

# AGRICULTURE DECISIONS

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

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## 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 DECISION**

**In re: ARIZONA LIVESTOCK AUCTION, INC.**

**P&S Docket No. D-96-0026.**

**Decision and Order filed November 21, 1996.**

**Failure to file a timely answer — Default vacated — Complaint dismissed — Jurisdiction under the Packers and Stockyards Act.**

The Judicial Officer vacated the Default Decision by Administrative Law Judge Dorothea A. Baker (ALJ) assessing a civil penalty against Respondent and directing Respondent to cease and desist from engaging in any act or practice, in connection with the providing of stockyard services, with regard to delivery, unloading, care, and handling of livestock received at the stockyard, which results in unnecessary damage, injury, or suffering to the livestock. A failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). However, on rare occasions Default Decisions have been set aside for good cause shown or where Complainant did not object. Respondent's jurisdictional challenge to the proceeding constitutes good cause for vacating the Default Decision. The Packers and Stockyards Act is one of the most comprehensive regulatory measures ever enacted and is remedial legislation that should be liberally construed to effectuate its purposes. Although the purposes of the Packers and Stockyards Act have been variously described, there is nothing in the Act, the legislative history relating to the Act, or the pertinent case law indicating that the Packers and Stockyards Act is designed to prevent injury to or suffering of livestock apart from the effect that the injury or suffering of the livestock may have on competition, trade, producers, purchasers, consumers, or other persons that the Packers and Stockyards Act is designed to protect. The Secretary of Agriculture's jurisdiction under the Packers and Stockyards Act is not dependent on proof that an animal is consigned for sale to Respondent or sold by Respondent, or on proof that there was actual economic harm to an individual. Instead, the Secretary of Agriculture's jurisdiction is dependent on whether Respondent engaged in an *unfair* or *unreasonable* practice. The meaning of the words *unfair* and *unreasonable* must be determined by the facts of each case within the purposes of the Packers and Stockyards Act. The record in the instant proceeding establishes that Respondent failed to provide shelter, food, and water to a disabled cow for approximately 3 hours. However, the record does not establish that Respondent's conduct affected any person or anything other than the disabled cow. Therefore, the record does not establish that Respondent engaged in an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act or that Respondent's conduct resulted in or could result in the type of injury that the Packers and Stockyards Act is designed to prevent, and the Complaint is dismissed without prejudice.

Kimberly D. Hart, for Complainant.

Ernest H. Van Hooser, Kansas City, MO, for Respondent.

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

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

This case is a disciplinary administrative proceeding instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (hereinafter the Packers and Stockyards Act), (7 U.S.C. §§ 181-229), and the regulations promulgated under the Packers and Stockyards Act (hereinafter the Regulations), (9 C.F.R. §§ 201.1-.200). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter the Rules of Practice), (7 C.F.R. §§ 1.130-.151), by a Complaint filed by the Acting Deputy Administrator, Packers and Stockyards Programs (hereinafter Complainant), on March 25, 1996. The Complaint alleges that on or about June 26, 1995, Arizona Livestock Auction, Inc. (hereinafter Respondent), "engaged in unfair and unreasonable practices in connection with the holding, feeding, watering and overall handling of livestock at the stockyard, in that [R]espondent failed to provide reasonable services and care in connection with the care of a disabled cow so as to prevent unnecessary damage, injury, and suffering[.]" in willful violation of sections 307 and 312(a) of the Packers and Stockyards Act, (7 U.S.C. §§ 208, 213(a)), and section 201.82 of the Regulations, (9 C.F.R. § 201.82). (Complaint at 2-3.) Respondent was served with the Complaint on March 29, 1996. Respondent failed to answer the Complaint within 20 days, in accordance with section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), and on June 18, 1996, pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing and a proposed Decision Without Hearing by Reason of Default, which were served on Respondent on June 29, 1996. On July 19, 1996, Respondent filed Objections to Complainant's Motion for Decision Without Hearing and a Motion for Leave to File Answer Out of Time. On July 23, 1996, pursuant to 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 Default (hereinafter Default Decision) in which the ALJ denied Respondent's Motion for Leave to File Answer Out of Time, assessed a civil penalty of \$1,500 against Respondent, and ordered Respondent, its officers, agents, employees, successors, and assigns to cease and desist from engaging in any act or practice, in connection with the providing of stockyard services, with regard to delivery, unloading, care, and handling of livestock received at the stockyard, including, but not limited to, nonambulatory animals, which results in unnecessary damage, injury, or suffering to the livestock. (Default Decision at 2, 4.)

On August 28, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35).<sup>1</sup> On September 19, 1996, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer (hereinafter Complainant's Response), and on September 23, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is vacated, and the Complaint is dismissed without prejudice.

Respondent raises three issues on appeal.

First, Respondent contends that:

Although Respondent did not file a formal answer to the Complaint within twenty (20) days from the date of service, Respondent did, on July 19, 1996, file a Motion to File Answer Out of Time asking to file an answer beyond the normal time on the following grounds:

(1) Respondent received the Complaint during the time that Respondent was moving its business from one location to another and, as a result of the disruption caused by this move, the Complaint was inadvertently misplaced and forgotten;

(2) The Respondent had a number of valid defenses to the Complaint; and

(3) The Complainant would not be harmed or prejudiced in any way if the Respondent was allowed to file its answer to the Complaint.

A copy of the Respondent's answer was attached to the Motion to File Answer Out of Time.

Respondent's Appeal Petition at 1-2.

A failure to file an Answer with the Hearing Clerk within 20 days after

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

service of the Complaint constitutes an admission of the allegations in the Complaint and a waiver of hearing. Specifically, sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

**§ 1.136 Answer.**

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(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.

7 C.F.R. § 1.136(a)-(c).

**§ 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. . . .

7 C.F.R. § 1.139.

**§ 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. § 1.141(a).

The Complaint served on Respondent on March 29, 1996, clearly informs Respondent of the consequences of the failure to file an Answer, as follows:

The respondent 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.

Complaint at 3. Moreover, a letter from the Office of the Hearing Clerk serving a copy of the Complaint on Respondent expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

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 three 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.

Letter from Joyce A. Dawson, Hearing Clerk, to Arizona Livestock Auction, Inc., dated March 26, 1996, at 1. (Emphasis in original.)

Respondent's Answer was due April 18, 1996, and Respondent admits that it failed to file a timely Answer. (Respondent's Appeal Petition at 1.)

