The Packers and Stockyards Act of 1921
A History of Administration and Enforcement
Third Edition

Prepared for
Grain Inspection, Packers and Stockyards Administration
Packers and Stockyards Program
New Employee Training

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American agriculture, as we all know, built on the free enterprise and open market system, has long been the envy of people all over the world. No other nation has an agricultural industry to match American farmers and ranchers when it comes to providing food at reasonable cost.

- President Gerald Ford

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Foreword

Welcome new employees of the Packers and Stockyards Program. This publication marks the third installment of my “History of P&S.” This *Third Edition* includes new and updated information not found in the first two editions, which were presented in Shepherdstown, West Virginia in June 2007 for the GIPSA Leadership Program and in Indianapolis, Indiana in September 2008 for the Packers and Stockyards Program National Employee Conference. This also marks the first time I have incorporated discussion of landmark cases under the Packers and Stockyards Act, including cases from the first decade of the 21st Century. A separate publication and presentation on landmark cases was prepared for training of nearly all P&SP employees in 2007 at the Federal Law Enforcement Training Center in Glynco, Georgia.

Throughout the course of our 88 year history, the Act has been amended and supplemented numerous times. Likewise, our agency has undergone many changes including in name and organizational structure. In the pages that follow, I have attempted to give an overview of the history of the Act and its amendments, with additional focus on the agency charged with its administration and significant “landmark” cases that have shaped our jobs as P&S employees. The detail and accuracy within this publication are only as good as the information available to me. In that respect, I am thankful to have found a number of valuable resources including an oral history given by Chester Morrill, the first person to head the Packers and Stockyards Administration. Morrill’s oral history was written from a series of interviews in 1952, in which he spoke in detail about the early days of P&S. Mr. Morrill gave me considerable insight into the early days of P&S in the 1920’s and led me to additional sources including 1924 Hearings before the Committee on Expenditures in the Department of Agriculture, House of Representatives. The National Agricultural Library at USDA has proven to be an excellent resource as well.

In conducting my initial research, I learned interesting, and perhaps trivial, things I hadn’t previously known. For example, Odin Langen served as Administrator of the Packers and Stockyards Administration in 1971 and 1972, following his six terms as a U.S. Representative from Minnesota. Langen lost his re-election bid in 1970 to Bob Berglund, who would later serve as Secretary of Agriculture under President Carter.

These P&S Chronicles are arranged by decade, providing information on significant Congressional actions, major cases, agency leadership and other happenings. Some overlap of events is bound to occur where the activities of one decade impact the events and actions of other decades. In those instances I’ve tried to eliminate unnecessary duplication of information. Finally, I’ve provided photos and exhibits throughout the text and at the back of this publication, including the federal register notice that establishes GIPSA as an agency, and profiles of each Secretary of Agriculture responsible for administering the Act since its enactment in 1921.

Enjoy.

Chapter 1
Introduction

The Packers and Stockyards Act (P&S Act) was enacted in 1921 following the release in 1918 of the Report of the Federal Trade Commission on the Meat Packing Industry. For years prior to enactment of the P&S Act, the largest meatpacking companies had been suspected of conspiring to control the purchases of livestock, the preparation of meat and meat products and their distribution in this country and abroad. In 1917, President Wilson directed the Federal Trade Commission (FTC) to investigate the facts relating to the meatpacking industry. The FTC concluded that the "Big Five" (Swift, Armour, Cudahy, Wilson and Morris) controlled the market in which they bought their supplies and the market in which they sold their products. The report pointed out that the monopolistic position of the "Big Five" was based primarily upon their ownership or control of stockyards and essential facilities for the distribution of perishable foods and that control of the stockyards carried with it dominance over commission firms, dealers, cattle-loan banks, trade publications, etc. The FTC reported packers were manipulating markets, restricting flow of foods, controlling the price of dressed meat, defrauding producers and consumers of food and crushing competition.[1] The FTC, in fact, recommended governmental ownership of the stockyards and their related facilities.

Congress chose a less drastic alternative and after some controversy[2] enacted the P&S Act a year after the Big Five packers and others entered into a consent decree under the Sherman Act. The Act was originally designed to regulate the "Big Five." As you know,

[1] The Report of the Federal Trade Commission on the Meat Packing Industry (1918) states at 392: "It appears that five great packing concerns of the country Swift, Armour, Morris, Cudahy, and Wilson have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands … The producer of livestock is at the mercy of these five companies because they control the market and the marketing facilities and, to some extent, the rolling stock which transports the product to the market … The power of the Big Five in the United States has been and is being unfairly and illegally used to Manipulate live-stock markets; Restrict interstate and international supplies of foods; Control the prices of dressed meats and other foods; Defraud both the producers of food and consumers; Crush effective competition; Secure special privileges from railroads, stockyard companies, and municipalities; and Profiteer … The rapid rise of the packers to power and immense wealth and their present strangle hold on food supplies were not based necessarily on their ownership of packing houses, but upon their control of the channels of distribution, particularly the stockyards, private car lines, cold storage plants and branch houses. Similarly the great profits which they have secured and are now securing are not primarily due to exceptional efficiency in operating packing houses and manufacturing plants, but are secured through their monopolistic control of the distributive machinery."

[2] At different stages in the legislative process, bills on the subject called for administration by a separate commission, for regulation of packers by the FTC and of the stockyards by the Interstate Commerce Commission.

the Act's scope has expanded well beyond just the largest of packers. Today, the Act regulates the activity of packers, livestock dealers, market agencies, live poultry dealers and swine contractors.

H.R. 6320, "The Packers and Stockyards Act," was passed by Congress on August 15, 1921, and became effective September 15, 1921. The Act's purpose at the time it was passed was to "regulate interstate and foreign commerce in live stock, live-stock produce, dairy products, poultry, poultry products, and eggs[3], and for other purposes." It prohibited packers from engaging in unfair and deceptive practices, giving undue preferences to persons or localities, apportioning supply among packers in restraint of commerce, manipulating prices, creating a monopoly or conspiring to aid in unlawful acts.

The Act also made stockyards quasi-public utilities and required yard officers, agents and employees to register with the government. Stockyards were forbidden from dealing in the livestock they handled, and were required to maintain accurate weights and measures and pay shippers promptly. However, not all stockyards were under the jurisdiction of the Act. Only those with pen space larger than 20,000 square feet were regulated.

In the years since 1921, the P&S Act has been updated several times to keep pace with a changing and dynamic industry.

[3] As originally enacted, the definition of "packer" read, in part, "any person engaged in the business … (d) of marketing meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, in commerce…"

Administration of the Act

During the past 88 years, the Packers and Stockyards Act has been administered in several different organizational structures both within other agencies and as an independent agency reporting directly to the Secretary or Assistant Secretary:

From	**To**	**Agency Name**
September 16, 1921	July 1, 1927	Packers and Stockyards Administration under the Secretary of Agriculture
July 1, 1927	July 1, 1939	Packers and Stockyards Division under the Bureau of Animal Industry
July 1, 1939	February 23, 1942	Packers and Stockyards Division under the Agricultural Marketing Service
February 23 , 1942	December 5, 1942	Packers and Stockyards Division under the Agricultural Marketing Administration
December 5, 1942	January 21, 1944	Packers and Stockyards Division under the Livestock and Meats Branch
January 21, 1944	August 18, 1945	Packers and Stockyards Division under the Livestock and Meats Branch Office of Distribution
August 18, 1945	November 2, 1953	Packers and Stockyards Division under the Livestock Branch Production and Marketing Administration
November 2, 1953	June 30, 1960	Packers and Stockyards Branch under the Livestock Division Agricultural Marketing Service
July 1, 1960	February 8, 1965	Packers and Stockyards Division under the Agricultural Marketing Service
February 8, 1965	May 8, 1967	Packers and Stockyards Division under the Consumer and Marketing Service
May 8, 1967	December 29, 1977	Packers and Stockyards Administration
December 30, 1977	June 16, 1981	Packers and Stockyards under the Agricultural Marketing Services
June 17, 1981	October 20, 1994	Packers and Stockyards Administration
October 20, 1994	Present	Packers and Stockyards Program under the Grain Inspection, Packers and Stockyards Administration

Of the various agency designations since 1921, the current Grain Inspection, Packers and Stockyards Administration (GIPSA) has served the longest. On February 24, 2008, GIPSA's tenure administering the Act surpassed the previous record of 13 years, 4 months and 4 days[4] held by the Packers and Stockyards Administration from June 1981 to October 1994.

Controversy has surrounded the designation and reorganization of the agencies authorized to administer the Act nearly every time changes were made. The greatest controversies appear to have occurred when the Department considered the creation or elimination of an independent agency to administer the Act.

For example, in 1967, Congress pressured the Department to reestablish the Packers and Stockyards Administration, which had not been an independent agency since 1927. Congressman Whitten[5], Chairman of the Subcommittee on Agriculture of the House Committee on Appropriations, expressed displeasure at the Department's failure to establish a separate agency and at the appropriation hearings, Congress segregated P&S funds from the Consumer and Marketing Service where the Packers and Stockyards Division was housed, insisting that an independent agency be established.

The Packers and Stockyards Administration functioned as an independent agency within USDA from May 8, 1967 through December 29, 1977, when it was merged into the Agricultural Marketing Service as a part of the Administration's policy to reduce the number of government agencies. In 1981, under the Reagan administration, efforts were successful in returning the agency to independent status. The agency itself put forth numerous arguments in support of its independent agency status, including among others:

- Elimination of the conflict-of-interest that exists between service-oriented programs and regulatory-oriented activities;
- Adding stature to the function of enforcing the Act commensurate with the size and importance of the industry regulated and its effect on the general public;
- Eliminating layering, thus making the agency more accessible to producers, marketers of livestock, meat and poultry, and consumers;
- Providing for more expeditious day-to-day decision making in dealing with problems under the Act; and
- Improving program planning by eliminating the diversion of funds from P&S to offset deficiencies in other programs.

The strongest argument upon which the agency relied was a 1958 amendment to the Act, which stated in section 407(b): "The Secretary shall maintain within the Department of Agriculture a separate enforcement unit to administer and enforce Title II of this Act." The amendment, according to Deputy Administrator Chas. B. Jennings, was intended to prevent P&S from being merged into a unit that had service responsibilities. That particular provision of section 407 was repealed in 1994.

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[4] The website www.timeanddate.com, was used to calculate the number of days between two dates.
[5] Representative Jamie Lloyd Whitten, for whom the USDA Whitten Building is named, was a Representative from Mississippi who served in Congress from 1941 to 1995.

Chapter 2
The 1920's

Congress passed the Packers and Stockyards Act on August 15, 1921, and delegated enforcement responsibility to the Secretary of Agriculture, who at that time was Henry C. Wallace.[6] Wallace set up the initial enforcement unit on September 27, 1921, calling it the Packers and Stockyards Administration. When Wallace issued his annual report to the President on November 15, 1921, he wrote, "[t]he organization for the administration of this act is now being built up as an independent unit in the department. Great care is being taken to select men who have general knowledge of the live-stock industry and of marketing and packing, and who are level-headed, even-tempered men, free from prejudice."

Chester Morrill (Source: Washington Post)

The man Wallace chose to head the new Packers and Stockyards Administration was Chester Morrill, a 36-year-old Georgetown Law School graduate. Morrill had been with the Department since 1914 working primarily in the Office of the Solicitor where his role involved drafting and interpreting legislation. It was in this capacity that Morrill wrote the Grain Futures Trading Act and contributed largely to the drafting of the Packers and Stockyards Act. With that in mind, when both pieces of legislation were passed by Congress in 1921, Secretary Wallace appointed Morrill to the position of *Assistant to the Secretary*. Wallace called on Morrill to administer both the Packers and Stockyards Act and the Grain Futures Trading Act.

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[6] A short biographical sketch of each Secretary of Agriculture to administer the Packers and Stockyards Act can be found at Exhibit B on page 191.

Morrill immediately began constructing the organization of the Packers and Stockyards Administration and finding suitable people to lead the agency. The first headquarters organization consisted of five divisions: (1) Administrative, (2) Law, (3) Audits and Accounts, (4) Rates, Charges and Registrations and (5) Trade Practices. Mr. Morrill's first professional staff in Washington consisted of 7 individuals, including 2 for administration, and one each for the 4 other sections. An economist was also included on the HQ staff. Including Mr. Morrill, the staff consisted of 4 lawyers, 3 livestock marketing specialists, and 2 accountants (including 1 CPA).

- Mr. Stephen Bray was one of the first employees to be appointed to the Packers and Stockyards Administration. Bray served as general assistant to Mr. Morrill. Immediately prior to this appointment, Bray was in charge of the livestock, meats, and wool division of the Bureau of Agricultural Economics. Earlier in his career, Bray worked in the Bureau of Animal Industry. Like Morrill, Bray was a lawyer and was familiar with the legal and practicable issues surrounding the livestock and meatpacking industries.

- Judge Bayard T. Hainer served as Chief Counsel for the Packers and Stockyards Administration. Hainer was born May 31, 1866 in Columbia, Missouri, and earned degrees from Iowa State College and Michigan State University (Law). In 1898, President William McKinley appointed Hainer Associate Justice of the Supreme Court of Oklahoma Territory. He served on the Court until Oklahoma achieved statehood in 1907. In 1927, after his tenure with the Packers and Stockyards Administration, Hainer was appointed Chief Counsel for the Federal Trade Commission. Judge Hainer is known for authoring a textbook *The Modern Law of Municipal Securities* and many magazine articles on various legal topics. Hainer's father emigrated to the U.S. from Hungary in 1854 and later was a professor of modern languages at the University of Missouri in Columbia. His brother, Eugene Jerome Hainer, served in the 53rd and 54th Congresses as a representative from Nebraska. Judge Hainer died in Oklahoma City, July 10, 1933.

- Howard Mason Gore served as the first chief of the trade practice division for the Packers and Stockyards Administration. Gore was born October 12, 1877, near Clarksburg, West Virginia and earned a BA from West Virginia University in 1900. A West Virginia livestock farmer, Gore was President of the West Virginia Livestock Association from 1912 to 1916. At the time of his appointment to P&S, Gore was a member of the West Virginia State Board of Education. Chester Morrill described Gore as a "peculiar individual," describing him as "fairly tall, fairly heavy-set, somewhat dark complexioned with very black hair, and had some peculiarities of manner."[7] In September 1923, Gore left P&SA when he was named Assistant Secretary of Agriculture. Upon the death of Secretary Henry C. Wallace, Gore became acting Secretary and then Secretary until March 4, 1925, when he was elected Governor of West Virginia. Gore served as governor from 1925 until 1929 and then as West Virginia Commissioner of Agriculture from 1931 to 1933. Gore died June 20, 1947.

- Mr. G. N. Dagger of Ohio was an agricultural economist and the first head of the Rates, Charges and Registrations Division. Dagger came from a farming background, having operated a 200-acre farm for livestock production. After enlisting in the Army and serving overseas, Dagger became an instructor in law and economics at Ohio State University. When Howard M. Gore became Assistant Secretary of Agriculture, Dagger assumed responsibility over the trade practice division as well.

- Charles J. Brand was one of the original marketing specialists with P&S. Brand was previously Chief of the Bureau of Markets at USDA, but left his position there in 1919 when he became vice president and general manager of the American Fruit Growers, Inc. At Morrill's request, Brand returned to USDA to be a member of the Packers and Stockyards Administration. In 1924, Brand was the most active person in the preparation of the McNary-Haugen[8] legislation,

[7] *The Reminiscences of Chester Morrill.* Although it was evident that Morrill did not look upon Gore as a close friend, he did believe him to be very competent and a valuable member of the P&SA team. Morrill retold of one particular instance in which he described Gore as "nothing if not ingenious." Morrill had assigned Gore to attend a trade conference during which some "pretty strong feelings and pretty strong words were passed." Gore had always been a tobacco chewer and always had to have a spittoon available. When he saw things were going very badly, Gore "accidently" knocked over the spittoon and spilled its contents. The diversion allowed him to bring the conference back to order.

[8] The McNary-Haugen Farm Relief Act was legislation to limit agricultural sales within the United States, and either store them or export them. It was co-sponsored by Charles L. McNary (R-Oregon) and Gilbert N. Haugen (R-Iowa). Despite attempts in 1924, 1926, and 1928 to pass the bill — it was vetoed by President Calvin Coolidge, and never approved. It was supported by then Secretary of Agriculture Henry C. Wallace. According to the bill, a federal agency would be created to support and protect domestic farm prices by attempting to maintain price levels that existed before the First World War. By purchasing surpluses and selling them overseas, the federal government would take losses that would be paid for through fees against farm producers. World War I had created an atmosphere of high prices for agricultural products as European nations demand for exports surged. Farmers had enjoyed a period of prosperity as U.S. farm production expanded rapidly to fill the gap left as European belligerents found themselves unable to produce enough food. When the war ended, supply increased rapidly as Europe's agricultural market rebounded. Overproduction led to plummeting prices which led to stagnant market conditions and living standards for farmers in the 1920s. Instability in the agricultural marketplace in the mid-1920s kept the bill afloat along with other plans for government-implemented price and wage controls in various industries. President Coolidge, with the support of Commerce Secretary Herbert Hoover, vetoed them twice after Congress passed the bill. To combat them, Coolidge supported the Hoover-Jardine Plan, which encouraged educational services and cooperative marketing in struggling industries. (http://en.wikipedia.org/wiki/McNary-Haugen_Farm_Relief_Bill)

although it was not a part of the function of the P&SA. Later, Brand would serve as the first administrator of the Agricultural Adjustment Act under Henry A. Wallace.

- Arthur S. French was a very successful certified public accountant in Des Moines, Iowa, when he was appointed to the P&SA. French was asked personally by Secretary Wallace to make a great financial sacrifice and come to Washington to head the Audits and Accounts Division of the Packers and Stockyards Administration.

- Mr. C.A. Briggs was appointed to fill the position of livestock weight supervisor. He had been working since 1910 as a scale expert at the Federal Bureau of Standards. Briggs graduated from the University of Missouri and had significant experience in weights and measures, investigational and service work. Briggs' role at Packers and Stockyards was supervision over the inspection and testing of scales in all public stockyard markets under P&S jurisdiction.

Morrill set up field offices and brought on employees trained and experienced in the practical phases of the marketing of livestock through terminal markets. On June 30, 1922, Morrill assigned employees to field offices at the following 19 stockyards:

Atlanta, GA	Fort Worth, TX	Pittsburgh, PA
Buffalo, NY	Indianapolis, IN	North Portland, OR
Chicago, IL	Kansas City, MO	San Francisco, CA
Cincinnati, OH	Nashville, TN	Sioux City, IA
Denver, CO	National Stock Yards, IL	South St. Paul, MN
Detroit MI	New York, NY	
El Paso, TX	Omaha, NE	

There were 30 supervisors and asst. supervisors stationed at these 19 markets. In 1921, a survey of stockyards found 78 yards in 70 cities in 35 states to be subject to P&S jurisdiction. Sixty-five of these were posted in October and November.[9] The number was relatively small because of the statutory requirement of 20,000 sq. ft. of pen space for a market to be subject to the Act. By the end of the first fiscal year, over 3,400 dealers and 1,000 market agencies had been registered.

[9] Fifty years later in 1971, only 26 of these original posted stockyards remained. They were the stockyards in the following cities: Denver, National Stock Yards (East St. Louis), Peoria, Evansville, Indianapolis, Sioux City, Wichita, Louisville, Detroit, Sioux Falls, South St. Paul, Kansas City, South St. Joseph, Omaha, Cincinnati, Oklahoma City, Portland, Lancaster, Chattanooga, Memphis, Nashville, Ft. Worth, San Antonio, Ogden, Richmond and Spokane.

On August 20, 1921, President Warren G. Harding issued an appropriation estimate to the Speaker of the House for the enforcement of the Packers and Stockyards Act. President Harding estimated the Department of Agriculture would require $240,450 to "carry into effect the provisions of the packers and stockyards act of 1921." Harding noted the Department would be creating and building up a new and independent organization and that the estimate had been carefully considered with that in mind. The President's 1921 budget estimate breaks down as follows:

Employee	**Estimated #**	**Salary Rate per annum**
Administrator in Charge	1	$6500
Assistant Administrator	4	$3600
General Auditor	1	$5000
Assistant Auditors	6	$2500
Examiners	3	$3600
Stenographic Reporters	2	$1800 - $2400
Head Clerk	1	$2500
Clerks	13	$1500 - $1800
Attorneys	3	$3600 - $5000
Division/District Supervisors	36	$2400 - $3000
Assistant Supervisors	10	$2000
Clerks	36	$1200
General Expenses		**Cost**
Stationery/Printing		$5000
Travel		$25,000
Equipment		$9000
Telephone/Telegraph		$10,000
Miscellaneous, incl. rent		$20,000
Contingent Fund		$10,000
Total Salaries and Expenses		$320,600
Partial Year Adjustment		($80,150)
Total Estimated Required for Fiscal Year 1922		**$240,450**

Setting up the original Packers and Stockyards Administration was delayed somewhat by litigation challenging the Act itself. The Packers and Stockyards Act was one of the earliest federal laws to regulate private business. Only the Interstate Commerce Act[10]

[10] 15 U.S.C. 1 (1887)

and the Federal Trade Commission Act[11] are older. Not surprisingly, it wasn't long after passage of the P&S Act that its constitutionality was challenged. *Stafford v. Wallace* (258 U.S. 495) was the first case to test the constitutionality of the P&S Act. It came about when the dealers and market agencies (commission men) operating at the Chicago Union Stockyards brought suit to restrain the Secretary of Agriculture from enforcing the P&S Act because it exceeded the authority under the Commerce clause of the U.S. Constitution.

Chief Justice and former President William Howard Taft delivered the Court's opinion in *Stafford* in May 1922. The case is considered not only a landmark P&S Act case, but also a landmark case with respect to the scope of the Commerce clause.[12]

Chief Justice William Howard Taft (*Library of Congress Prints and Photographs Division Washington, D.C.)*

In *Stafford,* the dealers and market agencies argued that they conducted their business solely within the confines of the Chicago Union Stockyards and not in interstate commerce. The Supreme Court, by a 7-1 margin,[13] upheld the constitutionality of the P&S Act under the "Current of Commerce" theory, stating, "*The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character."* The Court also relied on the legislative history of the P&S Act, citing a Congressional Report that said the [P&S Act] treated "the entire slaughtering and meat packing industry in all its ramifications as part of the 'current of Commerce'…"

[11] 15 U.S.C. 41 (1914)

[12] *Stafford v. Wallace* marked a milestone in the Court's interpretation of the powers granted to Congress under Article I, Section 8 of the U.S. Constitution. Specifically, *Stafford* expanded the "stream of commerce" doctrine introduced by Justice Holmes in *Swift and Co. v. United States* (1905). With *Stafford*, the Court determined that Congress had the further power to curb monopolistic business practices in intrastate industries that belonged to a stream of interstate commerce. As such, the case helped signal the Court's trend in the first half of the twentieth century toward an interpretation of interstate commerce favorable to the powers of the government.

Coming as it did after years during which the Court had often supported the powers of the states and corporations against that of the federal government, *Stafford* marked a growing emphasis on federal authority in commerce. This trend continued in the 1930s under President Franklin D. Roosevelt, in spite of two rulings that struck down his National Industrial Recovery Act (NIRA) and Agricultural Adjustment Act (AAA). In the 1960s, with *Heart of Atlanta Motel v. United States* (1964), the federal government would use control over interstate commerce to enforce civil rights law, by ruling that Congress could use is commerce power to prevent interstate commerce by companies that discriminate on the basis of race.

[13] The seven Justices in the majority were: Louis D. Brandeis, John Hessin Clarke, Oliver Wendell Holmes, Joseph McKenna, Mahlon Pitney, Chief Justice William Howard Taft, and Willis Van Devanter. Justice James Clark McReynolds was the lone dissenter. Justice William Rufus Day did not participate.

Supreme Court of the United States

STAFFORD et al.
v.
WALLACE, Secretary of Agriculture, et al.
BURTON et al.
v.
CLYNE, U. S. Atty.
Nos. 687, 691.

Argued March 20 and 21, 1922.[14]
Decided May 1, 1922.

Appeals from the United States District Court for the Northern District of Illinois.

Separate suits by T. F. Stafford and others against Henry C. Wallace, Secretary of Agriculture, and another, and by J. E. Burton and others against Charles F. Clyne, United States Attorney for the Northern District of Illinois, to restrain the enforcement of orders by the Secretary of Agriculture under the Packers and Stockyards Act of 1921. From orders in each case refusing interlocutory injunctions, complainants appeal. Affirmed.

These cases involve the constitutionality of the Packers and Stockyards Act of 1921, approved August 15, 1921, so far as that act provides for the supervision by federal authority of the business of the commission men and of the live stock dealers in the great stockyards of the country. They are appeals from the orders of the District Court for the Northern District of Illinois refusing to grant interlocutory injunctions as prayed. The bills sought to restrain enforcement of orders of the Secretary of Agriculture in carrying out the act, directed against the appellants in No. 687, as the commission men in the Union Stockyards of Chicago, and against the appellants in No. 691, as dealers in the same yards. The ground upon which the prayers for relief are based is that the Secretary's orders are void, because made under an act invalid as to each class of appellants. The bill in No. 687 makes defendants the Secretary of Agriculture and the United States attorney for the Northern District of Illinois, averring that

[14] Note the speed with which this case reached the Supreme Court. The Packers and Stockyards Act became effective in September 1921. The Secretary of Agriculture issued orders against the appellants, who then took their case to the United States District Court for the Northern District of Illinois seeking an injunction to prevent the Secretary from enforcing the orders. The District Court refused to grant the injunctions and the appellants appealed to the Supreme Court, which heard their case in March 1922.

the latter is charged with the duty of enforcing the severe penalties imposed by the act for failure to comply with orders of the Secretary thereunder. The bill in No. 691 makes the United States attorney the only defendant, with the same averment.

The two bills in substance allege that the Union Stockyards & Transit Company was incorporated by the state of Illinois in 1865, and given authority to acquire, construct, and maintain inclosures, structures, and railway lines for the reception, safe-keeping feeding, watering, and for weighing, delivery, and transfer, of cattle and live stock of every description, and to carry on a public live stock market, with all the necessary appurtenances and facilities; that it is the largest stockyards in the world, and in 1920 handled 15,000,000 head of live stock of all descriptions, including cattle, calves, hogs, and sheep, shipped mainly from outside the state of Illinois; that the live stock are loaded at the point of origin and shipped under a shipping contract which is a straight bill of lading, consigning them to the commission merchants at the yard; that on arrival the live stock are at once driven from the cars by the commission merchant, who is the consignee, to the pens assigned by the stockyards company to such merchant for his use; that they are then in the exclusive possession of the commission merchant, and are watered and fed by the stockyards company at his request; that with the delivery to the commission merchant the transportation is completely ended; that all the live stock consigned to commission merchants are sold by them for a commission or brokerage, and not on their own account; that they are sold at the stockyards, and nowhere else; that the commissions are fixed at an established rate per head; that the commission men remit to the owners and shippers the proceeds of sale, less their commission and the freight and yard charges paid by them; that the live stock are sold (1) to purchasers, who buy the same for slaughter at packing houses, located at the stockyards or adjacent thereto; (2) to purchasers, who buy to ship to packing houses outside the state of Illinois for slaughter; (3) to purchasers, who buy to feed and fatten the same; and (4) to dealers or traders; that about one-third of all the live stock received are sold to the dealers; that not until after the delivery of the live stock to the commission merchants and the transportation has completely ceased, does the business of the dealers begin; that they do not buy or sell on commission, but buy and sell for cash exclusively for their own profit; that the greater part of live stock received by commission men at the yards are in carload or trainload lots, and a substantial part are not graded or conditioned to meet the specific requirements of the buyers; that the dealers, after purchase, put the live stock in pens assigned to them by the stockyards owner and do the sorting and classification; that the dealers buy in open market in competition with each other; that they pay the expense of the custody, care, and feeding and watering the stock while they hold them; that they sell promptly, and have nothing to do with the shipment of the *live stock they sell from the yards to points outside.*

In the bill in No. 691, the appellants aver that they are members of the Chicago Live Stock Exchange and of the National Live Stock Exchange, the members of which are dealers in all the stockyards of the country, numbering 2,000, and that they bring their bill for all of them who may choose to join and take the benefit of the litigation.

The chairman of the Committee of Agriculture, in reporting to the House of Representatives the bill, which became the act here in question (May 18, 1921, 67th Congress, 1st Session, Report No. 77, to accompany H. R. 6320), referred to the testimony printed in the House Committee Hearings of the 66th Congress, 2d Session, Committee on Agriculture, vols. 220-2 and 220-3, as furnishing the contemporaneous history and information of the evils to be remedied upon which the bill was framed.

It appeared from the data before the committee that for more than two decades it had been charged that the five great packing establishments of Swift, Armour, Cudahy, Wilson, and Morris, called the 'Big Five,' were engaged in a conspiracy in violation of the Anti-Trust Law (Comp St. § § 8820-8823, 8827-8830), to control the business of the purchase of the live stock, their preparation for use in meat products, and the distribution and sale thereof in this country and abroad. In 1903 a bill in equity was filed by the United States to enjoin further conduct of this alleged conspiracy, as a violation of the Anti-Trust Law, and an injunction issued. United States v. Swift (C. C.) 122 Fed. 529. The case was taken on appeal to this court, which sustained the injunction. Swift v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. In 1912, these same defendants, or their successors in business, were indicted and tried for such violation of the Anti-Trust Law, and acquitted. See House Committee Hearings before Committee on Agriculture, 1820, vol. 220-2, subject, Meat Packer Legislation, 718. It further appeared that on February 7, 1917, the President directed the Federal Trade Commission to investigate and report the facts relating to this industry and kindred subjects. The Commission reported that the 'Big Five' packing firms, had complete control of the trade from the producer to the consumer, had eliminated competition, and that one of the essential means by which this was made possible was their ownership of a controlling part of the stock in the stockyards companies of the country. The Commission stated its conclusions as follows:

'The big packers' control of these markets is much greater than these statistics indicate. In the first place, they are the largest and in some cases practically the only buyers at these various markets, and as such hold a whip hand over the commission men who act as the intermediaries in the sale of live stock.

'The packers' power is increased by the fact that they control all the facilities through which live stock is sold to themselves. Control of stockyards comprehends control of live stock exchange buildings, where commission men have their offices; control of assignment of pens to commission men; control of banks and cattle loan companies; control of terminal and switching pacilities; control of yardage services and charges; control of weighing facilities; control of the disposition of dead animals and other profitable yard monopolies; and in most cases control of all packing house and other business sites. Packer-owned stockyards give these interests access to records containing confidential shipping information, which is used to the disadvantage of shippers who have attempted to forward their live stock to a second market.'

Summary of Report of the Federal Trade Commission on Meat-Packing Industry, July 3, 1918.

