. (Tr. 3501-03.)

6. Before cattle are sold to packers in Kansas, the cattle are typically sent to feedlots, where high energy rations are fed to them in order to add flecks of fat to the animals' muscle, known as marbling; thereby improving the taste and tenderness of the beef. While in the feedlot, cattle typically gain about 3 pounds per day. One pound of gain requires approximately 7 pounds of feed. Cattle generally remain at the feedlot for between 120 and 150 days, until reaching a weight of approximately 1,200 pounds. At that point, [the cattle] are sold to a packer. (Tr. 3339-44.)

7. The standard practice in Kansas is for cattle to be delivered [to the slaughter plant] within 7 days of the sale (Tr. 134). Cattle are typically slaughtered on the same day they arrive at the plant (Tr. 3473).

8. Packers in Kansas generally purchase fed cattle using one of the following four methods: (1) live; (2) flat, in the beef; (3) grade and yield sales; or (4) forward contracts (Tr. 3458-60).

9. In live cattle sales, packers pay for cattle based on their weight while they are alive. Cattle are usually weighed at the feedlot on the day the cattle are picked up for delivery to the slaughter plant. Bids are expressed in dollars per hundredweight. (Tr. 3458.)

10. In the traditional method of selling cattle on a live basis, packer buyers visit feedlots, where they are presented with a show list identifying the pens of cattle that are for sale that week. The [packer] buyers evaluate the cattle and bid on the pens of interest. Feedlots often must call the cattle owner to determine whether the cattle will be sold at the price bid by the packer buyer. A series of telephone calls with counterproposals between the packer buyer, the feedlot, and the owner may ensue. (Tr. 132, 3746.)

11. Feedlots usually allow the first buyer who arrives at the feedlot to place the first bid. Also, a feedlot will usually sell the cattle to the first buyer to bid the price at which the cattle owner is ultimately willing to sell. For example, if every buyer bids \$70 on a pen of cattle, the feedlot will sell the pen to the first buyer who bid. It is, therefore, important for the packer buyer to be the first bidder at the feedlot, and it is not uncommon for a buyer to arrive at the feedlot as early as the night before [the sale]. (Tr. 466-68, 3530, 3690-91.)

12. With flat, in the beef sales, packers pay the cattle owners based on the

actual carcass weight of the animals at the packing plant after slaughter, rather than the total live weight of the animal at the feedlot (Tr. 3458). In grade and yield sales, packers pay cattle owners based on a formula that takes into account both the actual carcass weight of the animals and the grade assigned to the carcass (Tr. 3459). A forward contract fixes the price to be paid for cattle several weeks or months in advance of the delivery date (Tr. 3459).

13. Respondent purchases cattle using all [four methods of purchase: (1) live; (2) flat, in the beef; (3) grade and yield sales; and (4) forward contracts] (Tr. 3458-60).

14. The Beef Marketing Group consists of nine feedlots in central Kansas that joined together in 1988 to develop more effective marketing methods for their cattle (Tr. 3713-14). The original Beef Marketing Group members are: Barton County Feeders, Inc.; [Carl] Dudrey Cattle Company; Golden Belt Feeders; Great Bend Feeding, Inc.; Knight Feedlot, Inc.; Mull Farms and Feeding, Inc.; Pawnee Valley Feeders, Inc.; Pratt Feeders, Inc.; and Ward Feedyard. Additional feedlots have been included based on an ownership interest of the original members. (Tr. 454.)

15. In 1990, the Beef Marketing Group entered into a marketing arrangement with Excel under which Beef Marketing Group members were entitled to sell cattle to Excel on a forward contract basis, which guaranteed Beef Marketing Group members the highest basis that Excel paid any producer for fed cattle delivered under forward contracts for the period in question. In return, Beef Marketing Group members agreed to supply Excel with a specified minimum number of cattle. (Tr. 3726-27.) Most of the cattle subject to the agreement [between the Beef Marketing Group and Excel] were Holstein cattle (Tr. 3720-21; CX 2 at 22).

16. The arrangement between the Beef Marketing Group and Excel resulted in Excel buying a substantial portion of the cattle sold by Beef Marketing Group [members] and Beef Marketing Group [members] feeding substantially more Holsteins. Holsteins are primarily used as dairy cattle and provide lesser quality cuts of beef. Respondent has little interest in purchasing Holsteins. (Tr. 3721, 3731.)

17. In September 1993, the agreement between the Beef Marketing Group and Excel was effectively terminated (Tr. 3729-30). In January 1994, Beef Marketing Group representative, Lee Borck approached Respondent's head buyer, Bruce Bass, with a proposal for a marketing agreement (Tr. 3732). Respondent's competitors had already expressed an interest in participating in a marketing agreement with the Beef Marketing Group (Tr. 582, 618, 624, 3737). In February 1994, Respondent and the Beef Marketing Group entered into the Beef Marketing

Agreement under terms essentially proposed by the Beef Marketing Group (Tr. 3733).

18. The Beef Marketing Agreement provides terms for live cattle sales which differ . . . from traditional methods for purchasing cattle in Kansas. Instead of bidding in dollars per hundredweight, bids are made using a basis that is adjusted for quality. The basis [originally] used was the highest price paid in Kansas for at least 500 . . . cattle in a given week, as reported by the United States Department of Agriculture (the Kansas practical top). Cattle which are top quality receive bids of "par" or "even," and Respondent pays the Kansas practical top price for that pen. Cattle of lesser quality receive discounted bids, for example, "minus fifty," and Respondent pays \$0.50 per hundredweight less than the Kansas top price. [Respondent can bid] over the basis, for example, "plus fifty," for superior cattle, although this rarely occurs. (Tr. 3511, 3743-44.)

19. Under the Beef Marketing Agreement, bids [originally] were made on Monday and had to be accepted or rejected by Wednesday (Tr. 3513). In deciding whether to accept or reject bids, producers do not have to consider any potential changes in the market during that week. Since the bids are keyed to the Kansas practical top price for the week, producers receive the benefit of any increase in the market value during the week, but are not be affected by any decline in value. A producer, however, would still have to consider the potential for market changes from week to week. For example, a producer might opt to sell a pen of cattle either before or after the animals reach their ideal weight, if there is some indication the price will be high enough in a given week to make up for a discount on light cattle, or for the cost of feeding the cattle for an extra week.

20. The Beef Marketing Agreement also includes several non-price terms. Respondent committed to bid on every pen of cattle and is entitled to offer a separate price for each pen (Tr. 3513, 3742, 3747-48). Respondent [originally] had until Saturday of the following week to pick up the cattle, giving Respondent 3 days more than the customary period [to pick up cattle] (Tr. 3513). Respondent [originally] had a right of first refusal for all cattle on which it bid even or better (Tr. 462, 830, 1595, 3231-32, 3511-14, 3734). Respondent agreed to share slaughter information with [Beef Marketing Group members] (Tr. 3514).

21. In August 1994, the basis for bidding under the Beef Marketing Agreement was changed to the reported Kansas top price for 2,500 cattle or more. The time to accept or reject bids was moved back from Wednesday to Tuesday, and the pick up date was moved back from Saturday to Friday. In addition, the day for buyers to look at cattle was moved back from Monday to Thursday of the prior week (Tr. 3515-16).

22. Further changes were made to the Beef Marketing Agreement in

November 1995. A new grade and yield option was added. Also, for cattle sold on a live weight basis, penalties and premiums were added for cattle yielding under or over specified amounts. The right of first refusal was expanded to include pens on which Respondent bid at least the Kansas top price minus 50 cents. The basis for bidding was changed to a negotiated middle point between the Kansas top price for 2,500 cattle or more and the Kansas top price paid during the week by Respondent (in weeks when the two prices were different). (Tr. 3515-16, 3656.)

23. Two Beef Marketing Group members stopped selling . . . cattle [to Respondent] under the terms of the Beef Marketing Agreement, although they have remained members of the Beef Marketing Group (Tr. 537, 3766). Pratt Feeders, Inc., stopped selling cattle to Respondent under the terms of the Beef Marketing Agreement in February 1995 (Tr. 537). Pawnee Valley Feeders, Inc., stopped selling cattle to Respondent under the terms of the Beef Marketing Agreement in August or September 1996 (Tr. 3767).

24. Respondent has continued to purchase cattle from other Kansas feedlots under traditional methods of purchase. Other packers have continued to purchase cattle from feedlots other than those that are members of the Beef Marketing Group. Feedlots other than those that are members of the Beef Marketing Group have continued to receive competitive prices for . . . cattle after the institution of the Beef Marketing Agreement between Respondent and the Beef Marketing Group (Tr. 3168, 3185-86, 3195-96).

25. Testimony received from owners and operators of feedlots that are not members of the Beef Marketing Group failed to show that they were harmed by the Beef Marketing Agreement. . . . [Sellers Feedlot] expanded in 1994 and 1996 (Tr. 960-61). Ottawa County Cattle Associat[es] grew from April 1994 through October 1994 (Tr. 1171). Mann's ATP, [Inc.], purchased a neighboring feedlot expanding capacity by 6,000 cattle, and has not had any difficulty filling pens. The number of its customers has doubled since 1994. (Tr. 1228-30.) Mid-America Feedyards has grown in capacity and occupancy over the last 3 years (Tr. 1728-32).

26. The types of marketing options available at a given feedlot is a factor cattle owners consider in determining where to place cattle; however, it is not as important as other factors, such as a feedlot's reputation, cost of gain, or pen availability (Tr. 1778, 1807, 1925, 3708-11, 3932-33).

[27. Respondent's right of first refusal under the Beef Marketing Agreement provides that Respondent may obtain cattle placed in feedlots that are members of the Beef Marketing Group by matching the previous high bid, rather than by bidding a higher price than previously bid.

28. Respondent's right of first refusal allows Respondent to enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by

matching any bid that may be higher than Respondent's bid.

29. Respondent's right to acquire cattle by matching the previous high bid not only has the potential of discouraging others from bidding on cattle, but also necessarily restricts competition because Respondent's right of first refusal obviates Respondent's need to bid competitively with those bidders not discouraged from bidding for cattle placed at Beef Marketing Group feedlots, in order to obtain those cattle.

30. The effect or potential effect of Respondent's right of first refusal under the Beef Marketing Agreement is to reduce competition.]

### **Conclusion of Law**

[Respondent's right of first refusal under the Beef Marketing Agreement violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because it has the effect or potential effect of reducing competition.]

### **Discussion**

#### **A. Applicable Law.**

....

Complainant maintains that Respondent[']s refusal to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas that are similar to members of the Beef Marketing Group: (1) gives Beef Marketing Group members an undue or unreasonable preference or advantage; (2) subjects Kansas feedlots that are not members of the Beef Marketing Group to an undue or unreasonable prejudice or disadvantage; and (3)] constitutes an unfair or unjustly discriminatory practice, in violation of section 202 of the Packers and Stockyards Act [(7 U.S.C. § 192).\*\*\*] The legislative history of [the Packers and Stockyards Act establishes] that Congress intended the legislation to have a more far-reaching effect than existing

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[ \*\*\*The Complaint alleges that Respondent subjects similarly situated feedlots in Respondent's procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these feedlots under the same terms made available to the Beef Marketing Group (Compl. ¶ II(d)). While the evidence does not establish the boundaries of Respondent's procurement area, the record establishes that Respondent has procured cattle at feedlots located outside Kansas. Complainant, however, changed its position during the proceeding and asserts that Respondent subjects similarly situated feedlots in Kansas, rather than similarly situated feedlots in Respondent's procurement area, to an undue or unreasonable prejudice or disadvantage.]

antitrust statutes, such as the Sherman [Antitrust Act,] Clayton Act[, the Federal Trade Commission Act, and the Interstate Commerce Act]. *See Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962). [For example, one of the Congressional sponsors of H.R. 6320, the bill that was later enacted as the Packers and Stockyards Act, described the breadth of the bill and the scope of the Secretary of Agriculture's authority under the bill, as follows:

Mr. Haugen. . . .

It gives the Secretary complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.

The bill further coordinates the duties of the Secretary of Agriculture so that it prevents overlapping of authority and duplication of jurisdiction of the departments of Government having regulatory power which previously existed. The object sought is to preserve and hold on to all powers granted to regulate and prevent abuse and unfair practices, or, in other words, not to weaken but to strengthen existing laws.

It provides for ample court review of any of the orders or regulations of the Secretary of Agriculture so as to protect the industry from any mistakes of judgment or unwarranted use of the power thus delegated.

Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of the war emergency measures, and possibly the interstate commerce act.

61 Cong. Rec. 1801 (1921).

Moreover, the language of the Packers and Stockyards Act does not limit the Secretary of Agriculture's jurisdiction, as expressed by Mr. Haugen. Therefore, I find the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act includes the authority to examine agreements between packers and feedlots and to impose sanctions authorized by the Packers and Stockyards Act if such agreements result in or may potentially result in the harm which the Packers and Stockyards Act is designed to prevent.]

. . . . [Footnote 2 omitted.]

**B. Complainant failed to prove the existence of \$0.43 per hundredweight price difference.**

The Complaint alleges that: "Respondent gives an undue or unreasonable

preference to the Beef Marketing Group by guaranteeing a high price for livestock purchased from the Beef Marketing Group while refusing to make the same terms of purchase available to similarly situated sellers of comparable livestock." (Compl. ¶ II(c).) [Footnote 3 omitted.] Specifically, Complainant contends that Respondent provided Beef Marketing Group members with a price preference of \$0.43 per hundredweight.<sup>4</sup> Complainant failed to . . . prove that \$0.43 per hundredweight accurately represents the price difference that . . . resulted from the Beef Marketing Agreement.

The alleged \$0.43 per hundredweight preference was derived from an analysis by the Industry Analysis Staff, Packers and Stockyards Programs, which examined Respondent's transactions for a 20-week period in late 1993 and early 1994, that encompassed the 10 weeks before and the 10 weeks after the Beef Marketing Agreement went into effect.

The Industry Analysis Staff began with an examination of simple statistics surrounding the transactions. Statistics, however, only examine factors in isolation; and therefore, [do] not . . . show whether any price change was actually caused by the Beef Marketing Agreement or by some other factor. Recognizing the limited value of a purely statistical analysis, the Industry Analysis Staff developed a multiple regression model. Multiple regression is a statistical technique which can be used to examine the simultaneous effects of several factors on a single variable, if the model complies with various assumptions. Using the regression model, the Industry Analysis Staff economists concluded that the price difference attributable to the Beef Marketing Agreement was \$0.43 per hundredweight. The Industry Analysis Staff model, however, suffers from a number of defects which render this conclusion unreliable.

Due to the complicated nature of the econometric study, [Complainant and Respondent] presented expert testimony to explain and analyze the study and its results. Dr. Gerald Grinnell and Dr. Warren Preston, two of the economists involved in the study, testified on behalf of [Complainant]. Dr. Grinnell and Dr. Preston are both agricultural economists employed by the United States Department of Agriculture. Although both have considerable expertise in the field of agricultural economics, neither has any specialized training or expertise in the

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<sup>4</sup>Complainant also presented testimony from [operators of feedlots, which are not members of the Beef Marketing Group,] who estimated that the value of the Beef Marketing Agreement ranged from \$1 to \$3 per hundredweight (Tr. 772, 931, 987). These estimates were purely speculative, with no factual support . . . and were made by individuals who were not aware of all the terms of the Beef Marketing Agreement. This testimony, therefore, is of scant probative value and merits no further discussion.

field of econometrics. [(Tr. 1961-67, 2591-95.)]

Professor Jerry Hausman testified on behalf of Respondent. Professor Hausman is a recognized expert in the field of econometrics. He is a professor at the Massachusetts Institute of Technology where he teaches econometrics. [Professor Hausman] is a former editor of the journal *Econometrica*; and he is the author of numerous publications on the subject. He developed a method of testing models for bias commonly known among econometricians as the "Hausman Specification Test." [(Tr. 3943-47.)]

According to Professor Hausman, the Industry Analysis Staff model is biased and unreliable (Tr. 3948). With non-randomized experiments, such as the one conducted by the Industry Analysis Staff, there is a critical assumption that the variable being tested is not correlated with all factors not accounted for by the developed model. The Industry Analysis Staff failed to test this assumption, and when Professor Hausman tested it, the model failed.

Professor Hausman explained that BMGAFTER (the variable of interest in the study) is a "catch-all," which would capture [not only the effect of the Beef Marketing Agreement on Beef Marketing Group prices, but also the effect of other factors not included in the regression that impacted Beef Marketing Group prices differently in the post-Beef Marketing Agreement period than prices at feedlots that are not members of the Beef Marketing Group (RX 46 at 15)]. The Industry Analysis Study assumes that these unaccounted-for factors are not correlated with the characteristics of the transactions that are included in the model; and also that the unaccounted-for factors had the same effect on price throughout the study. Professor Hausman employed two tests[, the Hausman Specification Test and the Chow Test,] to verify these assumptions. Based on [the results of the Hausman Specification Test, Professor Hausman found that it cannot be assumed that the unaccounted-for factors are not correlated with the characteristics of the transactions that are included in the regression model. Moreover, Professor Hausman found that the assumption that the unaccounted-for factors had the same effect on price throughout the study was rejected by the Chow Test data.] Professor Hausman . . . concluded that the [Industry Analysis Staff's] regression analysis was [not scientifically valid, and no conclusion could be drawn from the regression analysis]. (RX 46 at 11-20; Tr. 3969-70, 3979.)

Complainant failed to introduce any evidence to show that its model does pass the Hausman Specification Test or the Chow Test. Instead, Complainant disputed the applicability of the Hausman Specification Test and challenged Professor Hausman's method of performing the Chow Test, as well as his interpretation of the results. The arguments made by Complainant are unpersuasive. Professor Hausman is a noted econometrician with considerable expertise in conducting these

tests, particularly the Hausman Specification Test, which he developed. I found him to be a most credible witness and have consequently afforded great weight to his analysis of the econometric study.

....

Professor Hausman also pointed out that the model is not reliable in that it fails to account for non-price conditions of sale. . . . The model does include a variable to account for extended delivery when it was taken; however, no variable is included to test the value of the option of extended delivery. Failure to include important variables which are related to the variable of interest can create bias in the results (Tr. 3958). In fact, Complainant admits that any price difference resulting from [non-price conditions of sale] would appear in the \$0.43 per hundredweight price difference (Complainant's Reply Brief at 16). Omission of the [option of extended delivery], therefore, calls into question the accuracy of the results, since it cannot be determined from the [Industry Analysis Staff's] regression [analysis] whether or not it was this factor that actually caused the price difference.

. . . [T]estimony of industry witnesses contradicting certain [Industry Analysis Staff] test results [is an indicator of] the inaccuracy of the Industry Analysis Staff model. The regression results suggest that whether a pen is predominantly heifer or steer has a greater effect on the price of cattle than does the per centum of the pen that grades prime or choice (Tr. 2406-11; CX 10 at 3, CX 25 at 72-73). Industry witnesses testified that the per centum of a pen grading prime or choice is an important factor in determining price and . . . that there is currently no real price distinction between steers and heifers (Tr. 668-70, 737, 942, 1011-12, 1102, 1162, 1222-23, 1287-88, 1556-57, 1727-28).

Finally, even if the [Industry Analysis Staff] regression results were accepted as accurate for the period studied, that period cannot be found to be representative of the period covered by the Complaint. The Industry Analysis Staff model only observed the effects of the Beef Marketing Agreement for the first 10 weeks that it was in effect. Several industry witnesses testified that the market was volatile during this time period (Tr. 772, 975, 1339). Complainant introduced evidence that the market fluctuated in 10 out of the 12 weeks between February 14, 1994, and May 7, 1994 (Tr. 654-55). . . .

Complainant admits that the market was volatile in 1994 (Complainant's Proposed Findings of Fact, Conclusions and Order, Finding of Fact No. 13), but claims that such volatility was not unusual. There was no evidence introduced, however, suggesting that [the market was] volatile [in 1995 or 1996]. To the contrary, Complainant never looked at market changes during any other time period or made any attempt to discover whether the period selected for the study

would provide an accurate representation of the effects of the Beef Marketing Agreement.