Respondent's excuse for its failure to file a timely Answer, *viz.*, a move of its business from one location to another which caused Respondent to inadvertently misplace and forget the Complaint, provides no basis for my vacating the Default Decision. Further, even if I found, as Respondent contends, that Complainant would not be harmed or prejudiced in any way if Respondent were allowed to file its Answer to the Complaint, that finding would not provide a basis for vacating the Default Decision. Moreover, in the overwhelming majority of cases, there is no basis for setting aside a Default Decision issued in accordance with section 1.139 of the Rules of Practice.<sup>2</sup>

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<sup>2</sup>See *In re Bibi Uddin*, 55 Agric. Dec. \_\_\_ (Aug. 23, 1996) (default decision proper where Respondent's first filing made more than 9 months after Respondent was served with the Complaint); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. \_\_\_ (Aug. 15, 1996) (default decision proper where Respondent's first filing made more than 9 months after Respondent was personally served with the Complaint); *In re Sandra L. Reid*, 55 Agric. Dec. \_\_\_ (July 17, 1996) (default decision proper where Respondent's first filing was made 43 days after Respondent was served with the Complaint); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (default order proper where Answer was filed 51 days after Respondent served with the Complaint); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336

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(6th Cir. 1995) (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) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where 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) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer 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) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer 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) (default order proper where timely Answer 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) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer 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) (default order proper where timely Answer 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) (default order proper where timely Answer not filed); *In re*

However, on rare occasions Default Decisions have been set aside for good cause shown or where Complainant did not object.<sup>3</sup> I find Respondent's jurisdictional challenge to the proceeding sufficiently persuasive to warrant my vacating the Default Decision.

Respondent contends that the Packers and Stockyards Act does not give the Secretary of Agriculture jurisdiction over Respondent's alleged conduct, as follows:

Nowhere in the Complaint are there any allegations that the Respondent's conduct was unjust or discriminatory or deceptive. The only allegations regarding Respondent's conduct are that it was unfair and unreasonable. Therefore, the only portions of [s]ections 307 and 312(a) of the [Packers and Stockyards] Act and of [s]ection 201.82 of the Regulations that are pertinent in the case are those dealing with the words "unfair" and "unreasonable."

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The [Packers and Stockyards] Act is an economic regulation statute whose purpose, at least insofar as it relates to stockyards, market agencies and dealers, is to protect sellers and buyers of livestock and

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*Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (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) (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) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

<sup>3</sup>*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside 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); and see *In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

insure that livestock sales transactions are carried out in a fair, reasonable and nondiscriminatory manner. . . .

. . . .

Thus, in order for the Secretary of Agriculture to have subject matter jurisdiction over the Respondent's conduct that is alleged in the Complaint, the conduct must have been "unfair" or "unreasonable" from an economic context and it must have been "unfair" or "unreasonable" to a person that the [Packers and Stockyards] Act was designed to protect. Nowhere in the Complaint is there an allegation that [Respondent's] conduct was "unfair" or "unreasonable" from an economic standpoint to a person that the [Packers and Stockyards] Act was designed to protect. Clearly, the Respondent's conduct was not "unfair" or "unreasonable" from an economic standpoint to a seller or a buyer because the cow was not consigned to Respondent for sale nor was it sold by Respondent. Respondent's conduct was not "unfair" or "unreasonable" to the owner of the cow because it was the owner who dropped the cow off - not for sale, but to be picked up by a renderer so that the owner did not have to pay a fee for the renderer's service. The Respondent's conduct was not "unfair" or "unreasonable" to any other stockyard, or any other market agency, or any other dealer, because there were no such persons involved. The only living thing to whom the Respondent's conduct could have been considered to be "unfair" or "unreasonable" was the disabled cow and there is nothing whatsoever in the [Packers and Stockyards] Act which indicates that the [Packers and Stockyards] Act was designed to protect a cow.

Nowhere in the [Packers and Stockyards] Act is the Secretary of Agriculture given any jurisdiction to prevent an animal's suffering, injury or death, except insofar as it relates to an economic loss to a person that the [Packers and Stockyards] Act was designed to protect. The Respondent's conduct as alleged in the Complaint was not "unfair" or "unreasonable" from an economic standpoint to any person that the [Packers and Stockyards] Act was designed to protect, and the Complaint contains no such allegations. Consequently, the Secretary of Agriculture lacks jurisdiction over the conduct of the Respondent that is alleged in the Complaint.

### Respondent's Appeal Petition at 5-8.

The Packers and Stockyards Act was described by its sponsors as one of the most comprehensive regulatory measures ever enacted.<sup>4</sup> Furthermore, Congress has repeatedly broadened the Secretary of Agriculture's authority under the Packers and Stockyards Act.<sup>5</sup> The primary purpose of the Packers and Stockyards Act was described in a House Report in connection with a major amendment 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

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<sup>4</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 visitatorial, 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."); H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921) ("A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitatorial, 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.")

<sup>5</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. 1048, 85th Cong., 1st Sess. 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).

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>6</sup>

H.R. Rep. No. 1048, 85th Cong. 1st Sess. 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5213. Similarly, the United States Supreme Court has described the purpose of the Packers and Stockyards Act, as follows:

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

The chief evil feared 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. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of live stock through the stockyards, all made possible by the collusion between the stockyards management, and the commission men on the one hand, and the packers and dealers on the other. Expenses incurred in the

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<sup>6</sup>*Accord In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1056-57 (1990); *In re Ozark County Cattle Co., Inc.*, 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.)

passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper whose live stock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyard owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation to the prejudice of the absent shipper and owner in the neglect of the live stock, in the *mala fides* of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for service rendered.

*Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922). While the Packers and Stockyards Act is remedial legislation and should be liberally construed to effectuate its purposes<sup>7</sup> and its purposes have been variously described,<sup>8</sup> there

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<sup>7</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); *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); *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 ITT Continental Baking Co.*, 44 Agric. Dec. 748, 799 (1985).