Following the report of the Federal Trade Commission, and before the passage of this act, a bill in equity for injunction was filed in 1920, in the Supreme Court of the District of Columbia, in which, on February 27th of that year, was entered a decree against the same Big Five packers, consented to by them, with the saving clause that it should not be considered as an admission that they had been guilty of violations of law. The decree enjoined the packers from doing many acts in pursuance of a combination to monopolize the purchase and control the price of live stock, and the sale and distribution of meat products and of many by-products in preparation of meats and in unrelated lines, not here relevant, and from continuing to own or control, directly or indirectly, any interest in any public stockyard market company in the United States, or in any stockyard market journal, or in any stockyard terminal railroad or in any public cold storage warehouse. House Committee Hearings, Committee on Agriculture, 1920, vol. 220-2, p. 720, 'Meat Packer Legislation.'

It appears from these committee hearings that the dealers do not buy fat cattle generally, or largely compete with packers in such purchases. They buy either the thin cattle, known as 'stockers and feeders,' which they dispose of to farmers and stock feeders, to be taken to the country for farm use and fattening, or they buy mixed lots, and cull out of them the fat cattle. These they dispose of to packers, either directly or through commission men. The proportion of all the hogs passing through the yards in 1919 handled by these traders, speculators, or scalpers, as they are indifferently called. was 30 per cent. Of all the butcher cattle they handled 20 per cent., of the beef cattle 10 per cent., and of 'the stockers and *feeders' 80 per cent. At Kansas City, this last figure was higher, reaching 95 per cent. Committee Hearings, p. 2140.*

It was conceded that, of all the live stock coming into the Chicago stockyards and going out, only a small percentage, less than 10 per cent., is shipped from or to Illinois.

The complaints of the shippers of live stock against the charges and practices, working to their prejudice in the conduct of the stockyards, the commission men, and the dealers, were: First, suppression of competition in purchases through agreement, by which one packer would buy a carload or trainload of cattle and turn over half of it to the only other packer buying in the local market. Second, 'wiring on.' A shipper would send a carload or trainload of stock to one stockyard. Finding the market unsatisfactory, he would ship them further east. The packers' agents were promptly advised at the second stockyards and, controlling the price there, they made it the same as at the first stockyards, though the shipper had paid the freight, and had to stand the 'shrink' of the cattle from the journey. Third, the charges in the stockyards for hay and other facilities were excessive. Fourth, the duplication of commissions through the collusion of the commission men and the dealers, by which commission men would sell at a lower price to dealers than to outside buyers, and drive the latter to buying from dealers through commission men, forcing two commissions. Fifth, the monopoly conferred by the stockyards owner on a company in which packers were largely interested, of buying at a fixed price of $5 a head all dead cattle for rendering purposes, when they were worth more. Sixth, the frequency with which commission men reported to shippers that live stock had been crippled and had to be sold in that condition at a lower price, arousing suspicion as to the fact and if it was a fact, as to the cause of the crippling. Pages 22, 23, 24; also 466 et seq., 1086; 2125, 2244, et seq. Committee of House Hearings, Committee of Agriculture, vol. 220-2, 66th Congress, 2d Session.

Mr. Chief Justice TAFT, after making the foregoing statement of the case, delivered the opinion of the Court:

Section 316 of the Packers and Stockyards Act of 1921 makes applicable to suits for injunction against the orders of the Secretary of Agriculture, the same procedure, original and appellate, provided in the Act of October 22, 1913 (38 Stat. 208, 219, 220), for suits for injunction against the orders of the Interstate Commerce Commission. The latter act gives a right to a direct appeal to this court from the granting or refusing an interlocutory injunction. Hence the appeals herein are properly prosecuted.

In each bill the averments are sufficient, if the act be invalid, to show equitable grounds for injunction in the severe penalties incurred for failure to comply with the act before opportunity can be given to test its validity.

We have framed the statement of the case, not for the purpose of deciding the issues of fact mooted between the packers and their accusers before the Federal Trade Commission or the Committees of Agriculture in Congress, but only to enable us to consider and discuss the act whose validity is here in question in the light of the environment in which Congress passed it. It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted.

The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business. It constitutes the Secretary of Agriculture a tribunal to hear complaints and make findings thereon, and to order the packers to cease any forbidden practice. An appeal is given to the Circuit Court of Appeals from these findings and orders. They are to be enforced by the District Court by penalty if not appealed from and if disobeyed. Title 3 concerns the stockyards and provides for the supervision and control of the facilities furnished therein in connection with the receipt, purchase, sale on commission basis, or otherwise, of live stock, and its care, shipment, weighing, or handling in interstate commerce. A stockyards is defined to be a place conducted for profit as a public market, with pens in which live stock are received and kept for sale or shipment in interstate commerce. Yards with a superficial area less than 20,000 square feet are not within the act. Stockyard owners, commission men, and dealers are recognized and defined, and the two latter are required to register. The act requires that all rates and charges for services and facilities in the stockyards and all practices in connection with the live stock passing through the yards shall be just, reasonable, nondiscriminatory, and nondeceptive, and that a schedule of such charges shall be kept open for public inspection, and only be changed after 10 days' notice to the Secretary of Agriculture, who is made a tribunal to inquire as to the justice, reasonableness, and nondiscriminatory or nondeceptive character of every charge and practice, and to order that it cease, if found to offend, with the same provisions for appeal and enforcement in court as in the case of offending packers. The Secretary is given power to make rules and regulations to carry out the provisions, to fix rates, or a minimum or maximum thereof, and to prescribe how every packer, stockyard owner, commission man, and dealer shall keep accounts.

The bills aver that the Secretary has given the notice which requires appellants to register, and has announced proposed rules and regulations, prescribing the form of rate schedules, the required reports, including daily accounts of receipts, sales, and shipments, forbidding misleading reports to depress or enhance prices, prescribing proper feed and care of live stock, and forbidding a commission man to sell live stock to another in whose business he is interested, without disclosing such interest to his principal.

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 the live stock through the stockyards, all made possible by 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 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 the 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 stockyards 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, and in the unreasonableness of the charges for services rendered.

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. ***** Nor is there any doubt that in the receipt of live stock by rail and in their delivery by rail the stockyards are an interstate commerce agency. The only question here is whether the business done in the stockyards, between the receipt of the live stock in the yards and the shipment of them therefrom, is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this court and had great consideration in Swift v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. The judgment in that case gives a clear and comprehensive exposition, which leaves to us in this case little but the obvious application of the principles there declared.

The Swift Case presented to this court the sufficiency of a bill in equity brought against substantially the same packing firms as those against whom this legislation is chiefly directed, charging them as a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days, in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they would sell, and to that end to restrict shipments of meat when necessary, to establish a uniform credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads, to the exclusion of competitors, and all this in a conspiracy and single connected scheme to monopolize the supply and distribution of fresh meats throughout the United States. In holding the bill good, this court said:

‘The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. * * * It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt.'

Again:

‘Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. * * * Here the subjectmatter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect of such sales.'

Again, in answer to the objection that what was charged did not constitute a case involving commerce among the states, the court said:

‘Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. * * *'

The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are ever flowing, are in their very essence the commerce among the states and with foreign nations, which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

The principles of the Swift Case have become a fixed rule of this court in the construction and application of the commerce clause. It latest expression on the subject is found in Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458, decided at this term, February 27, 1922. In that case it was held, on the authority of the Swift Case, that the delivery and sale of wheat by farmers to local grain elevators in North Dakota, to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped, and the price was fixed by that in the Minneapolis market, less profit and freight, constituted a course of business, and determined the interstate character of the transaction. Accordingly a state statute, which sought to regulate the price and profit of such sales, and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause.

It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift Case. The recital in section 2, par. b, of title 1 of the act, quoted in the margin, leaves no doubt of this. The act deals with the same current of business, and the same practical conception of interstate commerce.

Of course, what we are considering here is not a bill in equity or an indictment charging conspiracy to obstruct interstate commerce, but a law. The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the Swift Case, certainly it may provide regulation to prevent their formation. The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

In United States v. Ferger et al., 250 U. S. 199, 39 Sup. Ct. 445, 63 L. Ed.

936, the validity of an act of Congress punishing forgery and utterance of bills of lading for fictitious shipments in interstate commerce was in question. It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this court, speaking through Chief Justice White, answered the objection by saying:
'But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained, it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce, and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.'

The Transportation Act of 1920 (41 Stat. 456) presents a close analogy to this case. It authorizes supervision by the Interstate Commerce Commission of intrastate commerce, where it is so carried on as to work undue, unreasonable advantage or preference in favor of persons or localities in intrastate commerce, as against those in interstate commerce, or any undue, unjust, or unreasonable discrimination against interstate commerce itself. The principle of these cases is thus clearly stated by the court in Minnesota Rate Cases, 230 U. S. 399, 33 Sup. Ct. 739, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18:

'The authority of Congress extends to every part of interstate commerce, and to every instrumentality and agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.'

In section 311 of the act, Congress gives to the Secretary of Agriculture in respect to intrastate transactions that affect prejudicially interstate commerce under his protection, the same powers given to the Interstate Commerce Commission in respect to intrastate commerce which affects prejudicially interstate railroad commerce in paragraph 4, section 13, as amended in section 416 of the Transportation Act of 1920. This was the paragraph and section which were enforced in Railroad Commission v. Chicago, Burlington & Quincy Railroad Co., supra, and the validity of which was upheld by this Court.

Counsel for appellants cite cases to show that transactions like those of the commission men or dealers here are not interstate commerce or within the power of Congress to regulate. The chief of these are Hopkins v. United States, 171 U. S. 604, 19 Sup. Ct. 40, 43 L. Ed. 290, and Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. These cases were considered in the Swift Case and disposed of by the court as follows (196 U. S. 397, 25 Sup. Ct. 280, 49 L. Ed. 518):

‘So, again, the line is distinct between this case and Hopkins v. United States, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnish certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In Anderson v. United States, 171 U. S. 604, the defendants were buyers and sellers at the stockyards, but their agreement was merely not to employ brokers, or to recognize yard traders, who were not members of their association. Any yard trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the states, and, being formed with a different intent, was not within the act. The present case is more like Montague & Co. v. Lowry, 193 U. S. 38.'

It is clear from this that if the bill in the Swift Case had averred that control of the stockyards and the commission men was one of the means used by the packers to make arbitrary prices in their plan of monopolizing the interstate commerce, the acts of the stockyards owners and commission men would have been regarded as directly affecting interstate commerce and within the Anti-Trust Act. Congress has found as an evil to be apprehended and to be prevented by the act here in question, in the use and control of stockyards and the commission men to promote a packers' monopoly of interstate commerce. The act finds and imports this injurious direct effect of such agencies upon interstate commerce, just as the intent of the conspiracy charged in the indictment in the Swift Case tied together the parts of the scheme there attacked and imported their direct effect upon interstate commerce.

Again, if the result of the combination of commission men in the Hopkins

Case had been to impose exorbitant charges on the passage of the live stock through the stockyards from one state to another, the case would have been different, as the court suggests. The effect on interstate commerce in such a case would have been direct. Similarly, in the Anderson Case, if the combination of dealers had been directed to collusion with the commission men to secure sales at unduly low prices to the dealers and to double commissions, or to practice any other fraud or oppression calculated to decrease the price received by the shipper and increase the price to the purchaser in the passage of live stock through the stockyards in interstate commerce, this would have been a direct burden on such commerce and within the Anti-Trust Act.

The other cases relied on by appellants are less relevant to this discussion than the Anderson and Hopkins Cases. Some of them are tax cases. As to them it is well to bear in mind the words of the Court in the Swift Case, 196 U. S. 400, 25 Sup. Ct. 281, 49 L. Ed. 518:

‘But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress * * * where such interference is deemed necessary for the protection of commerce among the states.'

Thus take the case of Bacon v. Illinois, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615. Bacon had purchased grain in transit from a western state to the east. He exercised the power under his contract to stop the grain in Illinois and put it in a grain elevator there. He intended to send it on to some other state for sale. He might have changed his mind. He did, however, after a time, send it out of the state. The grain was taxed while it was in Illinois. The question was whether it was immune from taxation because in transit in interstate commerce. It was held that property in a state which its owner intends to transport to some other state, but which is not in actual transit and in respect to the disposition of which he may change his mind is not in interstate commerce just because of the intention of its owner, and may, therefore, be taxed by the state where it is. The court brought out the distinction between such cases and this in the remark:

‘The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'

Moreover, it will be noted that even in tax cases where the tax is directed against a commodity in an actual flowing and constant stream out of a state from which the owner may withdraw part of it for use or sale in the state before it reaches the state border, we have held that a tax on the flow is a burden on interstate commerce which the state may not impose because such flow in interstate commerce is an established course of business. In [United Fuel Gas Co. v. Hallanan, December 12, 1921], the court summed up as follows:

‘In short the great body of the gas starts for points outside the state and goes to them. That the necessities of business require a much smaller amount destined to points within the state to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the state and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the states and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line.

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Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325, relied on by counsel for appellants and said to be exactly applicable to the case at bar, was an effort by the Pennsylvania Railroad Company to secure immunity from city regulation for a cab system which it ran in New York to and from its station to points in New York City, on the ground that it was part of interstate commerce. This court held that, because it was independent of the railroad transportation, and not included in the contract of railroad carriage, it did not come within interstate commerce. The case was distinguished in the Swift Case, 196 U. S. 401, 25 Sup. Ct. 281, 49 L. Ed. 518, from cartage for delivery of the goods when part of the contemplated transit. There is nothing in the case to indicate that if such an agency could be and were used in a conspiracy unduly and constantly to monopolize interstate passenger traffic, it might not be brought within federal restraint.

As already noted, the word ‘commerce,’ when used in the act, is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the act clearly within Congressional power and valid.

Other objections are made to the act and its provisions as violative of other limitations of the Constitution, but the only one seriously pressed was that based on the commerce clause, and we do not deem it necessary to discuss the others.

The orders of the District Court refusing the interlocutory injunctions are

Affirmed.

In his 1922 annual report to the President, Secretary Wallace said, "[i]n the enforcement of this act the dominating thought is to bring about harmony and cooperation and remove cause for antagonisms, misunderstandings, and irritations, to the end that confidence in the manner in which live stock is marketed shall be established." And, in 1924, the Secretary wrote, "[t]hrough administration of the packers and stockyards act, passed on August 15, 1921, there has developed in the selling and handling of livestock, a noticeably greater feeling of security and freedom of action against imposition and unfair practices, which alone has done much to accomplish the purposes of the law."

In 1924, the Secretary reported the policy of the Administration to resolve violations of the Act informally[15] had resulted in "the satisfactory disposition of many hundreds of matters without delay and expense resulting when formal action is required." Formal action had been initiated in 112 cases, with 65 closed by the end of 1924 and 47 still pending. An example of a matter described by the Secretary as one of the most important was the discontinuance of the use of short-weight butter cartons. These cartons were designed to hold one pound but were manipulated to only hold 15 ounces.

The first amendment to the Act occurred in 1926 when section 304 was expanded to address state agencies who may conduct weighing of livestock at stockyards. In such instances, the state department or agency may register as a market agency for weighing livestock and is subject to having the registration revoked upon failure to comply with the Act or an order of the Secretary.

Agency Heads of the 1920's

Chester Morrill (September 16, 1921 – March 12, 1925), the first man to head a Packers and Stockyards organization at USDA, was born August 22, 1885 on a farm in Shelby County, Missouri and moved with his parents to Washington, DC, shortly thereafter in 1889. Morrill's father had raised hogs in Missouri until they were wiped out by cholera. He then went to work for a railroad contractor in Kansas City, and with them, moved to Washington to help build the transit system there.

Starting at age 14, Morrill worked as secretary to the auditor for the Southern Railway. At 19, still with the Southern Railway, Morrill was court reporter and secretary to the

[15] In Chester Morrill's 1952 interviews, he said the following about Secretary Wallace's policy: "In the very inception of the Packers and Stockyards Administration, Secretary Wallace personally laid down the view that results were what we were interested in accomplishing, and that if we could bring about promptly the elimination of an undesirable practice or the institution of a desirable practice by informal methods, we would be working in the public interest. He stated that formal procedures should be resorted to only when it was apparent that the interested parties were unable or unwilling to agree with the administration without formal proceedings."

general counsel. He worked days and went to law school at night, graduating from Georgetown University Law School in 1909. After graduation, Morrill went to Knoxville, Tennessee where he served as local counsel for the Southern Railway. In 1914, Morrill returned to Washington and joined the Department of Agriculture's Office of the Solicitor. His first assignment was writing regulations for the recently passed U.S. Cotton Futures Act. He became an expert in grain marketing while working on the U.S. Grain Standards Act, which led to him later writing the Grain Futures Trading Act.

When President Harding was set to sign both the Grain Futures Trading Act and the Packers and Stockyards Act, Secretary Wallace asked Morrill to administer both and asked him to prepare the appropriation estimate included previously at page 15. Morrill served as head of the Packers and Stockyards Administration until March 12, 1925, when he moved to the Treasury Department and became assistant general counsel, working with the War Finance Corporation and the Federal Farm Loan Bureau. From 1931 to 1945, Morrill served as secretary of the Federal Reserve Board. From 1945 until his retirement in 1950, he was a special advisor to the Board of Governors of the Federal Reserve System. After retiring, Morrill served for a year as financial adviser to the Nationalist Chinese government on Taiwan.

Morrill died April 19, 1978, of an apparent stroke at age 92. He had been living in Bethesda, Maryland until moving to the Wisconsin Avenue Nursing Home in Washington, DC a few weeks before his death.

John T. Caine, III (May 15, 1925 – December 31, 1927) was born June 4, 1882 in what

is now Logan, Utah. He was raised on a farm where he gained considerable experience working with livestock. He graduated from Utah State University in 1903 with a degree in animal husbandry and from Iowa State University in 1905 with a master's degree, also in animal husbandry. President Calvin Coolidge appointed Caine chief of the Packers and Stockyards Administration in 1925. Caine is greatly remembered for his work with the extension service where he "traveled by railroads to demonstrate registered livestock. His goal was to give cattlemen knowledge and how to improve their livestock," according to his great-granddaughter, Sandy Opsahl.[16] Caine moved to Denver in 1943 and was manager of the National Western Stock Show. He oversaw the construction of the Denver Coliseum, dedicated in 1952. The Rocky Mountain News wrote about Caine in 1952, calling him "the world's greatest judge of livestock." Caine died in Denver in 1955.

[16] From the Rocky Mountain News, January 19, 2002.

Dr. Arthur W. Miller (January 1, 1928 – November 11, 1938) was born in approximately 1876 and spent his early years on a ranch in central Kansas. On May 16, 1901, Dr. Miller began working at USDA with the Bureau of Animal Industry (BAI). His early years with the BAI, he worked on many issues of animal disease control and eradication, including foot-and-mouth disease eradication. During the mid-1910's, Dr. Miller was in charge of the quarantine at Chicago's Union Stock Yards. Beginning May 1, 1917 and for ten years leading up to his appointment as head of Packers and Stockyards, Dr. Miller was chief of the field inspection division of the BAI. After heading the Packers and Stockyards Division as assistant chief of the BAI, Dr. Miller served as BAI chief until his retirement in October of 1945. Miller died in August 1955 at the age of 79 after a lengthy illness.

Dr. Miller

Chapter 3
The 1930's

Fourteen years after passage of the Packers and Stockyards Act, Congress approved the first major amendments to the Act. In August of 1935, Title V (later repealed) was added. Title V addressed Live Poultry Dealers and Handlers. The purpose of the new Title was to bring the shipment of poultry within the jurisdiction of the Secretary of Agriculture. The amendments declared generally that the handling of live poultry in large centers of population was accompanied by various unfair, deceptive and fraudulent practices, with resultant loss to producers and exorbitant cost to consumers. Congress declared these practices and devices an undue restraint and unjust burden on interstate commerce. Persons involved in the receiving, buying, selling on a commission basis, marketing, feeding, watering, holding, delivering, shipping, weighing, unloading, loading, trucking or handling live poultry were required to be licensed by the Secretary. Violations were subject to criminal penalties, including fines of up to $500 and imprisonment for up to six months.

Title V also inserted the words "or any live poultry dealer or handler" after the word "packer" in section 202 of the Act, and also made sections 401, 402, 403 and 404 applicable to live poultry dealers and handlers.

USDA Administration Building in the forefront. Note the completed South Building behind. Washington, DC, 1934 (*Source: National Agricultural Library*)

In 1930, the U.S. Supreme Court heard the case of *Tagg Bros. & Moorehead v. United States*, a case that challenged the P&S Act as violating the Due Process Clause of the Constitution (Fifth Amendment). The Court upheld the Act's constitutionality.

In another case, *Farmers' Livestock Commission Co. v. United States* (1931), the authority to suspend a registrant was challenged as unconstitutional on the ground that a suspension without a jury trial conflicted with the Sixth and Seventh Amendments to the Constitution. This argument was rejected as was the challenge that the phrase "unfair, unjustly discriminatory, or deceptive practice or device" was unconstitutional because of vagueness.

Agency Heads of the 1930's

Dr. A. W. Miller (January 1, 1928 – November 11, 1938)
See full bio on page 33.

Dr. F. W. Miller (November 11, 1938 – November 1, 1945). Dr. Frank W. Miller was born in Iowa, August 12, 1886. He began working at the USDA Bureau of Animal Industry on November 23, 1908, and was assigned at various times to St. Joseph, Missouri; Chicago, Illinois; and Davenport, Iowa offices. Miller has been described as presenting "a neat, attractive, and businesslike appearance." He was "very exacting in the performance of his duties but absolutely square and well informed in stockyard matters." Miller was highly regarded among those in the livestock industry, and on November 1, 1921, was transferred to the Packers and Stockyards Administration as one of its original employees. Dr. Miller worked for P&S at St. Paul, Minnesota and Washington, DC before being assigned as Division Supervisor for the Central Division, headquartered in Kansas City, Missouri. Dr. Miller is notable for having worked for P&S under the first seven agency designations from 1921 to 1945, including six designations during his tenure as the agency head (*see page 9*).

Chapter 4
The 1940's

Beginning in 1924 and continuing through 1942, the Annual Department of Agriculture Appropriations Acts contained authority for the Secretary to require bonds from market agencies and dealers and also provided authority to suspend the registrations of market agencies and dealers. These provisions were made permanent in 1943 with the enactment of the Department of Agriculture Appropriation Act of 1944, on July 12, 1943 by adding the word "Hereafter"[17] at the beginning of the provision. The permanency of the provision was challenged in 1953 on the basis that the appropriation was not a permanent one and that the provision only authorized the suspension of a registrant for insolvency or for a violation of a provision of the Act relating to solvency or financial responsibility. The United States Court of Appeals for the Seventh Circuit held that a provision in an appropriation act may be made permanent by the insertion of the word "hereafter" at the beginning of the provision and that suspension authority encompasses the violation of any provision of the Act.[18]

APPENDIX 4

An Act of Congress approved June 5, 1924, (43 Stat. L. 460) entitled "An Act Making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1925, and for other purposes" contains the following provision:

ENFORCEMENT OF PACKERS AND STOCKYARDS ACT

To enable the Secretary of Agriculture to carry into effect the provisions of the Packers and Stockyards Act, approved August 15, 1921, $452,540: *Provided*, That the Secretary of Agriculture may require reasonable bonds from every market agency and dealer under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing the Secretary finds any registrant is insolvent or has violated any provision of said Act, he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary of Agriculture or a court of competent jurisdiction.

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[17] The current version reads "On and after," however no reference was found to explain the difference in wording.
[18] Cella v. United States, 208 F.2d 783 (7th Cir. 1953), *cert. denied* 347 U.S. 1016 (1954).

The purpose of a suspension of a registrant for a violation of the Act is to serve as an effective deterrent to future violations not only by the registrant but also by other potential violations. The statutory provision authorizes the Secretary to suspend the "registrant," not the "registration." Therefore, if a person is registered as a dealer and a market agency (2 registrations), a suspension order is applicable to the registrant in both capacities.

A 1942 amendment gave the Secretary the power to authorize the charging of reasonable and nondiscriminatory fees for brand inspection.

Agency Heads of the 1940's

Dr. F. W. Miller (November 11, 1938 – November 1, 1945)
See full bio on page 35.

M. J. Cook (January 1, 1945 – March 6, 1955)

Chapter 5
The 1950's

The 1950's were a turbulent time in P&S history. Congress was very critical of the Department's administration of the Act. Like the debates prior to the Act's enactment in 1921, Congress again considered whether another federal agency might be better suited to administer the Act. Legislation was introduced in 1957 to transfer all jurisdiction over meat packers to the FTC. Congress admonished the Department to vigorously enforce its supervision of meat packers. Section 407 was added, which ordered the Secretary to maintain within the Department a separate unit to enforce the provisions of the Act applicable to the meat packing industry.

While the legislation to transfer all jurisdiction over meat packers to the FTC was not enacted, Congress did make amendments in 1958 to clearly delineate the jurisdiction of the Secretary and the Federal Trade Commission over meat packers. Section 202 was amended to limit the jurisdiction of the Secretary to activities relating to livestock, meats, meat food products, livestock products in unmanufactured form, poultry and poultry products. Jurisdiction over activities involving all other commodities was vested in the Federal Trade Commission. Section 406 was also amended which placed primary jurisdiction over and responsibility for all packer activities relating to meat and meat food products in the Secretary except that primary jurisdiction over and responsibility for the retail sales of these goods was placed in the FTC. The Secretary retains jurisdiction over retail sales of meat "only when he determines, in any investigation of, or any proceeding for the prevention of an alleged violation of this chapter, that such action is necessary to avoid impairment of his power or jurisdiction over acts or transactions involving…meat, meat food products,…other than retail sales thereof." The term "retail sales" is not defined in the Act. The legislative history shows Congress' intent for the term to mean, "sales by a retailer to an individual consumer – not bulk sales to institutions and bulk users of products as are normally made by wholesale dealers."

A major amendment to the P&S Act was also made in 1958, when Congress expanded USDA's jurisdiction to all auction markets operating in commerce. Before 1958, only auction markets with an area of 20,000 square feet or more were covered. In addition, jurisdiction over market agencies and dealers was expanded to include all of their livestock activities in commerce, including those away from stockyards. The original definitions of the terms "market agency" and "dealer" limited their coverage to persons operating "at a stockyard." This amendment substantially increased jurisdiction over livestock marketing, but did not include farmers and ranchers. Congress specifically stated that the amendments brought under the Act's jurisdiction all livestock marketing activities which are a part of interstate commerce and noted that none of the provisions of the Act apply to farmers or ranchers who, in the ordinary course of business, sell their livestock or purchase livestock for their own farming or ranching operations.

Agency Heads of the 1950's

M. J. Cook (January 1, 1945 – March 6, 1955)

Lee D. Sinclair (March 6, 1955 – April 20, 1958)

Donald L. Bowman (April 20, 1958 – July 10, 1960)

Chapter 6
The 1960's

Beginning in 1960, the Packers and Stockyards Act was administered through the Packers and Stockyards Division, Consumer and Marketing Service. On April 3, 1967, the Secretary announced plans to establish a Packers and Stockyards Administration that would report to him through the Assistant Secretary for Marketing and Consumer Services. During a 30-day comment period, 40+ responses raised no objections to the proposed action.

On May 8, 1967, Secretary Orville L. Freeman established the new agency.[19] Mr. Donald A. Campbell was designated Administrator. As Administrator, Campbell reported to the Assistant Secretary for Marketing and Consumer Services.

Bowman v. USDA (1966) involved the Packers and Stockyards Administration's interpretation of the word "insolvent." In the initial administrative case, Bowman was ordered to cease and desist from operating as a market agency while his current liabilities exceeded his current assets. Normally, in an accounting sense, "insolvent" requires a consideration of fixed assets as well as current.

The USDA had used the test of current assets vs. current liabilities for many years. *Bowman* examined whether this was an allowable test. Following resolution of this case, USDA issued 9 CFR 203.10, a Statement of General Policy, to give public notice of its interpretation of the term "insolvent."[20]

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[19] Creation of the Packers and Stockyards Administration was done, if not entirely at least in part, in response to repeated requests from Congress to establish such a separate unit. On February 19, 1964, Chairman Whitten addressed Secretary Freeman as follows: "Now, would you please give us a report as to why the Department continues to drag its feet in carrying out this request of the Congress to set this up as a separate unit in the Department, so that it might have some freedom of action and some freedom of access to those to which it deals?" and "I would like to urge again that you give some real thought, and I think maybe this committee may give some real thought, to trying to set this Packers and Stockyards Act up in a separate section in the Department, so that people can get to it and won't have to go through so many levels of supervision."

[20] 9 CFR 203.10 Statement with respect to insolvency; definition of current assets and current liabilities.

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 et seq.), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. United States Department of Agriculture*, 363 F. 2d 81 (5th Cir. 1966).

United States Court of Appeals, Fifth Circuit.

W. I. BOWMAN, Petitioner,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE and Orville Freeman, as Secretary of Agriculture, and United States of America, Respondents.
No. 22001.

July 1, 1966.

Petition for review of an order of the Secretary of Agriculture. The Court of Appeals, Griffin B. Bell, Circuit Judge, held that stockyard owner, market agency and dealer had violated solvency requirements of Packers and Stockyards Act.

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) *Current assets* means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) *Current liabilities* means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) Cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accrued interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) land and other natural resources; and (6) depreciable assets.

(e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance sheet; (5) accruals such as taxes, wages, social security, unemployment compensation, etc., due and payable as of the date of the balance sheet; and (6) all other liabilities whose regular and ordinary liquidation is expected to occur within one year.

Mr. Bowman seeks review of the decision of the Judicial Officer acting for the Secretary of Agriculture entered in a proceeding brought against him under the Packers and Stockyards Act. The complaint involved the operations of Mr. Bowman, doing business as the Capital Stock Yards in Montgomery, Alabama, the Camden Stock Yards at Camden, Alabama, and the Tri-County Stock Yards at Hurtsboro, Alabama. He was a 'stockyard owner', 'market agency', and a 'dealer' under the Packers and Stockyards Act.

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The complaint charged Mr. Bowman with the violations which are the subject matter of this petition for review brought under 5 U.S.C.A. § 1031 et seq., and also other charges which were eliminated on the hearing. It was duly answered and the case was then tried before a Hearing Examiner with a result adverse to Mr. Bowman. Exceptions were filed and oral argument was then had before the Judicial Officer on the record made before the Hearing Examiner. The Judicial Officer entered findings of fact, conclusions of law and an order against Mr. Bowman.

In sum, the Judicial Officer found and concluded that Mr. Bowman, in his operations at the three stockyards, had violated the solvency requirements of 7 U.S.C.A. § 204, and had engaged in business practices as a market agency in buying and selling livestock on a commission basis which were violative of §§ 304, 306(f), 307, 312(a), and 401 of the Packers and Stockyards Act as well as certain regulations promulgated pursuant to the Act.