Complainant asserts that the study does not need to be representative of the entire time period at issue [because the econometric findings for the period studied, standing alone, are sufficient to prove a price preference (Complainant's Reply Brief at 13-14). I agree with Complainant that, if the Industry Analysis study was reliable, the study would establish that Respondent gave members of the Beef Marketing Group a price preference; however, if the 10-week period studied was more volatile than the entire period during which the Beef Marketing Agreement was in effect, the amount of the price preference shown by the 10-week study would be higher than the actual price preference caused by the Beef Marketing Agreement during the entire period the Beef Marketing Agreement was in effect.]

The evidence does indicate that Respondent must have, on average, paid a higher price for cattle purchased under the terms of the Beef Marketing Agreement than it did on other transactions. Under the terms of the Beef Marketing Agreement, Beef Marketing Group members were able to receive the benefit of any increase in the market value of their cattle, but were not subject to any downward fluctuation of the market. . . . [T]herefore, [I find that Respondent paid, on average,] a higher price for cattle [placed] at Beef Marketing Group feedlots than [Respondent paid for cattle placed at feedlots that are not members of the Beef Marketing Group].<sup>5</sup> The [difference between the price Respondent paid for cattle at feedlots that are members of the Beef Marketing Group and the price Respondent paid for cattle at feedlots that are not members of the Beef Marketing Group], however, is uncertain and unproven. . . .

**C. [Respondent received benefits under the Beef Marketing Agreement for its payment of higher prices for cattle.]**

Although Respondent . . . paid higher prices [for cattle purchased] under the terms of the Beef Marketing Agreement [than it paid for similar cattle placed at feedlots that were not members of the Beef Marketing Group], Respondent was not only paying for cattle, it was also paying for [two] bargained-for non-price conditions of sale. Respondent obtained valuable benefits under the Beef

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<sup>5</sup>The conclusion that Respondent must have paid somewhat more for cattle under the Beef Marketing Agreement is also consistent with the fact that Respondent received superior non-price terms of sale under the Beef Marketing Agreement which would not likely have been offered for free. See the discussion at part C [in this Decision and Order, *infra*].

## Marketing Agreement. . . .

1. Right of First Refusal

Under the Beef Marketing Agreement, Respondent initially had a right of first refusal on all cattle for which it bid even or better. Subsequently, the right was expanded to include cattle on which Respondent bid [at least] "minus 50."

Complainant asserts that Respondent did not have a right of first refusal under the Beef Marketing Agreement, citing testimony from cattle producers who fed cattle at Great Bend Feeding, Inc., and Pratt Feeders, Inc., who did not know about [Respondent's right of first refusal (Complainant's Proposed Findings of Fact, Conclusions and Order at 80-83)]. It is true that several producers were unaware that the right [of first refusal] existed; however, most of them were also unaware of the extended delivery term, the existence of which Complainant does not dispute (Tr. 1764-65, 1789-90, 1824-25, 1874, 1944-45). The former assistant feedlot manager at Great Bend Feeding, Inc., explained that he did not provide producers with all of the details of the Beef Marketing Agreement because he did not want them to be unnecessarily confused (Tr. 3913). Pratt Feeders, Inc., sold under the terms of the Beef Marketing Agreement for only 1 year[; therefore,] it is unlikely that all of its customers would be aware of every term.

Complainant also maintains that the right of first refusal did not exist because it was not enumerated in a one-page summary of terms signed by Lee Borck and Bruce Bass (CX 2 at 2). Complainant refers to the memorandum as the "Beef Marketing Agreement," and insists that it represents the Beef Marketing Agreement in its entirety.<sup>6</sup> Complainant, however, cannot bypass the intent of the parties and unilaterally decide that the memorandum [is] a complete integration of the terms of the Beef Marketing Agreement.<sup>7</sup> Complainant did not offer any evidence to show that terms [of the Beef Marketing Agreement] are limited to those contained in the memorandum, and in fact, the evidence establishes that the Beef Marketing

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<sup>6</sup> . . . The memorandum was not presented to Complainant as anything more than a summary of terms. When Respondent [transmitted a facsimile] of the memorandum to Complainant, it bore the notation: "Keith, This would be the *general guidelines* on how the purchases are occurring." (CX 2 at 1 (emphasis added)). . . .

<sup>7</sup> Cf. *Battery Steamship Corp. v. Refineria Panama, S.A.*, [5]13 F.2d 735, 739 (2d Cir. 1975); *United States v. Clementon Sewerage Authority*, 365 F.2d 609, 613 (3d Cir. 1966); *Greenberg v. Tomlin*, 816 F. Supp. 1039, 1052 (E.D. Pa. 1993); *Monon Corp. v. Wabash Nat. Corp.*, 780 F. Supp. 577[, 582-83] (N.D. Ind. 1991).

Agreement between the Beef Marketing Group and Respondent is intended to, and does, contain additional terms, including a right of first refusal.

Several witnesses, including those testifying for [Complainant], stated that the right of first refusal exists. Bruce Bass and Lee Borck, who negotiated the Beef Marketing Agreement, both testified that there is a right of first refusal (Tr. 3512-13, 3734). Jerry Bohn, the general manager of Pratt Feeders, Inc., testified for [Complainant] that the right of first refusal is part of the Beef Marketing Agreement and explained that a disagreement over that term caused Pratt Feeders, Inc., to stop selling under the Beef Marketing Agreement (Tr. 462[-63]). Ray Palenske, a [cattle buyer for Respondent], and Marvin Stilgenbauer[, a cattle buyer for Excel], also testified for [Complainant] that there is a right of first refusal (Tr. 830, 1595). Finally, Jay Johnson, Chief of the Packer Branch[, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration], testified as a representative of the agency that Respondent has a right of first refusal and that the right has a value. He further stated that he knew the right existed at least as early as January 1995. (Tr. 3231-32.) Assertions that the right does not exist are, therefore, inconsistent with the evidence of record.

Complainant further argues that even if the right of first refusal does exist, it is not worth any extra payment. On the contrary, the right of first refusal is quite valuable. Along with [Respondent's] commitment to make a good faith bid on every pen, [the right of first refusal] helps Respondent maintain a steady supply of high quality cattle, close to Respondent's Emporia plant. After the Beef Marketing Agreement went into effect, [Respondent's] purchases from Beef Marketing Group [members] nearly doubled, and capacity utilization at Emporia increased by 66 head per week. Increased capacity utilization translates into increased profits since labor and other fixed costs remained constant with the increase. In the first 10 weeks of the Beef Marketing Agreement, the added cattle accounted for an additional contribution of \$17,609 from the slaughter division and an additional \$23,765 from the processing division, for a total increase in profits of \$41,374. (Tr. 3825-32; RX 8.)

The right of first refusal also allows Respondent's [cattle] buyers to be the first bidder at Beef Marketing Group [feedlots] without having to arrive at dawn, or sooner, and it eliminates repeated telephone calls and trips to the feedlots during the negotiating process (Tr. 881-82, 3467-68). Increased efficiency certainly has value, even if it [cannot be] quantified. Complainant recognized this value in its econometric study, which hypothesizes that price would increase with the number of cattle in each lot due to increased efficiency related to purchasing larger lots (CX 25 at 54).

In the alternative, Complainant asserts that even if the right of first refusal is a

valuable benefit that Respondent received from the Beef Marketing Agreement, it is anti-competitive and unlawful under the Packers and Stockyards Act, and, therefore, should not be considered. [As discussed in this Decision and Order, *infra*, I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because it has the effect or potential effect of reducing competition. However, even if Respondent's right of first refusal is not considered, Respondent's right under the Beef Marketing Agreement to extended delivery is a valuable benefit which can be considered.]

## 2. Extended Delivery

Under the Beef Marketing Agreement, Respondent is able to delay its pick up of cattle as many as three extra days. Delivery can be scheduled as many as 10 days following the sale, instead of the customary 7 days. Complainant argues that this term does not have value because packers could sometimes get extended delivery without the Beef Marketing Agreement.

The record evidence shows that even though feedlots do, at times, give extended delivery, such extensions are not normal practice (Tr. 447, 918, 944-47, 1132-33, 1226-27, 1733-36). Ray Palenske[, a cattle buyer for Respondent,] testified that he could normally get one extra day from a feedlot if he begged. He also testified, however, that it is "very, very, very difficult" to get more than one extra day . . . (Tr. 837). Excel [cattle] buyer, Robert Albrecht, testified that feedlots would give him an extra day approximately 50 percent of the time that he asked for one (Tr. 1633). The record further shows that some feedlots are particularly resistant to the practice of extending delivery. Kenneth Wiens, of Central Feeders, for example, testified that, although he sometimes gives extra days, he "frowns on" the practice, and he has some customers who never allow extra time (Tr. 739-40). Allen Sents, of McPherson County Feeders, testified that he tries to avoid giving extended delivery (Tr. 970). Wend[e]ll Zimmerman, of Zimm's Feedlot, testified that he "very seldom" allows delivery beyond 7 days (Tr. 1077-78). Lowell Sawyer, of O.K. Corral, testified that he is opposed to giving extended delivery terms and will only allow it "very occasionally" (Tr. 1289-90). None of the feedlot operators testified that they would guarantee 10-day delivery on all sales, for free.

There is a difference between being able to obtain extended delivery sometimes and having the right to take extra days on any transaction, for any reason. This difference is of economic value to Respondent.

The availability of extra days benefitted Respondent by allowing greater flexibility in scheduling delivery of cattle for slaughter. [Respondent slaughters] approximately 4,000 [cattle] each day [at its Emporia plant], and the cattle are

generally slaughtered on the same day they arrive at the plant (Tr. 3474). The scale house coordinator must schedule daily shipments in a way which accommodates Respondent's inventory without overburdening the plant. Having three extra days [during which cattle shipments can be scheduled] helps to ease scheduling pressures, while enabling Respondent to maximize its inventory.

Also, it is unlikely that feedlots would grant three extra days as a matter of right without some compensation for the cost of feeding the animals those additional days. Steve Sellers, of Sellers Feedlot, testified that after 7 days it can cost \$0.50 per hundredweight or more to feed an animal for a single day [(Tr. 945-47). Lowell Sawyer, of the O.K. Corral, testified that later in the feeding cycle the cost of gain is higher than the cost of gain earlier in the feeding cycle and one would lose money by having to feed cattle extra days, even taking into account the extra weight gained by the cattle] (Tr. 1308-09). Jerry Anderson, of Mid-America Feedyards, testified that a 10-day delivery period could cost as much as \$5 per hundredweight more than a 7-day delivery period (Tr. 1736). Furthermore, the cattle owner bears the risk of any type loss, which would include death, injury, or weight loss, during the extra days. In high risk situations, such as when a storm is forecast, an owner would likely deny extended delivery terms under a regular sale, but would be unable to refuse . . . Respondent [extended delivery of cattle placed at Beef Marketing Group feedlots]. (Tr. 1013-14.) Due to the extra risk and cost to the feedlots, it is to be expected that they would impose a compensatory charge. Complainant's econometric study recognizes this fact: "Feedlot managers are reluctant to hold cattle beyond the standard delivery period since delayed delivery increases costs to the feedlot. Thus, we expected that feedlots would demand additional compensation to hold cattle for extended delivery and IBP, inc. would incur higher costs of cattle." (CX 25 at 58.)

Complainant also argues that extended delivery is not worth \$0.43 because it is rarely used. This argument fails for two reasons. First, an option has value whether exercised or not. Second, the option was exercised. Complainant's expert witness, Dr. Gerald Grinnell, testified that Respondent took delivery from Beef Marketing Group members after 7 days more than 50 percent of the time (Tr. 2077-78). Complainant's statistical analysis further shows that the average number of days between the sale and delivery of cattle from Beef Marketing Group feedlots increased by almost 2 days after initiation of the Beef Marketing Agreement (CX 9 at 131). [Moreover, even if Complainant's assertion that Respondent's right of extended delivery is not worth \$0.43 per hundredweight is correct, Complainant did not prove that Respondent paid \$0.43 per hundredweight more for cattle placed at Beef Marketing Group feedlots than for similar cattle placed at similar feedlots in Kansas that are not members of the Beef Marketing Group.]

### 3. Pen-by-Pen Bidding

Respondent also advances the Beef Marketing Agreement provision for pen-by-pen bidding as a valuable right. Although it is possible that this term may have some value to Respondent, such value is not unequivocally established by the record. Although feedlots may have traditionally tied lesser quality pens of cattle to higher quality pens, it appears that currently, in Kansas, pen-by-pen bidding is consistently available without the Beef Marketing Agreement. In any case, it is not necessary for the potential value of the pen-by-pen bidding term to be established, since the . . . extended delivery term is sufficient to account for [Respondent's payment of a higher price for cattle placed at Beef Marketing Group feedlots than it paid for similar cattle placed at similarly situated feedlots in Kansas that are not members of the Beef Marketing Group].

#### **D. Complainant failed to prove that Respondent provided a preference which was *undue* or *unreasonable*.**

[Although] Complainant ha[s] proven that Respondent afforded the Beef Marketing Group members a preference . . . in the form of a . . . price advantage, Complainant failed to prove that such a preference [is] "undue" or "unreasonable."

The [Packers and Stockyards] Act does not specify what constitutes "undue" or "unreasonable," instead those terms must be defined according to the facts of each case. *See Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965). The facts of this case do not conclusively establish that [Respondent's payment of a higher price for cattle placed at Beef Marketing Group feedlots, than Respondent pays for similar cattle placed at feedlots that are not members of the Beef Marketing Group, is] . . . "undue" or "unreasonable."

The \$0.43 per hundredweight price advantage [which Complainant asserts Respondent paid for cattle at Beef Marketing Group feedlots] on a typical 1,200-pound animal would amount to approximately \$5 per head. At the time of the econometric study, Respondent's average live cost for cattle was approximately \$75 per hundredweight (CX 12 at 58), or \$900 for a typical 1,200-pound animal. Consequently, a \$0.43 per hundredweight difference represented only about one-half of one percent of the purchase price of a typical animal.

Complainant asserts that \$0.43 per hundredweight is undue or unreasonable because it is significant in comparison to producer profits and bidding increments. Some witnesses testified that on average, in 1994, they suffered losses on their cattle ranging from \$1.50 to \$8 per hundredweight (Tr. 556-57, 1000, 1085, 1194). [T]estimony [was also given] that, although bids in Kansas are currently made in

increments of \$1 per hundredweight, in 1994, increments of \$0.50 per hundredweight were more common and sometimes bids [were in increments of] as little as \$0.10 per hundredweight (Tr. . . . 916-17, 968-69, 1083, 1260).

On the other hand, the cost of gain at feedlots can vary as much as \$15 to \$30 per hundredweight (Tr. 3709-11). In comparison, it is questionable whether a difference of \$0.43 per hundredweight would significantly affect either [producer] profits or placement of cattle by producers. This conclusion is supported by testimony from producers which indicates that the Beef Marketing Agreement had little if any impact on any of their decisions on where to place cattle, as well as by the fact that Pratt Feed[ers, Inc.,] and Pawnee Valley Feeders[, Inc.,] withdrew from the Beef Marketing Agreement, while remaining members of the Beef Marketing Group. Whatever price advantage the Beef Marketing Agreement afforded, it was not sufficient to induce [Pratt Feeders, Inc., and Pawnee Valley Feeders, Inc.,] to continue under its terms.

....

**E. Respondent[']s failure to offer terms of the Beef Marketing Agreement to all feedlots in Kansas does not violate the Packers and Stockyards Act[.]**

Complainant alleges that Respondent [subjects similarly situated feedlots in Kansas to an undue or unreasonable prejudice or disadvantage,] in violation of section 202[(b) of the Packers and Stockyards Act], by failing to offer the terms of the Beef Marketing Agreement to all feedlots in Kansas [that are similar to the feedlots that are members of the Beef Marketing Group].<sup>8</sup> . . . In *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995), the United States Court of Appeals for the Eighth Circuit held:

[The agency's] claim, in essence, is that § 202 of the PSA . . . statutorily creates an entitlement to obtain the same type of contract that Swift Eckrich may have offered to other independent growers. We are convinced that the purpose behind § 202 of the PSA . . . was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it.

*Id.* at 1458. See also *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 202

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<sup>8</sup>See note \*\*\*.

(E.D.N.C. 1996).

Consequently, it is not enough for Complainant to show that Respondent buys cattle [placed at Beef Marketing Group members] using different methods and different terms of sale [than it uses at feedlots that are not members of the Beef Marketing Group]. In order to show a violation of the Packers and Stockyards Act, Complainant is required to prove that [Respondent's failure to offer the terms of] the Beef Marketing Agreement [to all similarly situated feedlots in Kansas] causes the kind of harm that the Packers and Stockyards Act is designed to prevent. This distinction was explained nearly 60 years ago:

Differences or variations in prices, or in the terms of credit, or amounts of discount, or in practices do not come within the ban of the [Packers and Stockyards A]ct unless they in fact constitute engaging in or using an unfair or unjustly discriminatory or deceptive practice or device in commerce or unless they constitute a making or giving, in commerce, of an undue or unreasonable preference or advantage, or result in undue or unreasonable prejudice or disadvantage as between persons or localities.

*Swift & Co. v. Wallace*, 105 F.2d 848, 853 (7th Cir. 1939). In *Armour & Co.*, the court stated again that price differences are not illegal, absent anti-competitive intent, quoting the following passage from a United States Court of Appeals for the Seventh Circuit anti-trust decision:

"[T]he object of the anti-trust law is to encourage competition. Lawful price differentiation is a legitimate means for achieving the result. It becomes illegal only when it is tainted by the purpose of unreasonably restraining trade or commerce or attempting to destroy competition or a competitor, thus substantially lessening competition, or when it is so unreasonable as to be condemned as a means of competition. The price reduction here has none of these stigmata."

*Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968) (citing *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 807 (S.D. Cal. 1952)), *aff'd*, 231 F.2d 356 (9th Cir.), *cert. denied*, 350 U.S. 991 (1955). *See also Central Coast Meats, Inc. v. United States Dep't of Agric.*, 541 F.2d 1325, 1327 (9th Cir. 1976). [While I find that Respondent's right of first refusal under the Beef Marketing Agreement violates the Packers and Stockyards Act because it has the effect or potential effect of reducing competition, I do not find that Respondent's failure to

offer the same terms to all similarly situated feedlots in Kansas constitutes a violation of section 202 of the Packers and Stockyards Act.]

**F. Complainant failed to prove that the Beef Marketing Agreement caused [injury to competitors].**

In addressing the type of harm which must be shown under section 202 of the Packers and Stockyards Act, courts have disagreed on whether there is a requirement that there be an injury to competition, or whether injury to competitors is enough. Some cases have held that because the Packers and Stockyards Act is broader than general antitrust law, that injury to competitors is sufficient. *See Swift & Co. v. United States*, 393 F.2d 247[, 253] (7th Cir. 1968); *Wilson & Co. v. Benson*, 286 F.2d 891[, 895] (7th Cir. 1961). [Other cases,] however, . . . have focused on whether there was actual or likely injury to competition. *See, e.g., Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985); *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968); *Aikins v. United States*, [282 F.2d 53] (10th Cir. 1960); *Berigan v. United States*, 257 F.2d 852 (8th Cir. 1958); *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939).

[I find that harm to competition can be proven by showing harm to competitors and that the Packers and Stockyards Act does not require that the person harmed be a direct competitor of the person causing the harm, *viz.*, it would be a violation of the Packers and Stockyards Act if it were shown that a packer caused harm, which the Packers and Stockyards Act is designed to prevent, to a feedlot or a livestock producer. However, Complainant failed to prove that Respondent's failure to offer the terms of the Beef Marketing Agreement to feedlots in Kansas that are not members of the Beef Marketing Group injured those feedlots or the cattle producers who placed cattle at those feedlots.]