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<sup>8</sup>*Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam) (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) (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) (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.*, *supra*, 760 F.2d at 214 (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*, *supra*, 630 F.2d at 590 (one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock, and to free him 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) (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) (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) (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) (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*, *supra*, 454 F.2d at 111 (the purpose of the Packers and Stockyards Act is to prevent economic harm to producers and consumers); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, *supra*, 438 F.2d at 1337-38 (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*, *supra*, 393 F.2d at 253 (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) (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) (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.*, *supra*, 363 F.2d at 85 (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) (one purpose of the Packers and Stockyards Act is to protect the owner and shipper of livestock, and to free him from fear that the channels through which his

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product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, *supra*, 495 F. Supp. at 570 (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) (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) (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) (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) (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 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) (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) (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) (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.*, *supra*, 49 Agric. Dec. at 360 (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.*, *supra*, 47 Agric. Dec. at 717 (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 (1996) (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 incipency; 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

is nothing in the Act, the legislative history relating to the Act, or the pertinent case law indicating that the Packers and Stockyards Act is designed to prevent injury to or suffering of livestock apart from the effect that the injury to or suffering of the livestock may have on competition, trade, producers, purchasers, consumers, or other persons that the Packers and Stockyards Act is designed to protect. Moreover, a prior proposal to consolidate section 201.82 (the section of the Regulations which Respondent is alleged in the Complaint to have violated) and section 201.110 of the Regulations reveals that the purpose of section 201.82 is not to protect animals, but rather, to protect the producer or seller from monetary loss, as follows:

*Handling and Weighing Livestock and Live Poultry.* Section 201.82 of the regulations requires stockyard owners, market agencies, dealers, and packers to exercise reasonable care and promptness when handling livestock to prevent shrinkage, injury, death or other conditions which may result in monetary loss to the producer or seller. Similarly, § 201.110 requires packers and poultry dealers or handlers to weigh live poultry as promptly as possible after the poultry is loaded on a vehicle, again to retard shrinkage, injury, death or other conditions which may result in monetary loss to the producer or seller. These regulations help assure producers against loss while their livestock or live poultry is in control of the buyer. This notice proposes to consolidate §§ 201.82 and 201.110 into a single regulation.

48 Fed. Reg. 42,825 (1983).

Complainant contends however that:

While [R]espondent cites several cases in support of its contention that the [Packers and Stockyards] Act was intended to protect economic loss to a person, none of those cases support the proposition that the sole purpose of the Packers and Stockyards Act is to protect economic loss to a person. In fact, section 312(a) of the [Packers and Stockyards] Act (7 [U.S.C.] §213) specifically provides as follows:

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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 unincumbered by monopoly or other unfair, unjustly 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 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.* [emphasis supplied]

This section gives the Secretary jurisdiction over unfair practices of stockyard owners involving feeding, watering, holding, delivery, shipment, weighing, or handling of livestock without requiring that an economic harm to an individual occur. The complaint alleges that [R]espondent engaged in unfair practices by the manner in which it handled an animal located on its premises. . . . Once the disabled animal was placed on [R]espondent's premises, [R]espondent was responsible for exercising fair practices in the handling and care of that animal as required by section 312(a) of the [Packers and Stockyards] Act. . . .

It is irrelevant whether the animal was consigned to [R]espondent for sale or sold by [R]espondent. Section 312(a) of the [Packers and Stockyards] Act does not in any way limit its application only to instances where an animal has been consigned to a stockyard or sold by a stockyard. The important point is that the animal was under [R]espondent's control by virtue of it being on [R]espondent's premises and [R]espondent asserted dominion and control over the animal by moving it.

Nowhere in section 312(a) of the [Packers and Stockyards] Act is there a requirement that an individual person suffer an economic loss from such inadequate handling of an animal. Section 312(a) explicitly requires that animals be handled without unfair or unjustly discriminatory practices, and the requirement that livestock be handled in a manner consistent with good husbandry practices -- which the animal at issue certainly was not, is fully within the Secretary's jurisdiction and authority.

In addition, section 307(b) of the [Packers and Stockyards] Act (7

[U.S.C.] §208) places an affirmative responsibility upon a stockyard owner to manage and regulate its stockyard in a just, reasonable and non-discriminatory manner. Complainant alleged in its complaint that the [R]espondent failed to manage and regulate its stockyard in a reasonable manner by failing to provide reasonable services and care in connection with the care of a disabled cow so as to prevent unnecessary damage, injury or suffering. There is also no language contained in this provision that limits the application of this section only to instances where there is proof of economic harm to an individual.

Section 201.82 of the Regulations (9 C.F.R. §201.82) also requires a stockyard owner to exercise reasonable care and promptness with respect to loading, transporting, holding, yarding, feeding, watering, weighing or otherwise handling livestock or live poultry to prevent waste of feed, shrinkage, injury, death or other avoidable loss. While the complaint does not allege economic harm to an individual, it is clear that this particular animal retained some value as long as it was alive. This being the case, [R]espondent was obligated to exercise reasonable care and promptness in its handling of the disabled animal to prevent injury or death. In the present case, [R]espondent failed to exercise such reasonable care and promptness which resulted in the unnecessary suffering of the animal and the loss of any value it retained while alive.

Therefore, the subject matter of the [C]omplaint is well within the jurisdiction and authority conferred to the Secretary under sections 307 and 312(a) of the [Packers and Stockyards] Act as well as section 201.82 of the Regulations.

Complainant's Response to Respondent's Appeal to the Judicial Officer at 5-8.

I agree with Complainant that the Secretary of Agriculture's jurisdiction over this matter is not dependent on proof that the cow in question was consigned for sale to Respondent or sold by Respondent, or on proof that there was actual economic harm to an individual. Instead, the Secretary of Agriculture's jurisdiction is dependent on whether Respondent's conduct, as alleged in the Complaint and admitted by Respondent's failure to answer, constitutes an *unfair* or *unreasonable* practice. The meaning of the words *unfair* or *unreasonable* must be determined by the facts of each case within the

purposes of the Packers and Stockyards Act.<sup>9</sup>

Respondent is deemed by its failure to file a timely Answer to have admitted that it failed to provide reasonable services and care in connection with the care of a disabled cow so as to prevent unnecessary damage, injury, and suffering, as follows:

The disabled cow was unloaded at the stockyard by [R]espondent's employee from a customer's trailer. Once the disabled cow was removed from the trailer, it was placed in a bobcat vehicle and unloaded in an area where a renderer picks up [R]espondent's dead animals. The disabled cow was placed next to a dead steer and left to expire naturally in heat in excess of 100 degrees fahrenheit with no shelter, food or water for approximately three hours. Respondent failed to make adequate arrangements for the care of the disabled cow nor did it attempt to obtain medical assistance, or to euthanize the animal.

A passerby observed the disabled cow in the rendering area at approximately 4:00 p.m. and contacted the local police for assistance. At approximately 5:00 p.m., the passerby informed [R]espondent's employee, Winnie Wilson, that a disabled cow was in the rendering area. Ms. Wilson contacted the Arizona Department of Agriculture to request assistance in destroying the disabled animal. A livestock officer from the Animal Services Division of the Arizona Department of Agriculture arrived at [R]espondent's premises at approximately 6:00 p.m. that same day. The livestock officer examined the disabled animal and then destroyed it at approximately 6:15 p.m.