The Judicial Officer ordered Mr. Bowman to cease and desist from operating as a market agency while his current liabilities exceed his current assets; using shipper's proceeds for his own purposes, including the extension of credit to customers; issuing accounts of sale to consignors which failed to show the full, true and correct name of the purchaser; issuing scale tickets which failed to show the date of the weighing, name or initials of the weigher, and the true and correct name of the purchaser of the livestock; financing the operations of an independent and separately registered dealer; and failing to charge and collect the charges specified in his rate schedule on file with the Secretary in connection with his purchase operations. The order of the Judicial Officer also prescribed the manner in which Mr. Bowman is to maintain custodial bank accounts. He was suspended as a registrant under the Act for a period of thirty days because of his handling of custodial accounts, and thereafter until he demonstrates that he is solvent. His operation of a stockyard in Demopolis, Alabama was excepted from the suspension, but a new venture, commenced subsequent to the complaint under the name of Bowman Order Buyers, was included.

The petition for review and the supporting briefs assert, in rather a scattergun fashion, alleged errors based on an insufficiency of evidence, vagueness of statutes and regulations, regulations promulgated without statutory authority, and an absence of due process because of the purported diminution of the ability of the Hearing Examiner and the Judicial Officer to act fairly in view of a press release by the Secretary disclosing that the complaint in question had been filed. We affirm.

I.

We take up first the question of insolvency. The evidence established a prima facie case that petitioner was insolvent in his operations on the dates in question within the meaning of 7 U.S.C.A. § 204, as the Secretary defines insolvency, which is that his current liabilities exceeded his current assets. The Secretary deems this to be the test of insolvency under the statute rather than measuring total assets against total liabilities.

The statute, § 204, contains no definition of solvency. The Secretary has used the test of current assets as against current liabilities for many years. And courts generally give great weight to the construction consistently given to a statute by the Executive Department charged with its administration.

The question posed is whether the test for insolvency used by the Secretary is an allowable one. The Packers and Stock Yard Act is remedial legislation, and it should be construed liberally so as to effectuate the purpose of Congress. One of the purposes of the Act was to insure the proper handling of shipper's funds and their proper transmission to the shipper. This would include prompt payment. Failure to pay would be a proscribed deceptive practice under §213(a), supra. And the Act is designed to '* * * prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required.' Daniels v. United States, 7 Cir., 1957, 242 F.2d 39, 42.

Having in mind the remedial purposes of the Act, we hold that the test used for determining solvency or insolvency under the circumstances here was reasonable. A financial status where current assets exceed current liabilities would be the sine qua non of prompt payment. We also hold that the evidence supports the finding of insolvency.

The bone of contention between the parties on the insolvency question represented a difference of opinion as to the appropriate classification of certain assets and liabilities. The auditor for the Secretary took the position that certain brood cattle, stocks and bonds, the cash value of life insurance, a mailing permit deposit, and insurance claims should not be classified as current assets and that certain notes and interest payable should be classified as current liabilities. Under such a classification, current liabilities would exceed current assets. We do not believe the position taken by the auditor was improper in this respect. The assets in question were not held with the expectation of immediate conversion.

In addition, Mr. Bowman strenuously urges that many of his valuable assets were ignored, It may well be that he is not insolvent, and that he does have many valuable assets over and above those considered in this proceeding but the burden was on him to come forward after the Secretary made out a prima facie case. The knowledge as to additional assets was peculiarly his.

We may add that the Judicial Officer recognized that Mr. Bowman might have been able to show solvency at the time of his decision. He noted that subsequent to the proceeding before the Hearing Examiner, he had sold his interest in the Capital Stock Yards and the Camden Stockyards, a large note had been paid, and some short term obligations had been changed to long term obligations. He stated however, that Mr. Bowman, although afforded the opportunity to do so, had not attempted to demonstrate his present solvency. The Judicial Officer went on to point out that upon a showing of solvency the order would be modified accordingly.

II.

With respect to the other business practices which were held to violate the Act, the custodial account departures are the most serious. These departures were the basis for the sixty days suspension under § 204. We begin with the proposition that the custodial account was to contain funds which Mr. Bowman received from the sale of livestock which had been consigned to the stockyards for sale on a commission basis. Three such accounts were maintained. These were fiduciary accounts.

Mr. Bowman was charged with a similar violation in 1951. At that time he agreed and stipulated that he would maintain a custodial account in which he would deposit proceeds from the sale of livestock on a commission basis, and would draw on such custodial account only to pay lawful marketing charges and shippers of livestock. Not with-standing this stipulation, it was later found that he had again used shipper proceeds for purposes of his own, and for purposes other than the payment of lawful marketing charges and the remittance of net proceeds to shippers. In re W. I. Bowman d/b/a Capital Stock Yards, 1956, 15 Agr.Dec. 828.

He was ordered then to maintain custodial accounts separate from his own accounts. The evidence is abundant that he has not done so. He used custodial account funds in financing the purchase of cattle by Luther Brackeen, and also in purchasing cattle for himself. He also used custodial account funds to extent credit to persons who purchased livestock from him. His answer is that his own funds were in these custodial accounts and that no one suffered a loss. But these were trust funds. United States v. Donahue Bros., Inc., supra. They were to be kept separate from his own, and it was a part of his duty in performing stockyard services to properly handle and use shipper proceeds. Daniels v. United States, supra. Moreover, he had stipulated that he would not so use the custodial account funds, and he was also under an order not to do so. The findings and conclusions of the Judicial Officer concerning the custodial accounts and Mr. Bowman's conduct with respect thereto, and the order based thereon are fully warranted in fact and in law, and are entitled to stand.

III.

We have carefully considered the other errors asserted. The evidence is sufficient to show that certain persons were not charged the correct and prescribed commissions for stockyards services, relevant facts concerning the sale of consignor's livestock were not reported to the consignors in every instance, and that some of the records which Mr. Bowman was required to maintain in his stockyard operations were incorrect and incomplete. It would serve no useful purpose to set out these deficiencies in detail.

The petition for review is denied in all respects. The evidence is sufficient in every instance. The standard of solvency used by the Secretary was proper, and we find no shortcoming in either the statutes or regulations which are the subject matter of this controversy. Lastly, the contention that the press release in some manner denied petitioner due process of law in that it prevented the Hearing Examiner and the Judicial Officer from acting fairly in the premises is frivolous.

Denied.

Unfair, Unjustly Discriminatory, or Deceptive Practices or Devices

The words “unfair, unjustly discriminatory, or deceptive practice or device” are used in sections 202(a) and 312(a) of the P&S Act, but are not defined. Courts have held that the meaning of these words must be determined by the facts of each case within the purposes of the Act. The legislative history tells us that omission of a definition was intentional. During the debates leading to passage of the P&S Act, one Congressman said, “Industry is progressive…and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of industry….We have chosen…to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes … in industry. … For the most part the bill does not deal with offenses essentially criminal in character. It deals with offenses against good morals in business…"[21]

Several cases illustrating unfair practices are included in this publication. These cases illustrate various activities held to be unfair practices, or determined not to be unfair practices. In the first, *Swift & Co. vs. United States* (1968), packers committed an unfair practice by ordering their buyers in a particular region not to compete against a particular dealer, but instead purchase lambs from that dealer instead of from producers (failure to compete). *Swift was* an appeal to the Seventh Circuit seeking to set aside an order of the Secretary. In this case, Swift had salaried buyers in a certain market area, the Western Slope lamb marketing area, and yet, purchased over 80% of its lamb needs from a single dealer. The court found Swift violated the Act, by failing to compete with the dealer. The court, in support of the Judicial Officer's opinion, said Swift would hardly choose such an expensive and indirect way of purchasing their lambs except for the depressed prices to producers flowing from their lack of competition with the dealer. Citing *Stafford v. Wallace*, the court said such buying practices were among those outlawed by the Packers and Stockyards Act.

Also in 1968, in *Armour and Company* (See page 52), the Seventh Circuit Court of Appeals found a packer's promotion offering a 50-cent coupon was not an unfair practice where the packer continued to sell to retailers at regular prices. There was no evidence that the packer intended to reduce local competition or that competition was injured by the campaign.

Two other cases involving unfair practices are included later in this publication at page 79, *Central Coast Meats vs. USDA*, a 1976 case from the Ninth Circuit, and at page 86, *De Jong Packing Company vs. United States*, a 1980 case also from the Ninth Circuit.

United States Court of Appeals, Seventh Circuit.

SWIFT & COMPANY, Petitioner,
v.
UNITED STATES of America and Orville Freeman, Secretary of Agriculture, Respondents.
AMERICAN STORES COMPANY, now Known as Acme Markets, Inc., Petitioner,
v.
UNITED STATES of America and Orville Freeman, Secretary of Agriculture, Respondents.
Nos. 15787, 15790.

April 1, 1968.

[21] 61 Cong. Rec. 1887, 1888.

Proceeding on petition to set aside and modify orders of Secretary of Agriculture. The cases were consolidated for hearing on appeal. The Court of Appeals, Cummings, Circuit Judge, held, inter alia, that evidence supported finding that meat packers had violated Packers and Stockyards Act provision, prohibiting packers from engaging in or using any unfair practice in commerce, and Department of Agriculture regulation requiring each packer engaged in purchasing livestock in person or through employed buyers to conduct buying operations in competition with and independently of other packers and dealers similarly engaged, and that the statutory provision and regulation thereunder prohibited meat packers' practice of refraining from bidding against registered dealer for producers' Western Slope fat lambs and then procuring from that dealer more than 80% Of Western Slope fat lambs purchased by packers.

Order affirmed; motions to strike portions of government's appendix denied; petitions dismissed.

In these two cases, Swift & Company and American Stores Company (now Acme Markets, Inc.) have petitioned to obtain review of a cease and desist order of the Judicial Officer of the United States Department of Agriculture representing the Secretary of Agriculture. The order was issued in an administrative proceeding under the Packers and Stockyards Act. Both petitioners are concededly packers engaged in interstate commerce and within the purview of that Act. The Judicial Officer found that during 1958-1960 they engaged in an unlawful business practice, prohibited by Section 202(a) of the Act and Section 201.70 of the Regulations, by having qualified buyers in the Western Slope lamb marketing area near Craig and Montrose, Colorado, but refraining from bidding on fat lambs against that area's principal dealer, Harry Heath & Son, and purchasing them in substantial quantities from that dealer-competitor instead of from the producers.

In the Swift case, the Judicial Officer also concluded that Swift had an agreement with Perry Holley Company, a competitor and registered dealer, as to the highest prices to be paid to lamb producers in the Craig, Colorado, marketing area during the 1959 marketing season, in contravention of Section 202(f) of the Packers and Stockyards Act.

At the hearings conducted by a Hearing Examiner appointed under the Administrative Procedure Act, 28 lamb producers, about one-fourth of those in the Western Slope lamb marketing area, testified about marketing conditions there from 1958 to 1960. After hearing their testimony and the testimony of other witnesses, and after receiving voluminous exhibits, the Hearing Examiner rendered his report, concluding, inter alia, that Swift and American Stores had violated the Act and Regulations as previously specified. He recommended that a cease and desist order should be issued to prohibit the illegal practices of Swift and American Stores.

A year after the Hearing Examiner's report was rendered, the Judicial Officer, representing the Secretary of Agriculture, in turn entered findings and conclusions approving the pertinent part of the Hearing Examiner's report. He found that the Western Slope of Colorado, near Craig and Montrose, is one of the western states' lamb production areas. Fat lambs are those that have acquired sufficient fat for meat production; those that require further feeding are the feeders. The annual Western Slope marketing season for lambs, both fats and feeders, is from mid-August to mid-October.

Both petitioners purchased for slaughter fat lambs in the Craig and Montrose areas and employed salaried lamb buyers there. However, during 1958-1960, these petitioners refrained from bidding against Harry Heath & Son, a competitor and registered dealer, for fat lambs offered by producers in those areas. Heath, the principal dealer in the area, bought the fat lambs from the producers, it was found, without competition from Swift and American Stores. They then satisfied their Western Slope requirements for lambs by purchasing from Heath.

During 1959 and 1960, Swift purchased 55,619 fat lambs in the Western Slope area, with 83.1% coming from Harry Heath & Son. During 1958-1960, American Stores purchased 62,927 Western Slope fat lambs, 82.8% coming from Harry Heath & Son.

The Judicial Officer determined that petitioners did not compete with Harry Heath & Son in the purchase of fat lambs from Western Slope producers and that the natural effect was lower producer prices. The practice of petitioners in having their on-the-scene buyers refrain from bidding against Heath while afterwards acquiring fat lambs from Heath was concluded to be an unfair practice within the meaning of Section 202(a) of the Act, and in violation of Section 201.70 of the Regulations.

Based on a conversation between Swift's buyer Forrest Taylor and Perry Holley, the Judicial Officer also found that Swift and Perry Holley Company, a competitor and registered dealer, had agreed on maximum prices to be paid producers for lambs in the Craig area in the 1959 marketing season. This agreement was concluded to violate Section 202(f) of the Act (note 4, supra).

Swift and American Stores were ordered to cease and desist from

'(1) entering into any agreement or arrangement with a dealer in lambs to refrain from competing against the dealer in the purchase of lambs offered for sale by lamb producers in commerce, or (2) failing to compete generally in the purchase of lambs in commerce from producers on any market or in any lamb marketing area where it has a qualified lamb buyer or buyers present and instead acquiring a substantial percentage of its lambs on such market or in such marketing area from a dealer or dealers without so competing.'

Swift was also ordered to cease and desist from

'(3) entering into any agreement or arrangement with any other person or persons with respect to prices to be paid for lambs.'

Petitioners first argue that they were denied due process of law because they were not charged with an unfair buying practice but only with agreements not to compete with Heath as to purchasing Western Slope fat lambs. As petitioners knew, the Department of Agriculture explained to Harry Heath & Son long before these hearings closed that it would be an unlawful practice for a dealer to maintain a non-competitive relationship with other buyers whereby the dealer would be 'purchasing substantial numbers of sheep or lambs 'on order' for any packer or dealer in any lamb producing or feeding area where such packer or dealer is competitive * * * through its own buyer.' Also, the answers filed in the administrative proceedings and the briefs here indicate that they knew they were charged with such an unlawful buying practice. This was also shown by the testimony at the hearings and by petitioners' own proposed findings. Accordingly, they were 'reasonably apprised of the issues in controversy.' As the case unfolded, there was 'a reasonable opportunity to know the claims of the opposing party and to meet them,' so that the fundamental requirements of due process were met.

Petitioners' argument resembles that advanced in Armand Company v. Federal Trade Commission, 84 F.2d 973 (2d Cir. 1936), certiorari denied, 299 U.S. 597, 57 S.Ct. 189, 81 L.Ed. 440. There the Armand Company and others were charged in an administrative complaint with a conspiracy, but there was no finding by the Federal Trade Commission that the conspiracy existed. Nevertheless, the Commission ordered the manufacturing company to stop certain practices. Despite the claim of variance between the complaint and the cease and desist order, the court held:

'The manufacturer called upon to justify such a course of dealing is advised of what he has to meet, and the divergence between the charge framed as a joint wrong and as single is utterly unimportant. If, during the course of the prosecution, he could show any reason why it was important to make the formal adjustment, conceivably it might be error to refuse to do so; but to hold, after all had gone through without question, that it had been only a dance of marionettes, would be to go back at least two centuries.'

Similarly, since there has been no showing that these petitioners were prejudiced, any variance between this complaint and order is not fatal.

Swift also asserts that the complaint fails to charge that it had a price agreement with the Perry Holley Company. Paragraph II(b) of the complaint charged Swift with agreeing with Wilson & Company, Inc. concerning prices to be paid for lambs in the Craig, Colorado, area during the 1958-1960 lamb seasons. As to lamb-buying operations, Holley was described in Paragraph II(h) of the complaint as under the direction of Wilson. It is the Government's theory that, taken together, these two paragraphs sufficiently apprised Swift that it was charged with an unlawful price agreement with the Perry Holley Company.

During the hearings, Swift questioned its Craig area buyer as to whether he had any price-fixing agreement with Perry Holley for fat lambs on the Western Slope. Swift also questioned other witnesses about such a price agreement, so that it certainly comprehended the presence of this charge. Any ambiguity on this point is dispelled by Swift's proposed findings, after hearing the evidence of a Swift-Holley price-fixing agreement and no other such agreement, to the effect that there was no evidence that Swift entered into any agreement 'with any other respondent (including Holley) or other person regarding prices to be paid for live lambs in Western Colorado.' In the absence of prejudice or surprise, Swift's Fifth Amendment argument must be rejected.

Petitioners' principal argument is that the Packers and Stockyards Act does not interdict their refusal to purchase fat lambs from producers while confining most of their Western Slope purchases to dealer Harry Heath & Son. Under the Sherman Act, it is true that a simple refusal to deal is permissible. However, the statutory prohibitions of Section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Act or even Section 5 of the Federal Trade Commission Act. Section 202(a) of the Act does not require the Government to prove injury to competition.[22] Wilson & Company v. Benson, 286 F.2d 891, 895 (7th Cir. 1961). The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen.

Our review of the evidence shows that there is ample support in this

[22] Note that the recent decision in *London v. Fieldale* calls into question the holding in *Wilson & Company v. Benson* and therefore the holding in *Swift v. US*. In *London*, the court ruled ruled that in order for producers to succeed in cases involving unfair actions they must prove how it adversely affects competition for their region.

record for the Judicial Officer's conclusion that Section 202(a) of the Act and Section 201.70 of the Regulations were violated.[23] Both petitioners had salaried buyers in the Western Slope area during 1958-1960, when Harry Heath & Son, a dealer buying and selling livestock for his own profit, was the chief purchaser of lambs there. During these years, petitioners purchased only a small number of fat lambs directly from the Craig and Montrose producers and purchased most of their Western Slope requirements from dealer Harry Heath & Son.

Various Western Slope producer witnesses offered their fat lambs to all prospective purchasers and actively solicited bids. None received a bid from Donald S. Couch, American Stores' buyer, during this period. Forrest Taylor, Swift's buyer, made only one bid and purchased only one band of lambs during the same time. The record also showed that producers' prices for fat lambs were depressed, and that producers' sales of fat lambs to Harry Heath & Son were without competition from petitioners. In 1959 and in 1960, Swift purchased 83.1% of its Western Slope fat lambs from Heath. During the entire 3-year period, American Stores purchased 82.8% of its Western Slope fat lambs from Heath. During the same interval, Heath was the buyer of the largest number of fat lambs in this area, having purchased 224,577 fat lambs directly from the producers. If petitioners had purchased their Western Slope fat lambs independently of Heath, their additional competition could have resulted in higher prices to the producers. The lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed.

Both petitioners purchased substantial quantities of fat lambs in the Western Slope area, and they must have usually paid Harry Heath & Son higher prices than that firm paid to the producers. The Judicial Officer considered that petitioners would hardly choose this expensive and indirect way of purchasing their Western Slope fat lambs except for the depressed prices to producers flowing from petitioners' lack of competition with Heath. Thanks to these buying practices, the only willing buyer of the fat lambs resold to petitioners was Harry Heath & Son, so that the producers could hardly obtain full market value for their livestock. Such buying practices were among those outlawed by the Packers and Stockyards Act. Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735.

American states that the reason it avoided buying from producers was in

[23] Apart from our conclusion that the unilateral refusals to buy from producers in the setting of these cases violated Section 202(a) of the Packers and Stockyards Act and Section 201.70 of the Regulations, petitioners' failure to compete with Heath in their purchases of substantial numbers of fat lambs from Heath could be viewed as a combination between petitioners and Heath within the meaning of Section 202(f) of the Act.

order to obtain its own 'sort' of lambs between feeders and fat lambs, but even when the 'sort' was in the Montrose stockyard, the dealers would do their own sorting. We were not directed to any record testimony showing that American would obtain a more desirable 'sort' by buying fat lambs from dealers instead of producers.

Both petitioners rely on Swift & Company v. United States, 308 F.2d 849 (7th Cir. 1962), as holding that refusals to purchase from producers are legal. Their reliance on that case is misplaced, for this Court did not consider that question when it approved the country dealers' practice of telephoning Swift to determine the price which Swift would pay them for livestock. Furthermore, that case involved Section 201.69 of the Regulations proscribing the furnishing of buying information, whereas this case involves Section 201.70 of the Regulations, requiring packers and dealers to conduct their buying operations 'in competition with, and independently of, other packers and dealers similarly engaged.' Finally, the opinion evidence in that case would not support a conclusion that Swift's Nashville buying operations violated Section 202(a) of the Act and Section 201.70 of the Regulations. In contrast, this record reveals anti-competitive behavior that was deemed responsible for the depressed prices in the area. On this record, we cannot say there was no rational basis for the administrative determination that these buying practices transgressed the Act and applicable regulation.

As held in Farmers' Livestock Commission Co. v. United States, 54 F.2d 375, 379 (statutory 3-judge court, E.D.Ill.1931), an individual refusal to buy may be within the prohibitions of the Packers and Stockyards Act. More recently, it was held that such a refusal violates the Act if 'without reasonable cause.' Capitol Packing Co. v. United States, 350 F.2d 67, 80-81 (10th Cir. 1965). Applying the rule of reason to these facts, the Judicial Officer could and did conclude that the natural effect and apparent purpose of Swift's and American Stores' buying practices were to restrict and lessen competition in the purchase of fat lambs from producers to the detriment of the producers, and that such practices were 'unfair' to the lamb producers in the Craig-Montrose area. The determination that petitioners' buying practices were unreasonable has ample support in the record. Nothing in the presentation here warrants a contrary conclusion.

Petitioners admit that it there were agreements between American Stores and Heath and between Swift and Heath to refrain from competing with that dealer in the purchase of fat lambs in the Craig-Montrose area, there would be a violation of Section 202(a) of the Act and Section 201.70 of the Regulations. Nevertheless, they contend that Clause (1) of the order requiring them to cease and desist from such agreements should be set aside on the ground that there was no evidence to support the Judicial Officer's finding of such agreements. Obviously Heath, the largest purchaser of Western Slope fat lambs, could not continue in business unless ordinarily paid a markup by petitioners over the prices Heath paid producers for their fat lambs. Except for the low prices received by producers, possibly caused by petitioners' failure to compete with Heath, the Judicial Officer could infer that otherwise it would have been cheaper for petitioners to buy fat lambs from the producers through their own buyers stationed in that area.

As stated in Interstate Circuit v. United States, 306 U.S. 208, 221, 59 S.Ct. 467, 472, 83 L.Ed. 610:

‘As is usual in cases of alleged unlawful agreements to restrain commerce, the Government is without the aid of direct testimony that the (accused businesses) entered into any agreement with each other * * *. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.'

Even in a criminal antitrust case, where the Government's burden of proof is greater than here, a ‘unity of purpose’ or ‘common design and understanding’ is enough to establish a violation. Guided by such principles, we hold that the unusual business practices shown by this record and previously discussed herein in some detail were sufficient to support the Judicial Officer's inference of an agreement so that Clause (1) of the order was proper.

Swift contends that there is no substantial evidence of an agreement between it and Perry Holley Company as to the maximum prices to be paid for fat lambs in 1959 in the Craig, Colorado, marketing area. However, Gordon Winn, a lamb producer in that area, testified that Swift buyer Forrest Taylor told Winn of Taylor's telling Perry Holley that the 1959 top price for fat lambs was to be $19.50, ‘and I don't mean $19.51,’ and that Holley said that was OK. This Winn-Taylor conversation was corroborated by another witness. In spite of an inconclusive denial by Taylor, the Hearing Examiner was entitled to believe Winn and the other witness. This credibility finding will not be disturbed.

Under Section 202(f) of the Act, it is unlawful for a packer to agree with any other person on livestock prices, whether or not the price-fixing agreement is carried out. Therefore, Swift's defense based on the asserted failure of any Holley-Swift price-fixing agreement cannot be accepted.

Finally, claiming vagueness and obscurity, both petitioners object to Clause (2) of the cease and desist order. Clause (2) provides that the petitioners shall cease and desist from:

‘(2) failing to compete generally in the purchase of lambs in commerce from producers on any market or in any lamb marketing area where it has a qualified lamb buyer or buyers present and instead acquiring a substantial percentage of its lambs on such market or in such marketing area from a dealer or dealers without so competing.'

This clause is directed at the unlawful business practices that petitioners conducted with Harry Heath & Son in the Western Slope area of Colorado. It is to be read with reference to the findings and in light of the language used by the Judicial Officer and in the light of the record.

The three particular phrases selected from Clause (2) as being unduly vague and obscure are 'compete generally,' 'substantial percentage' and 'marketing area.' In the setting of this case 'compete generally' refers to petitioners' failure to purchase fat lambs directly from producers, purchasing them instead from a competitor in areas where petitioners' own buyers are stationed. So construed as directed against petitioners' unfair buying practices, the term is not impermissibly vague.

The phrase 'substantial percentage' in the order must also be construed in the light of the record. We construe the phrase as meaning that where petitioners have buyers stationed in a lamb-marketing area, they must purchase fat lambs from producers through those buyers except for such insignificant purchases from dealers that prices to producers could not be affected, unless they can show the Secretary compelling reasons for purchasing through dealers.

As to 'marketing area,' the record reveals the various marketing areas for fat lambs. To accomplish its prophylactic effect, the administrative order need not be confined to the very territory where the offense occurred and therefore this order need not be limited to the Western Slope of Colorado area.

Swift also assails Clause (3) of the order requiring it to cease and desist from '(3) entering into any agreement or arrangement with any other person or persons with respect to prices to be paid for lambs.' Swift states that this clause proscribes 'agreements as to a bona fide purchase price * * * wherein Petitioner (Swift) is actually negotiating the purchase of lambs.' However, the order certainly does not preclude or interfere with normal purchases or negotiations, but is intended to reach only anticompetitive agreements that 'manipulate or control prices in commerce'. The order does not forbid bona fide negotiations for the purchase of lambs.

If petitioners are in doubt as to the scope of the order, they may seek binding advice from the Department of Agriculture as to its applicability.

We have considered subsidiary arguments raised by petitioners but deem them unpersuasive.

The motions to strike portions of the Government's appendix are denied and the petitions will be dismissed. The Judicial Officer's order is affirmed.

United States Court of Appeals for the Seventh Circuit.

ARMOUR AND COMPANY, Petitioner,
v.
UNITED STATES of America and Orville L. Freeman, Secretary of Agriculture, Respondents.
No. 16285.

Oct. 17, 1968.

Petition to set aside order of the Secretary of Agriculture. The Court of Appeals, Cummings, Circuit Judge, held that meat packer's five-week promotion of thick-sliced bacon by offering consumers a 50-cent coupon refund on purchase of each two-pound package of such bacon in western section of the United States was not an 'unfair practice' within Packers and Stockyards Act, where packer continued to sell to retailers at regular prices, program was inspired by an outside advertising agency, there was no acceptable evidence that packer intended campaign to reduce local competition or to coerce retailer, or that competition was injured by the campaign and instead, its purpose was to bring packer's products, including thick-sliced bacon, to attention of more customers in market where packer held an insignificant share.

Order set aside.

At the instance of the Western States Meat Packers Association, the United States Department of Agriculture filed a complaint in 1962 against Armour and Company alleging violations of Section 202(a), (b) and (e) of the Packers and Stockyards Act.

Armour is the second largest meat packer in the United States. In January and February of 1969, pursuant to recommendations contained in a survey conducted by N. W. Ayer & Co., Armour's Western Area advertising agency, the management of the Western Area of its Foods Division embarked upon a 5-week promotion of thick-sliced bacon by offering consumers a 50¢ coupon refund on the purchase of each 2-lb. package of such bacon in Alaska, Hawaii, Oregon, Washington and most of California. The Ayer survey disclosed that except for Spokane, Armour had less than 5 per cent of the meat market in the Western Area, but in

Spokane it had approximately 25 per cent of the market. The bacon promotion coupon plan was designed to increase the sale of all Armour Star meats, as well as to increase the sale of Armour Star thick-sliced bacon and establish a brand preference for such bacon in its new packaging and new rindless cut. This was a substantially new product, and Armour hoped that the purchasers would consume twice as much bacon by using the same number of slices of thick-sliced bacon as regular bacon. Ads were run featuring the bacon coupon promotion singly and in conjunction with other Armour Star products.

The Judicial Officer of the Department of Agriculture concluded that Armour's practice violated Section 202(a) and (b) of the Act, which makes it unlawful for a packer to:

‘(a) Engage in or use any unfair, (or) unjustly discriminatory, * * * practice * * * in commerce; or

‘(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever * * *.’

The refund offer was limited to one 50¢ payment per family and required the consumer to mail a coupon from the thick-sliced bacon package to Armour's advertising agency in San Francisco. The 50¢ figure was chosen for the coupon refund after considering the number of redemptions expected and the range of refunds, from 10¢ to full purchase price, offered in other companies' food promotions. For example, Oscar Mayer & Co., a competitor of Armour in the San Francisco portion of the Western Area, had previously offered 50¢ refunds on various meat products.

The financing of this coupon plan was from funds solely in Armour's Western Area, including trade territories not covered by the coupon-refund offer. In 1959, Armour spent 3/4 of a cent per pound for promotion for all processed meats produced in the Western Area. Each plant in the Western Area was to receive advertising and promotional value proportionate to the assessments against the projected production from that unit. Otherwise, the unit received a refund for monies not used in its territory, so that no unit of the Western Area contributed more than it received in advertising and promotion. About 286,000 persons accepted the five-week offer, costing Armour $143,000 instead of the $25,000 intended to cover this and two other scheduled promotions, one for this same product and one for frankfurters. As a consequence of the unexpected cost of the coupon-refund program, Armour's Western Area management canceled the two later coupon promotions and curtailed other advertising of individual Armour Star products that had been scheduled for other parts of 1959. Because of this cutback in its advertising program, $107,000 contributed by the various Western Area units was returned to them (Petitioner's Exhibit 22).

During the period in question, Armour's wholesale prices for 2-lb. packages of this bacon ranged from 85.6¢ to $1.20 in this area. According to the Department, disregarding the coupon plan, Armour's profit margin was 2 to 4 cents per package. While the refund was in effect, the net price to an accepting consumer was 50 to 60 per cent of the retail price. During the coupon period, Armour's average weekly sales of this product increased from 121,000 lbs. to an average of 360,000 lbs., but its sales of regular bacon decreased sharply. Its total sales during the redemption period consisted of approximately 900,000 2-lb. packages, and there was a 31.8 per cent response by consumers to the coupon plan, indicating that the cost of the refund plan was 16¢ per 2-lb. package.

The Judicial Officer concluded that Armour's coupon plan increased its sales of thick-sliced bacon while its competitors lost sales and accounts during the promotion period. He determined that the practice was unfair or, alternatively, unjustly discriminatory under Section 202(a) of the Act and that the practice also constituted an undue or unreasonable preference or advantage under Section 202(b). Accordingly, the following cease and desist order was entered in 1967:

‘Immediately prior to the launching of any program offering or giving a refund to any retail purchaser or consumer of meats or meat food products, respondent shall ascertain the unit cost at that time for the item in connection with which the refund is offered, and shall cease and desist from offering or giving a refund which when added to said unit cost results in a net unit return for the item to respondent substantially less than unit cost (including the amount of the Refund). Provided: That this order shall not apply to the introduction of a really new meat product.’