Central Feeders, Ottawa County Cattle Associat[es], Mann's ATP, [Inc.,] and Mid-America Feedyards all expanded after the Beef Marketing Agreement between the Beef Marketing Group and Respondent went into effect. Although some feedlot operators suspected that they lost some business as a result of the Beef Marketing Agreement, there is no evidence to substantiate these suspicions (Tr. 987, 1197-98, 1266-67, 1348). To the contrary, the testimony from producers indicates that membership in the Beef Marketing Group was not of particular concern to them in making cattle placement decisions.

Kim Goracke testified that, when selecting a feedlot, he relies primarily on the recommendations of his nutritionist and that he feeds at Pratt [Feeders, Inc.,] even though the terms of the Beef Marketing Agreement are no longer available there (Tr. 1750, 1763). Lynn Rock testified that he was not concerned enough about the

Beef Marketing Agreement to ask a feedlot whether it was a Beef Marketing Group member before placing cattle there. He further testified that although he would rather [place cattle with] a Beef Marketing Group member than [with] a [feedlot that was not a] Beef Marketing Group [member] if all else were equal, all else is not equal among feedlots. (Tr. 1803.) Lynn Kauffman testified that the Beef Marketing Agreement has not affected his placement decisions in the last several years and that although he sold to Pratt [Feeders, Inc.,] under the terms of the Beef Marketing Agreement in 1994, he continued to sell at Pratt [Feeders, Inc.,] after the Beef Marketing Agreement was no longer available (Tr. 1814.) When deciding where to place cattle, Mr. Kauffman testified that he considers pen availability, cost of gain, feed supply, general appearance of the feedlot, and trust and friendship with the feedlot operators (Tr. 1817-22). Walter Krier testified that he places his cattle based on friendship and loyalty and who does the best job with feeding and marketing (Tr. 1860-61). Ralph Hembree testified that he decides where to place cattle based on recommendations from other people in the cattle business, such as feed salesmen. Mr. Hembree was not sure whether or not all of the feedlots where he fed his cattle were Beef Marketing Group members. (Tr. 1921, 1938-39.)

Furthermore, Complainant admits that [feedlots that are not members of] the Beef Marketing Group continue to receive competitive prices despite the Beef Marketing Agreement (Complainant's Reply Brief at 68). Jerry Bohn, the general manager of Pratt Feeders, [Inc.,] testified that he continued to receive the best price available each week after withdrawing from the Beef Marketing Agreement (Tr. 540). In fact, [Mr. Bohn] stated that Pratt [Feeders, Inc.,] benefitted from the existence of the Beef Marketing Agreement after it withdrew, because there was greater interest from Respondent's competitors (Tr. 539).

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#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Complainant raises seven issues in Agency's Appeal Petition and Brief [hereinafter Complainant's Appeal Petition].

First, Complainant contends that the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to regulate the manner in which packers conduct business, including livestock procurement methods, such as Respondent's use of the Beef Marketing Agreement (Complainant's Appeal Pet. at 7-10).

I agree with Complainant. The Packers and Stockyards Act was described by

its sponsors as one of the most comprehensive regulatory measures ever enacted.<sup>9</sup> Similarly, the House Report applicable to the bill that was later enacted as the Packers and Stockyards Act (H.R. 6230), states, as follows:

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

H.R. Rep. No. 67-77, at 2 (1921).

The Conference Report applicable to H.R. 6230 states that "Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits[.]" H.R. Conf. Rep. No. 67-324, at 3 (1921).

Further, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.<sup>10</sup> The primary purpose of the

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<sup>9</sup>61 Cong. Rec. 1801 (1921) (By Mr. Haugen: "Undoubtedly it is a most far-reaching measure and extends further than any previous law into the regulation of private business, with the exception of war emergency measures, and possibly the interstate commerce act."); 61 Cong. Rec. 4783 (1921) (By Mr. Haugen: "It gives the Secretary of Agriculture complete visitorial, inquisitorial, supervisory, and regulatory power over the packers and stockyards. It extends over every ramification of the packers and stockyard transactions in connection with the packing business. It provides for ample court review. The bill is designed to supervise and regulate and thus safeguard the public and all elements of the packing industry, from the producer to the consumer, without injury or to destroy any unit in it. It is the most far-reaching measure and extends further than any previous law into the regulation of private business—with few exceptions, the war emergency measure and possibly the interstate commerce act.").

<sup>10</sup>For example, in 1924, the Packers and Stockyards Act was broadened to authorize the Secretary of Agriculture to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460 (codified at 7 U.S.C. § 204)). The Packers and Stockyards Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649 (codified at 7 U.S.C. §§ 192, 218b, 221, 223)). In 1958, the Packers and Stockyards Act was broadened to give the Secretary of Agriculture "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 85-1048, at 5 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5216). In 1976, the Packers and Stockyards Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary of Agriculture prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

Packers and Stockyards Act was described in a House Report, in connection with a major amendment of the Packers and Stockyards Act enacted in 1958, as follows:

The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.<sup>11</sup>

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.A.N. 5213.

Courts that have examined the Packers and Stockyards Act have uniformly described the Act as constituting a broader grant of authority to regulate than previous legislation.<sup>12</sup> Moreover, the Packers and Stockyards Act is remedial

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<sup>11</sup>*Accord In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1130-31 (1996); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1056-57 (1990); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988); *In re Gary Chastain*, 47 Agric. Dec. 395, 420 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 299 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 233-34 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and 1989 Cum. Supp.)

<sup>12</sup>*See, e.g., Swift & Co. v. United States*, 393 F.2d 246, 253 (7th Cir. 1968) (stating that the statutory prohibitions of section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Antitrust Act or even section 5 of the Federal Trade Commission Act); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (stating that the legislative history shows that Congress understood that section 202 of the Packers and Stockyards Act is broader in scope than antecedent legislation, such as the Sherman Antitrust Act, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act, and section 3 of the Interstate Commerce Act); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961) (stating that from the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Antitrust Act were not broad enough to meet the public needs as to business practices of packers; section 202(a) and (b) of the Packers and Stockyards Act was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest).

legislation and should be liberally construed to effectuate its purposes,<sup>13</sup> and its purposes have been variously described.<sup>14</sup> Therefore, I find that Respondent's use

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<sup>13</sup>*Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Rice v. Wilcox*, 630 F.2d 586, 589 (8th Cir. 1980); *Travelers Indem. Co. v. Manley Cattle Co.*, 553 F.2d 943, 945 (5th Cir. 1977); *Central Coast Meats v. United States Dep't of Agric.*, 541 F.2d 1325, 1328 (9th Cir. 1976); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966); *Lich v. Cornhusker Casualty Co.*, 774 F. Supp. 1216, 1221 (D. Neb. 1991); *Cook v. Hartford Accident & Indem. Co.*, 657 F. Supp. 762, 767 (D. Neb. 1987) (memorandum opinion); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1470 (N.D.N.Y. 1984) (memorandum decision); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988, 1013 (M.D. Tenn. 1980); *Arnold Livestock Sales Co. v. Pearson*, 383 F. Supp. 1319, 1323 (D. Neb. 1974) (memorandum opinion); *Folsom-Third Street Meat Co. v. Freeman*, 307 F. Supp. 222, 225 (N.D. Cal. 1969); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121, 1132 (1996); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 799 (1985).

<sup>14</sup>*See Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (stating that the chief evil at which the Packers and Stockyards Act is aimed is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells and unduly and arbitrarily to increase the price to the consumer who buys); *Denver Union Stock Yard Co. v. Producers Livestock Mktg. Ass'n*, 356 U.S. 282, 289 (1958) (stating that the Packers and Stockyards Act is aimed at all monopoly practices, of which discrimination is one); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1460 (8th Cir. 1995) (stating that the Packers and Stockyards Act has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985) (stating that the Packers and Stockyards Act gives the Secretary of Agriculture broad authority to deal with any practices that inhibit the fair trading of livestock by stockyards, marketing agencies, and dealers); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (stating that one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating that one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) (stating that one purpose of the Packers and Stockyards Act is to make sure that farmers and ranchers receive true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976) (stating that the Packers and Stockyards Act is a statute prohibiting a variety of unfair business practices which adversely affect competition); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974) (stating that the chief evil sought to be prevented or corrected by the Packers and Stockyards Act is monopolistic practices in the livestock industry); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 111 (8th Cir. 1972) (stating that the purpose of the Packers and Stockyards

(continued...)

<sup>14</sup>(...continued)

Act is to prevent economic harm to producers and consumers), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971) (stating that the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *United States Fidelity & Guaranty Co. v. Quinn Brothers of Jackson, Inc.*, 384 F.2d 241, 245 (5th Cir. 1967) (stating that one of the basic objectives of the Packers and Stockyards Act is to impose upon stockyards the nature of public utilities, including the protection for the consuming public that inheres in the nature of a public utility); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 956 (D.C. Cir. 1966) (stating that the purpose of the Packers and Stockyards Act is to prevent economic harm to the growers and consumers through the concentration in a few hands of the economic function of the middle man); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating that one of the purposes of the Packers and Stockyards Act is to ensure proper handling of shipper's funds and their proper transmission to the shipper); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) (stating that one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock and to free the owner from fear that the channels through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996) (stating that the Packers and Stockyards Act was enacted to regulate the business of packers by forbidding them from engaging in unfair, discriminatory, or deceptive practices in interstate commerce, subjecting any person to unreasonable prejudice therein, or doing any of a number of acts to control prices or establish a monopoly in the business); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); *Guenther v. Morehead*, 272 F. Supp. 721, 725-26 (S.D. Iowa 1967) (stating that the thrust of the Packers and Stockyards Act is in the direction of stemming monopolistic tendencies in business; the unrestricted free flow of livestock is to be preserved by the elimination of certain unjust and deceptive practices disruptive to such traffic; the Packers and Stockyards Act deals with undesirable modes of business conduct by livestock concerns which are made possible by the disproportionate bargaining position of such businesses); *De Vries v. Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951) (stating that the Packers and Stockyards Act was passed for the purposes of eliminating evils that had developed in marketing livestock in the public stockyards of the nation; controlling prices to prevent monopoly; eliminating unfair, discriminatory, and deceptive practices in the meat industry; and regulating rates for services rendered in connection with livestock sales), *aff'd*, 199 F.2d 677 (8th Cir. 1952), *cert. denied*, 344 U.S. 934 (1953); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95 (D. Minn. 1945) (stating that by the Packers and Stockyards Act, Congress sought to eliminate the unfair and monopolistic practices that existed; one of the chief objectives of the Packers and Stockyards Act is to stop collusion of packers and market agencies; Congress made an effort to provide a market where farmers could sell

(continued...)

of the Beef Marketing Agreement is well within the jurisdiction of the Secretary of Agriculture to regulate or prohibit under the Packers and Stockyards Act and that if Respondent's use of the Beef Marketing Agreement causes any harm, which the Packers and Stockyards Act is designed to prevent, even if that harm is not to Respondent's direct competitors, the Secretary may impose against Respondent any of the sanctions provided under the Packers and Stockyards Act.

Second, Complainant contends that the Judicial Officer is not bound by credibility, legal, or factual determinations made by the Chief ALJ (Complainant's Appeal Pet. at 10-11).

I agree with Complainant that the Judicial Officer is not bound by the Chief ALJ's credibility, legal, or factual determinations, and the Judicial Officer must make his own independent findings. The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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<sup>14</sup>(...continued)

livestock and where they could obtain actual value as determined by prices established at competitive bidding); *Bowles v. Albert Glauser, Inc.*, 61 F. Supp. 428, 429 (E.D. Mo. 1945) (stating that government supervision of public stockyards has for one of its purposes the maintenance of open and free competition among buyers, aided by sellers' representatives); *In re Petersen*, 51 B.R. 486, 488 (Bankr. D. Kan. 1985) (memorandum opinion) (stating that one purpose of the Packers and Stockyards Act is to ensure proper handling of shippers' funds and their proper transmission to shippers); *In re Farmers & Ranchers Livestock Auction, Inc.*, 46 B.R. 781, 793 (Bankr. E.D. Ark. 1984) (memorandum opinion) (stating that one of the primary purposes of the Packers and Stockyards Act and its regulations is to protect the welfare of the public by assuring that the sellers and buyers who are customers of the market agencies and dealers are not victims of unfair trade practices); *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating that the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 717 (1988) (stating that the primary purpose of the Packers and Stockyards Act is to assure not only fair competition, but also, fair trade practices in livestock marketing and meat packing); Harold M. Carter, *The Packers and Stockyards Act*, 10 Harl, *Agricultural Law* § 71.05 (1983) (stating that among the more important purposes of the Packers and Stockyards Act are to prohibit particular circumstances which might result in a monopoly and to induce healthy competition; prevent potential injury by stopping unlawful practices in their incipiency; prevent economic harm to livestock and poultry producers and consumers and to protect them against certain deleterious practices of middlemen; assure fair trade practices in order to safeguard livestock producers against receiving less than the true value of livestock as well as to protect consumers against unfair meat marketing practices; insure proper handling of funds due sellers for the sale of their livestock; and assure reasonable rates and charges by stockyard owners and market agencies in connection with the sale of livestock; and assure free and unburdened flow of livestock through the marketing system unencumbered by monopoly or other unfair, unjustly discriminatory, or deceptive practices).

**§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

*Appeals and review. . . .*

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law

judges, since they have the opportunity to see and hear witnesses testify.<sup>15</sup>

The Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved;<sup>16</sup> (2) the record is sufficiently strong to compel a reversal as to the facts;<sup>17</sup> or (3) an administrative law judge's findings of fact are hopelessly incredible.<sup>18</sup> Moreover, the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).<sup>19</sup>

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<sup>15</sup>*In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *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); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

<sup>16</sup>*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).

<sup>17</sup>*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).

<sup>18</sup>*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).

<sup>19</sup>*See also In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 687-88 (1998), *appeal* (continued...)

While I disagree with the Chief ALJ's conclusion that Respondent did not violate the Packers and Stockyards Act, I agree with most of the Chief ALJ's findings of fact and discussion and the Chief ALJ's credibility determinations. Therefore, except with respect to the Chief ALJ's conclusion and order and the other minor changes noted in this Decision and Order, *supra*, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order in this proceeding.

Third, Complainant contends that the Chief ALJ erroneously refused to

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<sup>19</sup>(...continued)

docketed, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), appeal docketed, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), appeal docketed, No. 97-3603 (6th Cir. June 13, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), cert denied sub nom. *Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *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); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *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 Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), reprinted in 51 Agric. Dec. 302 (1992); *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 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). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating that the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

consider evidence that multiple regression analyses using a pricing model for fed cattle are routinely utilized (Complainant's Appeal Pet. at 50). Even if I were to find that the Chief ALJ erred by refusing to consider evidence regarding the frequency of the utilization of multiple regression analyses using pricing models for fed cattle, I would find that the error is harmless. The Chief ALJ based his conclusion that Complainant failed to prove that Respondent gives Beef Marketing Group feedlots a \$0.43 per hundredweight price preference on his finding that the Industry Analysis Staff's multiple regression model is unreliable. Even if the Chief ALJ had found that multiple regression analyses using a pricing model for fed cattle are routinely utilized, it does not appear that such a finding would alter the Chief ALJ's conclusion that Complainant failed to prove that Respondent gives Beef Marketing Group feedlots a \$0.43 per hundredweight price preference.

Fourth, Complainant contends that the Chief ALJ erroneously excluded non-price preferences from consideration based on the Chief ALJ's ruling that Complainant did not allege in the Complaint that Respondent's making non-price preferences available only to members of the Beef Marketing Group violated the Packers and Stockyards Act (Complainant's Appeal Pet. at 62-65).

I agree with Complainant that the Chief ALJ's exclusion of non-price preferences from consideration, based on the Chief ALJ's finding that the non-price preferences are not alleged in the Complaint to be in violation of the Packers and Stockyards Act, is error.

The Administrative Procedure Act provides that notice of matters of fact and law asserted must be provided to those entitled to notice of an agency hearing, as follows:

#### § 554. Adjudications

....

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) *the matters of fact and law asserted.*

5 U.S.C. § 554(b) (emphasis added).

Similarly, the Rules of Practice require that allegations of fact and provisions of law that form a basis for the proceeding must be included in a complaint, as

follows:

**§ 1.132 Definitions.**

As used in this subpart, 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:

....

*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

....

**§ 1.133 Institution of proceedings.**

....

(b) *Filing of complaint.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or any regulation, standard, instruction or order issued pursuant thereto, whether based on information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

....

**§ 1.135 Contents of complaint.**

A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, *the allegations of fact and provisions of law which constitute a basis for the proceeding*, and the nature of the relief sought.

7 C.F.R. §§ 1.132, .133(b)(1), .135 (1996) (emphasis added).

It is well settled that the formalities of court pleading are not applicable in

administrative proceedings.<sup>20</sup> It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.<sup>21</sup> Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the Complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the Complaint must apprise Respondent of the issues in controversy.

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<sup>20</sup>*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940); *NLRB v. Int'l Bros. of Elec. Workers, Local Union 112*, 827 F.2d 530, 534 (9th Cir. 1987); *Citizens State Bank of Marshfield v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir. 1979); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

<sup>21</sup>*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Rapp v. United States Dep't of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. United States Dep't. Agric.*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 276-77 (1998); *In re Peter A. Lang*, 57 Agric. Dec. 91, 104 (1998) (Order Denying Pet. for Recons.); *In re Tammi Longhi*, 56 Agric. Dec. 1373, 1387-89 (1997), *appeal docketed*, No. 97-3897 (6th Cir. Aug. 12, 1997); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1323 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 200 n.9 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 132 (1996); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1097-98 (1994); *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53 (b)(2)); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233-32 (1987); *In re H & J Brokerage*, 45 Agric. Dec. 1154, 1197-98 (1986); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1434 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

The Complaint alleges that:

## II

(a) Respondent, IBP, inc., beginning in February 1994, and continuing through to the present, purchases livestock from a group of feedlots located in Kansas, hereinafter referred to as the "Beef Marketing Group", pursuant to an exclusive marketing agreement, hereinafter referred to as "Beef Marketing Agreement" or "BMA". Beginning on or about February 7, 1994, and ending on or about August 31, 1994, respondent guaranteed the "Kansas Practical Top" price, adjusted to reflect the quality of the purchased livestock, for all livestock purchased on a live weight basis from the Beef Marketing Group. Beginning on or about September 1, 1994, and continuing through to the present, respondent guarantees the average of the "Kansas Practical Top" price and respondent's top price, adjusted to reflect the quality of the purchased livestock, for all livestock purchased on a live weight basis from the Beef Marketing Group.

(b) Other feedlots have approached respondent seeking to sell livestock under the same terms available to the Beef Marketing Group. Although these feedlots are similarly situated to the feedlots of the Beef Marketing Group and sell comparable quality livestock, respondent has refused to make the BMA terms of purchase available to them.

(c) Respondent gives an undue or unreasonable preference to the Beef Marketing Group by guaranteeing a high price for livestock purchased from the Beef Marketing Group while refusing to make the same terms of purchase available to similarly situated sellers of comparable livestock.

(d) Respondent subjects similarly situated feedlots in its procurement area to an undue or unreasonable prejudice or disadvantage by refusing to purchase comparable quality livestock from these feedlots under the same terms made available to the Beef Marketing Group.

## III

By reason of the facts alleged in paragraph II herein, respondent, IBP, inc., has violated sections 202(a) and (b) of the Act (7 U.S.C. §§ 192 (a),(b)).

Compl. ¶¶ II, III (footnote omitted).

I find the Complaint apprises Respondent that all of the terms of the Beef Marketing Agreement are at issue in the proceeding and that the Chief ALJ erred by failing to consider every preference and advantage Respondent gives to Beef Marketing Group members and their producer customers and every prejudice and disadvantage to which Respondent subjects other similarly situated feedlots and their producer customers.