### Complaint at 2-3.

The record in the instant proceeding establishes that Respondent failed to provide a disabled cow with shelter, food, and water for approximately 3 hours. Moreover, the record establishes that Respondent did not attempt to

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<sup>9</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.*, *supra*, 498 F.2d at 930; *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*, *supra*, 484 F. Supp. at 566-67; *Guenther v. Morehead*, *supra*, 272 F. Supp. at 728.

obtain medical assistance for the cow and asked the Arizona Department of Agriculture to destroy the disabled cow a number of hours after the cow was on Respondent's premises.<sup>10</sup> Respondent concedes that its conduct could be considered to be unfair or unreasonable to the disabled cow, (Respondent's Appeal Petition at 8), and I agree with the ALJ that Respondent failed to provide services to prevent unnecessary suffering, (Default Decision at 3). Nonetheless, the Secretary of Agriculture's jurisdiction in this case is dependent upon finding that Respondent's conduct constitutes an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act. While failure to provide shelter, food, water, and medical assistance can constitute an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act, the record in this proceeding does not support such a finding. Further, the record does not establish: that Respondent's conduct resulted in or could result in the type of injury that the Packers and Stockyards Act is designed to prevent; any predatory intent on the part of Respondent; or that Respondent's conduct constitutes an incipient violation of the Packers and Stockyards Act.

Finally Respondent contends that:

Even if we assume for the sake of argument that the Secretary of

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<sup>10</sup>Complainant appears to take inconsistent positions regarding Respondent's conduct as it relates to the death of the disabled cow. On the one hand, Complainant contends in Complainant's Response to Respondent's Appeal to the Judicial Officer that Respondent's failure to exercise reasonable care to prevent the death of the disabled cow is an *unfair* and *unreasonable* practice within the meaning of the Packers and Stockyards Act, as follows:

[I]t is clear that this particular animal retained some value as long as it was alive. This being the case, [R]espondent was obligated to exercise reasonable care and promptness in its handling of the disabled animal to prevent injury or death.

Complainant's Response to Respondent's Appeal to the Judicial Officer at 7-8.

On the other hand, Complainant appears to allege in the Complaint that Respondent's failure to destroy the cow earlier than the cow was destroyed constitutes an *unfair* and *unreasonable* practice within the meaning of the Packers and Stockyards Act, as follows:

*Respondent failed to make adequate arrangements for the care of the disabled cow nor did it attempt to obtain medical assistance, or to euthanize the animal.*

Complaint at 2. (Emphasis added.)

Agriculture has subject matter jurisdiction over the conduct of the Respondent that is alleged in the Complaint, the Administrative Law Judge erred in assessing a civil penalty against the Respondent.

In determining the amount of the civil penalty to be assessed, section 312(b) requires the Secretary to 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.

In this case, the Administrative Law Judge could not have followed the statutory mandate because the record contains no information whatsoever regarding the size of Respondent's business and no information whatsoever regarding the effect that a penalty would have on Respondent's ability to continue in business.

As the proponent of an order assessing a civil penalty, GIPSA was required to produce evidence in accordance with the statutory requirements showing that the penalty was reasonable before any civil penalty could be lawfully assessed. *Bosma v. U.S. Department of Agriculture*, 754 F.2d 804 (9th Cir. 1984). Inasmuch as there was no evidence in the record regarding the size of the Respondent's business or the effect that a penalty would have on Respondent's ability to continue in business, the Administrative Law Judge had no basis for assessing a civil penalty against the Respondent. See, e.g., *Bosma v. U.S. Department of Agriculture*, [I]d; *Hutto Stockyards Inc. v. U.S. Department of Agriculture*, 903 F.2d 299 (4th Cir. 1990). Consequently, that portion of the Administrative Law Judge's order assessing a civil penalty against the Respondent should be set aside.

Respondent's Appeal Petition at 10-11.

Since I am vacating the Default Decision and dismissing the Complaint without prejudice, Respondent's third and final argument need not be addressed.

Whether Respondent's conduct constitutes or does not constitute an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act must be determined on the facts of each case. The limited record in this default proceeding does not support a finding that Respondent's conduct constitutes an *unfair* or *unreasonable* practice within the meaning of the Packers and Stockyards Act.

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

**Order**

The Decision Without Hearing by Reason of Default filed on July 23, 1996, is vacated, and the Complaint is dismissed without prejudice.

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**PACKERS AND STOCKYARDS ACT**

**MISCELLANEOUS ORDERS**

**In re: LARRY P. WEYANDT.**  
**P&S Docket No. D-89-0015.**  
**Supplemental Order filed August 9, 1996.**

Mary Hobbie, for Complainant.  
James H. English, Altoona, PA, for Respondent.  
*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

On March 8, 1989, an order was issued in the above-captioned matter, which, *inter alia* suspended respondent as a registrant under the Act, "for a period of 5 years and thereafter until such time as his financial condition is in conformity with the Act, provided, that at any time after a period of 1 year of this suspension has been served, this order may be modified to allow for the salaried employment of respondent Larry Weyandt by another registrant or as a salaried order buyer by a packer."

On March 30, 1996, respondent by letter to the Grain Inspection, Packers and Stockyards Administration, requested that the order of suspension be modified to permit him to obtain employment as a salaried livestock order buyer with his son Ronnie L. Weyandt, a registered and bonded dealer.

Complainant has recommended that the suspension order referred to above be modified as requested to permit respondent's employment as a salaried livestock order buyer. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued on March 8, 1989, is modified. The order shall remain in effect in all other respects.

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**In re: THOMAS A. LENZ a/k/a TOMMY LENZ d/b/a KTL LIVESTOCK.**  
**P&S Docket No. D-92-0026.**  
**Supplemental Order filed August 9, 1996.**

Mary Hobbie, for Complainant.  
Gerard D. Eftink, Kansas City, MO, for Respondent.  
*Order issued by James Hunt, Administrative Law Judge.*

On October 8, 1992, an order was issued in the above-captioned matter,

which, *inter alia*, suspended respondent as a registrant under the Act for a period of five years and thereafter until his current liabilities no longer exceed his current assets. This order contained a provision allowing for the salaried employment of respondent by R&L Livestock, Ltd., and further contained a provision allowing for a modification of the suspension after the expiration of one year to permit respondent's salaried employment by another registrant or packer.