In asking us to set aside the Judicial Officer's decision and order, Armour asserts that its bacon sales were not below cost and that no predatory intent was shown. Armour also claims that there is no substantial evidence that the business of competing packers was injured. Finally, the scope of the order is assailed, but as will appear, there is no need to consider that point.

Below Cost Sales Are Not Clearly Demonstrable Here

This is admittedly a test case to determine the validity of coupon promotion plans under the Packers and Stockyards Act. Armour sold the thick-sliced bacon in question to retail stores at its regular wholesale prices, and those stores in turn sold to consumers at regular retail prices. To support the Department's assertion that Armour's sales to the retail stores were below cost, we are told that the amount of the coupon refund must be added to Armour's unit costs of bacon during this five-week period. On the other hand, Armour argues quite persuasively that the coupon plan was meant to improve the sale of all Armour Star products throughout the year and therefore cannot be charged to the five-week production cost of thick-sliced bacon. In conformity with the practice of other packers, all Armour Western Area meat products were assessed for the cost of the program even though the coupon refunds concerned only 2-lb. packages of thick-sliced bacon. Considering that the coupon promotion plan was designed to stimulate bacon and other sales beyond its duration, it is questionable whether the $143,000 should be charged to thick-sliced bacon costs during the five weeks the plan was in existence, as the Department urges.[24] Even accepting arguendo the Department's novel premise that the entire $143,000 cost of the coupon promotion should be charged to the cost of producing the thick-sliced bacon and reflected in the sales to the retail stores during the five weeks of the promotion, there is no warrant for adding, as the Department does in its brief, 50¢ to the cost of every package of bacon sold during the period in question in determining the extent of any Armour loss on the bacon. In fact, the Judicial Officer's opinion concedes that only 31.8 per cent of the purchasers of these packages (286,000 out of some 900,000) actually accepted the redemption offer (26 Agr. Dec. at p. 496). Thus the cost to Armour amounted to 16¢ per package when the total sales during the period of the promotion are taken into consideration. After the Department's tabulation of Armour's unit cost per package is adjusted to reflect this 16¢ (or $8 per cwt.) additional cost rather than 50¢ (or $25 per cwt.), it appears that Armour at all times made a profit on the bacon during the promotional period, as shown in the following adjusted Departmental tabulation:

[24] The Department's assertions that Armour charged the entire cost of the promotion to its bacon sales, apparently abandoned at p. 17 of its brief in this Court, do not appear to be supported in the record, nor do Armour's internal accounting periods coincide with the duration of the promotion. The Department's own witness for this purpose repeatedly asserted that the accounting treatment of the promotional program was a matter of internal business policy, and the sole competitor who suggested that he might have charged off the promotion expense differently admitted that his operations were altogether different than Armour's.

Armour and Company's Production or Unit Cost Per Hundredweight and Profit on Armour Star 2-Pound, Thick-Sliced Bacon Based on the Market Value of Green or Fresh Bellies and Expenses in Its Sliced Bacon Departments for the First Full Week of the Promotion, Viz., January 24, 1959:

Plant	Market Value of Green or Fresh Bellies Weighing	Average Processing Expenses-Sliced Bacon Department	Partial Production or Unit Costs Per Cwt. (Including 16¢ Per 2 Lbs.or $8 Per Cwt. Refund)	Range or Invoice Prices Charged Retail Stores Per Cwt.	Range of Amount of Profit Per Cwt.
Spokane, Washington	$26.64	$9.79	$44.43	$45.0 to $53.0	$ .57 to $ 8.57
Portland, Oregon	26.69	9.47	44.16	45.0 to 53.0	.84 to 8.84
South St. Paul, Minnesota	23.75	8.25	40.00	45.0 to 53.0	5.00 to 13.00
Omaha, Nebraska	23.75	8.46	40.21	45.0 to 53.0	4.79 to 12.79

As the foregoing tabulation shows, Armour's minimum profit on bacon where refunds were made ranged from 57¢ to $13 per cwt., or from 1¢ to 26¢ per 2-lb. package.

The Department also suggests that the coupon plan resulted in below cost sales either on a standard cost basis or based on Armour's branch housing billing prices and sliced bacon department expenses. In so concluding, the Department has again employed a 50¢ refund figure for each 2-lb. package instead of the actual 16¢ refund cost per package. On either basis, when $8 per cwt. is added to account for the cost of the refund, the cost per 2-lb. package is several cents less than the highest prices Armour was charging retail stores during the promotion period and shows that Armour was not selling all this bacon below cost.

Elsewhere the Department's brief asserts that Armour's profit margin on each 2-lb. package of this bacon was from 2 to 4 cents. Assuming that these are the correct profit margins, the returns to Armour during the five-week program would be from 12 to 14 cents per 2 lbs. below unit cost if the entire $143,000 cost is properly chargeable to that brief period and to thick-sliced bacon. But on this record, we need not decide whether this coupon refund plan is truly a sale below cost to retail stores, for the Judicial Officer's decision and order must be set aside since it is based on a misconstruction of the Act and on findings unsupported by substantial evidence.

Intent to Destroy Competition or Eliminate a Competitor

At the oral argument, the Department's counsel agreed that coupon promotion plans cannot be deemed per se ‘unfair practices' within the meaning of Section 202(a) of the Packers and Stockyards Act. On the other hand, Armour agrees that this 1921 Act ‘was intended to go beyond then existing anti-trust statutes, and that the standards of the Act are not static.’ This is an acknowledgment by both parties that the Secretary of Agriculture has broad powers under Section 202(a) with regard to trade practices which are ‘unfair’ in that they conflict with the basic policies of the various antitrust statutes, even though the practices may not actually violate those statutes. However, the Department has not shown to our satisfaction that this coupon program so conflicts. Our conclusion, derived from case law and legislative history, is that a coupon program of this nature does not violate Section 202(a), absent some predatory intent or some likelihood of competitive injury. The latter aspect of this case is discussed later in this opinion.

When viewed together, the antitrust laws, although not completely harmonious and frequently overlapping, express a basic public policy distinguishing between fair and vigorous competition on the one hand and predatory or controlled competition on the other. Normally the twin solvents for determining when the boundaries of fair competition have been exceeded are the existence of predatory intent and the likelihood of injury to competition. The clearer the danger of the latter, as when competitors conspire to eliminate the uncertainties of price competition, the less important is proof of the former. Conversely, the likelihood of injury arising from conduct adopted with predatory purpose is so great as to require little or no showing that such injury has already taken place. Each statutory prohibition of specified acts or practices reflects the Congressional conclusions as to the gravity of the injury to be feared and the relative difficulty of distinguishing honest competition and predation. The fact that a given provision does not expressly specify the degree of injury or the type of intent required, does not imply that these basic indicators of the line between free competition and predation are to be ignored. Surely words such as ‘unfair’ and ‘unjustly’ in Section 202(a) and ‘undue’ and ‘unreasonable’ in Section 202(b) require some examination of the seller's intent and the likely effects of its acts or practices under scrutiny, even though these tests under Section 202(a) and (b) be less stringent than under some of the anti-trust laws. These adjectival qualifications expressed in the statutory language enjoin the Department and courts to apply a rule of reason in determining the lawfulness of a particular practice under Section 202(a) and (b).

This portion of the Packers and Stockyards Act was first construed by this Court in an exhaustive opinion in Swift & Co. v. Wallace, 105 F.2d 848 (7th Cir. 1939). As the keystone to its construction, the Court noted at the threshold that Section 202(a) and (b) 'does not purport to confer upon the Secretary of Agriculture any authority directly to regulate prices, or discounts, or sales methods; and clearly does not contemplate the exercise of any authority to establish uniformity of practice in respect thereto'. Specifically with respect to Section 202(a), Judge Treanor observed that it was 'easily conceivable' that 'a course of discrimination in terms of credit engaged in for the purpose of injuring a particular person or locality, or necessarily resulting in injury' could offend against Section 202. The Swift case approved discounts required by business realities or justified by accepted standards of industry fairness. For violation of Section 202(a), the opinion contemplated either intent or adverse competitive effect.

Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961), pointed out that the literal language of Section 202(a) does not specify that a competitive injury or a lessening of competition or a tendency to monopoly be proved, but that record amply supported the Judicial Officer's finding that Wilson's discriminatory price-cutting campaign was intended to stifle competition and resulted in a substantial diversion of business to Wilson. In fact, the sole purpose of Wilson's below-cost price cuts was to take accounts from its competitors and to discipline its former area manager for having taken customers away from Wilson. Seventy-five per cent of its San Francisco hotel meat supply business came from the below-cost price cuts. Here Armour was concerned with brand identification at the consumer level and not with coercing retailers to take its products. Armour continued to sell to retailers at regular prices. This was a short-term promotional campaign, whereas Wilson engaged in a protracted policy of selective price-cutting to retailers in order to take customers away from its competitors. In short, the Wilson case does not support the Department's view that neither intent nor some kind of competitive injury is necessary for the operation of Section 202(a).

Our construction of the Wilson case is reinforced by Swift & Co. v. United States, 308 F.2d 849 (7th Cir. 1962), which was this Court's next consideration of Section 202(a). The agreement there between the packer and another hog buyer to split or share the purchase of top-grade hogs was held to violate Section 202(a) because the 'essential nature and the necessary result of this * * * practice was to eliminate competition'. The agreement not to compete itself supplied the requisite intent. But Swift's dissemination of price information to country dealers was held not to violate Section 202(a) and a Regulation thereunder because the purpose was to consummate a sale rather than to eliminate competition. One practice violated the Act because of Swift's anti-competitive intent. The other practice was permitted because of the absence of any such intent.

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It is significant too that consent decrees ordinarily prohibit sales below cost only when the intent or effect is to suppress competition. ***** And one of the reasons Federal Trade Commissioner Elman gave for the dismissal of the unfair practice complaint in Quaker Oats Co., CCH Trade Reg. Rep., 1963-1965 Transfer Binder, P17,134 (FTC 1964), was that, as here, the record failed to support an inference that the manufacturer acted predatorily be selling oat flour below cost.

Price cutting was not regarded as unlawful under the common law. A pricing policy is not proscribed just because it might result in the destruction of a competitor, for the antitrust laws are not intended to protect a business against loss in a competitive market. The presence of predatory intent and injury to competition was emphasized throughout Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406, as justifying the guilty verdict against the price cutter. The absence of such intent resulted in the denial of a decree in Hershel California Fruit Products Co. v. Hunt Foods, Inc., 111 F.Supp. 732, 734 (N.D.Cal.1953). There Hunt reduced the price of its tomato paste by $1 per case over a period of one and one-half years. Nevertheless, a preliminary injunction was refused because no malevolent intent was apparent. The court concluded that this reduction was intended to secure customer acceptance of the tomato paste and was suggested by an outside adviser. Similarly here, one of the reasons for Armour's coupon plan was to secure customer acceptance of the newly packaged, rindless, thick-sliced bacon and other Armour Star products and was at the suggestion of an outside advertising agency in the Western Area.

The Department relies heavily on Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 80 S.Ct. 1267, 4 L.Ed.2d 1385, but the only question there was whether there could be a 'price discrimination' within Section 2(a) of the Robinson-Patman Act without a purpose or design to eliminate competition. The Court refused to read Section 3 of the Robinson-Patman Act into Section 2(a) but did agree that predatory intent would be relevant as to the likelihood of injury to competition. Although we realize that Robinson-Patman analogies are not conclusive under the Packers and Stockyards Act, it is noteworthy that the Anheuser-Busch case does not hold that price discriminations per se violate Section 2(a). There can be no violation unless the effect of the discrimination 'may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition * * *' (15 U.S.C. § 13).

Of course, illicit intent may be inferred from a seller's sustained undercutting of rivals' prices or from persistent unprofitable sales below cost. If Armour's losses had been so extravagant as to be unrecoverable, it could be persuasively argued that the object of this program was to inflict injuries on rivals regardless of the expectation of ultimate profit. Instead, the following language from Anheuser-Busch, Inc. v. Federal Trade Commission, 289 F.2d 835, 842 (7th Cir. 1961), on remand, is singularly applicable to Armour's conduct:

'Its conduct was in conformity with the principle that competition is the decisive force in the market place. That conduct is the antithesis of the predatory misconduct condemned in the above territorial pricing cases relied on by the Commission. In each of those cases the motive for the price cut was vindictive and the effect was punitive. There was not even a pretense that the price change was incident to a general intensification of the sales effort, as in the case at bar. It was a single lethal weapon aimed at a victim for a predatory purpose.'

Also pertinent to Armour's conduct is the following excerpt from Balian Ice Cream Co. v. Arden Farms Co., 104 F.Supp. 796, 807 (S.D.Cal.1952), affirmed, 231 F.2d 356 (9th Cir. 1955), certiorari denied, 350 U.S. 991, 76 S.Ct. 545, 400 L.Ed. 856:

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

It is often difficult to distinguish between predatory and healthy pricing practices. However, we are satisfied that this coupon program was designed to obtain a larger share of Armour Star business in the marketing area and was not a destructive attack on local competitors. The competitive justification for the program was to introduce thick-sliced 2-lb. bacon, considered by Ayer and Armour potentially to be a high profit item, into more homes. It was intended to result in a per capita increase in bacon consumption, but not necessarily at the expense of Armour's competitors. Armour's own sales of regular bacon declined drastically during its campaign. Armour's spirited competition, beneficial to consumers and not hurtful to its competitors, should not be indicted in the name of antitrust. See Rowe, op. cit., pp. 150, 465-466. Coupon practices are widespread in the food industries and have been employed by Armour's competitors. This was a five-week Western Area program and was inspired by an outside advertising agency. Already projected coupon plans were promptly canceled in view of the unexpected cost of this one. The plan was financed solely from the Western Area of Armour's Foods Division and evidently involved no greater expenditures than in other years. Many of the advertisements clearly linked the bacon sales with other Armour Star products for promotional reasons. N. W. Ayer & Co. and Armour's Western Area management certainly did not intend the thick-sliced bacon promotion to take most of the promotion budget, for promotions of many other Armour Star items were also planned for 1959. Only $25,000 had been budgeted by Armour for all three coupon plans. Armour's anticipation of only a small response to its coupon plan is still another indication of the absence of intent to eliminate competition.

The legislative history of the Packers and Stockyards Act fully supports our conclusion that Section 202(a) was not directed at this type of promotion unless there was some intent to eliminate competition or unless the effect of the promotion might lessen competition. Thus the Senate Committee Report makes it clear that this part of the legislation was promoted primarily by fear of monopoly and predation, but even so, caution was expressed against stifling the initiative of the industry. In turn, the House Committee said that the legislation was aimed at halting ‘a general course of action for the purpose of destroying competition’. As explained by Chief Justice Taft in Stafford v. Wallace, 258 U.S. 495, 514-515, 42 S.Ct. 397, 401, 66 L.Ed. 735, the chief evil feared was ‘the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily * * *’ who buys.' The present case involves neither this evil nor any of the other malpractices discussed in the Stafford case.

In the House hearings on Meat Packer Legislation, the Secretary of Agriculture testified that it was not the Department's idea to have Congress authorize the Department to ‘legislate prices in any way.’ He complained of packers who ‘drove out the local butchers years ago by selling at less than a fair price’ thus illustrating the gloss to be placed on ‘unfair practice’ in Section 202(a).

Even the legislative history relied upon by the Department in its brief shows that Section 202(a) was aimed at sales below cost where the packer intended to eliminate competitors or injure competition through geographic price discrimination. See Hearings on Meat Packer Legislation before the House Committee on Agriculture, 66th Cong., 2d

Sess. (1920), pp. 2211, 2657.[25] The main Congressional motivation was not the deficient reach of the Sherman, Clayton, Interstate Commerce Commission and Federal Trade Commission Acts, but the felt need for specialized regulation of the many-tiered packing industry, with its unique problems arising from marketing and distributing livestock and poultry, including all the complications arising from packer ownership of stockyards. That is why the Department of Agriculture, with its expected expertise, was chosen as the overseer of this industry. However, the legislative history does not show that the Secretary was to have carte blanche in prohibiting whatever practices he pleased. Otherwise the courts would not be empowered to set aside his orders (7 U.S.C. § 194(e)).

The Judicial Officer concluded that if predatory intent was needed, Armour's 'intent' to divert business from its competitors was sufficient. He resorted to question-begging reasoning, stating 'While diverting customers to oneself is normal and usual competition, respondent did so through the use of an illicit method'. But, as we have seen, there was nothing illicit in Armour's method unless there was some predatory intent or the likelihood of injuring competition.

Throughout its brief, the Department stresses Armour's supposed desire to 'block out' more efficient competitors. Actually, this phrase was derived from N. W. Ayer & Company's August 1957 promotional recommendations to Armour. The full quotation refers to the Spokane market and is as follows:

'Since the common practices of processed meat retailing make it very difficult for any one brand to get and hold a favorable place and space in a meat department, it is important that Armour remain aggressive with the trade and block out the possibility of a more aggressive competitor. Armour should give evidence of an interest in the merchandising and marketing problems of the retailer.'

This Ayer recommendation certainly does not support any finding that Armour's coupon program was prompted by predatory intent. The recommendation was merely to compete vigorously.

Here there was no acceptable evidence that Armour intended the compaign to reduce local competition or to coerce retailers. Instead, its

[25] Thus the Secretary of the American National Livestock Association testified:
'In earlier periods the packers did use every available method to drive the small independents out of business. They would, so I am credibly informed, undersell them in localities until they entailed upon these independents so severe losses that they either had to go out or be absorbed. Of course, a big institution like one of the five packers could well afford to do this and absorb the losses that might be caused by this underselling in other branches and make it up later on after they had eliminated that competition.'

purpose was to bring Armour Star products, including thick-sliced bacon, to the attention of more customers in markets where Armour held an insignificant share. The widespread and previously uncurtailed use of such campaigns by others also indicates that this particular one neither evidenced bad faith nor the likelihood that harm would result. Since Armour did not abuse this tactic knowingly, it should not be restricted from employing this method of encouraging competition in the meat industry. This is not to say that the Secretary would not be justified in condemning long-term or frequent and costly campaigns of this nature if motivated by an attempt to destroy competition or if likely to injure competition. As with Section 3 of the Robinson-Patman Act, Congress certainly empowered the Secretary to condemn sales made below cost for the purpose of destroying competition or eliminating a competitor or having adverse competitive effects.

While Section 202(a) of the Packers and Stockyards Act may be broader than antecedent antitrust legislation found in the Sherman, Clayton, Federal Trade Commission and Interstate Commerce Commission Acts, there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers. Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic. However, in Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.

Likelihood of Competitive Injury

Even if predatory intent is absent, Armour's coupon program might violate Section 202(a) if it would probably result in competitive injury, tend to restrain trade or create a monopoly. The Judicial Officer's decision stated that coupon refunds per se were not invalid, and that he was concerned only with the 'competitive impact or probable impact' of the plan (26 Agr.Dec. at p. 509). He thus considered that the plan would not be illegal apart from the deleterious impact on competitors. His position was consistent with the prior opinions of this Court under Section 202(a).

In Swift & Co. v. Wallace, 105 F.2d 848, 862 (7th Cir. 1939), the Court observed that discriminatory action 'necessarily resulting in injury' to competitors would appear to violate Section 202(a) of the Act.

In Wilson & Company v. Benson, 286 F.2d 891, 895 (7th Cir. 1961), it was noted that the exact wording of Section 202(a) does not specify that competitive injury must be proved. However, the order was sustained because ‘Wilson was successful in diverting a substantial volume of business from its competitors' through its price-cutting policy. The Department is incorrect in stating that the Wilson case abandoned any competitive injury requirement in the absence of predatory intent.

In Swift & Co. v. United States, 308 F.2d 849 (7th Cir. 1962), the Court did not have to reach the petitioner's contention that Section 202(a) would not be violated unless there was a tendency unduly to hinder competition. Rather, it concluded that the agreement in question necessarily resulted in the elimination of competition, so that Section 202(a) was violated.

Finally, in Swift & Co. v. United States, 317 F.2d 53, 55 (7th Cir. 1963), the Judicial Officer's cease and desist order under Section 202(a) and (b) of the Act was upheld because there was substantial evidence of injurying competition.[26]

Evidently acting under these precepts, the Judicial Officer found that Armour's coupon plan ‘seriously disrupted’ other packers' bacon business (26 Agr.Dec. at pp. 496-497). However, this finding is not supported by substantial evidence and cannot be sustained.

Our study of the evidence bearing on possible injury to competition does not disclose causal connection between fluctuations in bacon sales and Armour's five-week promotion. The various exhibits reveal extreme fluctuations in number of pounds sold by Armour's competitors to various Western Area retail stores during the 1958-1960 period. Armour's promotion did not mark a change in the future pattern of sales for any competitor, for some with rising bacon sales continued to rise during and after the promotion, and some with falling sales continued to fall. Sales by some Armour competitors to certain chain stores declined, but sales of other Armour competitors to the same or other chain stores showed increases. Morrell, Hormel, Hy-Grade and Seattle Packing Company all had substantial increases in bacon sales during the promotional period. Of course, the Department would not have to demonstrate that all of Armour's competitors lost business during the promotion period in order to find injury to competition; severe losses to some competitors would, if causally related to the promotion, be some evidence of a tendency to injure competition. But in light of the completely unpredictable fluctuations which characterized the bacon market in the Western Area during the years prior to, during and after the promotion, and in the absence of some evidence that fluctuations during the promotion were unusual, the fact that almost as many competitors showed sharp rises in sales as others did losses, explains the Department's total failure to demonstrate even a

[26] The Department is not required to prove injury to competition in the event that injury is likely. Swift & Co. v. United States, 393 F.2d 247, 253, 255 (7th Cir. 1968).

tendency to injure competition.

Moreover, there is no suggestion that the promotion had any lasting effect whatsoever on any competitor as the trend of market shares of 1958 through 1960 demonstrates. In Portland in 1960, Armour experienced a severe drop from 43 per cent to 19 per cent of the No. 1 thick-sliced bacon market while some of its competitors gained. Its share of that market on a weekly basis in 1959 ranged from 3 to 92 per cent, but this did not indicate any success of its promotion, for its fluctuations in 1958 were from 4 to 87 per cent and in 1960, from 4 to 53 per cent. Moreover, the thick-sliced bacon shares of its competitors also fluctuated widely in each of the three years, with some competitors fluctuating from 0 to 87 per cent in 1959, or from 1 to 56 per cent in years other than 1959. The absence of causality is further demonstrated by the fact that while all of Armour's Portland competitors showed some weeks where their shares of the market were negligible, in many cases their worst weeks came much later in the year than the coupon promotion. There were similar wide fluctuations in total bacon sales. In the same years, Armour's share of the total Portland bacon market (over four times the thick-sliced market) slipped from 27 per cent to 24 per cent, and then to 9 per cent, while its share of the regular bacon market varied from 12 per cent to 14 per cent and finally to 7 per cent.

We do not and need not deny that some competitors' sales to some retail outlets declined during the promotion, but it is central to our conclusion that there is no substantial evidence of injury when the statistics may be selected so as to provide some support for almost any conclusion. It is not surprising, then, that the findings of the Judicial Officer include figures tending to show that Armour's promotion may have displaced some competing thick-sliced bacon brands temporarily at selected outlets. It is interesting to note, however, that even the figures relied on by the Department in the Judicial Officer's decision demonstrate that a substantial portion of the diversion was from other Armour bacon products. Thus although Armour's sales of thick-sliced bacon to Fred Meyer, Inc. in Portland increased by 18,120 lbs. during the promotion, and competing sales of all bacon products decreased by 7,022 lbs., Armour's own sales of regular bacon to the same stores dropped by 8,804 lbs. during the period. Other figures from the Department's own exhibits also refute its case. For example, in Seattle, Armour's (and a subsidiary's) thick-sliced 2-lb. package sales to Safeway Stores rose by 27,984 lbs. during the promotion, but its own sales of all other bacon dropped by more than 65,000 lbs. in that period.

According to another Government exhibit, Armour's sales of thick-sliced bacon to Seattle Safeway Stores rose from 8400 lbs. during the month before the promotion to 36,384 lbs. during the promotional period but at the same time, the sales of its other bacon decreased by 57,249 lbs., resulting in a 20.7 per cent diminution of Armour's share of that bacon market.

These figures serve to show that the over-all bacon market was vigorously competitive and highly volatile. Even though the promotional plan may have increased the per capita consumption of Armour's thick-sliced bacon, its sales of other bacon were so diminished that its all-bacon market share suffered. Armour's market share of bacon sales in Portland and Seattle declined in 1959 and also declined in 1960, whereas the market shares of eight of its competitors increased during the promotion year.

Armour's reply brief discloses that the Department failed to mention that John Morrell and Company bacon sales to Fred Meyer, Inc. in Portland during the promotional period increased by 600 per cent, and its sales to Safeway Stores in Seattle increased more than 500 per cent. Likewise, Swift's sales to Tradewell in Seattle were 60 per cent greater during the promotional period; Hormel's sales to Safeway in Seattle were 27 per cent greater; and Seattle Packing Company's sales to Safeway in Seattle were 175 per cent greater.

The Department stresses that Del Monte Meat Company lost its thick-sliced bacon sales to Safeway Stores in Portland during the promotional period. However, in that quarter, its total bacon sales to Safeway in Portland were two to three times greater than during the previous quarters. It nearly doubled its Safeway market share in Portland in 1959 and nearly tripled it in 1960. In turn, Hormel thick-sliced bacon sales to Safeway in Portland increased by 430 per cent while Morrell's share of the thick-sliced bacon market in Portland rose from 15 per cent in 1958 to 41 per cent in 1960.

The Department asserts that a witness from Portland Provision Company said its bacon business ‘dropped way down,’ but the witness testified that he had no supporting records, and the uncontroverted evidence is that its total bacon sales increased from 171,340 lbs. in 1958 to 257,217 lbs. in 1959.

Although the Department's brief also urges that Armour's coupon promotion caused a decline in the Western Area bacon prices, the record shows that there was a general decline in bacon prices throughout the United States at the time of the promotion, so that Armour's coupon plan cannot have been the cause.

A distillation of the figures contained in this record shows that there was no significant market disruption even in the short run. We have found no probative evidence to show that the over-all sales of any single competitor of Armour declined during that time of the promotion. Increased sales of

Armour thick-sliced bacon do not demonstrate an equal decline in competitors' sales, for, as seen, Armour's sales of other bacon correspondingly declined. We cannot say that any reasonable test of competitive injury was satisfied here where market shares were not altered significantly, no competitors were driven out, many increased their sales, and none even showed temporary financial losses. As in Capitol Packing Company v. United States, 350 F.2d 67, 76 (10th Cir. 1965), the statistics in this record are not 'sufficient evidence' of injury to competition, for they simply do not show that Armour's competitors' bacon business was injured by this promotion.

Territorial Discrimination

As seen, we hold that Armour's coupon plan was not an unfair practice within the meaning of Section 202(a) of the Act. In the alternative, the Judicial Officer concluded that since the refund was offered only in the Western Area of the United States, it was 'unjustly discriminatory' within Section 202(a) and an 'undue or unreasonable preference or advantage' within Section 202(b).[27] We disagree. The competitive justifications for the plan and lack of ill intent, described earlier in this opinion, negate its being unjust, undue or unreasonable.

Armour attacks the Judicial Officer's conclusion on the ground that there was no price discrimination within the meaning of Section 202(a) and on the ground that Section 202(b) applies only to interference with competition between purchasers from Armour. Because of the broad phrasing of both these provisions, the Act should not be read so narrowly. The practice in question was certainly a territorial discrimination and therefore could be considered 'unjustly discriminatory' or as an 'undue or unreasonable preference or advantage' if there were any predatory intent or likelihood of injury to competition. Because of the statutory requirement that the discrimination must be unjust or the preference undue or unreasonable, Congress did not intend to condemn this type of practice per se.

As with price discriminations in different territories under the Robinson-Patman Act, this Armour practice should not be proscribed absent any predatory intent or likely effect of competitive injury. Here Armour did not finance sales below cost in the Western Area from profits from other areas to secure long-run benefits in the Western Area. This promotion was financed from local advertising money, and there is no showing that

[27] He reasoned that these Sections were violated because the practice was at the expense of Armour's competitors and because of the considerations he had advanced to support the unfair practice charge, namely, injury to competitors. But besides this primary line emphasis, he mentioned that only consumers in the Western Area received the benefits of Armour's program. (26 Agr. Dec. at p. 514.) There is no claim of secondary line injury, i.e., at the retail store level.

Armour spent any more for its 1959 advertising than in previous or subsequent years.[28] If there was any loss to Armour in this five-week sale of thick-sliced bacon, Armour hoped to recoup it by increasing total bacon consumption and attracting new customers for that and other products. Whatever discrimination or preference existed during this short interval was not unjust, undue or unreasonable.

Although the language of Section 202(b) is patterned closely after Section 3 of the 1887 Interstate Commerce Act (49 U.S.C. § 3), the precedential value of the case law construing the earlier Section is somewhat limited by the important differences in the regulatory schemes imposed on the railroads on the one hand and the packers on the other. In particular, the pervasive rate-making authority of the Interstate Commerce Commission, which Congress did not see fit to grant the Department of Agriculture in the case of the packers,[29] together with the statutory prohibition of rebates (49 U.S.C. § 2), places the borrowed language in a different context. Moreover, the proviso to Section 3 by its own terms seems to exclude what might be called primary line injury, that is, injury to competing carriers, thus rendering the language as construed in the Commerce Act cases inapplicable to the principal 'injured' parties here, namely, Armour's competitors, the only parties for which the record even attempts to demonstrate actual injury.

Nevertheless, as recognized in Swift & Co. v. Wallace, 105 F.2d 848, 853-856 (7th Cir. 1939), support for the construction which we have adopted here can be found in the cases construing Section 3. The Supreme Court has consistently declined to interpret Section 3 as prohibiting preferences and discriminations per se. Moreover, in defining what makes a preference or advantage 'undue' or 'unreasonable,' the Court has recognized the relevancy of all competitive factors which a carrier would look to in determining that rate which would maximize its revenues. In Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U.S. 197, 218, 16 S.Ct. 666, 675, 40 L.Ed. 940, the Court said: 'It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the changes they make, to secure it, operates in the interest of the public.' The Court went

[28] In concluding that the territorial discriminations were 'unjust' under Section 202(a), the Judicial Officer said that coupon refunds were available only in part of Armour's Western Area whereas the financing of the coupon program came from the entire Western Area (26 Arg. Dec. at p. 514). He neglected to add that Armour annually refunded to Western Area sources those promotion costs not spent in their parts of the Western Area. Therefore, this criticism of the program is unwarranted.