Fifth, Complainant contends that Respondent's use of the Beef Marketing Agreement is a discriminatory practice and that Respondent's use of the Beef Marketing Agreement gives a preference or advantage to the Beef Marketing Group and subjects similarly situated feedlots in Kansas to a prejudice or disadvantage (Complainant's Appeal Pet. at 12-65).

I agree with Complainant. The Packers and Stockyards Act does not define the word *discriminatory* as used in section 202(a) or the terms *preference or advantage* and *prejudice or disadvantage* as used in section 202(b). When not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.<sup>22</sup>

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<sup>22</sup>See *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) (stating that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating that when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating that courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating that in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating that words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating that in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating that words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating that Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating that in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating that the legislature must be presumed to use words in their known and ordinary signification); *De Ganay* (continued...)

While the word *discriminatory* varies depending on the context in which it is used, the common meaning of the word *discriminatory* includes "applying or favoring discrimination in treatment" (Webster's Collegiate Dictionary 332 (10th ed. 1997)) and the common meaning of the word *discrimination* means "a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored" (Black's Law Dictionary 467 (6th ed. 1990)).<sup>23</sup> I find that, under section 202(a) of the Packers and Stockyards Act, treating similar entities differently is a discriminatory practice.

Webster's Collegiate Dictionary defines the word *preference* as "the act, fact,

<sup>22</sup>(...continued)

*v. Lederer*, 250 U.S. 376, 381 (1919) (stating that unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating that the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating that the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions). See also *In re The Lubrizol Corp.*, 51 Agric. Dec. 1198, 1205 (1992) (stating that the term *used* is not defined in the Plant Variety Protection Act; therefore, it must be accorded its ordinary, dictionary meaning).

<sup>23</sup>See also *United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 751 (11th Cir. 1991) (stating that *discrimination* may be defined as a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored); *Richmond, Fredericksburg & Potomac R.R. v. Department of Taxation*, 762 F.2d 375, 380 n.4 (4th Cir. 1985) (stating that in essence, *discrimination* is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored); *Hocking Valley Ry. v. United States*, 210 F. 735, 740 (6th Cir.) (stating that *discrimination* in ordinary understanding and definition is the act of treating differently; it is the antithesis of advantage; one who enjoys an advantage over another at the hands of one with whom he has common dealing has his fellow within a corresponding discrimination), *cert. denied*, 234 U.S. 757 (1914); *Baker v. California Land Title Co.*, 349 F. Supp. 235, 238 (C.D. Cal. 1972) (stating that *discrimination* is a term well understood in the law; it is, in general, a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored), *aff'd*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *In re Grievance of Towle*, 665 A.2d 55, 60 (Vt. 1995) (stating, with respect to state employee disciplinary proceedings, we have defined *discrimination* as the unequal treatment of individuals in the same circumstances).

or principle of giving advantages to some over others" (Webster's Collegiate Dictionary 918 (10th ed. 1997));<sup>24</sup> the word *advantage* as "a factor or circumstance of benefit to its possessor" (Webster's Collegiate Dictionary 17 (10th ed. 1997));<sup>25</sup> the word *prejudice* as "injury or damage resulting from some judgment or action of another in disregard of one's rights" (Webster's Collegiate Dictionary 919 (10th ed. 1997));<sup>26</sup> and the word *disadvantage* as "loss or damage" (Webster's Collegiate Dictionary 329 (10th ed. 1997)).<sup>27</sup> I find that, under section 202(b) of the Packers and Stockyards Act, giving an advantage to any person and not to other similarly situated persons is making or giving a preference; that conferring a benefit on any

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<sup>24</sup>See also *Andrew v. Farmers' & Merchants' State Bank*, 247 N.W. 797, 799 (Iowa 1933) (stating that the word *preference* has been defined, when used in a general sense, as the act of preferring one thing above another; choice of one thing rather than another; estimation of one thing more than another; the state of being preferred or chosen before others); *Choctaw, O. & G. Ry. v. State*, 84 S.W. 502, 503 (Ark. 1904) (stating that the idea conveyed by the word *preference* is that, as between two persons occupying the same situation or relation, one has been preferred over the other, or granted certain privileges or facilities that were not extended to the other); *Keller v. State*, 31 S.E. 92, 95 (Ga. 1898) (stating that *preference* means the act of preferring one thing above another; estimation of the thing more than another; choice of one thing rather than another); *Weir v. Baker*, 29 A.2d 269, 272 (Ct. App. Md. 1942) (stating that, in a general sense, *preference* is the act of preferring one thing above another; choice of one rather than another; the state of being chosen or preferred before others).

<sup>25</sup>See also *In re Lakeland Development Corp.*, 152 N.W.2d 758, 767 (Minn. 1967) (stating that the word *advantage* affirmatively connotes elements of opportunity, benefit, or profit, and negatively suggests absence of sacrifice, harm, or loss); *State v. Cloud*, 176 So.2d 620, 622 (La. 1965) (stating that the word *advantage* means gain, benefit, profit, superiority, or favored position); *In re Krause's Estate*, 21 P.2d 268, 270 (Wash. 1933) (stating that benefit simply means profit, fruit, *advantage*); *Dubow v. Gottinello*, 149 A. 768, 769 (Conn. 1930) (stating that the word benefit means *advantage*, gain, or profit); *Ferrigno v. Keasbey*, 106 A. 445, 447 (Conn. 1919) (stating that word benefit means *advantage*, gain, or profit); *Winthrop Co. v. Clinton*, 46 A. 435, 437 (Pa. 1900) (stating that the word benefit means *advantage*, gain, or profit; its manifest signification is anything that works to the *advantage* or gain of the recipient); *Stowell v. Stowell's Executor*, 8 A. 738, 740 (Vt. 1887) (stating that the word *advantage* is a synonym of *benefit*); *Duvall v. State*, 166 N.E. 603, 604 (App. Ct. Ind. 1929) (stating that the word *advantage* is defined as any state, condition, circumstance, opportunity, or means favorable to success, prosperity, interest, reputation, or any desired end).

<sup>26</sup>See also *Benedict v. State*, 89 N.W.2d 82, 85 (Neb. 1958) (citing Black's Law Dictionary (1891 ed.) as defining *prejudice* as meaning injury or loss); *State v. Caporale*, 89 A. 1034, 1035 (N.J. 1914) (stating that the word *prejudice* in its generic sense means to cause any harm or damage or loss).

<sup>27</sup>See generally *State v. Nelson*, 504 P.2d 211, 214 (Kan. 1972) (stating that this court has defined *prejudicial* as "hurtful," "injurious," "disadvantageous"); *Prunty v. Consolidated Fuel & Light Co.*, 108 P. 802, 803 (Kan. 1910) (stating that "[i]n Webster's Universal Dictionary, . . . as synonyms of 'prejudicial' are given 'hurtful,' 'injurious,' 'disadvantageous.'" (Emphasis added.))

person and not on all similarly situated persons is making or giving an advantage; that subjecting any person to any injury or damage and not subjecting all similarly situated persons to the same injury or damage is subjecting the injured or damaged person to prejudice; and subjecting any person to any loss or damage and not subjecting all similarly situated persons to the same loss or damage is subjecting the person who suffers the loss or damage to a disadvantage.

Respondent has refused to purchase cattle under the terms of the Beef Marketing Agreement at feedlots other than feedlots that are members of the Beef Marketing Group (Answer at 3; Tr. 591-604, 980, 1143, 1198, 1341-43, 1703, 3549, 3648-50). Respondent's refusal to purchase cattle under the terms of the Beef Marketing Agreement from feedlots other than those in the Beef Marketing Group is not based on any characteristic unique to the members of the Beef Marketing Group. Mr. Borck, the Beef Marketing Group's founder, testified that Beef Marketing Group members are diverse, are not required to meet any qualifications for membership, and are not required to meet any qualifications for continued membership (Tr. 3773-76). Moreover, Respondent's refusal to purchase cattle under the terms of the Beef Marketing Agreement at feedlots that are not members of the Beef Marketing Group is not the consequence of any difference between the quality of cattle available from Beef Marketing Group members and the quality of cattle available from other feedlots. The terms of the Beef Marketing Agreement do not impose any quality specifications on cattle to be purchased by Respondent (CX 2 at 2; Tr. 1766, 1792, 1813-14, 1878, 1935, 1947, 3814), and the record establishes that the cattle that Respondent purchased at feedlots that are not members of the Beef Marketing Group were comparable to cattle purchased at feedlots that are members of the Beef Marketing Group (CX 9 at 44, 56, 68, 80, 104; Tr. 455, 586, 2060-66).

I agree with Complainant that Respondent's failure to make the terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice because Respondent, by its failure to offer the terms of the Beef Marketing Agreement to all similarly situated feedlots, is treating similar entities differently.

Further, I agree with Complainant that the pricing terms of the Beef Marketing Agreement, the testimony of industry witnesses, and exhibits introduced into evidence by Complainant establish that Respondent paid more for cattle at feedlots that are members of the Beef Marketing Group than Respondent paid for similar cattle at feedlots that are not members of the Beef Marketing Group. Thus, Respondent conferred a preference or advantage on Beef Marketing Group members and their producer customers and subjected similarly situated feedlots that are not members of the Beef Marketing Group and their producer customers

to a prejudice or disadvantage. Specifically, cattle purchased under the terms of the Beef Marketing Agreement were priced using the highest price paid in Kansas for 500 cattle during the week of sale ("Kansas practical top"), as reported by the United States Department of Agriculture (CX 2 at 2, Cash Contract ¶ A), adjusted for quality.<sup>28</sup> Respondent's expert witness, Jerry Hausman, admitted that Respondent paid the Kansas practical top price or more for cattle placed at Beef Marketing Group feedlots, 80 percent of the time (RX 18 at 3, RX 46 at 3; Tr. 4010-11). Thus, under the terms of the Beef Marketing Agreement, Respondent guaranteed members of the Beef Marketing Group and their producer customers a price based on the top price for the week no matter when the top price was established. Respondent did not offer this advantage to feedlots that were not members of the Beef Marketing Group.

Feedlot operators testified that Respondent paid higher prices for cattle placed with Beef Marketing Group members than Respondent paid for cattle placed at other feedlots (Tr. 772-73, 780-81, 784, 931, 979), and Respondent's data establishes that Respondent gave the members of the Beef Marketing Group and their producer customers a pricing advantage after the Beef Marketing Agreement went into effect (CX 5 at 65-66, CX 9 at 10-12; Tr. 2019-22).

Complainant further contends that in addition to preferential prices, Respondent gives three non-price advantages to members of the Beef Marketing Group, *viz.*: (1) a powerful marketing technique; (2) additional time in which to accept or reject bids; and (3) detailed carcass information (Complainant's Appeal Pet. at 58-62).

I agree with Complainant. When selecting a feedlot at which to place cattle, producer customers consider the marketing options available through each feedlot (Tr. 1786, 1860-61), including whether the feedlot has entered into the Beef Marketing Agreement with Respondent (Tr. 1750, 1814). One cattle producer testified that he would select a feedlot that had entered into the Beef Marketing Agreement with Respondent if choosing between two otherwise equal feedlots (Tr. 1779, 1795). Thus, Respondent gives feedlots that are members of the Beef Marketing Group a marketing technique that is not available to feedlots that are not members of the Beef Marketing Group. This marketing technique provides feedlots that are members of the Beef Marketing Group with a competitive advantage over feedlots that are not members of the Beef Marketing Group.

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<sup>28</sup>In August 1994, the basis for bidding under the Beef Marketing Agreement was changed to the reported Kansas top price for 2,500 cattle or more, and in November 1995, the basis for bidding was again changed to a negotiated middle point between the Kansas top price for 2,500 cattle or more and the Kansas top price paid during the week by Respondent (in weeks when the two prices were different) (Tr. 3515-16, 3656).

Further, the Beef Marketing Agreement provides that members of the Beef Marketing Group and their producer customers have at least 3 days to accept or reject bids made by Respondent (Tr. 1766-67). Feedlots that are not members of the Beef Marketing Group and their producer customers are required to accept bids made by Respondent during a period that ranges from immediately after the bid is made to overnight (Tr. 693-94, 969, 1084-85, 1260, 1699, 1767, 1861, 1936-37).

The extended period within which Respondent's bids for cattle placed at feedlots that are members of the Beef Marketing Group could be accepted has value (Tr. 975, 1084, 1138-39, 1193, 1260, 1767, 3744-45), and this extended period for the acceptance of bids provides members of the Beef Marketing Group and their producer customers with a competitive advantage over feedlots that are not members of the Beef Marketing Group and their producer customers.

Moreover, under the Beef Marketing Agreement, Respondent provides Beef Marketing Group members with detailed carcass performance information (Tr. 3514, 3749-50). Although carcass performance information is sometimes made available to feedlot operators and cattle producers who request it (Tr. 986, 1078-79, 1134, 1188, 1256, 1335, 1585, 1619, 1694, 1812), Respondent provides more extensive carcass performance information to Beef Marketing Group members and their producer customers, and provides it on a more routine basis, than such information is available to feedlots that are not members of the Beef Marketing Group (Tr. 3750). Feedlot operators and producers seeking the same carcass performance information as Respondent gives to members of the Beef Marketing Group at no cost, must purchase the information at a cost of between \$4 and \$6 per head (Tr. 1694, 3811-12). Beef Marketing Group members and their producer customers are able to use the carcass performance information to reduce the number of days they feed cattle by more than 11 days (Tr. 3813-14); thereby reducing feed and other costs associated with feeding cattle at a feedlot.

Thus, Respondent's use of the Beef Marketing Agreement gives members of the Beef Marketing Group and their customers a preference and an advantage and subjects feedlots which are not members of the Beef Marketing Group and their producer customers to a prejudice and a disadvantage.

Sixth, Complainant contends that the Chief ALJ erred when he failed to find that Respondent's refusal to offer the terms of the Beef Marketing Agreement to similarly situated feedlots in Kansas is unjustly discriminatory and the preferences and advantages given to Beef Marketing Group members and their producer customers are undue and unreasonable and the prejudices and disadvantages to which feedlots that are not members of the Beef Marketing Group and their producer customers are subjected are undue and unreasonable (Complainant's Appeal Pet. at 65-94).

The term *unjustly discriminatory* as used in section 202(a) of the Packers and Stockyards Act and the terms *undue or unreasonable preference or advantage* and *undue or unreasonable prejudice or disadvantage* as used in section 202(b) of the Packers and Stockyards Act are not defined in the Packers and Stockyards Act. Instead, the meaning of these terms must be determined according to the facts of each case within the purposes of the Packers and Stockyards Act.<sup>29</sup>

This case is close and I find that Respondent's failure to make terms of the Beef Marketing Agreement available to all similarly situated feedlots in Kansas is a discriminatory practice and that Respondent gives members of the Beef Marketing Group a preference and an advantage and subjects feedlots that are not members of the Beef Marketing Group to prejudice and disadvantage. However, as discussed in this Decision and Order, *supra*, Complainant has failed to prove that Respondent's use of the Beef Marketing Agreement harmed feedlots that are not members of the Beef Marketing Group or their producer customers, and I agree with the Chief ALJ that Complainant has not proven by a preponderance of the evidence that Respondent's use of the Beef Marketing Agreement is *unjustly discriminatory* or that Respondent gives Beef Marketing Group members an *undue or unreasonable preference or advantage* or subjects feedlots that are not members of the Beef Marketing Group to an *undue or unreasonable prejudice or disadvantage*.

Seventh, Complainant contends that the Chief ALJ erred when he concluded that the Beef Marketing Agreement does not cause the type of harm that the Packers and Stockyards Act is designed to prevent (Complainant's Appeal Pet. at 94-104).

I agree with Complainant that the Chief ALJ erred when he concluded that the Beef Marketing Agreement does not cause the type of harm that the Packers and Stockyards Act is designed to prevent. Specifically, I find that Respondent's right of first refusal under the Beef Marketing Agreement has the effect or potential effect of reducing competition.

Respondent argues and the Chief ALJ found that Beef Marketing Group members give Respondent the right of first refusal under the Beef Marketing

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<sup>29</sup>See *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1454 (10th Cir. 1988); *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 930 (10th Cir. 1974); *Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965); *Swift & Co. v. Wallace*, 105 F.2d 848, 854-55 (7th Cir. 1939); *Rowse v. Platte Valley Livestock, Inc.*, 604 F. Supp. 1463, 1466 (D. Neb. 1985) (memorandum opinion); *United States v. Hulings*, 484 F. Supp. 562, 566-67 (D. Kan. 1980); *Guenther v. Morehead*, 272 F. Supp. 721, 728 (S.D. Iowa 1967).

**Agreement.**<sup>30</sup>

While Complainant contends that Respondent does not have a right of first refusal under the Beef Marketing Agreement, Respondent states that the evidence fully supports that it has the right of first refusal under the Beef Marketing Agreement and that the right of first refusal is important to Respondent, as follows:

It is clear, based on the evidence in the record, that the right of first refusal exists and that it has significant value to IBP. The [Complainant's] own witnesses recognized not only that the right exists, but also that it has a value that accounts for some, if not all, of the 43 cent per cwt. price difference pointed to by the [Complainant]. (PFF, ¶¶ 69-71).

The right of first refusal should have come as no surprise to [GIPSA]. IBP's head cattle buyer, Bruce Bass, explained to [GIPSA] investigators as early as January 5, 1995[,] that IBP had a right of first refusal at BMG feedyards, and that the failure of Mull Feedyards and Pratt Feeders to adhere scrupulously to the right led to disputes between them and IBP. This information was recorded in a contemporaneous memorandum by [GIPSA] investigators and forwarded to the Chief of the Packers Branch, Jay Johnson, who acted as [GIPSA's] representative during all twenty days of the hearing. (RX-19).

Nevertheless, [Complainant] asserts that "there was no right of first refusal under the Beef Marketing Agreement." (Complainant's Proposed Findings of Fact, p. 79). In support of this astounding position, [Complainant] cites the testimony of producers who placed their cattle at two of the BMG feedyards (Great Bend Feeders and Pratt Feeders) and were unaware of the right of first refusal to IBP. All of their testimony proves that they did not know about the right. Given that a producer's sale negotiation is normally conducted by the feedyard, and not by the producer, the ignorance of some producers concerning the right of first refusal is hardly surprising.

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<sup>30</sup>See Prehearing Memorandum of IBP, inc., at 13, 17; IBP, inc[.]'s Proposed Findings of Fact and Post-Hearing Memorandum at 31-34; IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order at 10-14; Initial Decision and Order at 17-20; Oral Argument of June 8, 1998 (Tr. 65, 67, 71, 75-76).

In any event, the testimony cited by the [Complainant] does not even fully support its position. For example, one of the producer witnesses cited by the [Complainant], Walter Krier, admitted that he knew IBP had a right of first refusal on certain BMG cattle; he was simply unsure about the parameters of that right. When questioned by the Chief Administrative Law Judge, Mr. Krier testified as follows:

Q. IBP gives you a bid of whatever, a par bid.

A. A par bid.

Q. You do not like it. You say I am not going to take that. Another packer gives you a bid 50 cents higher. At that point in time, before you accept the other packer's bid does IBP have a right to come back and say okay, we will give you the 50 cents?

A. I don't know.

Q. You don't know?

A. I don't know about that, Your Honor. I don't know.

(Krier Tr. 1874).

David May (the former assistant feedyard manager at Great Bend Feeders) explained why all of his customers may not have known about the right of first refusal. As May testified:

Q. Now would you expect that all of those cattle owners who fed cattle at Great Bend would be aware of IBP's right of first refusal?

A. No, not necessarily. We did -- this was not a circumstance that arose very often and we really did not try to confuse the owners with a lot of the details of this program that was relatively new to them so we would not necessarily have made a point of saying now we have to give IBP the right of first refusal.

Q. Did IBP ever actually exercise its right of first refusal?

A. Yes, I believe they did.

(May Tr. 3913).