The one year period has expired, and respondent has applied for a modification of this suspension to permit his salaried employment by Sheldon Livestock Sales, Inc., Sheldon, Iowa. Complainant has requested that the suspension provision be so modified. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 8, 1992, is modified to permit the salaried employment of respondent by Sheldon Livestock Sales, Inc., with the order remaining in full force and effect in all other respects.

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**In re: MIKE WHITEHEAD.**  
**P&S Docket No. D-94-0042.**  
**Supplemental Order filed August 22, 1996.**

Mary Hobbie, for Complainant.  
Respondent, Pro se.  
*Order issued by James Hunt, Administrative Law Judge.*

On April 4, 1995, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of twenty-eight days and thereafter until his current liabilities no longer exceed his current assets.

The twenty-eight day period of definite suspension has expired, and respondent has demonstrated that his current assets exceed his current liabilities. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 4, 1995, is terminated, with the order remaining in full force and effect in all other respects.

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**In re: LUSTY D. REYHER, d/b/a R & R CATTLE CO., and HEART Y CALF RANCH.**

**P&S Docket No. D-94-0028.**

**Supplemental Order filed October 18, 1996.**

JoAnn Waterfield, for Complainant.

George McLachlin, Lamar, CO, for Respondents.

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

Upon the request of the respondent, Lusty D. Reyher, doing business as R & R Cattle Co., and Heart Y Calf Ranch, a supplemental order is hereby issued permitting respondent's salaried employment by Jimmie L. King, doing business as J.K. Cattle Company, of Amarillo, Texas, who is registered as a dealer. All other aspects of the decision and order shall remain in effect.

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**In re: INTERSTATE LIVESTOCK MARKET, INC., WILLARD D. HARTNAGLE AND JACKIE HARTNAGLE.**

**P&S Docket No. D-93-0065.**

**Supplemental Order filed November 15, 1996.**

Jane McCavitt, for Complainant.

Respondents. Pro se.

*Order issued by James Hunt, Administrative Law Judge.*

On August 5, 1993, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents Interstate Livestock Market, Inc., Willard D. Hartnagle and Jackie Hartnagle as registrants under the Act for a period of five (5) years and thereafter until they demonstrate that Interstate is solvent and that the shortage in the Custodial Account for Shippers' Proceeds has been eliminated. It was further provided that the order may be modified upon application to the Packers and Stockyards Administration to permit respondents Willard D. Hartnagle's and Jackie Hartnagle's salaried employment by another registrant or packer after the expiration of the 120 day period of suspension.

Willard D. Hartnagle and Jackie Hartnagle have now served the 120 day period of suspension, and they have requested that they be permitted to work as salaried employees for Corman Livestock Market in Burlington, Colorado. Accordingly,

IT IS HEREBY ORDERED that Willard D. Hartnagle and Jackie Hartnagle, having requested this supplemental order, may be employed by Corman Livestock Market of Burlington, Colorado during the remaining term of their suspension. The order of August 5, 1993 shall remain in full force and effect in all other respects.

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**In re: THURSTON PAULK, JR. d/b/a PAULK LIVESTOCK CO., COFFEE COUNTY STOCKYARD, INC. and GEORGE MICHAEL PAULK.  
P&S Docket No. D-96-0005.  
Dismissal of Complaint filed December 12, 1996.**

Kimberly D. Hart, for Complainant.  
Respondents. Pro se.

*Dismissal filed by Dorothea A. Baker, Administrative Law Judge.*

On December 10, and December 11, 1996, the Complainant filed Motions seeking the dismissal of the Complaint herein as to all Respondents. Accordingly, for good cause set forth therein, the Complaint filed herein on November 15, 1996, is hereby DISMISSED.

Copies hereof shall be served upon the parties.

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**In re: SAMUEL J. DALESSIO, JR., and DOUGLAS S. DALESSIO d/b/a INDIANA FARMERS LIVESTOCK MARKET, INC., and WARREN E. BANDY, JR.**

**P&S Docket No. D-93-0076.**

**Order Lifting Stay as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio d/b/a Indiana Farmers Livestock Market, Inc. filed December 9, 1996.**

JoAnn Waterfield, for Complainant.

Wayne A. Kablack, Indiana, PA, for Respondents.

*Order issued by William G. Jensen, Judicial Officer.*

On March 31, 1995, the Judicial Officer issued a Decision and Order which orders Respondents Samuel J. Dalessio, Jr., and Douglas S. Dalessio, their agents, employees, successors, and assigns to cease and desist from various activities and suspends Respondents Samuel J. Dalessio, Jr., and Douglas S.

Dalessio as registrants under the Packers and Stockyards Act, 1921, as amended and supplemented (hereinafter the Packers and Stockyards Act), (7 U.S.C. §§ 181-229), for a period of 5 years. *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590, 611 (1995). The Judicial Officer made the order effective, as follows:

The cease and desist provisions of this Order shall become effective on the day after service of this Order. The suspension provisions shall become effective on the 30th day after service of this Order, *Provided, however*, That if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate Order with respect thereto, or (ii) upon a showing made by Complainant that it is not likely that such an Order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

*In re Samuel J. Dalessio, Jr., supra*, 54 Agric. Dec. at 611-12.

Respondents Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc. (hereinafter Respondents), appealed the Judicial Officer's March 31, 1995, Decision and Order to the United States Court of Appeals for the Third Circuit, which affirmed the Judicial Officer's Decision and Order. *Dalessio v. Secretary of Agriculture*, 79 F.3d 1137 (3d Cir. 1996) (Table).

On November 6, 1996, Complainant filed a Motion to Lift Stay Order as to Respondents Samuel J. Dalessio, Jr. and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc. (hereinafter Complainant's Motion to Lift Stay).

Complainant states that Respondents' appeal to the United States Court of Appeals for the Third Circuit resulted in an automatic stay pending the outcome of the appeal, the Third Circuit did not issue an order fixing the effective date of the suspension period, the Third Circuit is not likely to issue an order fixing the effective date of the suspension, and no part of the suspension has been served by Respondents. Complainant's Motion to Lift Stay at 2. Further, Complainant requests that the Judicial Officer's March 31, 1995, order suspending Respondents' registration under the Packers and

Stockyards Act become effective immediately. Complainant's Motion to Lift Stay at 2.

Respondents have not filed a response to Complainant's Motion to Lift Stay.

Therefore, the suspension provisions of the Order filed in the instant proceeding, on March 31, 1995, shall become effective on the 10th day after service of this Order on Respondents.