[29] However, the Packers and Stockyards Act does grant control over rates charged by stockyards and market agencies, and it may be significant that it is in this context that the Supreme Court has drawn on the analogy to Section 3 of the Interstate Commerce Act. See Denver Union Stockyard Co. v. United States, 304 U.S. 470, 481-482, 58 S.Ct. 990, 82 L.Ed. 1469.

on to discuss at length the cases under the English Railway and Canal Act of July 10, 1854, upon which Section 3 was modeled, and clearly approved in principle those cases which found that a mere difference in rate between one locality and another was not, absent some special showing of injury, an undue or unreasonable preference. The Court's caution that ‘strict uniformity is not to be enforced’ seems to require something more than a showing that Armour chose to promote a new product in an area less than the entire country, before an undue or unreasonable preference between localities can be found.

The role of intent under Section 3 has also been acknowledged. In United States v. Illinois Central R.R. Co., 263 U.S. 510, 523-524, 44 S.Ct. 189, 192, 68 L.Ed. 417, Mr. Justice Brandeis stated:

‘The effort of a carrier to obtain more business, and to retain that which it has secured, proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice, though the carrier's motives in granting them are honest.'

The ‘infliction’ of prejudice suggests that the Court had in mind some demonstrable injury resulting from even a well-motivated preference. Indeed, the case upon which Justice Brandeis relied for this proposition, Interstate Commerce Commission v. Chicago & Great Western Ry. Co., 209 U.S. 108, 122, 28 S.Ct. 493, 498, 52 L.Ed. 705, quite clearly decided that intent to injure and actual injury were alternative indicia of the undue or unreasonable nature of the discriminations involved: ‘In short, there was no intent on the part of the railway companies to do a wrongful act, and the act itself did not work any substantial injury to the rights of the complainant.'

Both parties have had extensive time to make their record. The complaint issued in 1962 and the hearings took place in 1964 and 1965. The Hearing Examiner's recommendation was filed in 1966, and the Judicial Officer's decision issued in 1967. After ample opportunity the Department has failed in its proof, and that is an insufficient reason for reopening an already overstale case.

The Court is not substituting its judgment for that of the Judicial Officer as to inferences to be drawn from the evidence. Rather our conclusion is that Section 202(a) and (b) was erroneously construed and that the findings are not supported by substantial evidence. Accordingly, the order of the Judicial Officer must be set aside. So ordered.

Agency Heads of the 1960's

Howard J. Doggett (July 10, 1960 – August 6, 1961)

Clarence L. Girard (August 6, 1961 – November 27, 1962)

Donald A. Campbell (December 9, 1962 – January 18, 1971)

If one person was to be selected as having had the greatest impact on the administration and enforcement of the Packers and Stockyards Act, Don Campbell would surely receive a fair share of the votes. Campbell served USDA for 45 years, the first 21 with P&S and the remainder as Judicial Officer. On May 11, 1967, Don Campbell was named Administrator of the Packers and Stockyards Administration by Secretary Orville L. Freeman. Until the creation of the P&SA in 1967, Campbell headed the Packers and Stockyards Division in the Consumer and Marketing Service at USDA. Campbell began his career with the P&S program in or about 1950 and went on to be one of its strongest advocates. Campbell was named USDA Judicial Officer in 1971 and served in that capacity until 1995. During his tenure as Judicial Officer, Campbell issued numerous, and often lengthy, opinions under the P&S Act favorable to the agency.

Chapter 7
The 1970's

Have you ever wondered how a particular stockyard or auction market got its posting number? Since, for example, the Indianapolis Stockyards Corporation was posted in 1921, why was its posting number IN-117 and not IN-1 or IN-100? And what about the Kansas City Stockyards with posting number MO-143? It, too, was posted in 1921.

The answer is found in a January 4, 1972 *Federal Register* notice. Even though P&S posted stockyards beginning in October 1921, posting numbers were not assigned until January 1, 1972, when section 201.5 of the regulations was amended. The amendment provided for the posting of livestock markets by facility numbers rather than by the names of the facilities. Posting numbers were assigned using a two-letter state abbreviation[30] and a number beginning with 100. The stockyards were listed alphabetically by their location and numbered consecutively. That resulted in the Anderson Sale Barn in Anderson, Indiana receiving posting number IN-100, while the Evansville Union Stockyards in Evansville (posted in 1921) was assigned number IN-109 and the Indianapolis Stockyards Corporation was assigned IN-117.

The Chicago Union Stockyards, once the largest stockyards in the world, did not receive a P&S posting number. One of the most famous of all stockyards, Chicago Union opened Christmas Day, 1865 and was among the first stockyards posted by Packers and Stockyards in 1921. It closed its gates forever at midnight, July 30, 1971.

Union Stockyards, Chicago, 1940's

[30] GIPSA's posting numbers use the two-letter abbreviation for states as adopted by the U.S. Postal Service, with one exception. Posting numbers for Nebraska use the abbreviation NB, while the USPS uses NE.

The July 31 closing date of the Chicago Stockyards was actually six months later than originally planned.

Donald Campbell and Odin Langen (Administrators) both wrote numerous letters to concerned members of the industry and to members of Congress explaining that the Packers and Stockyards Act does not contain provisions that prohibit a stockyard company from discontinuing business. Campbell met with management at the Chicago Union Stockyards shortly after the announcement of the intended closing date of February 1, 1971. At that time, the stockyard management did not believe the announced closing date could be extended for financial reasons.

A group of five men, comprised of a cattle buyer for a Pennsylvania packer, a commissionman who purchased cattle at the stockyards, a cattle feeder who sold cattle through commissionmen at the stockyards, an order buyer for several Eastern packers and the president of the Illinois Packing Company, filed a formal complaint with the Secretary of Agriculture alleging the notice for discontinuing cattle operations and closing the Chicago Stockyards was unjust, unreasonable and in violation of the P&S Act. The relief sought was an order from the Secretary directing the Union Stock Yard and Transit Company continue the [then] current operation of the Chicago Union Stockyards.

A concurrent class action complaint was filed in U.S. District Court seeking the same relief. On February 1, 1971, the Court ordered the Union Stockyard and Transit Company to continue in business until August 1, 1971. The date was chosen to allow enough time for the plaintiffs to build stockyard facilities at Joliet, Illinois. To compensate the stockyard company, the plaintiffs had to pay $1,000 per business day to defray the company's losses. Funds were collected from shippers, buyers and commission firms to meet that payment.

In conjunction with the closing of the Chicago Stockyards, the Packers and Stockyards Administration announced it would close its office in Chicago and suboffice at National Stockyards, Illinois, and open a new office in Springfield, Illinois. This announcement brought letters of concern from the industry and Congress, including the St. Louis Live Stock Exchange, which wrote it was, "strongly opposed to this move. The presence of the local P&S has always been a strong force in maintaining the integrity and honest conduct of all parties operating on this market." Wm. L. Farris, President of the Exchange, wrote further, "we feel that continued presence of a local P&S office is vitally necessary to insure immediate attention and correction of any violations. We do not feel that the best interests of the livestock industry could be served, if the nearest P&S office is located in Springfield, Illinois."

While the large established terminal stockyards, like Chicago, were in decline, by the early 1970's, feedlots had become a major source of cattle marketed in the United

States.[31] Feedlots provide various services including feeding, watering, holding, delivery, shipping, weighing and other handling of livestock. GIPSA conducted investigations in 1973 to determine whether custom feedlots were operating as dealers or market agencies under the Act. As a result, several custom feedlot operators were instructed to register and obtain adequate bond coverage.

Solomon Valley Feedlot, Inc. was one of the feedlots instructed to register. It filed an action in the U.S. District Court in Kansas seeking a declaratory judgment and an injunction regarding the registration and bonding requirement. The district court held that Solomon Valley was not subject to the registration and bonding requirements. The U.S. Court of Appeals for the Tenth Circuit affirmed the decision because Solomon Valley handled no money and was not engaged in any activity specified in the definition of market agency or dealer.

United States Court of Appeals, Tenth Circuit.

SOLOMON VALLEY FEEDLOT, INC., et al., Plaintiffs-Appellees,
v.
Earl BUTZ, Secretary of Agriculture, et al., Defendants-Appellants.
No. 76-1325.

Argued and Submitted May 18, 1977.
Decided June 17, 1977.

Feedlot instituted suit seeking declaratory judgment that it and other feedlots of similar character were not "dealers" within definition of Packers and Stockyards Act of 1921. The United States District Court for the District of Kansas, George Templar, J., entered declaratory judgment that feedlots were not covered by Act, and appeal was brought on behalf of defendant Secretary of Agriculture and others. The Court of Appeals, William E. Doyle, Circuit Judge, held that feedlot, which made its profits from feeding cattle and whose selling activity on behalf of owners of cattle was merely accommodation to owners for whom service was performed free of charge, and other feedlots similarly situated were not subject to requirements of Act.

In this declaratory judgment action instituted by Solomon Valley Feedlot, Inc., the issue presented is the extent of the applicability of the Packers and Stockyards Act of 1921, as amended, and particularly whether Solomon Valley Feedlot, Inc., which is engaged in cattle feeding, is also a dealer or a market agency under the applicable statute. Other members of the feedlot industry have participated as amici curiae.

[31] GIPSA defines "custom feedlot" to mean "any facility which is used in its entirety or in part for the purpose of feeding livestock for the accounts of others, but does not include feeding incidental to the sale or transportation of livestock." 9 CFR 203.2(k)

The declaratory judgment finding and holding that the feedlots are not covered by the Act was entered on March 11, 1976. The appeal is on behalf of the Secretary of Agriculture and others.

The ultimate issue in the case is whether the registration and bonding provisions of the Stockyards Act, as amended, together with the regulations promulgated pursuant to the statute, apply to the plaintiff and others. One section of the statute requires all "dealers" and "market agencies" to register with the Secretary of Agriculture and to post bonds. The statute defines a "dealer" as "any person, not a market agency, engaged in the business of buying or selling in commerce, livestock, either on his own account or as the employee or agent of the vendor or purchaser."

Dealers have been required to register under the Act since 1921. One purpose of the Act was to make sure that farmers and ranchers received true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products. The early approach to marketing was through the stockyards and so the original Act applied to these markets. Later, however, packers and livestock dealers began to buy directly from producers and the public stockyard assumed less importance as a marketplace. As a result of this trend, the Act was amended in 1958. All dealers were, as a result of this amendment, required to comply with the statutory scheme regardless of where the cattle were bought or sold.

Until recently the custom feedlot has not been considered by the Department of Agriculture as a dealer. The Department now contends, however, that the feedlot has expanded its operation from merely feeding cattle to buying and selling services and is now a dealer. They point out that some feedlots have voluntarily registered as dealers. Since 1973, the Secretary through the packers and stockyards administration has been seeking to bring the feedlots under the authority of the Administration.

Based upon a finding of the Administration that Solomon was engaged in buying and selling, a notice was sent to Solomon that it was a dealer. Subsequently, on June 28, 1974, the present suit was filed seeking a declaratory judgment that Solomon and other feedlots of similar character were not dealers within the definition set forth in 7 U.S.C. Section 201.

The activity on the part of Solomon which is considered by the Administration as that of a dealer is its aiding its customers in the purchasing of livestock which are then placed at the Solomon Feedlot for feeding until they reach the desired weight for slaughter. Solomon then aids in the sale of the cattle once they have achieved the desired weight.

One specific method of doing business is that Solomon takes calves for feeding which have been raised by the customer. Another approach is that Solomon through its employees aids in the purchase of cattle for customers from "order buyers." All of this livestock is fed and ultimately sold, with the aid of Solomon, to packer-buyers. It is these latter activities that are regarded by the government as constituting engaging in the business of selling livestock as the agent of the customer. Solomon purchases cattle at the request of a customer who specifies the number and the kind of calves it wishes to buy and the general manager of Solomon, Mr. Max Deets, gives his opinion as to the weight and type of cattle that can be most successfully fed. Deets contacts the sellers and on some occasions has inspected cattle to fill the request of the customer or purchaser. The invoice is sent to Solomon and it gives notice to the customer of the purchase. Ordinarily the packer-buyer of the cattle which have reached the desired weight inspects the cattle on Solomon's premises. The owner generally sets the price. If he has not done so, the offer is relayed to the seller. Sometimes Mr. Deets gives his opinion as to whether the offer is appropriate. Although the customers rely on the ability and the integrity of Solomon, Solomon is not paid any fee in connection with this work.

The ruling of the district court was that under these circumstances the Solomon Valley Feedlot, Inc. was not engaged in buying or selling in commerce livestock as the employee or agent of the vendor-purchaser. The court's position was that Solomon was engaged in the feeding of cattle only and that its connections with the purchase and sale of cattle were a mere incident to the feeding business. It also found and determined that requiring Solomon to obtain bond coverage and to submit to the regulation of the Packers and Stockyards Act would fail to protect anyone designed by the Act to be protected. It, therefore, concluded and adjudged accordingly that Solomon Valley Feedlot, Inc. and other custom feedlots who carried on business in the same manner were not subject to the registration and bonding provisions of the Act.

The government maintains that this ruling was error; that the Administrator of the Packers and Stockyards Act had correctly interpreted the statute so as to include the feedlots which function in the manner of those before the court within the statutory term "dealer," it being the position of the Administrator that Solomon is in fact and in law engaged in the business of buying and selling in commerce livestock as the employee or agent of the vendor or purchaser.

I.

The first question is whether the statute on its face embraces the feedlot as a market agent or dealer. Both sides concede that Solomon is not a market agency.

The statutory definition of "dealer" contained in Section 201(d) is:
. . . any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

The question is then whether Solomon is in the business of buying or selling livestock in commerce either on its own account or as the employee or agent of the vendor or purchaser. The evidence does not establish that Solomon is engaged in the business of buying or selling as an agent of the vendor or purchaser. It is our conclusion that it is not so engaged.

Solomon as a cattle feeder makes its profit from feeding the cattle. This is in contrast to the dealer who profits from the transaction itself either by speculating on the market or by getting a commission. These individuals are truly in the business of buying or selling on their own account or as the employer-agent of the buyer or seller. In contrast, here the profit comes from efforts in altering the animals by improving their value through feeding. The emphasis is then entirely different. If the feedlot charged the customer a fee for selling the cattle or if it received the sale price from the packer, it would be arguable that the feedlots including Solomon were dealers or marketing agents.

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At bar Solomon's selling activity on behalf of the owners of the cattle was merely an accommodation to the owners. Solomon handled no money and was not engaged in any activity specified in Section 201, supra.

It would appear that the three groups of people engaged in purchasing livestock as dealers include (1) packers-buyers who are employed by packing plants to acquire cattle for slaughter; (2) commission people such as order-buyers; and (3) speculators, who buy in their own name to resell.

The literature of the Packers and Stockyards administration supports this view of the Act. See PA-399, The Packers and Stockyards Act, What It Is How it Operates. The above groupings are recognized in that literature which also recognized the distinction between the one who is regulated because he is engaged in the business in accordance with the statute and one who makes profit as a result of improving the animals.

II.

The purpose of the Act is to protect producers and consumers, and among

> the means employed to accomplish this purpose is the use of surety bonds. This is brought out by the 1976 amendment which made packers subject to the bonding requirement of the Act.
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> ******
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> [T]he amendment came about because of the fact that the business had changed so that the packers were directly engaged in purchases from producers and feedlots. The fact that the packers were having a number of business failures was the main reason for requiring that they be bonded. Congress was quite aware of the enhanced role of feedlots. So if it had seen the need for including feedlots within the sweep of the Act, it could have done so on the occasion of its expanding the regulation of packinghouses. Undoubtedly it was because these feedlots do not handle the proceeds of sales of cattle that caused Congress to not include them.
>
> In sum, since the wording of the statute falls short of including feedlots either expressly or impliedly and since the feedlots do not carry on activity that is within the general object and intent of Congress, we must conclude that they are not subject to the Act and, therefore, that the trial court was correct in so holding.
>
> It follows that the judgment of the district court should be and the same is hereby affirmed.

In a later case, *In re* Sterling Colorado Beef Co. and Ceres Land Co., the USDA Judicial Officer found a custom feedlot was subject to the Act. The feedlot was purchasing feeder cattle for the accounts of its customers, was issuing its own payment for the cattle, charged its customers $0.10 per hundredweight to cover expenses for purchase and delivery. The JO concluded the charges were a commission. He also found that the feedlot handled details of sales, scheduling the slaughter with the packer, received payment from the packer for the cattle, and paid its customers after deducting charges.

In 1976, the P&S Act was amended to increase financial protection to livestock producers and to expand USDA jurisdiction.[32] This amendment (1) required meat packers with

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[32] President Ford made the following remarks on September 13, 1976, following the signing of Public Law 94-410:

Members of the House and the Senate, members of the livestock industry, distinguished guests, ladies and gentlemen:

American agriculture, as we all know, built on the free enterprise and open market system, has long been the envy of people all over the world. No other nation has an agricultural industry to match American farmers and ranchers when it comes to providing food at reasonable cost.

In recent years, however, we have seen the need for greater protection of livestock producers. The legislation I am about to sign assures that our livestock producers will receive payments for the livestock they sell to meatpackers, even if a packer should suddenly go out of business.

annual livestock purchases of over $500,000 to be bonded; (2) provided trust protection for producers in the event of nonpayment for livestock by a meat packer[33]; (3) expanded USDA's jurisdiction over wholesale brokers, dealers, and distributors marketing meat in commerce; and (4) authorized the Agency to assess civil penalties of not more than $10,000 per violation. In subsequent legislation that amount was increased to $11,000 for packers, swine contractors, stockyard owners, market agencies, or dealers, and $27,000 for live poultry dealers.

Prior to the 1976 amendments, the U.S. Supreme Court held that the Packers and Stockyards Act and the regulations thereunder, provided for payment to livestock sellers before the close of the next business day following the purchase, but did not require a packer to hold cattle or carcasses in trust until the sellers actually convert the checks they receive into cash. The Court concluded that the regulations were designed to regulate payment procedures between buyer and seller, but were not intended to determine security rights between the sellers and third parties holding a valid security interest under State law on the packer's assets.[34]

A series of packer trust cases followed enactment of the 1976 amendments. The first to be heard by a Court of Appeals was *In re Gotham Provision Company, Inc.*, decided in 1982 (See page 95) after having its origin in bankruptcy court. The bank in this case argued (1) that the livestock producers selling livestock to Gotham were not cash sellers and not entitled to benefit from trust protection; (2) that livestock producers should not have priority over secured lenders, but if they do, they should have to trace the specific

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Last year, cattle producers unfortunately lost millions of dollars when one major meatpacker went bankrupt. This legislation will prevent such losses in the future. These constructive amendments to the Packers and Stockyards Act will reassure producers, provide stability in the marketplace, and help to ensure an adequate supply of meat for American consumers.

I am happy to see so many Members of the House and the Senate who were very instrumental in the passage of this legislation. Their bipartisan efforts gave Americans a sensible and a rapid response to a clearly demonstrated need.
Without creating excessive restrictions on any segment of the industry, without creating a superfluous, new government agency, and without significantly modifying our Federal bankruptcy laws, this legislation provides reasonable protection in the best interests of the producers, packers, and consumers.

Signing this bill will help to ensure that America's hard-working producers and packers who handle their livestock will continue to provide Americans with a dependable supply of meats unequaled anywhere on this globe. (Obtained courtesy of John Woolley and Gerhard Peters at The American Presidency Project, University of California at Santa Barbara, http://www.presidency.ucsb.edu.)

[33] Section 206(a) states, "It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that such arrangements are contrary to the public interest."

[34] Mahon v. Stowers, 416 U.S. 100, 94 S. Ct. 1626, 40 L. Ed2d 79 (1974). The Court said, "Whatever might be the policy reasons for insuring that packers did not take unnecessary advantage of cattle sellers by holding funds for their own purposes, it is hard to see that those reasons would automatically require that such sellers stand on a better footing than persons who have extended secured credit to a packer."

proceeds to which they are entitled; and (3) that certain claimants did not file timely valid claims. As to the bank's first two arguments, the court ruled against the bank. On the third argument, the court ruled against the bank as to one claimant and remanded the issue on another claimant back to the lower court.

Joint Ownership of Packer and Dealer is <u>not</u> Unfair

In *Central Coast Meats*, the Ninth Circuit Court of Appeals overturned the USDA Judicial Officer's ruling that joint ownership of both a packer and a dealer operation was an unfair practice.

United States Court of Appeals, Ninth Circuit.

CENTRAL COAST MEATS, INC., a California Corporation, et al.,
Petitioners,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.
No. 74-1302.

Aug. 10, 1976.

Appeal was taken from an order of Secretary of Agriculture requiring joint owners of both the cattle buying business and a meat packing business to divest themselves of one or the other of the two enterprises. The Court of Appeals, Merrill, Circuit Judge, held that although the two businesses did not at all times conduct their operations as completely independent and competitive entities, in view of failure of Secretary of Agriculture to show that action eliminated a buyer from marketplace who would otherwise be there the joint ownership of both enterprises did not constitute a proscribed unfair practice.

Reversed.

The Secretary of Agriculture, having determined that joint ownership by petitioners, Harold Habib, Sr., and Harry S. Habib of a cattle-buying business and a meat-packing business constitutes an unfair practice under ss 202(a) and 312(a) of the Packers and Stockyards Act, has ordered petitioners to divest themselves of one or the other of the two enterprises. Petitioners have taken this appeal from that order.

The Habibs are the owners and managers of Central Coast Meats, Inc. (CCM), a California corporation, whose business operations bring it within the definition of a packer. They also do business as livestock buyers and sellers under the name of Habib Cattle Company (HCC), and their operations there bring them within the definition of dealer.

A Department of Agriculture regulation, 9 C.F.R. s 201.68, bars ownership of a packer by a dealer, or vice versa. Section 201.70 of the Regulations condemns restriction or limitation of competition between packers and dealers.

The Department of Agriculture filed a complaint charging the Habibs with engaging in an unfair practice through their joint ownership of the two enterprises in question. A hearing was held and the administrative law judge concluded that joint ownership of the enterprises by the Habibs violated the regulations and thus constituted an unfair practice under the Act. On appeal the judicial officer, uncertain about the legal effect of the regulations, followed the Department's long-established policy of treating them as advisory only and disclaimed reliance upon them. Instead, he explored the record for proof of unfairness under the Act (see note 1).

Based on facts relating to the conduct of the Habibs' operations and on expert testimony the judicial officer found that the necessary effect of the unified operations of CCM and HCC was to reduce the number of bidders at sales; and that this reduction in the number of bidders would adversely affect the prices paid to producers. The judicial officer further found that unified operations would enable packers to: (1) monopolize public markets by tying purchasers of slaughter and feeder cattle; and (2) eventually control a large portion of the feeder market. The officer therefore concluded that “it is an ‘unfair’ practice, in violation of ss 202 and 312(a) of the Act, for a packer to engage in business as a dealer, or vice versa.” The divestiture order followed.

We do not believe that the judicial officer's broad conclusion is warranted under the Act. The true vice of a packer acting as a dealer as visualized by Congress is disclosed by s 202(c) and (d) of the Act. These subsections provide:
“It shall be unlawful with respect to livestock * * * for any packer * * * to:

(c) Sell or otherwise transfer to or for any other packer * * * or buy or otherwise receive from or for any other packer * * * any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or
(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; * * *.“

By this language Congress has clearly announced that it is not a per se violation of s 202(a) for a packer to act as a dealer; the clear implication of s 202(c) and (d) is that such conduct is to be allowed in certain circumstances. Congress having spoken to this effect, it does not lie with the Department, through regulation or by order to formulate under s 202(a) a per se rule making such action unlawful in all cases.

The Habibs contend that, by virtue of s 202(c) and (d), a packer may act as a dealer unless such conduct is shown to have the actual effect proscribed in those subsections. The Secretary in reply argues that, in light of the broad nature of the Act and congressional mandate to the Secretary to prevent abuse, actual injury need not be shown and that s 202(a) may be used to uproot unfair practices in their incipiency. Such a construction would seem to render (c) and (d) meaningless surplusage. However, we shall assume, without deciding, that the Secretary's standard applies here. But even under this standard the Secretary must show that the conduct in question is likely to produce the sort of injury the Act is designed to prevent…and this the Secretary has not done.

The record shows that CCM buys livestock on its own account to supply its packing house; HCC also buys and sells livestock on its own account for breeding and feeding purposes. Each entity is generally interested in different types of cattle; the packer is interested in slaughter cattle and the dealer in feeder and dairy cattle. The usual practice at the cattle sales attended by the Habibs was to deal first with the dairy and feeder cattle and later to deal with the slaughter cattle; occasionally, though, some dairy or feeder cattle would tardily make their appearance at the slaughter cattle sale. The presence of the Habibs at this later sale provided a buyer for this "straggler" market where none might otherwise have been present.

Despite the fact that HCC and CCM were generally interested in different sorts of cattle, there exist some cattle ("two-way") that are of a medial character that could interest both packers and dealers. It is with respect to these cattle that the judicial officer concluded that the Habibs had violated the Act, in that their separate operations had failed to compete for the purchase of such cattle. In support of his conclusion the judicial officer relied on undisputed facts adduced at the hearing. Ten times during one three-month period HCC bought cattle and later sold them to CCM at cost. On frequent occasions CCM and HCC employed the services of the same individual to bid for both entities at livestock sales, and in a few instances cattle bought by HCC were paid for by drafts drawn on CCM.

It must be acknowledged that CCM and HCC did not at all times conduct their operations as completely independent and competitive entities; in our view, however, this in itself is not sufficient to constitute a violation of the Act under the circumstances presented here.

The evil inherent in a failure to compete is that it actually eliminates a buyer from the marketplace who would otherwise be there. It may be that the presence of the Habibs in their dual capacity at sales might discourage the presence of those who would otherwise be inclined to bid on the two-way cattle. There is no evidence that this actually occurred, or even that it was a likely result of the Habibs' dual operations.

The experts' testimony as to the other evils inherent in packers acting as dealers e. g., tying, monopolization of markets is insufficient for the same reasons. Otherwise, generalized expert testimony as to the mere specter of these evils would allow conduct of the sort involved here to be deemed a violation of the Act without regard to the actual likely effect of such conduct.

This hypothetical possibility with reference to a limited market in our view is not sufficient to warrant a conclusion that the Habibs' arrangement constitutes a violation of the Act. Against this possibility must be arrayed the actual fact that CCM and HCC each independently constituted a competitive force in the sales attended by the Habibs one in competition with other packers, the other in competition with other dealers and that the dual ownership, instead of removing a buyer from the market in this major market area has added one to it, and thus had provided a competitive advantage to the producers. It is the Secretary, in prohibiting the Habibs from continuing to conduct both operations, who would actually remove a buyer from this market area.

If, in this confrontation of fact with possibility, the latter is to be held to prevail, that judgment must be based on facts bearing on the Habibs and a considered balancing of the benefits and evils that their method of doing business may be shown to have presented to the producers. Only after such a factually based evaluation by the Secretary can it be said that he has shown that the consequence of the dual operations of the Habibs, all aspects taken into consideration, is likely to be injury to the producer of the sort the Act is designed to prevent. Such an evaluation was not conducted here.

Reversed.

GOODWIN, Circuit Judge (dissenting):
I would affirm the Secretary's order.

In order to facilitate market regulation, Congress has invested certain executive agencies with broad powers. For example, Congress intended that the Federal Trade Commission be accorded wide latitude in its assessment of unfair trade practices. The FTC can "define and proscribe an unfair competitive practice, even though the practice does not infringe

> either the letter or the spirit of the antitrust laws."
>
> Significantly, the prohibitions of sections 202(a) and 312(a) of the Packers and Stockyards Act were intended to be as rigorous, if not more rigorous, that those imposed under s 5 of the Federal Trade Commission Act, s 2 of the Clayton Act, and the various sections of the Sherman Antitrust Act. The Packers and Stockyards Act is remedial legislation. It should be liberally construed in order to fully carry out its public purpose: protection of producers and consumers from economic harm at the hands of middlemen.
>
> In deciding what level of proof is required under the Act to characterize an activity as "unfair", the courts have inquired whether the questioned conduct necessarily offends a central purpose of the Act. The Seventh Circuit has suggested that the Secretary has broad powers of prohibition with regard to trade practices that conflict with the basic policies of the various antitrust statutes, "even though the practices may not actually violate those statutes * * *. This is fully consistent with the powers recognized in the FTC. In the instant case, the department had ample evidence that packer-dealer co-ownership does potentially threaten a central purpose of the statute.
>
> I find no implied authorization in the section governing dealers, 7 U.S.C. s 213, for a dealer to act as a packer; but there is a bar on "unfair practices" which mirrors subsection (a) of 7 U.S.C. s 192, the packer statute. Co-ownership here must be tested for compliance with both the dealer and packer statutes.
>
> Subsections (c) and (d) of 7 U.S.C. s 192 speak not to packer-dealer identity but to dealer-like activities by an entity plainly identifiable as a packer. I see no inconsistency between absolute prohibition of co-ownership under s 192(a) (or s 213(a)) and a prohibition under s 192(c) or (d) conditioned on proof of anticompetitive purpose or effect. Distinctions of this type are not unusual in a regulatory scheme as broadly endowed by Congress as this one is.
>
> If I were Secretary, I might not have considered the anticompetitive potential in this case to be as grave as the incumbent apparently has considered it, but I am content to leave the decision in his hands.

At the very end of 1977 (December 30), Packers and Stockyards moved back under the Agricultural Marketing Service as part of the Carter Administration's policy to reduce the number of government agencies. In August of 1979, the Secretary asked for an assessment of the overall or long-range effects of P&S being a part of AMS. In response, Deputy Administrator Chas B. Jennings wrote:

"I have had the privilege of administering the P&S Act as an independent agency as well as a subunit of AMS. Based upon my experience both in the livestock industry and in the Department, I recommend in the strongest terms that you take the necessary action to return the administration of the Packers and Stockyards Act to a separate independent agency functioning as I believe Congress and the industry intended."

On August 2, 1979, USDA published a notice in the *Federal Register* relating to the Title V regulations, stating that "The marketing of live poultry in designated areas has become virtually nonexistent and the regulations are no longer pertinent." All of the regulations issued under authority of Title V were revoked and the agency deemed Title V inoperative.

Agency Heads of the 1970's

Odin Langen (January 19, 1971 – April 1, 1972) was born January 15, 1913 in Minneapolis, Minnesota. He farmed near Kennedy, Minnesota and was active in numerous local government positions before serving in the Minnesota State House of Representatives. He served in the U.S. Congress from 1959 to 1971. In 1968, Langen defeated challenger Bob Bergland, who would later serve as Secretary of Agriculture from 1976 to 1981. Bergland defeated Langen in his 1970 reelection bid. In 1971, Langen was named Administrator of the Packers and Stockyards Administration. He resigned in April, 1972 to pursue farming in Minnesota. Langen died July 6, 1976.

Marvin Leland McLain (May 16, 1972 – January 20, 1977) was born October 1, 1906 in Brooklyn, Iowa. McLain earned a BS degree in 1928 from Iowa State College. He worked in the Commodity Credit Corporation and later served as Assistant Secretary of Agriculture for Agricultural Stabilization from January 1956 to November 1960. Before returning to USDA and serving as P&S Administrator, McLain was assistant legislature director of the American Farm Bureau Federation. McLain died February 23, 1997 in Des Moines, Iowa.