With respect to producers with cattle at Pratt Feeders, they were even less likely to be made aware of the right of first refusal: Pratt's involvement with the BMG arrangement lasted only a short time and ended because Pratt did not comply with the right. (PFF, ¶ 73). IBP's strict enforcement of its right of first refusal with Pratt clearly highlights both its existence and its importance to IBP. This information was supplied to [GIPSA] in January 1995, and it was confirmed in this proceeding by the testimony of Jerry Bohn (the operator of Pratt), Lee Borck (the leader of the BMG), and by Bruce Bass (IBP's head cattle buyer). (RX-19) (Bohn Tr. 463) (PFF, ¶ 73).

Witnesses in the best position to know the terms of the BMG arrangement, such as the negotiators of the agreement (Lee Borck and Bruce Bass) testified, without contradiction, that the right did indeed exist. (PFF, ¶¶ 69, 72, 75). [Complainant] argues the right of first refusal did not exist because it was "inferred." In support, [Complainant] cites Lee Borck, who acknowledged the right does not appear in a cursory, one-page summary of the arrangement. (Complainant's Proposed Findings of Fact, p. 79). Yet Mr. Borck testified time and time again that the right of first refusal did exist even if it was not set forth in the partial summary. (Borck Tr. 3734-38, 3755-57, 3796-99, 3802-04).

It should hardly surprise [GIPSA] that the full terms of the BMG arrangement were never recorded in a single writing. [GIPSA] knew as early as January 5, 1995[,] that most of IBP's special arrangements with feedyards are based on oral agreements. (RX-19). [Complainant] also recognizes in other contexts that the partial written summary was incomplete. Thus, [Complainant] maintains that "[a]lthough the Beef Marketing Arrangement is silent with respect to exclusivity, IBP refused to make its terms available to sellers of cattle who did not belong to the Beef Marketing Group." (Complainant's Proposed Findings of Fact, p. 22). The record is clear that the BMG arrangement in practice included the right of first refusal, regardless of what the summary says.

IBP's Response to Complainant's Proposed Findings of Fact, Conclusions, and Order at 10-14 (emphasis in original).

The Chief ALJ rejected Complainant's argument that Respondent did not have the right of first refusal under the Beef Marketing Agreement and found that the evidence supports a finding that Respondent has a right of first refusal, as follows:

1. Right of First Refusal

Under the agreement, Respondent initially had a right of first refusal on all cattle for which it bid even or better. Subsequently, the right was expanded to include cattle on which Respondent bid "minus 50."

Complainant asserts that Respondent did not have a right of first refusal under the agreement, citing testimony from cattle producers who fed cattle at Great Bend Feeders and Pratt Feeders, who did not know about that term. It is true that several producers were unaware that the right existed; however, most of them were also unaware of the extended delivery term, the existence of which Complainant does not dispute. (Tr. 1764-65, 1789-90, 1824, 1874, 1944-45). The former assistant feedlot manager at Great Bend explained that he did not provide producers with all of the details of the agreement because he did not want them to be unnecessarily confused. (Tr. 3913). Pratt sold under the terms of the agreement for only one year, so it is unlikely that all of its customers would be aware of every term.

Complainant also maintains that the right of first refusal did not exist because it was not enumerated in a one page summary of terms signed by Lee Borck and Bruce Bass. (CX 2 at 2). Complainant refers to the memorandum as the "Beef Marketing Agreement," and insists that it represents the Beef Marketing Agreement in its entirety. Complainant, however, cannot bypass the intent of the parties, and unilaterally decide that the memorandum was a complete integration of the terms of the agreement. Complainant did not offer any evidence to show that terms are limited to those contained in the memorandum; and, in fact, the evidence establishes that the agreement between BMG and Respondent was intended to, and did, contain additional terms, including a right of first refusal.

Several witnesses, including those testifying for the government, stated that the right of first refusal existed. Bruce Bass and Lee Borck, who negotiated the agreement both testified that there was a right of first refusal. (Tr. 3512-13, 3734). Jerry Bohn, the general manager of Pratt feedyards testified for the government that the right of first refusal was part of the

agreement; and explained that a disagreement over that term caused Pratt to stop selling under the agreement. (Tr. 462). Ray Palenske, an IBP buyer, and Marvin Stilgenbauer an Excel buyer, also testified for the government that there was a right of first refusal. (Tr. 830, 1595). Finally, Jay Johnson, Chief of the Packer Branch, of P&S, testified as a representative of the agency that IBP had a right of first refusal, and that the right had a value. He further stated that he knew the right existed at least as early as January 1995. (Tr. 3231-32). Assertions that the right did not exist are, therefore, inconsistent with the evidence of record.

Initial Decision and Order at 17-18 (footnotes omitted).

While I made minor changes to the Chief ALJ's discussion regarding Respondent's right of first refusal, I agree with Respondent and the Chief ALJ that Respondent has the right of first refusal under the Beef Marketing Agreement.

Moreover, I agree with Complainant that the right of first refusal, as explained by Respondent, suppresses the bidding process (competition); and therefore constitutes an unfair practice in violation of the Packers and Stockyards Act.

Two of Respondent's witnesses testified that Respondent's right of first refusal under the Beef Marketing Agreement suppresses the bidding process. Bruce Bass, head cattle buyer for Respondent, testified, as follows:

BY MR. BAUMGARTNER:

Q. The government has suggested that IBP could buy all the cattle it wanted in Kansas simply by bidding more. Would simply bidding more have put you in the same position that the Beef Marketing Group arrangement did?

A. No.

Q. Can you explain that?

A. It -- it would -- it would -- the right of first refusal allowed us to not have to bid more. I mean, it might -- we might have to bid more than maybe our initial bid, but we didn't have to bid more than the top bid. And in any other set of circumstances, the ethics of the business is such that sometimes they'll let you buy them for a quarter more per hundred weight, but usually it takes at least 50 cents. And -- so if -- like our last example, if Monfort said, you know, "I'll give you 67," and if he decided, "Well, I

think I'll try this one more time," if the owner was a non-BMG group and we didn't have the first right of refusal and he said, "I think I'll try this more one [sic] time," he might call IBP and say, you know, "I bid 67. Would you give me 68"? And if we said, "No, but I'll give you 67," he'd say, "Too bad. If I'm going to sell them for 67, I'm going to sell them to Monfort because they bid it first." Wherein, you know, the other way around if it were a Beef Marketing Group feedyard and, you know, we had bid even or better on the cattle, they would have to come back to us and offer them to us at 67. Therein we wouldn't have to pay that extra \$25, \$50, whatever it was that feedyard owner determined that he should have more than that bid in order to make it worth his while to sell them to someone else.

Tr. 3526-27.

Jerry Hausman, a recognized expert in the field of econometrics, called by Respondent, states in his written testimony that Respondent's right of first refusal suppresses bidding, as follows:

. . . by agreeing to give IBP a right of first refusal on pens of cattle that were judged by the IBP buyer as being of equal or better quality to cattle being sold at the Kansas top price, BMG members reduced the likelihood of aggressive bidding for these pens by other packers.

RX 46 at 5.

Similarly, Professor Hausman testified that Respondent's right of first refusal suppresses competition, as follows:

[BY MR. BAUMGARTNER:]

Q. I place on the easel RX-1 and what I'd like to ask you to do is go through this exhibit and compare for us the BMG arrangement with the traditional method of buying cattle from the standpoint of the non-price conditions of sale.

A. Okay. Well, the first one that I referred to would be number two and that is that IBP had the right of first refusal in all cattle which was even or better so that's helpful to IBP that it's going to reduce competition from other packers and it's also going to allow them to utilize their personnel better to buy cattle from other yards and to reduce haggling at the BMG yards so that's certainly something of value to IBP.

Tr. 3949-50.

Further, Jay Johnson, Chief of the Packer Branch, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, testified that Respondent has a right of first refusal, and that the right has a value (Tr. 3231-32). Mr. Johnson further testified that Respondent's right of first refusal under the Beef Marketing Agreement stifles competition, as follows:

[BY MS. WATERFIELD:]

Q. Now, we've heard some testimony throughout this hearing about the right of first refusal. Are you familiar with that term?

A. Yes, I am.

Q. Is there a traditional or customary right of first refusal in the cattle industry?

A. Yes.

Q. What is your understanding of the customary right of first refusal?

A. Normally, what's customary in the cattle industry is for a right of first refusal if IBP was to go out and offer \$65 for some cattle and a competitor came in and offered \$65.50, the seller then would go back to IBP and say do you want those cattle at \$66 which would have been the next 50 cent increment. And that is typically how right of first refusal is in the cattle business. That means that they will go back to them and give them an opportunity to bid one more time at the next increment.

Q. Now, have you been present for all the testimony in this hearing?

A. Yes, I have.

Q. Were you present when testimony was given with respect to the right of first refusal under the terms of the Beef Marketing Agreement?

A. Yes, I was.

Q. Is the, well, first of all, would you describe the right of first refusal

under the terms of the Beef Marketing Agreement as you understand it?

A. As I understand the Beef Marketing Groups and IBP's relationship as far as the right of first refusal, using a similar scenario as I just discussed, that if IBP, there's two different ways actually.

One is if IBP had offered \$65 for the cattle earlier in the week and a competitor came in and offered \$65.50, then the seller was obligated to go back to the feedlot and offer those cattle to IBP at \$65.50 or the same thing as their competitor. Just a matching of the price, not a one upping of the price.

And I think also the way it was described as well is if IBP had offered to buy cattle under the terms of the agreement and, for instance, offered a par bid or even a par or 50 cents above bid on cattle and when the commitment deadline ended, which during the early portion of the agreement back in 1994 was that it was Wednesday.

Once the cattle feeder decided that he did not want to accept that even bid and then someone came in later in the week and offered them a specific dollar amount of for say \$65 again, under the terms of the agreement, as I understand it, IBP had opportunity to go back and get those cattle at \$65. All they had to do was match the competitors, not increase the bid.

Q. And does the Agency consider the right of first refusal under the terms of the Beef Marketing Agreement to be the same as the customary right of first refusal?

A. No, we do not.

Q. What's different about the right of first refusal under the agreement?

A. We believe that under the agreement, that the right of first refusal is a violation of the Packers and Stockyards Act and is unfair, an unfair practice.

Q. Why?

A. Because it results in -- it's an anti-competitive activity that does not promote competition, but in fact stifles competition.

Q. Does the Agency have a position with respect to whether the right of first refusal as included in the terms of the Beef Marketing Agreement would justify a 43 cent preference?

A. Could you ask me that again, please?

Q. Does the Agency have a position with respect to the right of first refusal under the terms of the agreement as to whether or not that right of first refusal would justify a 43 cent preference?

A. Yes, we do.

Q. What is the position, sir?

A. The position is that this would be an unlawful act. Therefore, it would not justify the price difference.

....

JUDGE PALMER: Well, let me bore in here a little bit. Can you give any reason why -- strike that. Can you give any background, anything that would make you say the right of first refusal is an unfair practice? I don't care where you get it from. You can get it from another industry. You get it from other practices here in Packers and Stockyards, anything at all that says that a right of first refusal is an unfair practice.

THE WITNESS: My basis for making the statement that it's an unfair practice is that it precludes them from competing. If I could make an illustration of if you were going out to buy land, there was two parcels of land out there, and the first parcel of land comes up and you walk over to the other guy over there and you say, you know.

Rather than me bid and you bid and we raised the price up, you take this one and I'll take that one. Or you bid as high as you want to bid and then I will come in and I'll match the same price. So we both pay the same price.

So the auction starts. There's nobody really pushing the price. The price stays stagnant at a level and you're both able to get your needs. And rather than if you both were going head-to-head competing for that initial piece of land, the competition would in theory drive the price up if you both wanted that same building. Demand would increase.

Tr. 4412-15, 4439-40.

I find that the effect or potential effect of Respondent's right of first refusal under the Beef Marketing Agreement is to suppress competition. Respondent's right of first refusal under the Beef Marketing Agreement provides that Respondent may obtain cattle placed in feedlots that are members of the Beef Marketing Group by matching the previous high bid, rather than by bidding a higher price than previously bid. Respondent's right to acquire cattle by matching the previous high bid has the potential of discouraging others from bidding on cattle and necessarily restricts competition because Respondent's right of first refusal obviates Respondent's need to compete for cattle placed at Beef Marketing Group feedlots in order to obtain those cattle. Instead, Respondent's right of first refusal allows Respondent to enter a bid, await, but not participate in, any additional bidding, and obtain cattle merely by matching any bid that may be higher than Respondent's bid. Therefore, Respondent's right of first refusal under the Beef Marketing Agreement violates section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) because it has the effect or potential effect of reducing competition.<sup>31</sup>

For the foregoing reasons the following Order should be issued.

### **Order**

Respondent, IBP, inc., its agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from

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<sup>31</sup>See generally *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) (holding that an agreement by a packer and dealer not to compete for the purchase of hogs whereby the dealer purchased the hogs without competition and the packer purchased the hogs from the dealer at the price paid by the dealer to the original seller was a practice in violation of section 202 of the Packers and Stockyards Act because the essential nature and necessary result of the arrangement or practice was to eliminate competition); *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 985 (1975) (holding that a packer that permits a person with whom the packer should be competing for the purchase of livestock to purchase livestock for the packer's account, violates section 202(a) and 202(e) of the Packers and Stockyards Act (7 U.S.C. § 192(a), (e)) since such arrangement has the effect or potential effect of restricting competition, whether or not such purpose was intended by the purchasing arrangement).

entering into or continuing any agreement, contract, arrangement, or understanding containing a right of first refusal which provides that Respondent may obtain livestock by matching the highest previous bid for the livestock.

The provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

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**In re: HINES AND THURN FEEDLOT, INC., d/b/a THURN & HINES LIVESTOCK, JAMES L. THURN, AND DERYL D. HINES.**

**P&S Docket No. D-96-0046.**

**Decision and Order filed August 24, 1998.**

**Cease and desist order — Registration order — NSF checks — Failing to pay — Failing to pay when due — Admissions — Failure to file timely answer — Mitigating circumstances — Sanction.**

The Judicial Officer affirmed the decision by Judge Baker (ALJ) ordering Respondents to cease and desist from failing to pay for livestock; failing to pay, when due, for livestock; and issuing NSF checks in payment for livestock. The Order provides that Respondents shall not be registered to engage in business for 5 years. Respondents failed to file a timely answer and admitted the material allegations of fact contained in the complaint in their untimely answer; therefore, a default order was properly issued. Given the large number of Respondents' violative transactions and the dollar amounts involved, the sanction imposed is appropriate. Further, the sanction imposed was recommended by administrative officials and is consistent with other cases involving failures to pay for livestock. The hardship to Respondents' creditors, which might result from a suspension order, is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock industry prevails over the interests of creditors who might be damaged as a result of a suspension order.

Andre Allen Vitale, for Complainant.

William D. Werger, Manchester, Iowa, for Respondents.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

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

The Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations promulgated under the Packers and Stockyards Act (9 C.F.R. §§ 201.1-.200) [hereinafter the Regulations]; and 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 filing a

Complaint on August 16, 1996.

The Complaint alleges that: (1) James L. Thurn [hereinafter Respondent Thurn] and Deryl D. Hines [hereinafter Respondent Hines] are the *alter egos* of Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock [hereinafter Corporate Respondent] (Compl. ¶ III); and (2) Respondent Thurn, Respondent Hines, and Corporate Respondent [hereinafter Respondents] willfully violated sections 312(a) and 409(a) of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b(a)) by: (a) issuing insufficient funds checks in payment for livestock; (b) failing to pay the full purchase price for livestock; and (c) failing to pay, when due, the full purchase price for livestock (Compl. ¶ II).

Respondents were served with the Complaint on August 24, 1996. Respondents filed an Answer to the Complaint on September 16, 1996, admitting: (1) the jurisdictional allegations of paragraph I of the Complaint; (2) that Respondent Thurn was president of Corporate Respondent, owner of 50 percent of its outstanding shares, and responsible, in combination with Respondent Hines, for the direction, management, and control of Corporate Respondent; (3) that Respondent Hines was vice-president of Corporate Respondent, owner of 50 percent of its outstanding shares, and responsible, in combination with Respondent Thurn, for the direction, management, and control of Corporate Respondent; (4) that insufficient funds checks were issued in payment for Corporate Respondent's livestock purchases; (5) that Corporate Respondent failed to pay, when due, for its livestock purchases; and (6) that \$853,266.06 of the amounts alleged in the Complaint was unpaid (Answer to Complaint).

Respondents' Answer to Complaint was filed late; and therefore, Respondents are deemed to have admitted the material allegations in the Complaint and waived their right to a hearing, pursuant to sections 1.136(c) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(c), .139). Moreover, Respondents admit the material allegations of fact contained in the Complaint in their Answer to Complaint. The admission of the material allegations of fact contained in a complaint constitutes a waiver of hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On November 12, 1997, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a proposed Decision Without Hearing by Reason of Admissions and moved for its adoption. On April 2, 1998, Respondents filed Objection to Motion for Decision Without Hearing.

On April 30, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in which the ALJ: (1) concluded that Respondent Thurn and Respondent

Hines are the *alter egos* of Corporate Respondent; (2) concluded that Respondent Thurn, Respondent Hines, and Corporate Respondent willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the Regulations (9 C.F.R. § 201.43); (3) ordered Respondent Thurn, Respondent Hines, and Corporate Respondent to cease and desist from (a) issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented, (b) failing to pay, when due, the full purchase price of livestock purchases, and (c) failing to pay the full purchase price for livestock purchases; and (4) suspended Respondent Thurn, Respondent Hines, and Corporate Respondent as registrants under the Packers and Stockyards Act (7 U.S.C. §§ 181-229) for 5 years (Default Decision at 8-9).

On May 29, 1998, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>\*</sup> On June 17, 1998, Complainant filed Objections to Respondents' Petition for Appeal, and the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), and based upon a careful consideration of the record in this proceeding, I adopt the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

## APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

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<sup>\*</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), reprinted in 5 U.S.C. app. § 4(a) at 1491 (1994), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

**CHAPTER 9—PACKERS AND STOCKYARDS**

**SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS**

**§ 201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined**

....

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

**§ 213. Prevention of unfair, discriminatory, or deceptive practices**

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

## SUBCHAPTER V—GENERAL PROVISIONS

### § 228b. Prompt payment for purchase of livestock

#### (a) Full amount of purchase price required; methods of payment

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

7 U.S.C. §§ 201(c)-(d), 213, 228b(a).

9 C.F.R.:

## TITLE 9—ANIMALS AND ANIMAL PRODUCTS

....

### CHAPTER II—GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMINISTRATION (PACKERS AND STOCKYARDS PROGRAMS),

**DEPARTMENT OF AGRICULTURE**

**PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT**

**ACCOUNTS AND RECORDS**

....

**§ 201.43 Payment and accounting for livestock and live poultry.**

(a) *Market agencies to make prompt accounting and transmittal of net proceeds.* Each market agency shall, before the close of the next business day following the sale of any livestock consigned to it for sale, transmit or deliver to the consignor or shipper of the livestock, or the duly authorized agent, in the absence of any knowledge that any other person, or persons, has any interest in the livestock, the net proceeds received from the sale and a true written account of such sale, showing the number, weight, and price of each kind of animal sold, the date of sale, the commission, yardage, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

9 C.F.R. § 201.43(a).

**ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION  
(AS MODIFIED)**

....

Respondents' Answer [to Complaint] constitutes the admission of the material allegations of fact contained in the Complaint. The admission of the material allegations of fact contained in a complaint constitutes a waiver of hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Complainant moved for the issuance of a Default Decision.

On April 2, 1998, Respondents filed Objection to Motion for Decision Without Hearing, wherein [Respondents again admitted] violations of the [Packers and Stockyards] Act. . . . However, Respondents requested oral hearing for the purpose of presenting evidence regarding willfulness and the appropriate sanction. The matters of concern in Respondents' Objection [to Motion for Decision Without Hearing] have been duly considered.