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**In re: DANE S. FINE.**  
**P&S Docket No. D-96-0038.**  
**Vacation of Default Decision filed December 20, 1996.**

Mary Hobbie. for Complainant.  
Louis Hunger Ceraso. New Kensington. PA, for Respondent.  
*Vacation issued by Dorothea A. Baker, Administrative Law Judge.*

On December 20, 1996, the Complainant filed a Motion to Vacate a Default Decision which had been issued in this case on December 6, 1996. For good cause set forth therein, said Motion is granted. The Default Decision is vacated.

Copies hereof shall be served upon the parties.

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**PACKERS AND STOCKYARDS ACT**

**DEFAULT DECISIONS**

**In re: BIG BEND CATTLE COMPANY, INC.**

**P&S Docket No. D-96-0023.**

**Decision and Order filed July 23, 1996.**

**Failure to file an answer - Engaging in the business of a dealer without maintaining an adequate bond or its equivalent - Cease and desist order - Suspension of registration - Civil penalty.**

Andrew Y. Stanton, 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, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the respondent willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

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. 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.

Copies of an amended 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. 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 amended complaint.

Respondent has failed to file an answer to either filing within the time prescribed in the Rules of Practice, and the material facts alleged in the amended 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. (a) Big Bend Cattle Company, Inc., hereinafter referred to as the respondent, is a corporation organized and existing under the laws of the State of Florida. Its business mailing address is Route 1, Box 97, Pinetta, Florida 32350.

(b) Respondent is, and at all times material herein was:

1. Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

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

2. Respondent was notified by certified mail received December 14, 1995, that it would be removed as a clearee from the bond maintained to secure the performance of its livestock obligations under the Act effective January 11, 1996, and that it was necessary to obtain and maintain an \$80,000.00 surety bond or its equivalent before continuing livestock operations subject to the Act. Notwithstanding such notice, respondent has continued to engage in the business of a dealer without maintaining an adequate bond or its equivalent.

### **Conclusions**

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 201.29, 201.30).

### **Order**

Respondent Big Bend Cattle Company, Inc., its agents and employees, directly or through any corporate or other device, in connection with its 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.

Respondent is suspended as a registrant under the Act until such time as it complies fully with the bonding requirements under the Act and the

regulations. When respondent demonstrates that it is in full compliance with the bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

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 Four Thousand Dollars (\$4,000.00).

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 September 3, 1996.-Editor]

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**In re: TOLLEFSON FARMS, INC.**

**P&S Docket No. D-96-0035.**

**Decision and Order filed September 19, 1996.**

**Failure to file an answer - Issuance of checks in payment for livestock without maintaining sufficient funds on deposit - Failure to pay when due the full purchase price of livestock - Cease and desist order - Civil penalty.**

Kimberly D. Hart, for Complainant.

Respondent, Pro se.

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

### **Preliminary Statement**

This is a disciplinary proceeding under the 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, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture, charging that the respondent willfully 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, 1996. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material

allegations contained in the complaint.

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

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

### Findings of Fact

1. Tollefson Farms, Inc., hereinafter referred to as respondent, is a corporation organized and existing in the state of Minnesota. Its business address is 1116 Hennepin Avenue, Glencoe, Minnesota 55336.<sup>1</sup>

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

(a) Engaged in the business of slaughtering livestock and manufacturing or preparing meat and meat food products for sale or shipment in commerce; and

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

3. Respondent, in connection with its operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(a) in the complaint, purchased livestock and in purported payment issued checks 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 account upon which such checks were drawn to pay such checks when presented.

4. Respondent, in connection with its operations subject to the Act, on or about the dates and in the transactions listed in paragraph II(a) & (b) and on other occasions, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

5. As of May 1, 1996, there remained an outstanding balance for livestock purchases in the amount of \$1,613.85.

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<sup>1</sup>Respondent's new business mailing address is 20 North Lake Street, Suite 316, Forest Lake, Minnesota 55025.

### Conclusions

By reason of the facts found in Findings of Fact 3, 4 and 5 herein, respondent has willfully violated sections 202(a) & 409(a) of the Act (7 U.S.C. §§ 192(a) & 228b(a)).

### Order

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

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

Respondent Tollefson Farms, Inc. is hereby assessed a civil penalty in the amount of Seven Thousand Dollars (\$7,000) in accordance with section 203(b) of the Act (7 U.S.C. § 193(b)). 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 November 1, 1996.-Editor]

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**In re: JACKIE D. HALL d/b/a HALL FARMS.**

**P&S Docket No. D-96-0027.**

**Decision and Order filed August 26, 1996.**

**Failure to file an answer - Issuance of checks in payment for livestock without maintaining sufficient funds on deposit - Failure to make full payment for livestock when due - Cease and desist order - Suspension of registration.**

Kimberly D. Hart, 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, Packers and Stockyards Programs, GIPSA, 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 regular mail after an attempt to serve respondent by certified mail was unsuccessful. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

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

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

### **Findings of Fact**

1. (a) Jackie D. Hall, hereinafter referred to as the respondent, is an individual whose business address is Route 12, Box 140, Florence, Alabama 35633.

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

(1) Engaged in the business of a dealer buying and selling livestock in commerce for his own account, of a market agency buying livestock in commerce on a commission basis and acts as a clearing agent for Herman Hall, Jr.; and

(2) 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. Respondent is also registered with the Secretary of Agriculture as an agent to provide clearing services for Herman Hall, Jr.

2. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(a) of

the complaint, purchased livestock and in purported payment issued checks 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 account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions listed in paragraph II(a) of the complaint, and in the transactions set forth in paragraph II(b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of February 1, 1996, there remained unpaid a total of \$10,992.00 for respondent's livestock purchases.

### Conclusions

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

### Order

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

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

Respondent Jackie D. Hall is suspended as a registrant under the Act for a period of 5 years. Provided, however, that upon application to Packers and Stockyards Programs a supplemental order may be issued terminating the suspension of the respondent at any time after 90 days upon demonstration by respondent that all livestock sellers identified by the complaint in this proceeding have been paid in full and provided further, that this order may be modified upon application to Packers and Stockyards Programs to permit respondent's salaried employment by another registrant or a packer after the expiration of the 90 day period of suspension and upon demonstration of circumstances warranting modification of the order.