Chas B. Jennings (June 30, 1977 – September 30, 1979)

Chapter 8
The 1980's

The early 1980's were again wrought with controversy over the independent status of the Packers and Stockyards Administration. After existing as an independent agency from 1967 to 1977, Packers and Stockyards moved under the Agricultural Marketing Service in 1978 under the Carter Administration. Congress introduced a bill, H.R. 1575, on February 3, 1981 that would amend the Packers and Stockyards Act to establish the Packers and Stockyards Administration. With the Reagan Administration taking office in 1981, came a commitment to reinstate the independent agency status of the Packers and Stockyards Administration. The Reagan Administration was committed to providing for the Administrator of P&S to report directly to the Assistant Secretary for Marketing and Inspection Services. The Packers and Stockyards Administration was created on June 17, 1981 as part of a departmental reorganization. In a July 23, 1981, letter to the Chairman of the House Committee on Agriculture, Secretary John R. Block informed the Chairman that USDA opposed enactment of H.R. 1575. Opposition to the bill was based on the June 17 reorganization, which accomplished the objectives of the bill. A *Federal Register* notice published on December 10, 1981, provides a description of the P&SA's organizational structure at that time. (See Exhibit E).

Unfair Practices

In *De Jong Packing Company*, packers were found to have engaged in an unfair practice by conspiring to force auction markets to change their terms of sale from "as is" to "subject," and also found a packer committed an unfair practice by failing to pay for condemned cattle within one business day following sale.

In United States Court of Appeals, Ninth Circuit

DE JONG PACKING COMPANY, and Mt. Vernon Meat Co., Inc., Petitioners,
v.
The UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.
HYGRADE FOOD PRODUCTS CORPORATION, Petitioner,
v.
The UNITED STATES, the Secretary of Agriculture and the Packers and Stockyards Administration, Respondents.
Nos. 77-2722, 77-2979.

April 7, 1980.
Rehearing Denied June 3, 1980.

Packers and Stockyards Administrator instituted administrative action alleging that a group of packers had violated the Act by conspiring to force auction stockyards to change their terms of sale from "as is" sales of slaughter cattle, under which the packers bear the risk that the cattle will fail to pass government inspection, to "subject" sales, those subject to the cattle's passing government inspection, which place the risk of loss on the seller. An administrative law judge found that the packers had violated the Act and issued appropriate cease and desist orders. Packers appealed. The Court of Appeals, Merrill, Circuit Judge, held that the packers had engaged in an unfair practice and had violated a regulation by failing to pay for condemned cattle within one business day following sale.

Affirmed.

On Petition to Review a Decision of the Secretary of Agriculture.

The Packers and Stockyards Administrator instituted this administrative action under the Packers and Stockyards Act ("the Act"), alleging violations of s 202(a), (e) and (g) of the Act. The complaint alleged that a group of packers, petitioners here, had conspired to force auction stockyards to change their terms of sale, from "as is" sales of slaughter cattle, under which the packers bear the risk that the cattle will fail to pass government inspection, to "subject" sales those subject to the cattle's passing government inspection which place the risk of loss on the seller.

The administrative law judge found that petitioners had violated the Act as charged and that petitioner De Jong had violated 9 C.F.R. s 201.43(b) as well, and that appropriate cease and desist orders should issue. The government, contending that the cease and desist order was insufficiently broad, appealed to the Judicial Officer, who has final authority to decide cases within the Department of Agriculture. Petitioners also appealed, contending that the cease and desist orders should not have issued. The Judicial Officer sustained all findings of violations. In addition, he concluded that all petitioners, not just De Jong, had violated 9 C.F.R. s 201.43, because they had conspired with De Jong. Accordingly, he broadened the scope of the cease and desist order. Petitioners have appealed to this court.

Under the customary trade practices and marketing procedures of the northwest Washington livestock auction markets, the purchase of livestock is on an "as is" basis unless otherwise expressly specified prior to sale. When so purchased, the purchaser buys the animals as he sees them with no guarantee that they are suitable for any purpose. He assumes the risk of subsequently discovered defects, and full payment is due within one business day of purchase.

When slaughter cattle are sold at an auction market on a "subject" basis, the sale is contingent upon the animal passing federal inspection as fit for human consumption, and payment is not due until one business day after the animal has passed inspection.

It is not practicable or lawful to sell a particular animal at auction with some prospective buyers bidding on an "as is" basis, while others bid on "subject" terms. It is the responsibility of the stockyard owner to fix the terms of sale. Under the practice at northwest Washington auctions, cattle are very rarely sold on "subject" terms; only cattle with visible defects or which have elicited no "as is" bid are so sold.

In early February, 1972, petitioners, with the exception of Hygrade, signed a letter to the stockyards which stated that in the future petitioners would purchase and pay for cattle only subject to their passing government inspection.[35] The stockyards promptly rejected the proposed change in policy. On March 8 and 9, 1972, the Packers and Stockyards Administration sent letters to the packers advising them that it considered

[35] As to this letter, the administrative law judge stated in his initial decision:
"The obvious tenor of the document is threatening and coercive. * * * The meaning of the document was not unclear to the recipient markets. They understood it to be what it was an ultimatum by their major customers. Without the patronage of these customers, the markets could not profitably conduct their business. Upon receipt of this ultimatum, it is no wonder that the markets sought Government aid in order to resist."

Petitioners allege that they took this action in response to the increasingly common practice on the part of some sellers of administering antibiotics so that diseased cattle which will not pass government inspection appear to be healthy at the time of auction. The market operators opposed the shift to "subject" terms, asserting that it would cause added administrative problems and expense to the market. The Judicial Officer found that "each group had valid business reasons for its position * * *."

their actions to be in violation of the Act, and that it would take further administrative action if the stockyards did not “reconsider.” All packers but petitioner De Jong appear to have reconsidered. Their purchase of cattle continued on an “as is” basis and they promptly paid for all cattle purchased, in accordance with the practice. De Jong, however, refused to pay for any cattle sold to it which were subsequently condemned. The Washington State Department of Agriculture then initiated proceedings pursuant to the state's regulatory program, seeking to compel De Jong to pay. A state court found that De Jong had bought the cattle on “subject” terms and therefore, as a matter of contract law, was not required to pay.

Shortly after that decision became final, during April of 1974, each petitioner (now including Hygrade) sent a letter to the stockyards informing them that as of May 1, 1974 (in one case as of April 29, 1974), all bids would be subject to the cattle passing inspection, and that payment for cattle would be delayed for three bank days pending determination as to whether the cattle were fit for human consumption. (Hygrade's letter varied only in specifying that it would implement this policy by withholding the average price of two animals for the three-day period.)

From May 1, 1974, to May 15, 1974, petitioners adhered to their announced position and no cattle were purchased “as is.” During the last two weeks of May, 1974, however, all petitioners notified the stockyards that they were rescinding their “subject” policy and resumed bidding for cattle on an “as is” basis.

EVIDENCE OF CONSPIRACY

It is clear that bidding for cattle on a “subject” basis is perfectly legal, and that any packer acting independently is free to bid on such terms. If what was done here constituted a violation of s 202, it was because concerted action was taken by petitioners. The existence of a conspiracy or agreement thus becomes critical. Petitioners contend that the record does not support the Judicial Officer's finding of conspiracy. Our question on review is whether the finding is supported by substantial evidence.

It is clear that a conspiracy existed as of February 8, 1972, when petitioners (absent Hygrade) joined in advising the stockyards that all future bids would be “subject” bids. As the Judicial Officer noted in his decision:

“This case is quite unusual! ‘Conspirators seldom sign articles of partnership in crime which may thereafter be conveniently put into evidence by the prosecution.’"

The question, then, is whether a conspiracy existed in 1974, when petitioners individually notified the stockyards that their bids would be

confined to “subject” bids in the future. Petitioners assert that they all simultaneously and independently arrived at the decision to send their 1974 letters as a result of De Jong's success in Washington state courts. This contention was rejected by the Judicial Officer. He noted that the state court success was founded on the state court finding that the livestock markets had accepted De Jong's bids knowing that they were “subject” bids. Thus, the co-operation of the livestock markets in continuing to accept “subject” bids was necessary to future success. The Judicial Officer stated:
“ * * * the State Court decision was not likely to make each of the respondents, acting independently, come to the conclusion that he alone could force the auction markets to change their sales policy effective May 1, 1974 (or April 29, 1974).”

As to whether a 1974 conspiracy existed, the Judicial Officer stated: “There is no evidence in this case that any of the conspirators withdrew from the conspiracy prior to mid-May 1974. Merely purchasing livestock in 1972 and 1973 without enforcing the terms of the February 1972 ultimatum is no evidence that the conspirators abandoned their conspiratorial purpose. In fact, I infer from their unity of action in 1974, following the State Court decision, that in 1972 and 1973, the respondents other than Hygrade were merely biding their time awaiting the outcome of De Jong's activities in furtherance of the conspiracy.”

We find this inference to be rational. Further, the parallel action taken in 1974 lends support to the inference that it was in response to a conspiracy. The similarity of the letters written by the individual petitioners, the manner in which terms and conditions of purchase were stated by each, and the coincidence of the effective dates selected by each (April 29, and May 1, 1974), all lend credence to the view that each petitioner was aware of the action taken by the others and was acting in concert with the other petitioners. It is conceded that there was “trade talk,” of which petitioners were aware, regarding a boycott. While mere consciously parallel action is not sufficient to demonstrate conspiracy, neither is express agreement required; it is “enough that knowing that concerted action was contemplated or invited, (defendants) gave their adherence to the scheme and participated in it

Here, from the facts that petitioners combined to seek “subject” terms in 1972 and waited to act together again in 1974, it can be inferred that petitioners believed that concerted action was necessary to achieve their purpose, and that no petitioner would have acted as it did had it not believed that the others would do the same.

We conclude that as to all petitioners who joined in the 1972 notice to stockyards there is substantial evidence to support the finding that the

1972 conspiracy was not abandoned prior to 1974, and that the writing of the 1974 letters constituted concerted action taken pursuant to agreement.

As to Hygrade, the company that did not join in the 1972 letter, the Judicial Officer found that it "knowingly and intentionally joined the conspiracy in 1974." He based his finding on the similarity between the conditions set forth in the Hygrade letter and those set forth in the letters of the other petitioners,[36] and on the coincidence in timing.[37]

We conclude that there was substantial evidence to support the finding that Hygrade, in 1974, joined the ongoing conspiracy formed by the other petitioners in 1972.

UNFAIR PRACTICE UNDER SECTION 202(a)

The administrator alleged violations of subsections (a), (e) and (g) of s 202.

As to subsection (g), petitioners assert that they have never conspired to do any act made unlawful by the section; that if they conspired at all, it was to do a perfectly lawful act to bid only on "subject" terms. We agree and find no violation of subsection (g).

At to subsection (e), the alleged violation is apparently based on the contention that the conspiracy, in effect, was to fix prices, the rationale

[36] The Judicial Officer stated:
"1. Both letters applied only to cattle (although Hygrade purchases other species).
2. Under both letters, all cattle would be purchased 'subject' rather than 'as is.'
3. Both letters provided that the packer would refuse to pay for an animal found unfit for human consumption if slaughtered within the identical time period, viz., three bank days; and both provided for the packer to pay for condemned animals slaughtered after such period.
4. Both letters provided for notice of condemnation by telephone, with condemnation slips to be thereafter mailed to the auction markets.
The only difference between the purchasing conditions of the two letters was in the method of payment. Hygrade would have withheld payment of only two animals from each sale until it was determined whether any animals failed to pass inspection; * * * whereas the other respondents would have withheld payment for all cattle for three bank business days."

[37] The Judicial Officer stated:
"3. Hygrade's letter was sent practically simultaneously with the letters of the other respondents in 1974, and all of the letters had the identical effective date, May 1, 1974, except for Ferry, which had an April 29, 1974, effective date. Respondents contend that they all simultaneously and independently arrived at the decision to send their 1974 letters as a result of the State Court decision referred to in Findings 11, 12 and 19, supra. But it is not likely that such uniformity in timing would have occurred absent collective action. The State Court decision was filed February 15, 1974. The time for appeal expired about March 18, 1974. Although the beginning of a month might have been picked by each respondent, acting independently, as the effective date for action, not one of the respondents picked April 1, 1974, as the effective date, and not one picked June 1, 1974, or thereafter as the effective date."

apparently being that since the petitioners would only bid "subject," they were fixing prices of condemned cattle at zero. We cannot accept the notion that a conditional sale is an effort to fix prices. If the condition is not met, then no purchase takes place at all. The unfit cattle are not purchased at zero dollars; they are simply not purchased. Accordingly, we find no violation of subsection (e).

The problem is with subsection (a), and the question is whether this conspiracy constitutes an unfair practice under that subsection. The fact that the conspiracy is not a subsection (g) violation, and that absent concert of action "subject" bidding is not an unfair practice, does not provide an escape. A competitor "can do many things independently which he may not combine with others to accomplish."[38] What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action; to obtain by concert of action market power not possessed by the purchasers individually and, by exercise of that market power, to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces.

Such conduct falls squarely within the prohibition of Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930), and United States v. First National Pictures, Inc., 282 U.S. 44, 51 S.Ct. 45, 75 L.Ed. 151 (1930). In Paramount Famous Lasky Corp., a group of motion picture distributors agreed that they would deal with exhibitors only on the terms of a standard exhibition contract which required arbitration of all disputes. The Court held that the "manifest purpose" of this arrangement was "to coerce the exhibitor and limit the freedom of trade," and that the "necessary and inevitable" effect of such an agreement was the unreasonable restraint of competition. The Court conceded that arbitration might be well suited to the needs of the film industry, but concluded that the statute could not " ' * * * be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results.' This is precisely what petitioners would have us do.

[38] While s 202 of the Packers and Stockyards Act may have been made broader than antecedent antitrust legislation in order to achieve its remedial purpose, it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton Act and the Fair Trade Commission Act. See Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968); Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968). Thus the courts that have considered s 202 have consistently looked to decisions under the Sherman Act for guidance, although recognizing that s 202 in some cases proscribes practices which the Sherman Act would permit. E. g., Armour & Co. v. United States, supra, 402 F.2d 712 (7th Cir. 1968); Swift & Co. v. United States, supra, 393 F.2d 247 (7th Cir. 1968); Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962). The parties in the present case agree, as indeed they must, that decisions under the Sherman Act are germane to the issues before us.

First National Pictures, Inc., involved the same parties; there, the distributors agreed to deal only with exhibitors who agreed to provide a security deposit as required by the standard contract and to assume any contractual obligations of the prior theater owner. The Court found that its decision in Paramount Famous Lasky Corp. was dispositive; it concluded that

"The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the film boards and secure their concerted action for the purpose of coercing certain purchasers of theaters by excluding them from the opportunity to deal in a free and untrammeled market."

The situation in the present case is indistinguishable. Here, as in Paramount Famous Lasky Corp. and First National Pictures, Inc., a group of competitors have joined together for the purpose of coercing more favorable terms of trade from third parties than they could obtain through the normal play of competitive forces.

In Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., we drew a distinction between "normal and usual" agreements by which parties restrict their liberty to deal with others, which are permissible, and those with the "purpose to coerce the trade policy of third parties or to secure their removal from competition," which are not. Here, it was the clear and sole purpose of petitioners to exert a coercive influence upon the trade practices of third parties in order to exact more favorable terms than they could otherwise obtain. This the Judicial Officer could properly enjoin.

Petitioners contend that their two unsuccessful attempts to coerce a change in marketing practices have demonstrated lack of market power on their part; that Paramount Famous Lasky Corp. and First National Pictures, Inc., are to be distinguished in that market power was clearly present in those cases; that without market power no adverse effect on competition is to be expected, and that for this reason a cease and desist order should not have been entered here.

Initially, we note that there may have been reasons for the failure of petitioners' coercive efforts other than lack of market power. However, even assuming that petitioners lacked market power, and even were we to conclude that petitioners' lack of market power would preclude our finding that they had violated the Sherman Act, the cease and desist order under s 202 was proper.

The consequences of violation of the Sherman and Clayton Acts are far more substantial than here, where the issue is simply whether the practice in question should be halted.

> The question would seem to be whether, under the Act, a practice cannot be halted as unfair under s 202 unless competitive harm has already occurred, or whether the likelihood that harm will result suffices. This question we did not reach in Corona Livestock Auction, Inc. v. United States Department of Agriculture, supra, 607 F.2d 811 (9th Cir. 1979), or Central Coast Meats, Inc. v. United States Department of Agriculture, 541 F.2d 1325 (9th Cir. 1976).
>
> The government contends that the purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered; that unfair practices under s 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition. We agree. It would make little sense and might prove disruptive of the market to hold that petitioners may continue to repeat their concerted efforts to coerce a change in market practices and may be halted only when they have finally acquired sufficient market power to succeed.
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> We affirm the Judicial Officer's conclusion that petitioners engaged in an unfair trade practice in violation of s 202(a) of the Act.
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> The order is affirmed.

Packer Trust Challenged

In 1982, the Fifth Circuit Court of Appeals became the first court of appeals to consider the 1976 packer trust amendments. Those amendments to the Packers and Stockyards Act established the statutory trust in favor of unpaid sellers of livestock to packers. The purpose of section 206, according to Congress, was to safeguard livestock producers left unprotected when a packer's business fails.[39] Prior to enactment of section 206,

[39] S. Rep. No. 94-932. "… Between 1958 and early 1975, 167 packers failed, leaving livestock producers unpaid for over $43 million worth of livestock… By far the largest of the failures was that of American Beef Packers (ABP), which went bankrupt in January 1975, leaving producers in 13 states unpaid for a total of over $20 million in livestock sales. Of particular concern to the livestock producers in this instance was the fact that ABP's principal source of financing, General Electric Acceptance Corporation, stood ahead of them among the bankrupt's creditors by virtue of its duly protected security interest in ABP's inventory, i.e., livestock and derivative products which the producers had sold on a cash basis and for which they had not been paid.

"Under present law, a packer is able to offer as security for a loan the livestock, meat, meat food products, or receivables or proceeds therefrom, which he has not paid for. The producer, who was responsible for raising, feeding, and caring for the livestock, is left unpaid, while secured creditors reap the reward of his labors."

producers were unprotected while secured creditors were protected. Section 206 entitled unpaid cash sellers to have their claims satisfied from a defaulting packer's assets prior to satisfaction of claims of perfected security interests.

The case of *In re Gotham Provision Company, Inc.*[40] tells us that statutory trusts are not "secret liens," as was suggested in another case, *Fillippo v. S. Bonaccurso & Sons, Inc.*[41] *Gotham* establishes that unpaid sellers have the burden to show that there existed a pool of commingled funds exceeding in dollar amount their total trust interests. The floating pool includes not only the inventories of, or receivables or proceeds from meat, meat food products or livestock products derived from livestock purchased from the defendant livestock sellers, and also includes inventories, receivables and proceeds on hand as of the date of the earliest sale involved.

Cases brought under the trust provision rejected the idea that unpaid cash sellers had the burden of tracing the proceeds realized from the sale of their livestock. The trust is a floating pool available to all unpaid cash sellers, on a pro rata basis, and contains all livestock and meat purchased in cash sales and not yet paid for as well as the proceeds of that livestock and meat.[42] The burden of proof is on the sellers to establish the amount subject to their trust.

Gotham also establishes that regulation 201.200 is a substantive regulation having the force and effect of law. The regulation requires clear language for an extension of credit and requires that it be in writing.

United States Court of Appeals, Fifth Circuit.

In re GOTHAM PROVISION COMPANY, INC., Debtor/Debtor in Possession,
The FIRST STATE BANK OF MIAMI, Appellant,
v.
GOTHAM PROVISION COMPANY, INC., et al., Appellees.
No. 80-5682.

March 11, 1982

Secured lender instituted adversary bankruptcy proceeding to determine validity, priority and extent of lien claimed on bankrupt packer's escrow account containing collections on packer's accounts receivable, and unpaid cash sellers of livestock filed counterclaim against lender to recover amounts necessary to compensate them fully for sales of cattle made to the packer. The Bankruptcy Court entered judgment in favor of

[40] 669 F.2d 1000 (5th Cir. 1982).
[41] 466 F. Supp.1008, 1012 (E.D. Pa. 1978).
[42] *In re* Matter of Federal Packing Co. of Fla. Lykes Bros, Inc. v. Jeanette E. Tavormina and City Nat'l Bank of Miami.

sellers, and review was sought in the district court. The United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., entered judgment, and the lender appealed. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) livestock purchases were "cash sales" and were not exempt from trust provisions of the Packers and Stockyards Act requiring that packers purchasing livestock on cash basis hold such livestock and accounts receivable and proceeds derived from resale of such livestock in trust for benefit of unpaid cash sellers; (2) under the Packers and Stockyards Act, sellers had priority over lender to which packer had given security interest in inventories and receivables subject to trust, and sellers were entitled to recover proceeds of such receivables to extent of outstanding balance on cash sales even though sellers could not trace particular accounts receivable derived from sale of their livestock; (3) unpaid cash seller's filing of notice with Secretary of Agriculture was required in order for seller to have claim under Packers and Stockyards Act to trust; and (4) assignee of all of unpaid cash seller's accounts receivable could perfect claim under section of Packers and Stockyards Act.

Affirmed in part, reversed in part, and remanded.

This appeal presents the first opportunity for a court of appeals to construe the trust provisions of the 1976 amendments to the Packers and Stockyards Act of 1921. In the aftermath of numerous bankruptcies of meat packers in the early 1970's, Congress amended the Packers and Stockyards Act to provide certain livestock producers with some means to ensure that they would receive payment for livestock sold to packers. Section 206 of the amended Act requires that packers who purchase livestock on a cash basis hold such livestock and accounts receivable and proceeds derived from the resale of the livestock in trust for the benefit of unpaid cash sellers.

This case arose from the financial demise and bankruptcy of Gotham Provision Co., Inc. ("Gotham"), a meat packer. The First State Bank of Miami ("the Bank") entered into a financing arrangement with Gotham on November 9, 1976, whereby the Bank would advance funds to Gotham and take as collateral a security interest in Gotham's inventories, accounts receivable and proceeds from the sale of meat. Gotham's financial fortunes turned for the worse in 1978; the Bank was aware of Gotham's financial problems. Ultimately, Gotham filed a Chapter XI petition in bankruptcy on March 9, 1979. Approximately one month prior to the filing of the bankruptcy petition, the outstanding balance due to the Bank on the Gotham loan was $450,000, and, by March 16, 1979, seven days after the filing of the bankruptcy petition, this amount was reduced to $112,324.19. At that time, the bankruptcy judge, at the request of the United States Department of Agriculture ("USDA") ordered that all future collections of accounts receivable be held in escrow. This escrow account contained $74,439.85 at the time of the trial in the bankruptcy court below.

Several livestock producers who had allegedly made cash sales of cattle to Gotham during February, 1979, were left unpaid, and they notified Gotham and the Secretary of Agriculture ("Secretary") of their intent to preserve their rights under the trust provisions of the Packers and Stockyards Act. The Bank thereafter instituted an adversary proceeding in the bankruptcy court to determine the validity, priority and extent of the lien it claimed on the escrow account by virtue of its security interest in the accounts receivable. The Bank named Gotham and certain livestock producers, including D. R. Kilpatrick ("Kilpatrick"), Lykes Brothers, Inc. ("Lykes"), Ronnie Perkins ("Perkins"), W. D. Roberts ("Roberts"), Billie Rogers Farm ("Rogers"), United States Sugar Corporation ("U. S. Sugar"), Robbie Addison ("Addison"), W & D Dairy and W. Garcia as defendants. The latter two defendants did not make an appearance in the bankruptcy court, and their claims to the escrow account were extinguished by the bankruptcy judge. The other defendants answered by alleging that the trust provisions of the Packers and Stockyards Act gave them priority over the escrow funds. In addition, they filed a counterclaim against the Bank to recover the additional amounts necessary to compensate them fully for the cash sales of cattle made to Gotham on the theory that the funds used to decrease Gotham's loan balance were subject to the trust created by s 206 of the Packers and Stockyards Act.

The bankruptcy judge held that the livestock producers were cash sellers as defined by the Act and were thereby entitled to the protection of s 206. The judge further held that the floating pool of trust assets to which these producers held a valid claim included both the escrow account and the money used to decrease Gotham's debt to the Bank. Thereby, the bankruptcy judge ruled that the producers had priority over the escrow funds and that they should recover against the Bank on their counterclaims. The district court affirmed.

On appeal to this court, the Bank raises several claims of error. First, it argues that the court below erred by holding that the livestock producers were cash sellers. Second, the Bank argues that even if the producers are cash sellers, the statute should not be construed to allow these producers to have priority over the Bank's security interest in the accounts receivable and to force the Bank to remit to them moneys derived from the accounts receivable which had been applied to reduce Gotham's debt to the Bank. Finally, the Bank argues that certain parties should not be permitted to take advantage of the trust provisions of the Act since these parties did not properly file their claims in accordance with the Act. We reverse the judgment below pertaining to appellee Perkins and remand for further findings on the filing issue. We reject each of the other arguments raised by the Bank and therefore affirm with respect to all other appellees.

I. CASH SALES VERSUS CREDIT SALES

Congress clearly limited the application of the trust provisions of s 206 of the Packers and Stockyards Act to transactions where:

(1) The commodities sold are “livestock,” as defined in s 2(a) of the Act,;

(2) The purchaser of the livestock is a “packer” as defined in s 201 of the Act;

(3) The transaction is a “cash sale”;

(4) The cash sellers have not received full payment for their livestock;

(5) The packer in question makes average annual purchases of more than $500,000; and

(6) The cash sellers have preserved the trust within the required period by giving notice to the packer and by filing that notice with the Secretary of Agriculture.

Where each of these conditions has been satisfied, the packer is required to hold in trust for the benefit of unpaid cash sellers any livestock purchased in cash sales, inventories of meat or other products derived from such livestock, and accounts receivable or proceeds obtained through the sale of these items by the packer.

The Bank's first argument is that the s 206 trust does not arise in this case because the transactions in question in this case are not cash sales. We find this assertion to be without merit. The Act itself provides specific guidance for the determination of whether a transaction is a cash sale. Subsection (c) of s 206 defines a “cash sale” to be “a sale in which the seller does not expressly extend credit to the buyer.” Section 206 itself does not indicate what constitutes an express extension of credit, but s 409 of the Act, provides some assistance. Section 409 requires that purchasers of livestock pay the seller the full amount of the purchase price before the close of the next business day following the purchase and transfer of possession of the livestock, or, if the transaction is on a “grade and yield” basis, before the close of the next business day following the determination of the purchase price. However, s 409(b) allows the parties to effect payment in another manner so long as the parties expressly agree in writing, in accordance with the terms and conditions specified by the Secretary of Agriculture, to such a financing arrangement. In essence, s

409 of the Act presumes that all livestock sales are cash sales unless the parties expressly agree in writing to make the transaction a credit sale. Read in this context, the language of s 206 defining “cash sales” to include all sales where the seller has not expressly extended credit contemplates that unless the parties clearly agree in writing to a credit arrangement, the transaction is a cash sale.

The legislative history of the 1976 amendments supports this view. The Senate Committee on Agriculture and Forestry recognized that s 409 would be critical to determining whether a transaction was a cash or credit sale. Discussing the statutory provision found in s 409(a) allowing the parties to modify in writing the terms of payment established in s 409(a), the Committee stated:

Nothing in section 7 would preclude a packer and a producer from agreeing in writing that the packer may transmit through the mails, by the close of the next business day, payment for livestock purchased. Such action would not result in the producer being considered a credit seller. If, however, the agreement is for payment beyond the close of the next business day, the producer would be considered a credit seller and as such would forfeit his rights under the trust.

Since the “agreements” referred to in this excerpt are required by s 409(b) to be in writing, Congress clearly intended that a writing specifying terms of payment which extended beyond the time allowed in s 409(a) would establish that the transaction is a credit sale. Likewise, where the parties made no such writing, payment would be due within the two-day period specified in s 409(a), and the transaction would thereby be a cash sale. The existence of a writing which merely provides that payment may be made by mailing a check to the seller within the s 409(a) time period would not, as the legislative history notes, transform a cash sale into a credit sale because such an agreement is not an extension of credit.[43]

Other passages in the legislative history support the rule that an extension of credit exempt from trust protection must be in writing. Rep. Poage, the chairman of the House Committee on Agriculture's Subcommittee on Livestock and Grains, explained in his opening remarks on the floor of the House that if a livestock producer intends to enter into a credit arrangement, “he has to write it out so he can fully understand that he is

[43] An example of such an agreement to authorize payment by check through the mails is found in the following agreement between appellee Roberts and Gotham:
On this date, I am entering into an agreement with Gotham Provision Company, Inc., authorizing them to pay for and mail checks in payment for cattle purchased from us as they have done in the past. This pertains to section 206 of the packers and stockyards regulations.
(This agreement does not expressly extend credit and thereby does not constitute evidence of a credit transaction.)

not going to be paid until a certain date." **** In addition, Rep. Thone, the principal sponsor of the 1976 amendments, in responding to a question from one congressman regarding whether packers could continue the practice of orally agreeing with producers for payment to occur at a time after the next business day after the purchase and then pledging the accounts receivable from the sale of the meat to a bank, stated that:

(T)here is a provision in this legislation which clearly allows that practice to continue. If they want to agree on payment a week from Monday or two weeks from Monday, the first of next year or whatever, they can do that by written contract at any time they so desire to do so.

The regulations issued by the Secretary of Agriculture under the authority of s 409(b) are consistent with this interpretation of the Act. Under 9 C.F.R. s 201.200 (1981), packers whose average annual purchases exceed $500,000 may not purchase livestock on credit unless the packer obtains from the seller a written acknowledgment that the seller agrees to make the sale on credit and that the seller waives his rights under the trust provisions of the Act. The regulations also require the packer to retain the acknowledgment and to give a copy of the acknowledgment to the seller.

For the foregoing reasons, we hold that a livestock purchase is not exempt from the trust provisions of s 206, unless the packer obtains from the seller a writing which clearly indicates that the seller has extended credit to the packer and thereby waived protection of the trust provisions of the Act. In the instant case, there is no evidence that Gotham obtained any such writing from any of the appellee livestock sellers. The record reflects that on October 22, 1977, Gotham did send to parties from whom it had purchased cattle a form for their signatures which basically tracked the language of the suggested form in s 201.200 for a written acknowledgment of an express extension of credit. However, none of the appellees signed such a form or any writing to indicate that credit had been expressly extended. Based on the record in this case, we hold that the appellees were cash sellers within the meaning of the Act.

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II. APPLICATION OF THE TRUST PROVISIONS TO THE BANK

The second major argument advanced by the Bank is that even if the appellees are cash sellers, the trust provisions of the Packers and Stockyards Act should not be construed to give the cash sellers a superior interest in Gotham's accounts receivable as against the Bank. The Bank urges that common law trust principles should govern the enforcement of the s 206 trust; therefore, the appellees must at minimum trace their sales into the accounts receivable over which the Bank held a security interest in order to recover. We are unable to reconcile the Bank's arguments with the language of the statute and its legislative history.