No useful purpose would be served by an oral hearing. . . . [I]t is well settled that a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts, even if the conduct resulted from careless disregard for statutory and regulatory requirements. *Butz v. Glover*, 411 U.S. 182 (1973); *In re Hardin County Stockyards, Inc.*, 53 Agric. Dec. 654 (1994). Even if done unintentionally, the issuance of insufficient funds checks, failures to pay, and failures to pay when due for livestock purchases are violations of sections 312(a) and 409 of the [Packers and Stockyards] Act (7 U.S.C. §§ 213(b), 228b), and section 201.43 of the Regulations (9 C.F.R. § 201.43).

Respondents' Objection to [Motion for] Decision [Without Hearing] focused, among other things, upon what they considered mitigating circumstances: They have made significant repayments against amounts owed the creditors; failure to pay was not intentional and willful; and work is being done with other registrants in the hope of paying more back to the creditors.

The Judicial Officer accords deference to the sanction [recommended] by the [administrative] officials who are charged with enforcement of the [Packers and Stockyards] Act. The mitigating circumstances put forth by Respondents have been considered by [administrative officials charged with enforcement of the Packers and Stockyards Act] and by the [ALJ]. The law is clear in this instance, and there is no basis for an oral hearing.

Accordingly, [this] 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] Hines and Thurn Feedlot, Inc., doing business as Thurn & Hines Livestock, . . . is a corporation with a business mailing address of Rural Route 2, Box 55, Edgewood, Iowa 52042.

2. [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock,] is, and at all times material [to this proceeding] was:

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

(b) Engaged in the business of a market agency buying livestock on a commission basis; and

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

3. [Respondent] James L. Thurn . . . is an individual whose business mailing address is Rural Route 2, Box 55, Edgewood, Iowa 52042.

4. Respondent [James L.] Thurn is, and at all times material [to this

proceeding] was:

(a) President of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock];

(b) Fifty percent stockholder of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock]; and

(c) Responsible, in combination with Respondent Deryl D. Hines, for the direction, management, and control of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock].

5. [Respondent] Deryl D. Hines . . . is an individual whose business mailing address is Rural Route 2, Box 55, Edgewood, Iowa 52042.

6. Respondent [Deryl D.] Hines is, and at all times material [to this proceeding] was:

(a) Vice-President of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock];

(b) Fifty percent stockholder of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock]; and

(c) Responsible, in combination with [Respondent] James L. Thurn, for the direction, management, and control of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock].

7. Under the direction, management, and control of Respondent [James L.] Thurn and Respondent [Deryl D.] Hines, [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock], on or about the dates in the transactions set forth [in this paragraph of the Findings of Fact,] purchased livestock and in purported payment [of the livestock,] issued checks which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

Purchase Date	Seller	Check Amount	Check Date	Check Number
10/09/95	Zumbrota Livestock Auction Market, Inc.	\$ 214,818.66	10/09/95	11824
10/11/95	Zumbrota Livestock Auction Market, Inc.	\$ 7,793.97	10/12/95	11865

10/12/95	Equity Cooperative Livestock Sales Association	\$ 16,804.36	10/12/95	11857
10/12/95	Walnut Auction Sales, Inc.	\$ 55,201.57	10/12/95	11858
10/12/95	Kalona Sales Barn, Inc.	\$ 14,022.45	10/12/95	11860
10/13/95	Lanesboro Sales Commission, Inc.	\$ 60,814.85	10/13/95	11870
10/17/95	Equity Cooperative Livestock Sales Association	\$ 156,473.06	10/17/95	7776
10/17/95	Equity Cooperative Livestock Sales Association	\$ 20,842.82	10/17/95	11900

8. Under the direction, management, and control of Respondent [James L.] Thurn and Respondent [Deryl D.] Hines, [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock], on or about the dates in the transactions set forth in Finding of Fact 7 and on or about the dates in the transactions set forth [in this paragraph of the Findings of Fact,] purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Seller	Purchase Amount	Due Date
10/19/95	Aplington Sales Commission, Inc.	\$ 31,057.73	10/20/95
10/19/95	Aplington Sales Commission, Inc.	\$ 10,507.72	10/20/95
10/16/95	Cresco Livestock Market	\$ 21,767.09	10/17/95

<b>Purchase Date</b>	<b>Seller</b>	<b>Purchase Amount</b>	<b>Due Date</b>
10/16/95	Belle Plaine Livestock Exchange, Inc.	\$ 35,784.41	10/17/95
10/16/95	Dolan Lundeman Sunderland & Co.	\$ 8,792.55	10/17/95
10/09/95	Farmers Livestock Auction Market	\$ 70,431.56	10/10/95
10/14/95	Farmers Livestock Auction Market	\$ 34,692.74	10/15/95
10/16/95	Farmers Livestock Auction Market	\$ 74,953.35	10/17/95
10/10/95	Galesburg Livestock Sales, Inc.	\$ 11,416.03	10/11/95
10/17/95	Galesburg Livestock Sales, Inc.	\$ 66,226.18	10/18/95
10/16/95	H.D. Copeland	\$ 18,277.42	10/17/95
10/16/95	H.D. Copeland	\$ 18,774.92	10/17/95
10/14/95	John E. Connery	\$ 24,256.78	10/15/95
10/16/95	John E. Connery	\$ 275.90	10/17/95
10/17/95	John E. Connery	\$ 31,979.37	10/18/95
10/18/95	John E. Connery	\$ 32,594.39	10/19/95
10/19/95	John E. Connery	\$ 12,626.69	10/20/95
10/19/95	Kalona Sales Barn, Inc.	\$ 5,472.26	10/20/95
10/12/95	Kane Livestock Sales, Inc.	\$ 2,765.78	10/13/95
10/16/95	Kane Livestock Sales, Inc.	\$ 12,336.73	10/17/95
10/16/95	Kane Livestock Sales, Inc.	\$ 4,670.35	10/17/95
10/17/95	Kane Livestock Sales, Inc.	\$ 10,810.18	10/18/95
10/17/95	Kane Livestock Sales, Inc.	\$ 7,480.70	10/18/95
10/18/95	Kane Livestock Sales, Inc.	\$ 2,322.60	10/19/95
10/19/95	Kane Livestock Sales, Inc.	\$ 12,084.15	10/20/95
10/18/95	Lanesboro Sales Commission, Inc.	\$ 174,848.72	10/19/95

Purchase Date	Seller	Purchase Amount	Due Date
10/18/95	Lanny R. Minnaert	\$ 26,853.76	10/19/95
10/17/95	Manchester Livestock Auction	\$ 125,324.95	10/18/95
10/17/95	Manchester Livestock Auction	\$ 2,511.36	10/18/95
10/10/95	Michigan Livestock Exchange	\$ 38,533.30	10/11/95
10/16/95	Michigan Livestock Exchange	\$ 18,446.43	10/17/95
10/04/95	Northern Michigan Livestock Association	\$ 14,296.90	10/05/95
10/18/95	Northern Michigan Livestock Association	\$ 18,287.27	10/19/95
10/10/95	O and S Cattle Company	\$ 8,509.32	10/11/95
10/12/95	O and S Cattle Company	\$ 10,923.82	10/13/95
10/13/95	O and S Cattle Company	\$ 33,873.14	10/16/95
10/16/95	O and S Cattle Company	\$ 12,619.54	10/17/95
10/17/95	O and S Cattle Company	\$ 9,907.25	10/18/95
10/16/95	Tama Livestock Auction Co.	\$ 10,879.90	10/17/95
10/18/95	Tama Livestock Auction Co.	\$ 8,955.24	10/19/95
10/19/95	Walnut Auction Sales, Inc.	\$ 28,543.88	10/20/95
10/16/95	Zumbrota Livestock Auction Market, Inc.	\$ 269,275.28	10/17/95
10/16/95	Zumbrota Livestock Auction Market, Inc.	\$ 52,758.74	10/17/95

9. As of September 16, 1996, \$853,266.06<sup>1</sup> of the amounts due from the

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<sup>1</sup>In [Answer to Complaint,] Respondents contend that \$1,107,235.70 of the amounts alleged in the Complaint had been paid. Respondents admit that the balance of \$853,266.06 of the amounts alleged [in the Complaint] is unpaid. No evidence was presented to verify or disprove Respondents' contention (continued...)

transactions set forth in Findings of Fact 7 and 8 remained unpaid.

### Conclusions [of Law]

[1. The Secretary has jurisdiction in this matter.]

[2.] By reason of Findings of Fact 4 and 6, Respondent [James L.] Thurn and Respondent [Deryl D.] Hines are the *alter egos* of [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock].

[3.] By reason of Findings of Fact 7, 8, and 9, Respondent [James L.] Thurn, Respondent [Deryl D.] Hines, and [Respondent Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock], willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the Regulations (9 C.F.R. § 201.43).

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise two issues in Respondents' Petition for Appeal to Judicial Officer [hereinafter Respondents' Appeal Petition], and request that I vacate the ALJ's Default Decision.

First, Respondents contend that the ALJ should have granted Respondents' April 2, 1998, request for an oral hearing to provide Respondents with an opportunity to present evidence regarding the appropriate sanction to be imposed against Respondents (Respondents' Appeal Pet. at 1).

I disagree with Respondents' contention that the ALJ should have granted Respondents' April 2, 1998, request for an oral hearing in this proceeding. Respondents were served with the Complaint on August 24, 1996, but did not file Respondents' Answer to Complaint until September 16, 1996, 23 days after they were served with the Complaint.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

#### § 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint

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<sup>1</sup>(...continued)

that [they] paid the . . . \$1,107,235.70 . . . . Respondents' admission that \$853,266.06 is unpaid is sufficient to compel a finding that Respondents failed to pay livestock debt in violation of the Packers and Stockyards Act.

. . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

### **§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The 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.

### **§ 1.141 Procedure for hearing.**

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint, served on Respondents on August 24, 1996, clearly informs Respondents of the consequences of failing to file an answer in accordance with the Rules of Practice, as follows:

Respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with

the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 7.

Likewise, the letter from the Hearing Clerk accompanying the Complaint and the Rules of Practice served August 24, 1996, on Respondents, provides:

CERTIFIED RECEIPT REQUESTED

August 19, 1996

Hines and Thurn Feedlot, Inc.  
d/b/a Thurn & Hines Livestock  
Mr. James L. Thurn  
Mr. Deryl D. Hines  
Rural Route 2, Box 55  
Edgewood, Iowa 52042

Gentlemen:

Subject: In re: Hines and Thurn Feedlot, Inc. d/b/a Thurn & Hines Livestock, James L. Thurn and Deryl D. Hines, Respondents  
P&S Docket No. D-96-0046

Enclosed is a copy of a Complaint, which has been filed with this office under the Packers and Stockyards Act, 1921.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and five copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain

each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson  
Hearing Clerk

Letter dated August 19, 1996, from Joyce A. Dawson, Hearing Clerk, to Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, James L. Thurn, and Deryl D. Hines (emphasis in original).

Despite the express statements in the Complaint, the Rules of Practice, and the cover letter from the Hearing Clerk, that a failure to file a timely answer in this proceeding is deemed an admission of the allegations in the Complaint and could result in the entry of a default decision against Respondents, Respondents failed to file a timely answer.

Moreover, Respondents admit the material allegations of the Complaint in their untimely Answer to Complaint and pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the admission of the material allegations contained in

the Complaint constitutes a waiver of hearing. Specifically, Respondents admit: (1) issuing insufficient fund checks for the purchase of livestock; (2) failing to pay, when due, for livestock; and (3) failing to pay for livestock purchases (Answer to Complaint). Respondents reiterate these admissions in Respondents' Objection to Motion for Decision Without Hearing and Respondents' Appeal Petition.

Respondents proffer that their violations of the Packers and Stockyards Act were precipitated by Northwestern Cattle's failures to pay for livestock purchased from Respondents (Objection to Motion for Decision Without Hearing).<sup>2</sup> The ALJ considered that factor and Respondents' asserted lack of intent to violate the Packers and Stockyards Act and concluded that Respondents failed to present meritorious objections to warrant an oral hearing (Default Decision at 2-3). The ALJ ruled that "[n]o useful purpose would be served by an oral hearing" and stated that the "Department of Agriculture's policy and precedent clearly establish that it is well settled that a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts, even if the conduct resulted from careless disregard for statutory or regulatory requirements" (Default Decision at 3).

I agree with the ALJ. 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.<sup>3</sup> Respondents'

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<sup>2</sup>Respondents were middlemen in a series of cattle transactions over several years. Corporate Respondent would purchase cattle from various sources and resell those cattle to John Ed Morken, d/b/a Northwestern Cattle, Spring Grove, Minnesota. Corporate Respondent would receive payment from Northwestern Cattle and would subsequently make payment to the original sellers (Objection to Motion for Decision Without Hearing).

<sup>3</sup>*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *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). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Willfully' 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.'")

(continued...)

argument that they issued insufficient funds checks and failed to pay for livestock because Northwestern Cattle failed to pay Respondents does not mitigate against a finding that Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act, or the 5-year suspension of Respondents' registration as a result of their violations of the Packers and Stockyards Act.

Respondents claim that denial of an opportunity to present mitigating circumstances during an oral hearing deprives them of their right to due process (Respondents' Appeal Pet. at 2).

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,<sup>4</sup> Respondents have shown no basis for setting aside the Default Decision.<sup>5</sup> The Rules of Practice clearly provide that an

<sup>3</sup>(...continued)

The 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. United States Dep't of Agric.*, 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, Respondents' violations would still be found willful.

<sup>4</sup>See generally *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside a default decision because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (setting aside a default decision because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (vacating a default decision and remanding the case to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

<sup>5</sup>See generally *In re Jack D. Stowers*, 57 Agric. Dec. \_\_\_ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision

(continued...)

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<sup>5</sup>(...continued)

proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir.

(continued...)

answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondents' Answer to Complaint was filed 23 days after Respondents were served with the Complaint. Moreover, Respondents' Answer to Complaint admits the material allegations of the Complaint.

The requirement in the Rules of Practice that a respondent deny or explain any allegation of a complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical

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<sup>3</sup>(...continued)

1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

manner. The United States Department of Agriculture's four administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 40 to 60 cases per year. As such, the courts have recognized that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."<sup>6</sup> If Respondents were permitted to contest some of the allegations of fact after failing to file a timely answer and after filing a late Answer to Complaint, which admits the material allegations of the Complaint, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution.<sup>7</sup>

Second, Respondents contend that "[t]he sanction imposed by the Administrative Law Judge was unreasonable under the circumstances which included mitigating factors which would have been presented had an oral hearing been permitted" (Respondents' Appeal Pet. at 1).

I disagree with Respondents' contention that the sanction imposed by the ALJ is unreasonable. The ALJ imposed the following sanction against Respondents:

Corporate Respondent, Hines and Thurn Feedlot, Inc., its officers, directors, agents, and employees, successors and assigns, directly or through any corporate device and Respondent James L. Thurn and Respondent

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<sup>6</sup>See *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Accord *Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). See also *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

<sup>7</sup>See *United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

Deryl D. Hines, their agents and employees, directly or through any corporate device in connection with their activities subject to the P&S Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock purchases; and
3. Failing to pay the full purchase price of livestock purchases.

Respondents Hines and Thurn Feedlot, Inc., James L. Thurn, and Deryl D. Hines are suspended as registrants under the P&S Act for five (5) years. Provided, that upon application to the Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of Respondents at any time after two (2) years upon demonstration that all livestock sellers identified in the complaint in this proceeding have been paid in full. Provided further, that this order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent Thurn and Respondent Hines by another registrant or packer after the expiration of the first two (2) years of this suspension term and upon demonstration of circumstances warranting modification of the order.

#### Default Decision at 8-9.

The United States Department of Agriculture'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, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[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.

Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act and section 201.43 of the Regulations by: (1) purchasing livestock

and in purported payment for the livestock, issuing 8 checks in amounts totaling \$546,771.74 which were returned unpaid by the bank upon which they were drawn because Corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented; (2) purchasing livestock for a purchase price of over \$1,000,000, and failing to pay, when due, the full purchase price of the livestock; and (3) failing to pay \$853,266.06 for livestock.

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is "to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Bruhn's Freezer Meats v. United States Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971), cited in *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978). The requirement that a purchaser make timely payment effectively prevents sellers from being forced to finance the transaction. *Van Wyk v. Bergland* at 704. Respondents contravened that requirement, and Respondents' violations directly thwart one of the primary purposes of the Packers and Stockyards Act.<sup>8</sup>

Given the large number of Respondents' violative transactions and the dollar amounts involved, a severe sanction is warranted. Further, great weight is given to the sanction recommendations of administrative officials, and the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, USDA, recommended the sanction imposed by the ALJ. Finally, the sanction imposed by the ALJ is consistent with the sanctions imposed in cases involving failures to pay for livestock.<sup>9</sup> Under these circumstances, a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act is entirely appropriate.

Respondents claim that they and the livestock producers that sold to

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<sup>8</sup>See *Mahon v. Stowers*, 416 U.S. 100, 111. (1974) (per curiam) (dictum) (stating that regulation requiring prompt payment supports policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for their own purposes); *Bowman v. United States Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating that one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

<sup>9</sup>*In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996); *In re Samuel J. Dalessio, Jr.*, 54 Agric. Dec. 590 (1995), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994); *In re Jimmy Ray Hendren*, 51 Agric. Dec. 672 (1992); *In re David H. Harris*, 51 Agric. Dec. 649 (1992); *In re Jeff Palmer*, 50 Agric. Dec. 1762 (1991); *In re Sam Odom*, 48 Agric. Dec. 519 (1989); *In re Edward Tiemann*, 47 Agric. Dec. 1573 (1988).

Respondents are victims of Northwestern Cattle's failure to pay Respondents and that most, if not all, of Respondents' creditors support Respondents' return to employment immediately (Respondents' Appeal Pet. at 3). Respondents' alleged victimization and creditors' preference are irrelevant considerations in determining sanctions for Respondents' serious violations of the Packers and Stockyards Act. As the court held in *Van Wyk*, Respondents' claim that their inability to meet their obligations is a debtor/creditor problem and is irrelevant to disposition of the proceeding. *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating that failure to pay shipper promptly is a proscribed deceptive practice under the Packers and Stockyards Act).

Respondents request permission to be employed by registrants in the livestock business during the suspension period to enable Respondents to repay their creditors. However, it has consistently been held that any hardship to a respondent's creditors, customers, community, or employees, which might result from a suspension order, is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interest that might be damaged as a result of a suspension order.<sup>10</sup>

I find no basis for Respondents' contention that the sanction imposed by the ALJ is unreasonable, and the mitigating circumstances raised by Respondents are not relevant to the sanction to be imposed for Respondents' willful violations of the

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<sup>10</sup>See *In re Sam Odom*, 48 Agric. Dec. 519, 540-41 (1989) (holding that national public interest in deterring similar violations must prevail over the narrow interests of particular creditors); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 206 (1989), *aff'd*, 891 F.2d 281 (3d Cir. 1989) (unpublished) (holding that national public interest in deterring similar violations must prevail over the narrow interests of particular creditors); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987) (holding that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interest that might be temporarily damaged as a result of a suspension order); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1365 (1982) (holding that any hardship to local interests is given no weight in determining the sanction); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979) (holding that hardship on local livestock community arising from registrant's suspension is outweighed by the national interest in deterring future violations); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978) (holding that hardship on local livestock community arising from registrant's suspension is outweighed by the national interest in deterring future violations); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977) (holding that hardship to the community resulting from a suspension order is irrelevant in determining sanctions); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (holding that it is USDA's policy to impose a severe sanction for violations of the Packers and Stockyards Act even when it would have an adverse effect on the local economy).

Packers and Stockyards Act.

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

**Order**

**Paragraph I.**

Corporate Respondent, Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, its officers, directors, agents, and employees, successors and assigns, directly or indirectly through any corporate or other device, and Respondent James L. Thurn and Respondent Deryl D. Hines, their agents and employees, directly or indirectly through any corporate or other device in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock purchases; and
3. Failing to pay the full purchase price of livestock purchases.