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 November 4, 1996.-Editor]

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**In re: HOPKINS COUNTY LIVESTOCK and DAIRY AUCTION, INC.,  
MARVIN JONES and E. BOB CODY.**

**P&S Docket No. D-96-0015.**

**Decision and Order with Respect to Hopkins County Livestock and Dairy  
Auction, Inc. and Marvin Jones filed October 22, 1996.**

**Failure to file an answer - Failure to maintain and use properly its Custodial Account for  
Shippers' Proceeds - Engaging in business while current liabilities exceed current assets -  
Suspension.**

Julie C. Schuster, for Complainant.

Respondents, Pro se.

*Decision and Order issued by Victor W. Palmer, Chief 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, GIPSA, United States Department of Agriculture, charging that respondents Hopkins County Livestock and Dairy Auction, Inc. and Marvin Jones willfully 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 Hopkins County Livestock and Dairy Auction, Inc. and Marvin Jones on February 16, 1996 and February 20, 1996, respectively. 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 Hopkins County Livestock and Dairy Auction, Inc. and Marvin Jones have failed to file answers within the time prescribed in the

Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents Hopkins County's and Jones' failures to file answers, 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. Respondent Hopkins County Livestock and Dairy Auction, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing in the State of Texas. Its business mailing address is P.O. Box 815, Sulphur Springs, Texas 75483.

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

a. Engaged in the business of conducting and operating the Hopkins County Livestock and Dairy Auction, Inc. stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

b. Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

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

3. Respondent Marvin Jones, hereinafter referred to as respondent Jones, is an individual whose business mailing address is P. O. Box 815, Sulphur Springs, Texas 75483.

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

a. President of the corporate respondent;

b. Owner of 33% of the stock of the corporate respondent; and

c. Responsible in combination with E. Bob Cody for the direction, management and control of the corporate respondent.

5. As of August 31, 1995, the corporate respondent's current liabilities exceeded its current assets. As of that date, the respondent had current liabilities totalling \$321,221.87 and current assets totalling \$229,092.61 resulting in an excess of current liabilities over current assets of \$92,129.26.

6. The corporate respondent, under the direction, management and control of the respondent Jones, failed to maintain and use properly its Custodial Account for Shipper's Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions thereof due the owners and consignors of livestock, in that:

(a) As of August 10, 1995, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$139,933.97, and had to offset such checks a balance in the custodial account of -\$88,592.17, and proceeds receivable of \$67,300.07, resulting in a shortage of \$161,226.07 in funds available to pay shippers their net proceeds.

(b) As of August 17, 1995, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$130,789.46, and had to offset such checks a balance in the custodial account of -\$89,609.36, and proceeds receivable of \$44,504.09, resulting in a shortage of \$175,894.73 in funds available to pay shippers their net proceeds.

(c) As of August 24, 1995, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$113,030.26, and had to offset such checks a balance in the custodial account of -\$78,931.70, and proceeds receivable of \$22,441.20, resulting in a shortage of \$169,520.76 in funds available to pay shippers their net proceeds.

(d) As of August 31, 1995, the corporate respondent had outstanding checks drawn on its custodial account in the amount of \$102,932.17, and had to offset such checks a balance in the custodial account of -\$113,565.27, and proceeds receivable of \$37,354.91, resulting in a shortage of \$179,142.53 in funds available to pay shippers their net proceeds.

(e) Such deficiencies were due, in part, to the failure of the respondents to deposit in the custodial account, within the time prescribed in the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock to the corporate respondent, the respondent Jones and others.

### Conclusions

By reason of the facts in Findings of Fact 3 and 4, respondent Marvin Jones is the alter ego of Hopkins County Livestock and Dairy Auction, Inc.

By reason of the facts in Finding of Fact 5 herein, respondent Hopkins County Livestock and Dairy Auction, Inc.'s financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts in Finding of Fact 6 herein, respondents Hopkins County Livestock and Dairy Auction, Inc., and Marvin Jones have wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42).

### Order

Respondent Hopkins County Livestock and Dairy Auction, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, and respondent Marvin Jones, directly or through any corporate or other device, shall cease and desist from:

1. Engaging in business subject to the Act while their current liabilities exceed their current assets;
2. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the times prescribed in Section 201.42 of the regulations (9 C.F.R. §201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;
3. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 C.F.R. §201.42); and
4. Using funds received from the sale of consigned livestock for purposes of their own or for any purpose other than payment to consignors of the amount due from the sale of their livestock and the payment of lawful marketing charges.

Respondents Hopkins County Livestock and Dairy Auction, Inc., and Marvin Jones are suspended as registrants under the Act for a period of 14 days and thereafter until it is demonstrated that their current liabilities do not exceed their current assets and that the shortage in the Custodial Account for Shippers' Proceeds has been eliminated. When respondents demonstrate that they are solvent and that the custodial account deficiency has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension.

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 November 29, 1996.-Editor]

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**In re: MARK LEE d/b/a GOODING LIVESTOCK COMMISSION CO.  
P&S Docket No. D-96-0042.  
Decision and Order filed October 30, 1996.**

**Failure to file an answer - Engaging in the business of buying and selling livestock while insolvent - Failure to maintain and use properly Custodial Account for Shippers' Proceeds - Suspension - Cease and desist order.**

Andrew Y. Stanton, 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 willfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

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

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

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

### **Findings of Fact**

1. Mark Lee d/b/a Gooding Livestock Commission Co. (hereinafter referred to as "respondent") is an individual whose business mailing address is P.O. Box 387, Gooding, Idaho 83330.

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

(a) Engaged in the business of operating Gooding Livestock

Commission Co., a posted stockyard under the Act,

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

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account or the account of others, and a market agency buying and selling livestock on a commission basis.

3. As more fully set forth in paragraph II of the complaint, from January 31, 1996, through the present date, respondent has been insolvent, *i.e.*, its current liabilities have exceeded its current assets.

4. As more fully set forth in paragraph III of the complaint, during the period January 31, 1996, through the present date, respondent has engaged in the business of a market agency buying and selling livestock on a commission basis notwithstanding the fact that its current liabilities exceeded its current assets.

5. As more fully set forth in paragraph IV of the complaint, respondent, during the period October 31, 1995, through February 29, 1996, failed to maintain and use properly his Custodial Account for Shippers' Proceeds, thereby endangering the faithful and prompt accounting therefor and payments of the portions thereof due the consignors of livestock.

### Conclusions

By reason of the facts alleged in paragraph II of the complaint, respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts alleged in paragraph III of the complaint, respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

By reason of the facts alleged in paragraph IV of the complaint, respondent has willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.42 of the regulations (9 C.F.R. § 201.42).