It is clear that the purpose of the 1976 amendments to the Packers and Stockyards Act of 1921 was to provide some future protection for livestock sellers against the type of serious financial loss that cattlemen experienced when some major meat packers went bankrupt in the early 1970's. Of principal concern to Congress was the bankruptcy of American Beef Packers in 1975, at the time one of the largest meat packers in the country. That bankruptcy affected many farmers throughout the country who had delivered their entire year's output of cattle to American Beef Packers and did not receive payment. The provisions of the Uniform Commercial Code placed further impediments in the way of the cattlemen in their battle to obtain compensation, since lenders enjoyed priority over the cattlemen by virtue of secured interests in assets of the packer. The Senate Agriculture and Forestry Committee was explicit in identifying as a target of the legislation the favored position that lenders enjoyed over cattlemen in these situations:

Of particular concern to the livestock producers ... (in the case of American Beef Packers ("ABP")) was the fact that ABP's principal source of financing, General Electric Acceptance Corporation, stood ahead of them among the bankrupt's creditors by virtue of its duly protected security interest in ABP's inventory, i.e., livestock and derivative products which the producers had sold on a cash basis and for which they had not been paid.

Under present law, a packer is able to offer as security for a loan the livestock, meat, meat food products, or receivables or proceeds therefrom, which he has not paid for. The producer, who was responsible for raising, feeding, and caring for the livestock is left unpaid, while secured creditors reap the reward of his labors....

What is needed to prevent future producer tragedies, as occurred following the ABP bankruptcy, is legislation that will afford a measure of protection to the livestock producer and feeder and yet not be so restrictive as to reduce competition in the livestock slaughtering business.

As finally adopted by Congress, the 1976 amendments create a comprehensive framework for the protection of the interests of livestock producers in their dealings with packers. The amendments empower the Secretary to require large packers to be bonded, empower the Secretary, after notice and hearing, to order an insolvent packer to cease purchasing livestock, allow the Secretary to seek temporary injunctions and restraining orders against packers, create a private right of action against packers for violation of the Act, require packers to make prompt payment for cash purchases, create a statutory trust for the benefit of unpaid cash sellers, and preempt certain provisions of state law.

Although each of these protections help, to some degree, to ensure that the market for livestock will operate more equitably, it is the trust provision which was most squarely directed at the problem discussed in the Senate Report quoted above-that of secured creditors taking priority over cash sellers of livestock in the event of a packer bankruptcy. To make this clear, Congress included in the trust provision of the Act, s 206, the following statement of findings and intent:

It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, give lenders security interest in, or place liens on, livestock purchased by packers in cash sales, or on inventories of or receivables or proceeds from meat, meat food products, or livestock products therefrom, when payment is not made for the livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest.

If any doubt is left regarding whether Congress intended s 206, the trust provision of the amendments to the Act, to give priority to the interests of cash sellers of livestock in packer inventories, accounts receivable, and proceeds derived from the cash seller's livestock over lenders who take security interests in these assets, we think that the following statement of the principal sponsor of the 1976 amendments to the Act, Rep. Thone, during the House debates lays any such doubt to rest:

Why do we need this trust provision? Frankly, as I see it, this is central to the bill. Without the trust provision we have not really helped (farmers such as those injured by the American Beef Packers bankruptcy).

What is the need for it, then? What are the arguments for the trust? First we have the simple answer of equitable treatment. How can one argue that a packer should be able to commit property as collateral for a loan, in this particular case livestock, for which he has not paid and does not actually own, to a third party, and then allow the third party to stand ahead of the producers if the packer fails?

Again some would argue that by having the bond and the prompt pay and the solvency test, why do we need this trust provision? The answer is that the trust provision will help prevent a packer from giving a priority to subsequent secured creditors, over the livestock producer who has not been paid. The trust is the only provision here that gives any help to the farmer.

In view of the foregoing, we believe that if a lender could defeat the s 206 trust merely by taking a security interest in inventories and receivables, the clear intention of Congress would be thwarted and the trust provision of the Act would be reduced to a nullity. We hold that so long as cash sellers remain unpaid for their livestock sold to a packer subject to s 206, that packer must hold his inventories, accounts receivable and proceeds derived from cash sales for the benefit of the cash sellers until such time as they are fully paid. Where the packer has given a lender a security interest in inventories or receivables that are subject to the s 206 trust, the unpaid cash sellers have priority over those assets and may recover the proceeds of those receivables to the extent of the outstanding balance on the cash sales. In this case, the appellees are entitled to the collections of the receivables held in escrow, and the Bank must return to the appellees from the payments on the accounts receivable which were applied to reduce the balance of the Bank's loan to Gotham the amount necessary to compensate the appellees in full for their cash sales to Gotham.

The Bank argues that the appellees must trace the particular accounts receivable derived from the sale of their livestock into the Bank's hands in order to recover. The Secretary of Agriculture, as amicus curiae, advances a different interpretation of the statute. The Secretary argues that no specific identification of the accounts receivable that cover the products of an individual cash seller was intended by Congress. The bankruptcy court below agreed with the Secretary, holding that the trust consisted of a floating pool of those assets derived from appellees' livestock as well as inventories, receivables and proceeds derived from other cash sellers' livestock.

We conclude that the bankruptcy court was correct in rejecting the Bank's argument that specific tracing is required to establish that accounts receivable are subject to a s 206 trust. The language of the Act itself, s 206(b), does not clearly answer this question. However, a review of the legislative history convinces us that Congress did not intend that livestock producers perform the almost impossible task of tracing their products into specific receivables.

The report of the Senate Committee on Agriculture and Forestry directly refutes the Bank's specific tracing argument. Discussing the s 206 trust, the Committee stated:

Under this provision, no specific identification of the livestock or the carcasses, meats, proceeds or receivables derived therefrom is required. Instead, they are held in a pool in trust for the benefit of all unpaid cash sellers. Each cash seller would be entitled to a pro rata share in settlement of his account.

Further support for the notion that specific tracing is unnecessary and that the trust consists of a floating pool of inventories and receivables is found elsewhere in the legislative history.

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In the case at bar, the bankruptcy court found, based on testimony of a principal of Gotham and an officer of the Bank, that the meat products of cash and credit sellers had been commingled, and that the accounts receivable derived from producer cash sales could not be distinguished from those derived from credit sales. The Bank presented no evidence to establish which accounts may be free of the trust.

According to general principles of trust law, noted by the bankruptcy court below, where trust funds are commingled with funds not subject to the trust, a lien on the entire commingled fund exists for the benefit of the beneficiaries of the trust, and those who receive a transfer of assets from the commingled fund with actual or constructive notice of the trust are subject to the lien. In this case, the Bank had constructive notice of the trust because a federal statute created the trust.

We hold that where there is a commingling of livestock products such that it is impossible to determine whether a packer's inventories and accounts receivable have been derived from livestock purchased by the packer in a cash sale or credit sale, all of the packer's inventories, accounts receivable and proceeds attributable to livestock sales are subject to the s 206 trust to the extent of the amount owed to the unpaid cash seller. The only burden on the unpaid cash sellers in such a case is to prove the balance due to them and the existence of a floating pool of commingled inventories of livestock products, accounts receivables and proceeds derived from cash and credit livestock sales. Since the appellees have carried this burden in this case, they are entitled to recover against the Bank the amount awarded by the bankruptcy court.

III. PRESERVATION OF THE s 206 TRUST

The Bank argues next that two appellees, Rogers and Perkins, did not preserve their rights to the trust by making the proper timely filing of notice with the Secretary of Agriculture. Both Rogers and Perkins made cash sales to Gotham on a “grade and yield” basis. The prices for 15 of Rogers' cattle and 16 of Perkins' cattle were determined on Wednesday, February 14, 1979, and the prices for the remaining Perkins' cow and the 79 other Rogers' cattle were determined on the following day, February 15, 1979. The final dates by which Gotham was required to make payments on these cattle were February 15 and 16, 1979, and the 30-day periods following these dates ended on March 17 and 18, 1979. It is not disputed that both Rogers and Perkins gave timely notice to Gotham. The notice that Rogers filed with the Secretary bears a stamp “Received March 19, 1979,” and Perkins' notice bore a “Received March 23, 1979” stamp. The bankruptcy court held that each cash seller “filed sufficient notice with the Debtor and with the Secretary within the time periods prescribed by s 206.” The district court affirmed, holding that because Gotham received written notice and the Secretary received actual notice within the required 30-day period, the trust was preserved.

Section 206(b) establishes a notice requirement for unpaid cash sellers who wish to invoke the s 206 trust. Section 206(b) provides, in pertinent part:

Provided, That the unpaid seller shall lose the benefit of such trust if, in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 228b of this title, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.

In cases such as the one at bar where the unpaid cash sellers have not received any payment instrument, the statute requires that unpaid cash sellers give written notice to the debtor packer and file that notice with the Secretary. Both the notice to the packer and the filing with the Secretary must be performed within the 30-day period following the final date for making payment under s 409, in order to preserve the trust.

Appellees Rogers and Perkins and the Secretary of Agriculture as amicus curiae argue that the statutory requirement for filing is satisfied if the Secretary has actual notice of the intent of the cash sellers to invoke the s 206 trust within the requisite 30-day period. Here there is evidence that the Secretary had such notice, since officials of the Department of Agriculture personally notified the cash sellers of Gotham's bankruptcy petition.

We reject the argument that actual notice to the Secretary of the type found in this case is sufficient to preserve the trust under s 206. This argument is facially inconsistent with the language of the statute, which requires an unpaid cash seller to file notice with the Secretary rather than to give notice. Furthermore, the legislative history is explicit in rejecting the proposition that notice given by the Secretary to livestock producers of the bankruptcy of a packer satisfies the filing requirement of the statute. The Senate Report states:

The Committee further believes that it would be most beneficial if the Secretary, through the Packers and Stockyards Administration, would formulate some means of notifying producers of a packer bankruptcy. This notification would not affect the time periods established in section 8 (of the Bill, s 206 of the Act) for an unpaid seller to notify the packer and the Secretary in order to preserve his right to the trust. Such notification should spur unpaid cash sellers to file their notices, and thereby preserve their right to the trust, while also allowing more rapid determination of the scope of the bankrupt packer's estate.

As noted above, the notice which appellee Rogers Farms, Inc. filed with the Secretary was marked "Received March 19, 1979," thirty-one and thirty-two days after the final dates for making payment for its cattle sold in the two groups of sales, respectively. The statutory deadlines for filing notice with the Secretary, however, occurred on Saturday, March 17, 1979 and Sunday, March 18, 1979. Therefore, we now turn to the question of whether a filing on Monday, March 19, 1979, would be timely because the filing periods ended on a weekend.[44]

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We see no reason why the method of Rule 6(a) [of the Federal Rules of Civil Procedure] should not be invoked for purposes of computing the 30-day notice and filing period prescribed by s 206 of the Packers and Stockyards Act.

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Applying the method of Rule 6(a) to the facts of this case, we hold that the statutory period for preserving the s 206 trust for appellees Rogers and Perkins ended on Monday, March 19, 1979. Since there is no dispute that Rogers gave written notice to Gotham and filed with the Secretary no later than March 19, Rogers preserved its right to the s 206 trust.

The USDA stamped Perkins' notice as "received" on March 23, 1979. Both Perkins and the Secretary contend that filing does not occur when the USDA stamps the notice "received," but is effective when notice is transmitted to the Secretary. The bankruptcy court did not address this issue and made no findings of fact as to when Perkins' notice to the Secretary was mailed or received.

Although the stamp applied by the Secretary to the notice papers is conclusive evidence that filing occurred no later than the date of the stamp, it is not conclusive evidence that the notice was not received in the Secretary's office at an earlier date.[45] In a case where there was some delay in affixing the stamp "received" on the notice, the date of receipt

[44] Rule 6(a) of the Federal Rules of Civil Procedure sets forth the basic rules for computing time periods in connection with proceedings in federal court. Rule 6(a) provides, in pertinent part:
In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

[45] There is no doubt that whatever acts are required to make a filing under s 206, Rogers filed notice no later than March 19, 1976, and Perkins filed no later than March 23, 1976. Since there are no findings of fact on the issues of when notice to the Secretary was sent or received in Perkins' case, it is not established that one or both of these events did not occur by March 19. We believe that it is inappropriate to reach the issue of whether transmittal of written notice to the Secretary by mail or otherwise would constitute filing until these factual issues are answered.

would certainly be a more appropriate measure of filing. We are convinced, therefore, that filing is effective no later than the time written notice is actually received in the USDA offices. However, in view of the absence of findings of fact relating to the date that Perkins' notice was transmitted and the date it was received in the USDA office, and in view of the inadequate development in this litigation of the issue of what constitutes filing, we decline to decide whether the filing required by s 206(b) occurs when notice is transmitted to the Secretary. We therefore remand Perkins' case for further proceedings.

The Bank raises one further claim, that Rogers Farms, Inc. was not a proper party to file a claim under s 206, since Gotham had purchased its cattle from Billie Rogers Farm, an unincorporated separate entity. The bankruptcy court found that Billie Rogers Farm had assigned all of its accounts receivable to Rogers Farms, Inc., and held that the assignee could perfect a claim under s 206. The court further noted that there was no showing that this assignment was prejudicial to Gotham or to the Bank. We agree with the bankruptcy court that Rogers Farms, Inc. is entitled to the protection of s 206 with respect to the cattle for which it remains unpaid.

IV. CONCLUSION

The bankruptcy court's decision, affirmed by the district court, properly held that the appellees were cash sellers within the meaning of s 206 of the Packers and Stockyards Act, and that those cash sellers who had properly preserved the s 206 trust were entitled to recover the unpaid balance on their sales of livestock from the trust assets, both those held in escrow and those in the hands of the Bank. The bankruptcy court did not make sufficient findings to determine whether appellee Perkins preserved his rights to the s 206 trust, and therefore the judgments below with respect to Perkins are reversed and the case is remanded. All other appellees have properly preserved the s 206 trust, and the judgments as to those parties are affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Tragedy Strikes P&S

January 13, 1982 was a tragic day in Washington, DC. That was the day Air Florida Flight 90 crashed onto the 14th Street Bridge killing 78 people. Packers and Stockyards lost one of its own employees about 30 minutes after the plane crash in another accident. The Federal government released employees early that day because of a major snowstorm. Mariano Cortez, an auditor with P&S, was one of three people killed when a Metro subway train derailed and slid into a tunnel support. It had been the worst accident in the over 30-year history of the DC Metrorail system until 9 people were killed in a collision between 2 subway trains on June 22, 2009.

Crisis in the Poultry Industry Addressed

As originally enacted in 1921, the Packers and Stockyards Act regulated the livestock markets and the meatpacking industry. It also covered meatpackers' poultry operations. Because much of the live poultry marketing shifted from meatpackers to dealers and handlers in large metropolitan centers, the Act was amended in 1935, adding Title V[46] to extend jurisdiction to all persons engaged in marketing live poultry. Title V was repealed in 1987.

During fiscal year 1983, several poultry processors had financial problems and declared bankruptcy. These bankruptcies affected about 1,700 poultry growers who were owed approximately $14 million. In 1984, the United States General Accounting Office (GAO) released results of a study it conducted examining regulation of the poultry industry under the P&S Act. GAO recognized the limited enforcement authorities USDA had over the poultry industry and found poultry grower groups in favor of legislation that would provide poultry growers protections that mirrored those afforded livestock producers. Integrator groups were opposed to any amendments to the P&S Act that would increase government regulation of the poultry industry.

GAO emphasized the changes made in 1976 to provide increased protections to livestock producers and noted that these changes did not affect the poultry industry. Congress amended the P&S Act in 1987, repealing Title V and adding prompt payment and trust protections for poultry growers. [47] Congress did not address the different enforcement authority USDA has over live poultry dealers.

The 1995 case of *Jackson v. Swift-Eckrich*, decided in the United States Court of Appeals for the Eighth Circuit, describes the 1987 amendments and the Department's authority over live poultry dealers under the P&S Act (See page 115).

[46] Title V was codified in the United States Code at 7 U.S.C. §§ 218-218d.
[47] The 1987 amendments were contained in the bill titled, "Poultry Producers Financial Protection Act of 1987," sponsored by Representative Charles E. Stenholm of Texas, and interestingly co-sponsored among others by three future Secretaries of Agriculture, Madigan, Espy and Glickman.

Agency Heads of the 1980's

James L. Smith (April 20, 1980 – September 13, 1981)

Jim Smith, a native of Calumet, Oklahoma, worked prior to coming to P&S as a cattle buyer with Armour & Co. in Ft. Worth, Texas and in partnership with his father on their livestock and grain farm in Calumet. Smith earned a B.S. degree in animal husbandry from Oklahoma State University in 1954, then joined the P&S program as a livestock marketing specialist in 1957. Smith's early work with P&S included assignments in Washington, Nebraska, Oklahoma and Colorado. In 1965, he was named staff investigator for the National Commission on Food Marketing in Washington, and rejoined P&S when the commission expired in 1966. Smith served as area supervisor of the Northeast P&S office for six years, followed by seven years as chief of the livestock procurement branch. In November 1979, Smith was named acting deputy administrator prior to his appointment as deputy administrator, which was effective on April 20, 1980.

B. H. (Bill) Jones (September 14, 1981 – October 21, 1989)

Chapter 9
The 1990's

The Packers and Stockyards Administration celebrated the 70th anniversary of the P&S Act in September 1991. It was at this celebration that the current P&S logo was unveiled[48]; the only difference being that it was for the Packers and Stockyards Administration rather than the Packers and Stockyards Program. The keynote speaker for the celebration was Congressman Charles Stenholm (*see footnote 47, page 110*). Among those present for the celebration was 93-year-old Oscar Muse, who began working for P&S in 1922. Former agency executives Jim smith, Glenn Bierman, Bill Jones and Don Campbell also shared in the festivities.

A few years later, more Departmental change resulted in the creation of the current agency charged with administering the P&S Act. In a December 1994 *Federal Register* notice, Acting Secretary Richard E. Rominger announced wide ranging changes to the Department of Agriculture. Among those changes was the creation of a new agency, the Grain Inspection, Packers and Stockyards Administration (GIPSA), which would assume responsibilities for administering and enforcing the P&S Act. (See Exhibit A)

GIPSA resulted from the combining of two previously independent agencies, the Packers and Stockyards Administration and the Federal Grain Inspection Service (FGIS).

FGIS was established in 1916 to provide the U.S. grain market with Federal quality standards, as well as a uniform system of inspection standards. Currently, FGIS provides a service and regulatory role in impartial and accurate quality and quantity measurements of grain. It promotes and protects the integrity of domestic and global marketing of U.S. grain.

In 1997, the USDA Office of Inspector General (OIG) released a report on its assessment of GIPSA's efforts to monitor and investigate anti-competitive practices. OIG concluded that GIPSA's resources were not adequate for proper monitoring of the livestock procurement market for anti-competitive behavior. OIG suggested several ways to allocate its resources to better monitor the market for anti-competitive behavior. These suggestions included (1) reorganizing the agency's national and regional offices; (2) integrating its economics staff into the investigations of anti-competitive practices; (3) obtain additional staff with economic, statistical, and legal backgrounds to work on investigations of anti-competitive practices; and (4) developing procedures to consult

[48] The P&S Logo was designed by agency employee Lou Odom. Odom was a meat merchasing specialist in the Packer and Poultry Branch at Headquarters.

with USDA's Office of the General Counsel (OGC) prior to initiating and during investigations of anti-competitive practices.

Further restructuring within GIPSA resulted in changes for the Packers and Stockyards Program in 1998. At Headquarters, the reorganization included establishing the Office of Policy/Litigation Support. At the field level, the existing twelve smaller regional offices[49] were replaced by three large offices strategically located to better serve specific parts of the industry. The regional office in Atlanta, Georgia was located in the southeast to better serve the poultry industry. The hog industry was to benefit from having a regional office centrally located in Des Moines, Iowa. The third regional office, located in Denver, Colorado, was established to better serve the cattle and sheep industries. Each of the offices covered all aspects of administering the P&S Act in its assigned territory and served as the lead investigative unit for complex and competition investigations involving its species of expertise. In order to keep P&S employees close to the industry after closure of the many regional offices, Resident Agent positions were created and located throughout the U.S.

Atlanta, Georgia

Packers and Stockyards opened its Atlanta field office in June 1963, following reorganization of the agency earlier that year. In April 1963, Donald A. Campbell, Director of the Packers and Stockyards Division announced a reorganization that would reduce the number of field offices from 26 to 13, including one in Atlanta, Georgia. The Atlanta office, in 1963, was responsible for the states of Alabama, Florida, Georgia, North Carolina, and South Carolina.

Eastern Regional Office
Russell Federal Building
Atlanta, Georgia

That first office in Atlanta was located at 900 Peachtree Street, N.W., in Room 415. It later moved to 1795 Peachtree, N.E. and again to 1720 Peachtree Street., N.W. (first in room 640 and later in Room 338). The Eastern Regional Office (ERO) is currently responsible for 22 states stretching from Louisiana east to Florida and north to Maine. In 2001, the ERO moved to its current location in the Russell Federal Building.

Griffin E. Bonham served as the first Area Supervisor in Atlanta, from June 1963 to July 1979. Other supervisors in the Atlanta office include:

Quentin "Bernie" Bierman	July 1979 – October 1982
Ben David Baird	January 1983 – December 1987

[49] The twelve regional offices prior to the 1998 reorganization were located in: Atlanta, Georgia; Bedford, Virginia; Denver, Colorado; Ft. Worth, Texas; Indianapolis, Indiana; Kansas City, Missouri; Lancaster, Pennsylvania; Lawndale, California; Memphis, Tennessee; Omaha, Nebraska; Portland, Oregon; and South St. Paul, Minnesota. Exhibit C is a U.S. map showing the territories covered by these regional offices.

Michael B. Huff	March 1988 – June 1998
Amy Van Skiver	June 1998 – May 2001
Elkin Parker	August 2001 – present

Des Moines, Iowa

The regional office in Des Moines opened in 1998. Known as the Midwestern Regional Office (MRO), the staff in Des Moines is responsible for an 11-state region in the upper Midwest from Ohio and Kentucky west through Missouri to Nebraska and north to North Dakota. The MRO is located in the Federal Building at 210 Walnut Street. The Federal Building is connected to the Des Moines city skywalk system, making it convenient and accessible from all parts of downtown. Jay A. Johnson has served as the supervisor of the P&S office in Des Moines since it opened.

Midwestern Regional Office
Federal Building Des Moines, IA
(Courtesy of Kevin J. Studer and GSA, Des Moines)

Denver, Colorado

Western Regional Office
1 Gateway Center, Aurora, CO
(Courtesy of Carol D. Carter)

On November 12, 1921, Chester S. Morrill presided over a public hearing held at the Denver Union Stockyards inviting public comment regarding the proposed rules and regulations for market agencies. Reports from that meeting indicate that the dealers and buying on commission agents did not agree that they should be subject to the new Act and regulations.

Soon after Morrill's meeting, the Denver P&S office was established in room 414 of the Livestock exchange Building. The office remained in the Livestock Exchange Building, though it moved five times to different rooms, until 1999 when the current office was opened in a modern office building at the Gateway Center in neighboring Aurora, Colorado.

Supervisors in the Denver office included:

James Christensen	Early 1920's
L.W. Krake	Late 1920's – 30's
Dr. Jessie L. Shabram	Early 1940's
H.L. Jones	Middle 1940's
Paul K. Grogan	Late 1940's

J. Fred Matteson	Early 1950's
Charles Jennings	Middle 1950's
Quentin H. Bierman	Middle 1950's
Melvin E. Holmquist	1957-1978
Paul Marone	1978-1981
James Stroud	1981-1985
Billy Lockhead	1985-1988
Milton B. Hansen	1988 – 1998
Keith B. Kienow	1998 – 2001
John D. Barthel	2002 – present

USDA Jurisdiction over Live Poultry Dealers

In 1995, the Eighth Circuit Court of Appeals decided a case brought by turkey growers against a live poultry dealer alleging violations of the P&S Act. The decision in *Jackson vs. Swift Eckrich* describes the Secretary's jurisdiction over live poultry dealers.

United States Court of Appeals, Eighth Circuit.

Bill JACKSON, Husband; Juanita Jackson, Wife, Appellants/Cross-appellees,
v.
SWIFT ECKRICH, INC., Appellee/Cross-appellant.
Con Agra, successor in interest to Swift Eckrich, Inc., of Huntsville, Arkansas; Dick Wolf Individually and as Agent and Employee of Swift Eckrich, Inc. of Huntsville, Arkansas; Russ May, Individually and as Agent and Employee of Swift Eckrich, Inc. of Huntsville, Arkansas; Paul Prudhomme, Individually and as Agent and Employee of Swift Eckrich, Inc. of Huntsville, Arkansas, Defendants.
Nos. 93-3874, 93-3971.

Submitted Nov. 17, 1994.
Decided April 28, 1995.

Turkey growers brought action against live poultry dealer, alleging, inter alia, violation of Packers and Stockyards Act (PSA), breach of contract and fraud. The United States District Court, Western District of Arkansas, H. Franklin Waters, Chief Judge, 836 F.Supp. 1447, following jury verdict in favor of growers, granted in part dealer's motion for judgment as matter of law regarding PSA claims, and issued amended judgment reducing damages. On cross-appeals, the Court of Appeals, McMillian, Circuit Judge, held that: (1) Secretary of Agriculture does not have primary jurisdiction under PSA to determine whether live poultry *dealer engaged in discriminatory or unfair practices; (2) PSA did not entitle growers to obtain same type of contract with live poultry dealer as dealer may have offered to other independent growers; (3) district court's jury instruction and explanation regarding damages interrogatory, which separated issue of damages in connection with dealer's refusal to offer performance contract, as opposed to floor contract, to growers from issue of any other damages for violations of PSA, were adequate; and (4) Sherman Act's four-year statute of limitations, rather than two-year limitations period of Agricultural Fair Practices Act (AFPA) applied to claimed PSA violations.*

Affirmed.

Bill and Juanita Jackson, husband and wife, appeal from a final order entered in the United States District Court for the Western District of Arkansas, granting partial judgment as a matter of law to appellee/cross-appellant Swift Eckrich, Inc., on grounds that the doctrine of primary jurisdiction required the Secretary of Agriculture to determine whether an alleged bargaining practice of Swift Eckrich violated the Packers and Stockyards Act (PSA), *Jackson v. Swift-Eckrich, Inc.*, 836 F.Supp. 1447 (W.D.Ark.1993). For reversal, the Jacksons argue the district court erred in (1) holding the doctrine of primary jurisdiction applied, (2) improperly substituting its judgment for that of the jury, and (3) improperly reducing the judgment. On cross-appeal, Swift-Eckrich argues the district court erred in holding (1) the Sherman Act statute of limitations period applied to claims under the PSA, (2) the doctrine of primary jurisdiction did not apply to all claims brought under the PSA, and (3) Swift Eckrich was not entitled to judgment as a matter of law on the Jacksons' claims of breach of contract and fraud. For the reasons discussed below, we affirm the judgment of the district court.

I. BACKGROUND

This case is about turkey growing. In 1985, the Jacksons signed their first contract to grow turkeys for Swift Eckrich, a poultry processing company with a plant in Huntsville, Arkansas. From 1981-1985, the Jacksons raised turkeys for another company, but they decided to switch to Swift Eckrich because of a desire for greater profits. Swift Eckrich, unlike most poultry processors, is not a totally integrated enterprise. Swift Eckrich had a practice of selling young turkeys, poults, to independent growers who would raise the turkeys and then sell them back to Swift Eckrich (approximately seventeen to nineteen weeks later) when the turkeys reached a marketable size. Swift Eckrich's sale and re-purchase of the turkeys was provided for in the same contract. The contract also contained terms regarding the manner in which the turkeys were to be raised. There were, however, two versions of the growing contract which

Swift Eckrich offered to independent growers, a “floor” contract and a “performance” contract. Each type of contract had a one-year term. The Jacksons signed a series of six one-year floor contracts with Swift Eckrich between 1985 and 1991.

The floor contract was a market-related contract. The price per pound Swift Eckrich paid the growers was a function of the grain and turkey markets. Growers had to pay feed costs themselves, but they had the potential to make more money under the floor contract because of the possibility of favorable market movements. The risk of loss was higher with this contract than with the performance contract. The performance contract was a cost-plus contract. Under the performance contract, a grower was reimbursed for his or her actual costs of raising the turkeys, plus so much based on performance. In 1985, the Jacksons had a choice of a performance contract or a floor contract. They chose the floor contract. They maintain, however, they were initially told they would have the opportunity to choose each year the type of contract under which they would grow turkeys.

The Jacksons continued to grow turkeys for Swift Eckrich under a floor contract until, according to Bill Jackson's testimony, they requested a performance contract for the 1989 growing year. Swift Eckrich's procurement manager, Dick Wolf, testified that he could not recall such a request from the Jacksons. Wolf further testified that Swift Eckrich had reached a point where it was only offering performance contracts to producer growers, i.e. those growers who had their own feed mills, or could otherwise control the cost of their feed. Because the Jacksons did not have a feed mill or could not otherwise control their feed costs, their request for a performance contract was denied. On August 19, 1988, the Jacksons signed a floor contract for the 1989 growing year. Bill Jackson also testified that Swift Eckrich denied his request for a performance contract in 1990 as well. The Jacksons nonetheless signed floor contracts in 1990 and 1991. The Jacksons argue that Swift Eckrich's failure to offer them a choice of contracts constituted a violation of the PSA provisions which prohibit unfair, unjustly discriminatory, or deceptive practices, and undue or unreasonable preferences.

In this lawsuit, filed in August 1992, the Jacksons also alleged that a number of Swift Eckrich's turkey-handling practices violated both the contracts and the PSA. For example, Swift Eckrich's weighmaster, Dean Bartlett, was not aware of, and did not comply with, certain federal regulations that governed the timing of turkey-weighing, even though he had earlier signed an affidavit agreeing to comply with such regulations. Swift Eckrich also failed to properly record truck identification numbers when the turkeys were weighed. Such information was important because the turkeys were weighed in the trucks; therefore, in order to obtain an accurate weight for the turkeys, the proper truck weight, the “tare” weight, had to be deducted from the gross weight. The Jacksons presented expert testimony at trial that the weighing system employed by Swift Eckrich resulted in underweighed turkeys. The Jacksons also contended that Swift Eckrich improperly charged an excessive number of dead-on-arrival birds (DOAs) to them, even though Swift Eckrich's “catch-and-haul” crews, employees who retrieved and transported the turkeys, may have caused some of the fatalities by mishandling the turkeys. Moreover, instead of using a contract formula for deducting condemned turkey carcasses, Swift Eckrich used an average-live-weight calculation. Swift Eckrich later admitted that condemned turkeys (rejects) were typically smaller than average. Although a typical Swift Eckrich turkey weighs about 26 pounds, Swift Eckrich admitted that some weight tickets showed condemned turkeys weighing over 80 pounds. Finally, the Jacksons alleged that Swift Eckrich improperly charged them for bird downgrades. The grading of turkey quality affected the price Swift Eckrich paid the growers. The Jacksons maintained that many of the bruised birds which were downgraded by Swift Eckrich received injuries as a result of the way Swift Eckrich catch-and-haul crews handled the birds.