**Paragraph II.**

Corporate Respondent, Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, Respondent James L. Thurn, and Respondent Deryl D. Hines are suspended as registrants under the Packers and Stockyards Act for 5 years: *Provided*, That upon application to the Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of Respondents at any time after 2 years upon demonstration that all livestock sellers identified in the Complaint have been paid in full; *And provided further*, That this Order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent James L. Thurn and Respondent Deryl D. Hines by another registrant or packer after the expiration of the first 2 years of this suspension term and upon demonstration of the circumstances warranting modification of this Order.

**Paragraph III.**

Paragraph I of this Order shall become effective on the day after service of this Order on Respondents. Paragraph II of this Order shall become effective on the 60th day after service of this Order on Respondents.

**In re: HUGH T. HENNESSEY, d/b/a HENNESSEY CATTLE CO., SIXES RIVER CATTLE CO., EARNEST A. BUSSMANN, and PETER E. BUSSMANN.**

**P&S Docket No. D-97-0003.**

**Decision and Order filed July 13, 1998.**

**Scheme to restrict competition not found - Dismissal of Complaint.**

Respondents were alleged to have engaged in a scheme to restrict competition by controlling prices with respect to the sale of slaughter cattle in the Willamette Valley region of Oregon. Complainant maintained that it was not permissible for both Respondent Peter Bussmann and Respondent Hugh Hennessey, as representatives of Sixes River Cattle Company, to both be present at auctions without bidding against each other. The evidence supported the conclusion that Peter Bussmann ceased to regularly attend the Corvallis auction due to health concerns, and that, as a result, Hugh Hennessey was hired by Sixes River to purchase cows in his stead. Hennessey was also a buyer for Armour Meat Company and Walt's Meats, but was only authorized to purchase extra-fat or "gobby" cows for Sixes River. Judge Bernstein found that this arrangement did not adversely affect competition at the Corvallis sale and that the purchasing arrangement did not remove a competitor from the marketplace. The evidence showed that Respondents did not violate the Act or the regulations. The Complaint was dismissed.

Andrew Y. Stanton, for Complainant.

Respondent Hugh T. Hennessey, Pro se.

G. Lance Salladay, Boise, ID, for Respondents Sixes River Cattle Co., Earnest and Peter Bussmann.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

### **Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented ("the Act") (7 U.S.C. § 181 *et seq.*). The proceeding was instituted on October 24, 1996, by a Complaint filed by the Acting Deputy Administrator of the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture ("USDA"). The Complaint alleges that Respondents entered into an agreement with the purpose or effect of restricting competition by controlling prices with respect to the sale of slaughter cattle in the Willamette Valley region of Oregon, in willful violation of sections 312(a) of the Act and 201.70 of the regulations.

Respondents filed Answers denying all material allegations. I conducted a hearing in Portland, Oregon, on February 24 through 26, 1998. Complainant was represented by Andrew Y. Stanton. Sixes River Cattle Co., Earnest A. Bussmann, and Peter E. Bussmann were represented by G. Lance Salladay, Boise, Idaho. Hugh T. Hennessey appeared *pro se*.

The parties filed post-hearing briefs, proposed findings of fact, proposed

conclusions of law and reply briefs. The last such brief was filed on June 30, 1998. All proposed findings of fact, conclusions of law, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the record. The hearing transcript is cited herein as "Tr." Complainant's exhibits are cited as "CX" and Respondents' exhibits are cited as "RX."

### **Findings of Fact**

1. Respondent Sixes River Cattle Company ("Sixes River") is an Oregon corporation whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Sixes River was engaged in the business of a dealer, buying and selling livestock in commerce for its own account or the account of others, and as a market agency, buying on consignment; and was duly registered with the Secretary of Agriculture as a dealer and a market agency (Answer ¶ 1; Tr. 118-19). At all times material, George Bussmann was the sole stockholder and president of Sixes River (Tr. 347, 489).

2. Respondent Earnest A. Bussmann is an individual whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Earnest Bussmann was the manager of Sixes River, and was responsible for the direction, management and control of its business operations (Tr. 451, 488-89, 589-90, 603).

3. Respondent Peter E. Bussmann is an individual whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Peter Bussmann was an employee of Sixes River. Due to a heart condition, Peter Bussmann's duties at Sixes River were limited and consisted primarily of attending the Lebanon Auction Livestock Sale every Thursday to sell feeder cattle owned by Bussmann Brothers and to purchase feeder and slaughter cattle for Bussmann Brothers and Sixes River. Occasionally, Peter Bussmann would take feeder cattle that he did not sell at Lebanon to the Corvallis auction on the following day. Corvallis held an auction every Friday (Tr. 226-29, 452-54, 460, 589-96, 598-99, 618).

4. The Lebanon auction sale was less stressful than other sales because very few, if any, other buyers generally attended that auction. Also, after the Lebanon sale, Peter Bussmann was able to spend the night in the area and return to Sixes River the next day (Tr. 454-56, 460).

5. The Corvallis auction sale is more stressful than the Lebanon auction sale as it is regularly attended by several buyers; and Peter Bussmann must return to Langlois the same day as the sale at Corvallis because Sixes River needs the

trailer back at Langlois to pick up cattle on Saturdays. Corvallis is approximately a 4-hour drive from Langlois, Oregon (Tr. 292, 341, 455-56).

6. Respondent Hugh T. Hennessey ("Hennessey"), doing business as Hennessey Cattle Co., is an individual whose business address is 6883 70<sup>th</sup> Avenue, S.E., Salem, Oregon 97301. Hennessey, at all times material, was engaged in the business of a dealer, buying and selling livestock in commerce for his own account or the account of others, and a market agency, buying on commission; and was duly registered with the Secretary of Agriculture as a dealer and as a market agency (CX 1, 2).

7. Sixes River hired Hennessey as a commissioned buyer to purchase slaughter cattle on its behalf at various stockyards in north-central and northern Oregon and southern Washington. During the material time period, Hennessey was also a buyer for Armour Meat Company and Walt's Meats. Hennessey was authorized only to buy extra-fat, or "gobby" cows for Sixes River, whereas he purchased choice, high-quality slaughter cows for Armour and mid to high-quality animals for Walt's Meats (Tr. 32, 120, 165, 177, 279-80, 293-94, 342, 452, 460, 600-01).

8. Sixes River buys gobby cows in order to resell them to Beef Packers, Inc. ("BPI"). Gobby cows are considered to be the least desirable type of slaughter cattle. There is a very limited market for gobby cows. BPI is the only packer in the area that processes such cattle (Tr. 301, 304, 401, 409, 456-57).

9. One of the auctions that Hennessey regularly attended was the Corvallis auction on Fridays. Peter Bussmann also occasionally attended the Corvallis auction in order to sell feeder cattle left over from the Lebanon auction on the previous day. Peter Bussmann would sometimes also purchase a few feeder cows at Corvallis if he saw a good deal. At Corvallis, the small feeder calves are sold first, cow/calf pairs are sold second, bred cows third, large feeder cattle fourth, and slaughter cattle are sold last. Peter Bussmann would not always leave the sale immediately after the feeder cattle were sold, and would sometimes be present during the sale of slaughter cattle. Peter Bussmann would not bid during that portion of the auction, however, because Hennessey was present to bid on slaughter cattle for Sixes River (Tr. 219-20, 228, 279, 281, 297-98, 454-58, 490, 587-88, 598-600, 607).

10. There were 11 occasions during the weekly sales between July 1994 and July 1995, when both Hennessey and Peter Bussmann were present at the Corvallis Auction, with each bidding on at least one animal. In some instances, Peter Bussmann did not purchase any cattle but only bought back his own to prevent a sale at too low a price (CX 7-14, 16-18; Tr. 490-91).

11. The Corvallis auction was regularly attended by several buyers other

than Mr. Hennessey, including Kenneth Hale, Chris Bartel, and Terry Cowert (Tr. 127-29, 219, 280, 484-85).

12. Irving Hanger is the owner of Corvallis Auction Yard, however, he rarely attended sales (Tr. 320). He has serious medical problems, as well as a problem with alcohol abuse (Tr. 627). Sales at Corvallis were instead managed by Mr. Hanger's son, John Hanger, who testified that sales were competitive at all times material to the Complaint (Tr. 295-96). In addition, the Corvallis Auction Yard did not engage in any market support activities in order to protect its consignees during that time period (Tr. 164, 295-96, 365-68).

### **Conclusions of Law**

1. Respondents did not engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with buying or selling cattle in violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)).

2. Respondents conducted their buying operations in competition with and independently of other packers and dealers similarly engaged in accordance with section 201.70 of the regulations (9 C.F.R. § 201.70).

### **Discussion**

The Complaint alleges that Respondents engaged in a scheme to restrict competition by controlling prices, in wilful violation of § 312(a) of the Act and § 201.70 of the regulations.

Section 312(a) of the Act provides that:

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

7 U.S.C. § 213(a).

Section 201.70 of the regulations requires that:

Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operation in competition with, and independently of, other packers and dealers similarly engaged.

## 9 C.F.R. § 201.70.

Neither the Act nor the regulations define the terms “unfair,” “unjustly discriminatory,” or “deceptive.” Their meaning must be determined by the facts of each case, taking into account the purposes of the Act. *Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1454 (9<sup>th</sup> Cir. 1988). Accordingly, Courts have held that in order to prove a violation of section 312(a) of the PSA, a complainant must show that the challenged conduct is likely to produce the sort of injury the Act is designed to prevent. *See, e.g., Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1454 (9<sup>th</sup> Cir. 1988); *Bosma v. United States Dep't of Agriculture*, 754 F.2d 804, 808 (9<sup>th</sup> Cir. 1984); *Central Coast Meats, Inc. v. United States Dep't of Agriculture*, 541 F.2d 1325, 1327 (9<sup>th</sup> Cir. 1976)(2-1 decision).

The type of injury that is sought to be prevented by prohibiting failure to compete in section 201.70 of the regulations is the removal of a buyer from the market who would otherwise be there. *Central Coast Meats, Inc. v. United States Dep't of Agric.*, 541 F.2d 1325, 1327 (9<sup>th</sup> Cir. 1976). In the instant case, that did not occur and was not likely to occur. It is important to note that Complainant does not challenge the fact that Mr. Hennessey was purchasing cattle for several principals. Rather, Complainant maintains that it is not permissible for Peter Bussmann and Hennessey as representatives of the same principal to both be present at these auctions without bidding against each other.

Essentially, Complainant's argument is that with Bussmann present, Hennessey could have bid on the gobby cows for Armour or Walt's Meats, thus increasing competition and by not doing so, they decreased competition. Although Complainant repeatedly asserts that there was a strong market for gobby cows and that both Armour and Walt's Meats wanted those animals, the record does not support that claim. The evidence shows that there was only one competitor for gobby cows, BPI.<sup>1</sup> That fact would not change simply because Peter Bussmann happened to be present at Corvallis auction sales.

In addition, Hennessey was not the only buyer at the Corvallis auction. Any of the other buyers could have bid on the gobby cows, but did not. Armour or Walt's Meats could have sent additional buyers if they had wished to compete with Sixes River for the gobby cows.

Furthermore, Courts have generally held that proof of actual or likely harm to

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<sup>1</sup>Not only did other witnesses testify to this (Tr. 301, 304, 401, 409, 456-57) but Complainant's own investigators acknowledged that they failed to ascertain that there were any other competitors in the area for gobby cows (Tr. 177, 337-39).

competition is necessary to find a violation of the Act.<sup>2</sup> See, e.g., *Swift & Co. v. Wallace*, 105 F.2d 848 (7<sup>th</sup> Cir. 1939); *Berigan v. United States*, 257 F.2d 852 (8<sup>th</sup> Cir. 1958), *Aikens v. United States*, 282 F.2d 53 (10<sup>th</sup> Cir. 1960), *Armour & Co. v. United States*, 402 F.2d 712 (7<sup>th</sup> Cir. 1968), *Farrow v. United States Dep't of Agric.*, 760 F.2d 211 (8<sup>th</sup> Cir. 1985). The evidence does not show any actual or likely harm to competition resulting from Hennessey and Bussmann not bidding against each other. John Hanger, the auctioneer at Corvallis, testified that the activity at Corvallis during the relevant period was consistent with a competitive market; and there were no market support activities employed, which would have indicated a depressed market.

The only evidence indicating any harmful effect on competition is an affidavit given by Irving Hanger, the president of the Corvallis Auction Yard. Mr. Hanger stated in relevant part that:

When I started in 1973, there was good competition for slaughter cows with numerous packers both large and small in the area. Over the years, competition has changed. I don't remember exactly when Tip Hennessey began buying for Armour here but he soon was buying most of the top cows for that account. Pete Bussmann had the order for Beef Packers Incorporated in California and they took the top cows also. Before too long Tip was buying for BPI and Bussmann was at the sale as a spectator. When the sale was over, Tip would come into the sales office and mark the cows to Sixes River, Pete Bussmann's dealer firm, and that has become a regular occurrence at my market. I never asked Bussmann why or how this arrangement came about but it has bad effects on competition and the prices for slaughter cows.

CX 19 at 2.

However, Irving Hanger's statement with respect to Peter Bussmann's presence at the auctions and the level of competition at the auctions is entitled to little weight. The evidence indicates that Irving Hanger rarely attended the Corvallis auctions and that his perceptions may have been affected by his problem of alcohol abuse (Tr. 320, 627). Furthermore, his statements are contained in an affidavit

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<sup>2</sup>Some courts have allowed a lesser showing of injury to competitors. See *Wilson & Co. v. Benson*, 286 F.2d 891 (7<sup>th</sup> Cir. 1961), *Swift & Co. v. United States*, 393 F.2d 247 (7<sup>th</sup> Cir. 1968). Complainant has failed to meet even this standard, as the record is devoid of any evidence of injury to any of Respondents' competitors.

which was not subject to cross-examination. I, therefore, accorded much more weight to the testimony of the auctioneer on the scene, John Hanger, and others who concluded that the market at Corvallis was competitive.

The Ninth Circuit has found violations in the absence of injury to competition, but only where the conduct at issue was *per se* proscribed. See *Spencer Livestock, supra*, at 1454; *Bosma, supra*, at 808-09. Here, that is not the case. There is no statute or regulation that prohibits a principal from attending an auction where it has a buyer present, or from sending more than one representative to an auction. Nor is there any case law which definitively proscribes such activity under all circumstances. Complainant relies on two Departmental cases that did find violations of the Act where a principal and agent both attended auctions without bidding against each other. Those cases are, however, distinguishable.

In *In re Jesse Amaral, Sr.*, 36 Agric. Dec. 872 (1977), the judge found that the respondents had competed for the same types of animals prior to the purchasing agreement and that the agreement did result in the loss of a competitor from the marketplace. The principal was a qualified buyer who regularly attended the auctions anyway; and, furthermore, one of the respondents admitted that the arrangement was entered into for the purposes of restricting competition and lowering prices. *Id.* at 887-88. In *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966 (1975), the principal and agent also both regularly attended the auctions and were both qualified cattle buyers; and again both would have been competing for the *same* veal calves in the absence of the purchasing arrangement. However, in the instant case, no one else was interested in the gobby cows.

In addition, both cases were marked by the absence of any valid reason for hiring an agent, which helped lead to the inference that the purchasing arrangements were entered into for the purpose of reducing competition. In the instant case, Peter Bussmann did not regularly attend the Corvallis Auction Sale which explains why Sixes River hired Hennessey.

During the time period of July 1994 to July 1995, Peter Bussmann only attended 11 of the approximately 50 weekly auctions at Corvallis and during those dates he often did not remain for the sale of slaughter cattle. Complainant makes light of Bussmann's heart condition, arguing that he really was not concerned about his health since he only reduced his activities instead of ceasing work altogether; and that he, therefore, could have regularly attended the Corvallis auction. The uncontroverted testimony, however, indicates that Peter Bussmann has a serious heart condition. As a result of that condition, he reduced his work activities by attending one auction each week instead of five auctions. The auction that he attended at Lebanon was the least stressful for him to attend, as there were less buyers competing for cattle. Also, he was also able to spend the night after the

Lebanon auction and travel home the next day, further reducing the stress involved.

The evidence further shows that Peter Bussmann only attended the Corvallis auction when necessary to sell feeder cows left over from the Lebanon sale. While there, he would occasionally also buy a few feeder cows. His instructions from Sixes River and Earnest Bussmann were to return home as soon as possible after the feeder sale. It was not always possible, however, for Bussmann to leave immediately as it took time to complete the paperwork and arrange for animals to be loaded onto the trailer. In addition, Bussmann occasionally liked to stay to socialize with people with whom he had worked for so many years. As such, he would not always be gone by the time the sale of slaughter cattle began. Under these circumstances, it cannot be inferred, as it was in *Amaral* and *San Jose Valley Veal*, that there was any anticompetitive intent in entering into the purchasing arrangement.

More importantly, unlike *San Jose Valley Veal* and *Amaral*, there was no loss of a competitor from the marketplace when Hennessey took over bidding for Sixes River. Hennessey purchased different types of cattle for each of the principals that he represented. Although Complainant asserts that Hennessey could have bid on gobby cows for Armour and Walt's Meats, there is no evidence to support the contention that they or anyone else sought this type of animal.

The great weight of the evidence, therefore, supports the conclusion that Peter Bussmann ceased to regularly attend the Corvallis auction due to health concerns, and that, as a result, Hennessey was hired to purchase gobby cows in his stead. The evidence further indicates that this arrangement did not adversely affect competition at the Corvallis sale.

Based on these facts, Respondents' activities were not unfair or deceptive. They did not adversely affect competition, nor were they likely to. More importantly, the purchasing arrangement did not remove a competitor from the marketplace who would otherwise have been there. Therefore, it cannot be said that Respondents caused the type of harm that the Act was designed to prevent. Accordingly, Respondents have not violated the Act or the regulations.

### Order

The Complaint is dismissed.

This Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final August 19, 1998.-Editor]

**PACKERS AND STOCKYARDS ACT****MISCELLANEOUS ORDER****In re: IBP, INC.****P&S Docket No. D-95-0049.****Stay Order filed September 3, 1998.**

JoAnn Waterfield & Timothy Morris, for Complainant.  
William H. Baumgartner, Jr., et al, for Respondent.  
*Order issued by William G. Jenson, Judicial Officer.*

On July 31, 1998, I issued a Decision and Order: (1) concluding that IBP, inc. [hereinafter Respondent], violated section 202 of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 192); and (2) ordering Respondent to cease and desist from entering into or continuing any agreement, contract, arrangement, or understanding containing a right of first refusal which provides that Respondent may obtain livestock by matching the highest previous bid for livestock. *In re IBP, inc.*, 57 Agric. Dec. \_\_\_\_, slip op. at 16, 75 (July 31, 1998).

On August 12, 1998, Respondent filed Motion of IBP, inc. [,] For a Stay of the Agency's Order of July 31, 1998 [hereinafter Motion for a Stay], requesting a stay of the July 31, 1998, cease and desist order pending the resolution of Respondent's petition for review filed with the United States Court of Appeals for the Eighth Circuit (Motion for a Stay at 2). On August 31, 1998, Complainant filed Complainant's Response to IBP, inc.'s Motion for a Stay of the Agency's Order, stating that Complainant does not object to a stay of the July 31, 1998, Decision and Order pending resolution of Respondent's petition for review filed with the United States Court of Appeals for the Eighth Circuit. On August 31, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for a Stay.