### Order

Respondent, Mark Lee d/b/a Gooding Livestock Commission Co., his officers, directors, agents, employees, successors and assigns, individually or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Engaging in business subject to the Act while insolvent, *i.e.* while current liabilities exceed current assets;

2. Failing to deposit in his "Custodial Account for Shippers' Proceeds" within the time prescribed by section 201.42 of the regulations (9 C.F.R. § 201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;

3. Failing to maintain his "Custodial Account for Shippers' Proceeds" in conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42); and

4. Using custodial funds for purposes of his own or for any purpose other than the remittance of net proceeds to the person or persons entitled thereto and the payment of lawful marketing charges.

Respondent is suspended as a registrant under the Act for a period of 28 days and thereafter until respondent demonstrates that he is no longer insolvent and the shortage in his custodial account has been eliminated. A supplemental order may be issued terminating this suspension at any time after the expiration of 28 days upon demonstration by respondent that he is no longer insolvent and that the deficiency in his custodial account has been eliminated.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 11, 1996.-Editor]

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**In re: KENNETH RAY CLARK d/b/a B & B ANGUS SERVICE.**  
**P&S Docket No. D-96-0039.**  
**Decision and Order filed November 4, 1996.**

**Failure to file an answer - Engaging in the business of buying and selling livestock without being registered as a dealer and without adequate bond - Failure to pay the full purchase price of livestock when due - Cease and desist order - Prohibition from registration.**

Timothy A. Morris, for Complainant.

David M. Cantor, Louisville, KY, for Respondent.

*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, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent willfully 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 regular mail after an attempt to serve respondent by certified mail was unsuccessful. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

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

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

### **Findings of Fact**

1. Kenneth Ray Clark, hereinafter referred to as the respondent, is an individual whose business address is P.O. Box 7823, Louisville, Kentucky 40207.

2. The respondent, at all times material herein, was engaged in the business of a dealer buying and selling livestock in commerce for his own account.

3. The respondent at all times material herein was not registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

4. Respondent, in connection with his operations subject to the Act and in the transactions set forth in paragraph II in the complaint, purchased livestock and failed to pay the full purchase price of such livestock.

5. As of April 8, 1996, there remained unpaid a total of \$2,394,945.00 for respondent's livestock purchases.

### **Conclusion**

By reason of the facts found in Findings of Fact 3, 4, and 5 herein, respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C.

§§ 213(a) & 228b).

**Order**

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

1. Failing to pay the full purchase price of livestock;
2. Failing to pay when due for livestock; and
3. Engaging in business in any capacity for which registration and bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without registering with the Secretary of Agriculture and filing an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Kenneth Ray Clark shall not be registered to engage in business subject to the Act for a period of five (5) years and thereafter until the respondent becomes properly registered and bonded. Pursuant to section 303 of the Act (7 U.S.C. § 203), respondent is prohibited from engaging in business subject to the Act without being registered with the Secretary of Agriculture.

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 December 16, 1996.-Editor]

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**PACKERS AND STOCKYARDS ACT**

**CONSENT DECISIONS**

**(Not published herein-Editor)**

Russel Ulmer d/b/a Ashley Livestock Exchange. P&S Docket No. D-95-0037. 6/18/96.

Mammoth Cave Dairy Auction, Inc. P&S Docket No. D-96-0029. 6/18/96.

John DiSanti, Jr. P&S Docket No. D-96-0002. 7/3/96.

El Paso Auction, Inc., Bill Tyer and Vickie Tyer. P&S Docket No. D-96-0020. 7/15/96.

Jerry Goetz. P&S Docket No. D-96-0024. 7/18/96.

W. Wayne Pape d/b/a A. C. Oefinger Commission Company and John Clay & Company. P&S Docket No. D-96-0030. 7/18/96.

Christensen Processing & Marketing, Inc., Thomas Christensen II, and Thomas Christensen III. P&S Docket No. D-95-0032. 7/19/96.

David Stout Cattle Co., Inc. P&S Docket No. D-96-0003. 7/24/96.

Harlon Dean Morrison d/b/a Dean Morrison Cattle Co. P&S Docket No. D-96-0032. 7/25/96.

Bill Van Kley. P&S Docket No. D-96-0034. 8/2/96.

Hollywood Dressed Beef Corp. and Robert A. Petersen. P&S D-95-0017. 8/6/96.

R & L Livestock, Ltd., Marion Rus and Sturgis Van Vugt. P&S Docket No. D-96-0004. 8/27/96.

James Mahaffey. P&S Docket No. D-96-0037. 8/29/96.

Larry Edmiston. P&S Docket No. D-96-0041. 9/10/96.

Taylor Packing Co., Inc., Harold A. Roney and Patsy L. Leone, Jr. P&S Docket No. D-95-0021. 10/4/96.

Jeffrey C. Stiefel d/b/a Valley Livestock. P&S Docket No. D-96-0047. 10/9/96.

Robert Asberry, Sr. P&S Docket No. D-95-0024. 10/16/96.

Wayne County Livestock Auction, Inc. and Scott Mugrage. P&S D-96-0052. 10/16/96.

Martin's Stockyards, Inc. and Martin William Miranda. P&S Docket No. D-96-0033. 10/17/96.

Lean Genes Marketing Group. P&S Docket No. D-96-0054. 10/24/96.

CVR, Inc. d/b/a W. E. Reeves Packing Company and Canadian Valley Meat Company, John R. Luke, and Jeffrey V. Luke. P&S Docket No. D-96-0057. 10/24/96.

Little Joe Livestock-Meats, Inc. and Joseph Pagliuso, Jr. P&S Docket No. D-95-0061. 11/14/96.

L. V. Knight. P&S Docket No. D-96-0019. 11/14/96.

Southeast Livestock Order Buyers, Inc., Jefferson County Stockyards, Inc., Jacquelyn A. Chandler and William Chandler. P&S Docket No. D-96-0028. 11/22/96.

Timothy Reece d/b/a Reece Cattle Company. P&S Docket No. D-95-0058. 12/3/96.

National Farmers Organization, Inc., John Petersen and Donald Ter Beest. P&S Docket No. D-96-0051. 12/19/96.

Dane S. Fine. P&S Docket No. D-96-0038. 12/20/96.

Conaway and Cooper, Inc. d/b/a Elkins Stockyard, C. C. Conaway, Inc. and C. C. "Bus" Conaway, II. P&S Docket No. D-96-0017. 12/27/96.

NFO, Inc., John Petersen and Donald Ter Beest. P&S Docket No. D-96-0051. 12/30/96.

Willie L. Hill. P&S Docket No. D-97-0002. 12/30/96.