Respondent's Motion for a Stay is granted. The Order issued in this proceeding on July 31, 1998, *In re IBP, inc.*, 57 Agric. Dec. \_\_\_\_ (July 31, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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**PACKERS AND STOCKYARDS ACT****DEFAULT DECISIONS**

**In re: BUFORD WATSON, JR., a/t/a PETE WATSON AND TW&W.  
P&S Docket No. D-98-0020.  
Decision and Order filed September 30, 1998.**

Andre Allen Vitale, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Victor W. Palmer, Administrative Law Judge.*

This disciplinary proceeding brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter the P&S Act, and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*), hereinafter the regulations, was instituted on April 13, 1998 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, by a Complaint alleging that Respondent wilfully violated the P&S Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were served on Respondent by regular mail on May 13, 1998, after service by certified mail, return receipt requested, was returned unclaimed. Accompanying the Complaint, Respondent was mailed a cover letter informing him that an Answer must be filed within twenty (20) days of service and that failure to file an Answer would constitute an admission of all of the material allegations of fact in the Complaint and a waiver of the right to oral hearing.

Respondent did not file an answer within the time period required by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission to all of the material allegations of fact in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

**Findings of Fact**

1. Buford Watson, Jr., also trading as Pete Watson and TW&W, referred to herein as Respondent, is an individual with a mailing address of P.O. Box 93-1A, Rutledge, Tennessee 37861.
2. Respondent is and at all times material herein was:
  - a. Engaged in the business of a dealer buying and selling livestock in

commerce for his own account and a market agency buying livestock in commerce on a commission basis; and

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

3. The surety bond which Respondent was required to maintain for the purpose of securing the performance of his livestock obligations under the P&S Act terminated on September 29, 1989. In spite of the fact that his bond had terminated, Respondent continued to operate subject to the P&S Act. Since September 29, 1989, Respondent has operated subject to the P&S Act without maintaining an adequate bond or its equivalent.

4. As set forth in section VI(a) of the Complaint, Respondent issued insufficient funds checks for livestock purchases.

5. As set forth in section VI(a) and (b) of the Complaint, Respondent failed to pay, when due, for livestock purchases.

### **Conclusions**

1. By reason of the facts set forth above in Finding of Fact 3, Respondent wilfully violated section 312(a) of the P&S Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, .30).

2. By reason of the facts set forth above in Finding of Fact 4, Respondent wilfully violated section 312(a) of the P&S Act (7 U.S.C. § 213(a)).

3. By reason of the facts set forth above in Finding of Fact 5, Respondent wilfully violated sections 312(a) and 409 of the P&S Act (7 U.S.C. §§ 213(a), 228b).

Accordingly, the following order is issued.

### **Order**

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

1. Engaging in business in any capacity for which bonding is required under the P&S Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent;

2. Issuing insufficient funds checks in payment for livestock purchases; and

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

In accordance with section 312(b) of the P&S Act (7 U.S.C. § 213(b)), a \$2,500

civil penalty is assessed against Respondent.

This decision and order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties

[This Decision and Order became final November 10, 1998.-Editor]

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**In re: JOHN LUSTIG MEATS, INC., JOHN S. LUSTIG, JR.  
P&S Docket No. D-98-0009.  
Decision and Order filed November 13, 1998.**

Andrew Y. Stanton, for Complainant.  
Respondents, Pro se.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents have wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*).

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

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision Without Hearing by Reason of Default, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

(1) John Lustig Meats, Inc., hereinafter referred to as the corporate respondent,

is a corporation whose business mailing address is 670 East Cherry Road, Quakertown, Pennsylvania 18951.

(2) The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock for purpose of slaughter; and

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

(3) John S. Lustig, Jr., hereinafter referred to as the individual respondent, is an individual whose business mailing address is 188 Keystone Road, Quakertown, Pennsylvania 18951.

(4) The individual respondent is, and at all times material herein was:

(a) The president and owner of 80% of the class A stock and 90% of the class B stock of the corporate respondent and directs, manages and controls all business activities of the corporate respondent, including the acts and practices alleged herein; and

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

### **Conclusions**

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

### **Order**

Respondent John Lustig Meats, Inc., its officers, directors, agents, employees, successors and assigns, and respondent John S. Lustig, Jr., individually or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

1. Issuing checks in purported payment for purchases of livestock which are returned unpaid by the bank upon which they are drawn because the corporate respondent does 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;

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

3. Failing to pay for livestock purchases.

Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are jointly and severally assessed a civil penalty in the amount of Thirteen Thousand Dollars (\$13,000.00).

This Decision Without Hearing by Reason of Default shall become final and effective without further proceedings 35 days after the date of service upon the

respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision Without Hearing by Reason of Default shall be served upon the parties.

[This Decision and Order became final on February 5, 1999.-Editor]

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**In re: MARK V. PORTER d/b/a MVP FARMS.  
P&S Docket No. D-98-0022.  
Decision and Order filed November 24, 1998.**

Eric Paul, 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 Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail on May 28, 1998. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint. Respondent was required by section 1.136(a) of the Rules of Practice to file an answer by June 17, 1998. Respondent failed to file an answer by this date or request an extension of time in which to file an answer. On July 6, 1998, respondent submitted by FAX a letter dated June 20, 1998, in which respondent states in response to the complaint "At this time I have chosen not to fight Packers and Stockyards in this case. I do admit some of the violations submitted in the complaint." Although respondent goes on to assert that his presence in the marketplace adds competition and to claim that "the Sale Yards you listed in the complaint are confident and satisfied with me," respondent neither denies any of the material allegations of the complaint or requests the holding of a hearing by this

letter. Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

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

### Findings of Fact

1. Mark V. Porter, hereinafter referred to as the respondent, is an individual doing business as MVP Farms whose business mailing address is P.O. Box 864, Sunnyside, Washington 98944.

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

(a) Engaged in the business of buying and selling livestock in commerce for his own account, and buying livestock in commerce on a commission basis; and  
 (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock from Marysville Livestock Auction, Inc. and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Purchased Under Names	No Hd	Livestock Amounts	Invoice Amounts	Payments & (Dates Paid)	Livestock Amount Unpaid
06-Feb-96	MVP and/or RJ	14	\$ 4,459.90	\$ 4,465.50		
13-Feb-96	MVP and/or RJ	24	10,521.17	10,544.27		
20-Feb-96	MVP and/or RJ	28	6,511.76	6,511.76		
27-Feb-96	MVP and/or RJ	22	8,690.48	8,690.48		
05-Mar-96	MVP and/or RJ	56	<u>14,116.86</u>	<u>14,179.86</u>		

					\$20,000.00 (30-Sep-96)	
					10,000.00 (23-Oct-96)	
					5,000.00 (07-Feb-97)	
					<u>2,000.00</u> (22-Aug-97)	
TOTAL:			\$44,300.17	\$44,391.87	\$37,000.00	\$7,300.17 <sup>1</sup>

<sup>1</sup> This figure assumes that payments received paid all non livestock charges, including \$63.00 assessed in connection with the livestock purchases made on March 5, 1996.

4. Respondent, on or about the dates and in the transactions set forth below, purchased livestock from Ellensburg Livestock Exchange, Inc. and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Purchased Under Names	No Hd	Livestock Amounts	Invoice Amounts	Payments & (Dates Paid)	Livestock Amount Unpaid
05-Sep-97	MVP	27	\$12,811.86	\$12,811.86		\$12,811.86
31-Oct-97	MVP	1	255.20	255.20		255.20
07-Nov-97	S & L	3	1,580.40	1,595.40		1,580.40
14-Nov-97	BPI	11	4,932.34	4,962.98		4,932.34
21-Nov-97	S & L	27	11,486.07	11,486.07		11,486.07
21-Nov-97	BPI	12	3,751.67	3,827.35		3,827.35
05-Dec-97	BPI	31	11,755.17	11,896.57		11,755.17
05-Dec-97	Baxley	30	10,344.22	10,434.97		10,344.22
12-Dec-97	Baxley	32	14,161.19	14,277.12		14,161.19

12-Dec-97	BPI	7	2,661.57	2,693.36		2,661.57
23-Jan-98	MVP	10	3,714.49	3,714.49		3,714.49
06-Feb-98	MVP	13	5,446.71	5,446.71		<u>5,446.71</u>
TOTAL:						\$82,900.89

5. As of March 25, 1998, respondent's unpaid livestock purchases from Marysville Livestock Auction, Inc. and Ellensburg Livestock Exchange, Inc. total \$90,201.06.

6. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

Purchase Date	Purchased From	No Hd	Purchase Amount	Payment Due per § 409	Check Date	No. of Days Late
03-May-96	Sunnyside Livestock Market, Inc	22	\$ 2,884.65	06-May-96	10-May-96	4
06-May-96		10	1,454.51	07-May-96	10-May-96	3
10-May-96		11	9,347.08	13-May-96	17-May-96	4
18-May-96		25	5,330.11	20-May-96	05-Jun-96	16
20-May-96		68	24,607.67	21-May-96	05-Jun-96	15
20-Jul-96		48	8,341.11	22-Jul-96	12-Aug-96	21
22-Jul-96		46	14,722.89	23-Jul-96	12-Aug-96	20
27-Jul-96		10	1,105.74	29-Jul-96	12-Aug-96	14
29-Jul-96		76	14,125.61	30-Jul-96	12-Aug-96	13
05-Aug-96		46	11,668.02	06-Aug-96	12-Aug-96	6
30-May-96	Toppenish Livestock Comm.	77	24,989.94	31-May-96	11-Jun-96	11

06-Jun-96		96	34,860.42	07-Jun-96	18-Jun-96 21-Jun-96 24-Jun-96	11 14 17
18-Jul-96		65	19,498.07	19-Jul-96	12-Aug-96	24
25-Jul-96		85	26,500.55	26-Jul-96	12-Aug-96	17

7. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and held checks issued in payment for such livestock for a number of days after the check date to unlawfully delay respondent's payments of the full purchase price of such livestock, thereby failing to pay, when due, the full purchase price of livestock.

Purchase Date	Purchased From	Purchase Amount	Payment Due per § 409	Check Date	Delivery and Deposit	Days Late
17-Feb-95	Ellensburg Livestock Exchange, Inc.	\$ 8,540.84	21-Feb-95	03-Mar-95	06-Mar-96	13
17-Feb-95		16,091.54	21-Feb-95	20-Feb-95	28-Feb-96	7
24-Jan-95 31-Jan-95 07-Feb-95	Marysville Livestock Auction, Inc.	30,0117.65	25-Jan-95 01-Feb-95 08-Feb-95	17-Feb-95	01-Mar-95	28 to 31
14-Jan-95 16-Jan-95	Sunnyside Livestock Market, Inc.	58,701.29	17-Jan-95 17-Jan-95	20-Jan-95	23-Jan-95	6
21-Jan-95 23-Jan-95		58,511.30	23-Jan-95 24-Jan-95	25-Jan-95	30-Jan-95	6 to 7
03-Mar-95 04-Mar-95		66,100.45	06-Mar-95 06-Mar-95	10-Mar-95	13-Mar-95	7
05-May-95 06-May-95 08-May-95		56,607.14	08-May-95 08-May-95 09-May-95	11-May-95	15-May-95	6 to 7

19-May-95 20-May-95 22-May-95		23,629.79	22-May-95 22-May-95 23-May-95	24-May-95	30-May-95	7 to 8
02-Jun-95 03-Jun-95 05-Jun-95		55,802.81	05-Jun-95 05-Jun-95 06-Jun-95	07-Jun-95	12-Jun-95	6 to 7
10-Jun-95 12-Jun-95		45,075.33	12-Jun-95 13-Jun-95	15-Jun-95	19-Jun-95	6 to 7

8. Respondent, in the transactions set forth below, issued checks in purported payment for livestock which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

Check Date	Check No.	Livestock Seller Payee	Livestock Purchase Dates	Check Amount	Date Returned
25-Feb-98	6174	Ellensberg Livestock Exchange, Inc.	08-Aug-97 to 06-Feb-97	\$86,509.78 <sup>1</sup>	05-Mar-98
08-Jul-96 (date check completed)	3784	Marysville Livestock Auction, Inc.	06-Feb-96 to 05-Mar-96	54,484.25 <sup>2</sup>	09-Jul-96
01-Apr-96	4365	Sunnyside Livestock Market, Inc.	23-Mar-96 and 25-Mar-96	40,049.83	04-Apr-96
22-May-96	4453		18-May-96 and 20-May-96	29,937.78	30-May-96
01-Jun-96	4459	Toppenish Livestock Comm.	30-May-96	24,989.94	07-Jun-96
09-Jun-96	4546		06-Jun-96	34,860.42	14-Jun-96
01-Jun-96	4542	Quincy Livestock Market	15-May-96 to 29-May-96	21,053.25	17-Jun-96
17-Jun-96	4555		05-Jun-96	23,808.17	28-Jun-96

17-Jun-96	4556		12-Jun-96	10,741.46	02-Jul-96
24-Jun-96	4559		15-May-96 to 19-Jun-96	38,643.43	11-July-96
02-Jul-96	4621		15-May-96 to 26-Jun-96	23,521.77	16-Jul-96
08-Jul-96	4623		15-May-96 to 03-Jul-96	59,384.90	19-Jul-96
11-Jul-96	3892		15-May-96 to 10-Jul-96	56,621.98	31-Jul-96

<sup>1</sup> This check was for \$84,537.54 in livestock charges (including a \$7,965.00 balance owed as of August 8, 1997) and \$1,972.24 in non livestock charges.

<sup>2</sup> This check was for \$44,300.17 in livestock charges, and \$91.70 in related non livestock charges during these dates, and an additional amount required to fully pay off respondent's account as of July 8, 1996.

9. Respondent was notified by certified mail received August 28, 1995, to increase the amount of bond coverage that respondent maintained to secure his livestock purchase obligations under the Act from \$75,000.00 to \$80,000.00. Respondent was notified by certified mail received October 18, 1995, that his \$5,000 deposit to his trust fund agreement account does not satisfy his bond requirement unless he submits a rider to his trust fund agreement. Notwithstanding such notice, and a prior order of the Secretary requiring respondent to cease and desist engaging in business without maintaining a reasonable bond or its equivalent, respondent has continued to engage in the business of a dealer and a market agency buying on commission without completing and submitting the rider required for an adequate bond or its equivalent.

### Conclusions

By reason of the facts found in Findings of Fact 3 through 8 above, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 8 above, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9C.F.R. §§ 201.29, .30).

### Order

Respondent Mark V. Porter, his agents and employees, directly or through any

corporate or other device, shall cease and desist from:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock;
3. Issuing checks in payment for livestock and holding such checks after the date of issuance before delivering such checks to the livestock sellers;
4. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank accounts upon which they are drawn to pay such checks when presented; and
5. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Mark V. Porter is suspended as a registrant under the Act for a period of 5 years and thereafter until he demonstrates that he is in full compliance with such bonding requirements, provided, that when respondent demonstrates that all unpaid livestock sellers have been paid in full, and that he is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after respondent has served at least 150 days of the suspension.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 4, 1999.-Editor]

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**In re: LYNN R. HOTTLE.**  
**P&S Docket No. D-98-0028.**  
**Decision and Order filed December 1, 1998.**

Mary Hobbie, 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 Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the

Act, instituted by a complaint filed by the Acting Deputy Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail on July 27, 1998. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

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

### **Findings of Fact**

1. Lynn R. Hottle, hereinafter referred to as the respondent, is an individual doing business in the State of Pennsylvania, and whose mailing address is R.D. #2, P.O. Box 183, Wysox, Pennsylvania 18854.

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

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

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

3. Respondent, in connection with his operations subject to the Act, was notified by certified mail received on March 3, 1998, as set forth in paragraph II(a) in the complaint that he was required to maintain a surety bond or its equivalent in the amount of \$10,000 to secure the performance of its livestock obligations under the Act. Respondent was again notified by certified mail received on March 30, 1998, that due to the volume of business (livestock purchases) shown on his last annual Dealer Business Report of March 13, 1998, he was required to increase his bond from the amount of \$10,000.00 to \$15,000.00 before continuing his livestock operations subject to the Act.

Notwithstanding such notices, respondent failed to obtain the bond and has continued to engage in the business of a dealer without maintaining an adequate bond or its equivalent, as required by the Act and regulations.

### Conclusions

By reason of the facts found in the Findings of Fact herein, respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, .30)

### Order

Respondent Lynn R. Hottle, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of one thousand dollars (\$1,000.00). This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 5, 1999.-Editor]

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**In re: S.A. HALAL MEAT, INC., and MOHAMMED ARSHAD.**  
**P&S Docket No. D-98-0031.**  
**Decision and Order filed December 16, 1998.**

Mary Hobbie, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

### Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Deputy Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of

Agriculture, charging that the respondents wilfully violated the Act.

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by certified mail on August 5, 1998. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

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

### **Findings of Fact**

1. S.A. Halal Meat, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated and doing business in the State of New York, and whose mailing address is 6902 Ridge Boulevard, Apt. D-10, Brooklyn, New York 11209.

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

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter, whose average annual purchases of livestock exceed \$500,000; and

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

3. Mohammed Arshad, hereinafter referred to as the individual respondent, is an individual whose address is 6902 Ridge Boulevard, Apt. D-10, Brooklyn, New York 11209.

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

(a) President and sole shareholder of the corporate respondent and responsible for its direction, management and control;

(b) The *alter ego* of the corporate respondent;

(c) Engaged in the business of buying livestock in commerce for the purpose of slaughter; and

(d) A packer within the meaning of and subject to the provision of the Act.

5. The corporate respondent, under the direction, management and control of the individual respondent was notified by a letter of February 4, 1998, hand-delivered by Packers and Stockyards Program personnel on March 9, 1998, as set forth in paragraph II(a) in the complaint that it was required to maintain a surety

bond or its equivalent in the amount of \$10,000 to secure the performance of its livestock obligations under the Act. The corporate respondent, under the direction, management and control of the individual respondent, has made representations in response to numerous contacts, the last being April 27, 1998, that a bond would be obtained. Notwithstanding such notices, respondents failed to obtain the bond and have continued to engage in the business of a packer buying livestock in commerce for slaughter without maintaining an adequate bond or its equivalent, as required by the Act and regulations.

### **Conclusions**

By reason of the facts found in the Findings of Fact herein, respondents have willfully violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, .30)

### **Order**

Respondent, S.A. Halal Meat, Inc., its officers, directors, agents and employees, successors and assigns, directly or indirectly through any corporate or other device, and respondent Mohammed Arshad, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondents are hereby jointly and severally assessed a civil penalty in the amount of one thousand dollars (\$1,000.00). This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondents, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 8, 1999.-Editor]

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**CONSENT DECISIONS**

(Not published herein-Editor)

**PACKERS AND STOCKYARDS ACT**

Prindle Leasing Co., Inc., d/b/a Joseph Latella & Sons and Peter A. Latella, Sr. P&S Docket No. D-97-0018. 7/20/98.

Cimarron Properties, Ltd. and Wall Lake Cattle Co., Inc., d/b/a Midlands Cattle Company and Gordon Reisinger. P&S Docket No. D-97-0026. 7/22/98.

Donald Dryden. P&S Docket No. D-98-0013. 7/31/98.

Mississippi Livestock Producers Association. P&S Docket No. D-98-0024. 8/17/98.

Nicholas Meat Packing Co., and Eugene A. Nicholas. P&S Docket No. D-98-0026. 9/29/98.

Garfield R. Freeze. P&S Docket No. D-97-0025. 10/29/98.

Lee Gashel & Sons, Inc. and Kenneth L. Gashel. P&S Docket No. D-98-0016. 11/2/98.

Tommy W. Welch and Rhoda V. Welch, a/k/a Vickie Welch. P&S Docket No. D-98-0017. 11/3/98.

James B. Henderson. P&S Docket No. D-99-0004. 11/13/98.

Poplarville Stockyards, Inc., M&J Cattle Company, Inc., and Joe Mack Smith. P&S Docket No. D-95-0014. 11/19/98. Consent decision as to Joe Mack Smith.

Orville L. Pettersen and Sandra K. Pettersen, d/b/a Pettersen Livestock. P&S Docket No. D-98-0033. 11/20/98.

L&S Cattle Company, a partnership, Doug Sasseen and Donnie Stidham. P&S Docket No. D-96-0018. 12/9/98. Consent decision as to L&S Cattle Company, a partnership, and Doug Sasseen.