The Jacksons brought this action under a variety of legal theories, some overlapping, which included alleged violations of the PSA, breach of contract, fraud, breach of the implied warranty of merchantability, and negligence. The negligence claim was not submitted to the jury. The jury found that Swift Eckrich violated the PSA, breached its contracts with the Jacksons, and committed common law fraud. The jury found in favor of Swift Eckrich on the breach of the implied warranty of merchantability, a claim which was premised on the Jacksons' allegation that Swift Eckrich sold them bad poults. The jury awarded the Jacksons $251,000 for Swift Eckrich's failure to offer performance contracts to the Jacksons for 1989, 1990, and 1991. It also awarded $50,000 to the Jacksons for “other violations” of the PSA, and $40,000 for breach of contract and fraud.

Following the verdict, Swift Eckrich filed a motion for judgment as a matter of law, maintaining that the doctrine of primary jurisdiction should have precluded the issues regarding the alleged PSA violations from reaching the jury. The district court granted the motion in part, holding that the allegation of a PSA violation based upon Swift Eckrich's practice of offering different contracts to various growers was more appropriately addressed by the administrative agency, i.e. the Packers and Stockyards Administration (a division of the Department of Agriculture), charged with oversight of the PSA. As a result, an amended judgment was issued, reducing the damages award by $251,000. The district court left intact that portion of the award based on “other” PSA violations, holding that the expertise of the Secretary of Agriculture was not necessary to determine whether such acts or practices violated the PSA. The district court also held that, if it were wrong on the primary jurisdiction question, it would nonetheless grant judgment as a matter of law to Swift-Eckrich with regard to its failure to offer performance contracts because, as a matter of law, the failure to offer performance contracts did not violate the PSA. The Jacksons filed a notice of appeal from the partial grant of judgment as a matter of law on November 23, 1993, and on December 7, 1993, Swift Eckrich cross-appealed from the district court's denial of the rest of its motion for judgment as a matter of law. At the request of this court, the United States filed a brief, as amicus curiae, on the issue of primary jurisdiction.

II. DISCUSSION

A.

Primary jurisdiction is a "judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency." It is a doctrine "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." This doctrine is often confused with the doctrine of exhaustion of administrative remedies. The exhaustion doctrine ordinarily requires a plaintiff to pursue relief, when available, from an administrative agency before proceeding to the courts. Until that recourse is exhausted, suit is premature and must be dismissed. The doctrine of primary jurisdiction requires a court to enable a referral to an agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.

The Jacksons contend that, more than twenty-five years ago, this court held that the Secretary of Agriculture had no administrative power under the PSA to prevent discrimination or unfair practices by live poultry dealers. *See* Arkansas Valley Industries v. Freeman, 415 F.2d 713, 718 (8th Cir.1969) (*Freeman*). They argue that this situation remains unchanged today. Although they concede that the Secretary has rule-making and supervisory authority, they contend that the sole means of enforcement under the circumstances of this case is by a suit filed in federal district court by either the Secretary of Agriculture through the Department of Justice or an aggrieved party. The United States, as amicus, agrees that Congress has not authorized the Secretary to conduct administrative proceedings to adjudicate allegations of unfair practices committed by poultry dealers. Swift Eckrich, on the other hand, argues that the district court correctly concluded that whether its failure to offer performance contracts to the Jacksons constituted unjust discrimination under § 202 of the PSA, was a question within the special expertise of the Secretary. The district court held that "this issue should first be determined by the Secretary of Agriculture in appropriate proceedings mandated by the Packers and Stockyards Act." The district court rejected the argument that the PSA administrative enforcement provisions were limited to livestock dealers, concluding that the Poultry Producers Financial Protection Act of 1987, which amended the PSA, brought live poultry dealers such as Swift Eckrich within the scope of the PSA administrative review procedures. The Jacksons and the United States maintain that the 1987 amendments did not provide the poultry growers with access to such review.

Whether the Secretary of Agriculture has primary jurisdiction under the PSA to determine whether a live poultry dealer engaged in discriminatory or unfair practices requires a careful examination of the statutory scheme of the PSA. As a point of departure, we note the PSA's definition of "poultry" includes turkeys, but its definition of "livestock" does not. This simple distinction is important to a proper understanding of the scope of the Secretary's administrative review under the PSA. Section 202 of the PSA sets out the prohibited conduct at issue in the present case:

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

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

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

It is undisputed that Swift Eckrich is a "live poultry dealer" as that term is defined by the PSA. Section 308(a) of the PSA, as amended, provides that any person subject to the statute who violates any of its provisions relating to the purchase or sale of poultry or relating to any poultry growing arrangement shall be liable to the persons injured for the full amount of damages sustained in consequence of such violation. Section 308(b) further states that such liability may be enforced either by complaint to the Secretary "*as provided by section [309]*" or by suit in any district court of the United States of competent jurisdiction.

Interpretation of § 309 of the PSA, thus becomes important to the controversy in the present case. Section 309(a) provides an administrative procedure through which an aggrieved party may seek relief for a PSA violation by any "stockyard owner," "market agency," or "dealer." Each of these terms is defined in the statute. The definition of a "stockyard" includes the presence of livestock; accordingly, the term "stockyard owner" cannot be applied to Swift Eckrich or the Jacksons. The terms "market agency" and "dealer" also refer only to situations involving livestock.

The only other statutory provision governing the procedures for adjudicating alleged violations of the PSA, § 203, refers to the Secretary's authority over those violations committed by a “packer.” A “packer” is defined as a person engaged in the livestock business. This court previously concluded that the PSA's definition of “packer” does not include live poultry dealers. After considering the statutory language and the legislative history, the *Freeman* court held the Secretary did not have the authority under § 203 of the PSA to issue and enforce a cease and desist order against live poultry dealers and handlers.

In the present case, we hold the district court mistakenly construed “dealer” in § 309 of the PSA to include live poultry dealers and thereby concluded the Jacksons could have brought their complaint for damages against Swift Eckrich in an administrative proceeding. The district court overlooked the fact that the terms “dealer” and “live poultry dealer” are expressly defined by the PSA to be mutually exclusive. Under the plain language of the PSA, the administrative complaint procedure under § 309 of the PSA is simply not available for claims against a live poultry dealer. The current statutory scheme provides no procedure through which the Jacksons could obtain an administrative ruling that Swift Eckrich's failure to offer performance contracts did or did not violate § 202 of the PSA.

Swift-Eckrich argues the district court correctly applied the doctrine of primary jurisdiction because the 1987 amendments to the PSA provide aggrieved poultry growers, like the Jacksons, with a procedure for administrative review. The 1987 amendments, however, only authorized the Secretary to enforce administratively the trust and prompt payment provisions of the PSA against live poultry dealers. The trust provision protects poultry growers in the event of a buyer bankruptcy and the prompt payment provision regulates the time for payment of producers. Neither of these provisions was at issue in this case.

The 1987 amendments did expand the scope of § 308 of the PSA by allowing claims for damages based on poultry-related violations of the PSA. However, the administrative enforcement provisions contained in § 309 of the PSA were not changed; therefore, as explained above, liability and damages for violations of the PSA by poultry dealers can be determined only through suit in federal court, not an administrative proceeding. The district court mistakenly concluded that the expansion of § 308 of the PSA to allow aggrieved parties in the poultry industry to recover damages for PSA violations implied that the administrative authority contained in § 309 of the PSA should also be expanded.

Swift Eckrich argues it is “completely illogical for Congress to have created administrative authority of the Packers and Stockyards Administration over live poultry dealers and give it no method to enforce such authority." However, §§ 308 and 309 of the PSA do provide a forum for persons aggrieved y a PSA violation in connection with the purchase or sale of poultry, or relating to any poultry growing arrangement. That forum is the federal district court. Whether this legislative decision was logical is not for us to decide. The plain language of the PSA reflects Congress's decision to make certain administrative procedures available only to those involved in the red meat industry. The fact that this choice may have been unwise or even inadvertent will not allow us to imply an administrative avenue of redress where the PSA clearly does not provide one. Because the plain language of the PSA provides for an aggrieved party, or the Secretary, to seek redress in federal district court and because no administrative referral of the question of what constitutes a discriminatory or unfair practice in the poultry industry under the current statutory scheme is feasible, we hold that the district court erred in applying the doctrine of primary jurisdiction to the Jacksons' PSA claims.

B.

The Jacksons alleged that a representative of Swift Eckrich initially told them they would be able to choose a floor or performance contract during their relationship with Swift Eckrich. They also argue Swift Eckrich offered growers the choice between performance and floor contracts during the same years that they were denied such a choice. They contend that such denials were violations of § 202 of the PSA, which prohibits, among other things, unfair, unjustly discriminatory, or deceptive practices. Swift Eckrich responds that the Jacksons were denied performance contracts because of their inability to control costs. Further, Swift Eckrich contends that the only growers without feed mills who were offered performance contracts were those who subcontracted with a producer who had a mill. The district court concluded, as a matter of law, that "the claimed actions [with] respect to the performance contracts were neither deceptive or injurious to competition, nor were they unfair, unjust, or unreasonable." We agree.

As the district court recognized, the Jacksons were under no obligation beyond any of the one-year contracts to do business with Swift Eckrich. Likewise, Swift Eckrich was under no obligation to continue to do business with the Jacksons. When the Jacksons first asked for a performance contract, after performing under three consecutive one-year floor contracts, Swift Eckrich could have refused to offer any contract whatsoever to the Jacksons. The Jacksons have not argued that some type of estoppel or option contract was at work here. Thus, their claim, in essence, is that § 202 of the PSA, statutorily creates an entitlement to obtain the same type of contract that Swift Eckrich may have offered to other independent growers. We are convinced that the purpose behind § 202 of the PSA, was not to so upset the traditional principles of freedom of contract. The PSA was designed to promote efficiency, not frustrate it.[50] Therefore, affirming the district court's alternative grounds, we hold the district court did not err in granting judgment as a matter of law to Swift Eckrich on the performance contract issue.[51]

With regard to the claims of "other" PSA violations, the breach of contract claim, and the fraud claim, the district court found that a jury question existed. We agree. The Jacksons presented evidence that Swift Eckrich had violated a number of PSA regulations, that it did not use the condemned carcass calculation formula provided in the floor contracts, and that it recorded bird weights without actually performing any measurements. The evidence was sufficient for reasonable minds to differ as to these claims. Therefore, we hold the district court was correct to deny Swift Eckrich's motion for judgment as a matter of law with regard to these claims.

C.

The Jacksons argue that the district court erred in calculating its reduction of the damages award. The district court crafted a three-part interrogatory on damages because of its concern about the viability of the performance contract issue. Interrogatory No. 5 read as follows:

(a) State the amount of damages, if any, you find were sustained by the plaintiffs as a result of the violations of the Packers & Stockyards Act in connection with the plaintiffs' contention that defendants failed to offer plaintiffs performance contracts in the following years [1989-1991].

(b) State the amount of any damages you find were sustained by the plaintiff as a result of any other violations of the Packers & Stockyards Act.

(c) State the amount of damages, if any, you find were sustained by the plaintiffs on the breach of contract claims and fraud claims.

The Jacksons contend that the jury award of over $250,000 under subparagraph (a) included damages based on the various improper weighing and handling practices as well as damages for the failure of Swift Eckrich to offer a performance contract to the Jacksons for 1989-

[50] *See Farrow v. United States Dep't of Agriculture*, 760 F.2d 211, 214 (8th Cir.1985); *see also De Jong Packing Co. v. United States Dep't. of Agriculture*, 618 F.2d 1329, 1335 n. 7 (8th Cir.)

[51] Because we hold that Swift Eckrich's failure to offer performance contracts to the Jacksons did not violate the PSA, we need not reach the question whether the four-year statute of limitations the district court applied to the PSA barred recovery for Swift Eckrich's failure to offer a performance contract for the 1989 growing year because the 1989 floor contract was signed by the Jacksons four years and one day before they filed this lawsuit.

1991. Based on their interpretation of the jury's verdict, the Jacksons conclude that the $50,000 award under subparagraph (b) for other violations was for conduct in the years 1987 and 1988. Thus, they contend that the district court excessively reduced the award by eliminating damages for PSA violations in the years 1989-1991 that were not based on the failure to offer a performance contract. They argue that, if the jury had been told that the failure to offer a performance contract was not a PSA violation, the jury's award under subparagraph (b) would have included damages which the jury simply incorporated into subparagraph (a). The Jacksons based this argument in part on the fact that the jury's award under subparagraph (a) closely paralleled their expert's damage calculations for 1989-1991. These calculations included amounts for the alleged mishandling practices. Swift Eckrich responds that the Jacksons improperly ask this court to speculate as to what the jury would have done under different circumstances. It argues that Interrogatory No. 5 did not limit the jury's ability to assess damages based on the floor contracts for 1989-1991 and that the district court, by separating the damages, clearly addressed the Jacksons' concerns.

The Jacksons' counsel brought these concerns to the attention of the district court in a bench conference immediately before the district court gave the jury the damages interrogatory. After the conclusion of the bench conference, the district court attempted to further explain the interrogatory to the jury:

Interrogatory Number 5 has three subparts. The last subpart has to do with the amount of damages sustained by the plaintiff on their breach of contract and fraud claims.... The other two have to do with damages in respect to the Packers & Stockyards violations.

It is possible that you all could believe that the Packers & Stockyards Act has been violated in more than one way. We have separated damages for various reasons.

And those damages are, in subparagraph A, those that you believe were suffered, if any-and it says if any-as a result of not getting a performance contract, if you believe that was a violation of the Packers & Stockyards Act.

Subpart B is any other damages, such as weighing, shrink, whatever, any other damages you find as a result of the violation of the Packers & Stockyards Act. Make sure that you take that into account. In other words, in B don't put anything in there having to do with the performance contract. Put that in A if you believe that the performance contract-the failure to give a performance contract-was a violation of the Packers & Stockyards Act.

This instruction clearly provided that damages for improper handling practices such as untimely and improper weighing were to be awarded in subparagraph (b). Therefore, the jury was not limited in assessing damages under the floor contracts. Moreover, it would be pure speculation for this court to attempt to determine the jury's understanding of the expert testimony in this case in order to recalculate the damage award. We think the district court's instruction and explanation were adequate. Therefore, we hold the district court did not err in amending the judgment to reflect its determination that Swift Eckrich was entitled to a judgment as a matter of law on the performance contract issue.

D.

The PSA does not provide a statute of limitations. The district court, therefore, applied the four-year statute of limitations period of the Sherman Act, 15 U.S.C. § 15(b), to the claimed PSA violations. Swift Eckrich argues that the district court should have applied the two-year limitations period of the Agricultural Fair Practices Act (AFPA), 7 U.S.C. § 2305(c). The AFPA was enacted by Congress to protect the rights of farmers and other producers of agricultural commodities to join cooperative associations. The focus of the AFPA is thus rather narrow. Because the PSA has its origins in antecedent antitrust legislation and primarily prevents conduct which injures competition, we hold the district court did not err in applying the Sherman Act's statute of limitations to the PSA claims in the present case.

III. CONCLUSION

Both parties have raised a number of other issues on the appeal and cross-appeal, all of which are without merit.

For the reasons discussed above, the judgment of the district court is affirmed.

Agency Heads of the 1990's

Virgil M. Rosendale (February 18, 1990 – January 22, 1993)

James R. Baker (November 28, 1994 – January 19, 2001)

Jim Bob Baker was the first GIPSA administrator, reporting for duty on November 28, 1994. Prior to joining GIPSA, Baker was the manager of Lewis Livestock Company in Conway, Arkansas and served as chairman of the Arkansas Livestock and Poultry Commission.

Baker served on the board of directors for the Faulkner County (AR) Farm Bureau and was a State board member of the Arkansas Farm Bureau. He was a member of the Faulkner county Extension Advisory Board and a Charter Board Member of the Faulkner County 4-H Foundation Board as well as an advisor to the Future Farmers of America.

Baker is a native of Glenwood, Arkansas and received a degree in agribusiness from Southern State College in Magnolia, Arkansas. After leaving GIPSA in 2001, Baker became vice president for business development with the National Bank of Arkansas in Conway, Ark.

Chapter 10
2000-2009

The first decade of the Twenty-First Century continues to highlight Packers and Stockyards' role in the area of competition in the livestock and poultry industries. Several court cases have resulted in different interpretations of the Act, particularly section 202. The 2002 Farm Bill expanded our jurisdiction over new entities, and the 2008 Farm Bill greatly increased our regulatory oversight of livestock and poultry contracts. The Government Accountability Office and USDA's Office of Inspector General have made visits to P&S to evaluate the agency's performance in enforcing the competition requirements of the Act.

The Farm Security and Rural Investment Act of 2002, better known as the 2002 Farm Bill, amended the P&S Act to regulate certain activities of swine contractors who enter into swine production contracts with swine production contract growers.

In general, the amendment made swine contractors subject to certain provisions of the Packers and Stockyards Act. The amendment prohibited certain activities of swine contractors, required swine contractors to maintain certain records, and held them responsible for the acts of their employees, officers, and agents. The amendment also gave swine production contract growers the right to sue swine contractors in Federal District Court. The amendment did not impose any new bonding or registration requirements, establish a trust for swine production contract growers, or establish any prompt payment requirements for swine contractors.

In 2000, the Government Accountability Office (GAO) released a report on P&SP activities that followed up on the recommendations made by the USDA Office of Inspector General (OIG) and supported OIG's conclusions. GAO found that GIPSA completed a major restructuring of its Headquarters and field offices in 1999 and hired staff to strengthen its investigation of alleged anti-competitive practices. However, GAO reported two principle factors continued to detract from GIPSA's ability to investigate concerns about the anti-competitive practices in the livestock and poultry markets. First, GIPSA's investigations were led and conducted primarily by economists without the formal involvement of attorneys from OGC. Second, GIPSA's investigative processes and practices were designed for traditional trade practice and financial issues that the agency had emphasized for years, but were not suited for the more complex anti-competitive practices they are addressing now.

In 2005, in part at the request of Senator Tom Harkin of Iowa, the USDA OIG conducted an audit of GIPSA's management and oversight of the Packers and Stockyards Program.

OIG had as its objective, “to evaluate GIPSA’s management and oversight of the P&SP to ensure that anti-competitive and unfair practices in the livestock and poultry markets were accurately and effectively examined, reported, and resolved.” Specifically, OIG evaluated the adequacy of GIPSA’s actions to: (1) investigate and act against anti-competitive activities in the livestock and poultry markets and implement needed regulatory reforms, (2) examine the counting and tracking of complaints and investigations for each of the P&SP enforcement areas, (3) determine how P&SP interpreted and carried out advice from prior OIG and GAO reviews, and (4) examine GIPSA’s allocation and use of resources to P&SP to investigate and act on possible violations of the Act.

The OIG identified a number of deficiencies and in program oversight and provided ten recommendations:

1. Develop and implement a policy for defining investigations.
2. Develop and implement procedures fro recording data in the complaints and investigation log.
3. Develop and implement a well defined process for timely identifying the work to be performed, preparing and approving work plans, performing the fieldwork and analysis, and reporting the results.
4. Develop and implement an effective system to communicate expectations regarding P&SP investigative process and specific investigations.
5. Develop and implement an organizational structure that appropriately divides the responsibility for approving work plans, managing the investigations, and reporting the results between the Regional Managers and the Deputy Administrator.
6. Develop and implement a structure for receiving, reviewing, and acting on policy issues and requests for guidance.
7. Develop and implement a process for reviewing investigative findings and monitoring industry activity to determine if regulatory reforms are needed.
8. Develop and implement procedures that empower the legal specialists to consult with OGC.
9. Develop and implement a strategy and process for effective implementation of changes in P&SP operation.
10. Develop an internal review function to monitor and report on agency activities.

P&SP enhanced and increased its enforcement of the P&S Act during FY2007. In late April 2007, it published a change to the Rules of Practice Governing Proceedings under the Packers and Stockyards Act (9 CFR 202). The change allows P&SP to enter into stipulation agreements with persons suspected of operating in violation of the P&S Act. By entering into a stipulation agreement, the person in violation agrees to pay a civil penalty at a rate lower than GIPSA would seek at a hearing. The process is both efficient and effective, as the impact on the industry is close in time to when the violation occurred, and both parties save the expense of litigation.

The Farm, Conservation and Energy Act of 2008 (the 2008 Farm Bill) further amended the P&S Act by placing more strict controls on production contracts, including where and how disputes may be resolved. The Farm Bill also required the Secretary to implement regulations that address issues like unreasonable preferences, adequate notice to poultry growers, requiring additional capital investment, and reasonable periods of time to remedy a contract breach. Expect these new regulations to be effective in early 2010.

Recent Significant Cases

A few significant cases from this decade are shaping the way the Packers and Stockyards Act will be enforced. The case of ***London v. Fieldale Farms Corp***.[52] in 2005 resulted in a ruling that "only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the [Packers and Stockyards Act]." Plaintiffs Harold and Christine London grew poultry under production contracts with Fieldale Farms Corporation. Fieldale terminated the production contracts, which by their terms remained in effect indefinitely or until either party provided thirty days' notice of termination. The Londons brought an action against Fieldale that alleged Fieldale violated § 202 of the PSA because the contract termination occurred without economic justification. The jury ruled in favor of the Londons on their termination claim and awarded them monetary damages. The district court set aside the jury's verdict, including the award of monetary damages. The Londons appealed the district court's decision to the Eleventh Circuit.

The United States Court of Appeals for the Eleventh Circuit held in a matter of first impression that § 202 of the Packers and Stockyards Act required a plaintiff who alleged that a live poultry dealer had violated § 202 was required to prove that the alleged violation "adversely affects competition or is likely to adversely affect competition" in order to prevail under the PSA.

The Londons and the Secretary of Agriculture through an *amicus curiae* brief argued that "the plain language of the statute, the purpose of the PSA, and the . . . [Secretary's] interpretation all indicate that in order to prove that any practice is 'unfair' under § 202(a), it is not necessary to prove predatory intent, competitive injury, or likelihood of injury." Fieldale argued that the district court correctly ruled that the plaintiffs must establish that "the unfair, discriminatory or deceptive practice adversely affected competition in order to prevail under the PSA."

The issue before the Eleventh Circuit was "[w]hether the district court properly granted Fieldale's motion for judgment as a matter of law on the London's PSA termination claim because the Londons did not show that the termination had an adverse effect on competition." The court explained that "several courts have held that only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA." The court reviewed several of these decisions and concluded that it agreed with the view of "those circuits that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition." The court added

[52] *London v. Fieldale Farms Corp.,* 410 F.3d 1295 (11^{th} Cir. 2005).

that elimination of the "competitive impact requirement" would undermine the policy justifications for enactment of the PSA. In this regard the court stated that:

> "Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged." . . . Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contact or for justifiably terminating a contract with a grower who has failed to perform as promised.

The court also determined that it would not give deference to the interpretation of § 202 forwarded by the Secretary. It stated that

> “This court gives ... deference to agency interpretations of regulations promulgated pursuant to congressional authority. The PSA does not delegate authority to the Secretary to adjudicate alleged violations of Section 202 by live poultry dealers. Congress left that task exclusively to the federal courts. The absence of such delegation compels courts to afford no ... deference to the Secretary's construction of Section 202(a).

United States Court of Appeals, Eleventh Circuit.

Harold Bruce LONDON, Christine Saunders London, Plaintiffs-Appellants,
v.
FIELDALE FARMS CORPORATION, Defendants-Appellees.

June 1, 2005.

Appellants, Harold Bruce London and Christine London, appeal the district court's order granting summary judgment to appellee/defendant, Fieldale Farms Corporation, on the Londons' Packers and Stockyards Act (“PSA”) retaliation and improper weighing claims. The Londons also appeal the district court's order granting Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim and state law breach of contract and fraud claims. For the reasons that follow, we affirm the district court's orders.

BACKGROUND

A. *Facts*
Fieldale is an integrated poultry company which enters into poultry growing contracts with growers. Fieldale owns various poultry feed mills, hatcheries, and processing plants. Fieldale's processing operations emanate from a business paradigm known as “contract farming.”

Harold London worked as a broiler[53] flock supervisor and broiler manager for three different companies from 1979 until 1995. Christine London managed hen houses in the 1970's and worked as a chicken vaccinator for a poultry company in the 1980's. In 1987, the Londons purchased a nine acre farm that contained one chicken house for growing broilers (“Green Meadows No. 1”). In addition to this one broiler house on their residence, the Londons leased two other farms, the J.W. Peck Farm, which had one poultry house, and the Merritt Martin Farm (later known as “Green Meadows No. 2”), which had two chicken houses. At the time the Londons purchased their farm, Mar-Jac Poultry Company employed Harold and agreed to place broilers on the Londons' farm. In 1990, Fieldale offered Harold a job as a broiler serviceman. After Harold commenced his employment with Fieldale, the Londons switched their grower contracts from Mar-Jac to Fieldale. In 1995, Fieldale terminated Harold's employment.

The Londons and Fieldale entered into three contracts that governed their grower arrangement. The contracts are similar in content. Each contract is a separate agreement for the Londons' various farms: (1) contract for Green Meadows No. 1; (2) contract for Green Meadows No. 2; and (3) contract for the J.W. Peck Farm. The contracts are to run indefinitely or until thirty days after notice of termination by either party. The contracts also give Fieldale the option to terminate on only seven days notice when continuing the contractual relationship would have detrimental effects on Fieldale's business.

Pursuant to its contracts with the Londons, Fieldale provides them with broilers, as well as the feed and medication necessary for successful growth. In return, the Londons are responsible for providing care and oversight for the broilers during the full term of the growth cycle, which normally lasts for forty to forty-nine days. The Londons' responsibility is vital to the success of the business and encompasses a variety of duties, such as maintaining adequate water and temperature for the baby chicks and “culling” out birds that are behind in growth. At the end of the grow-out period, Fieldale crates the broilers and ships them to its processing plants. After Fieldale delivers the broilers to the processing plants, Fieldale weighs the birds, crates, and trucks on scales specifically designed to determine the birds' live weight.

Fieldale pays its broiler growers based upon a complex formula, primarily taking into account the weight of the birds upon their arrival at the plant and the feed consumed by the birds during the grow-out period. Fieldale compares its growers based upon the cost of producing the finished broilers. This comparison determines the relative performance of the grower. Fieldale determines the average cost per pound for all of the birds processed during a one week period. Fieldale then determines the cost per pound for each grower whose birds were processed during that week. Fieldale deducts money from the grower's check if his cost is above average, and adds money back to the grower's check if the cost of producing the broilers is below average. In other words, Fieldale gives those

[53] A broiler is a baby chick.

growers who are most cost efficient a higher per-pound rate than those growers who cost Fieldale more money in food and medicine.

As part of its contractual duty to provide technical service, Fieldale assigns flock supervisors to visit the grower farms on a weekly basis to assist the growers with the management of the broilers. Fieldale's flock supervisors are required to maintain service reports on each grower farm. Fieldale also requires the flock supervisors to document any problems they find on the grower farms that endanger the broilers' welfare.

In 1997, Harold gave a deposition in a lawsuit against Fieldale. In that case, an African-American prospective chicken grower alleged that Fieldale denied him a contract to grow chickens because of his race. Fieldale had never contracted with an African-American grower. In his deposition, Harold testified that his supervisor, Doug Hatley, made racially derogatory comments. After Harold's testimony, the Londons allege that they began to notice that their flock supervisor was increasingly critical of their farm management. The Londons contend that in the spring of 1998, the flock supervisor checked on the Green Meadows No. 2 Farm and informed Christine that if they were not above average on the present flock then “they”[54] would terminate the grower contract. When the flock came in below average, Fieldale stopped delivering broilers to the farm. Later, another flock supervisor told the Londons that the remaining two farms would only get one more bunch of birds. The Londons assert that the last flocks Fieldale delivered were infected with a disease known as gumboro.[55]

B. *Procedural History*

On November 20, 2001, the Londons filed suit against Fieldale asserting claims under the PSA for wrongful termination of their poultry growing contracts, alleging that the termination was without economic justification and in retaliation for Harold London's testimony in a racial discrimination lawsuit against Fieldale. The Londons asserted a PSA misweighing claim, alleging that Fieldale failed to transport promptly the Londons' birds after loading and failed immediately to weigh the birds upon arrival at the processing plant. The Londons also asserted state law claims for breach of contract and fraud. After discovery, Fieldale filed a motion for summary judgment. The district court granted the motion for summary judgment on the Londons' contention that Fieldale provided them with substandard chicks in retaliation for Harold's testimony in the race discrimination lawsuit; on the Londons' claim that Fieldale improperly failed to make fuel weight adjustments on the flocks from the Green Meadows Farms; on two other vague weighing claims; on the Londons' retaliation claim; and on the Londons' prompt weighing and transportation claim. The case proceeded to trial with the following issues presented to the jury: (1) whether Fieldale violated the PSA in terminating

[54] Christine testified that she understood the word “they” to mean Fieldale.

[55] Gumboro, or infectious bursal disease, is a viral disease that attacks young broiler chickens, usually between 18 and 26 days of age. The disease attacks the immune system, particularly the B cells, which produce antibodies.

the Londons' poultry growing contracts without economic justification; (2) whether Fieldale violated the PSA by failing to make a fuel weight adjustment on the flocks from the J.W. Peck Farm; (3) whether Fieldale violated the PSA by failing to make a wet bird adjustment to the weight of the flocks; and (4) whether Fieldale breached its contract with the Londons or defrauded the Londons by sending them settlement documents containing inaccurate weights.

After the Londons presented their case, Fieldale moved for a judgment as a matter of law on all claims. The district court granted the motion on the Londons' state law claims, on any PSA wet bird claim that arose prior to November 20, 1997, and on each PSA fuel adjustment claim except for those related to the J.W. Peck Farm. The district court reserved ruling on the termination claim. At the close of the evidence, Fieldale renewed its motion for judgment as a matter of law as to the post-November 20, 1997, wet bird claims, the J.W. Peck Farm fuel adjustment claim, and the PSA termination claim. The district court denied the motion, again reserving consideration of the motion as to the PSA termination claim. The jury returned a verdict in favor of the Londons on their termination claim and awarded them $164,000.00. The jury also returned a verdict for the Londons on the wet bird claim, awarding them $225.00, and on the fuel adjustment claim, awarding them $32.00. After trial, Fieldale filed a renewed motion for judgment as a matter of law and, in the alternative, a motion for a new trial. The district court entered an order granting Fieldale's motion for judgment as a matter of law on the Londons' termination claim, setting aside $164,000.00 of the judgment. The Londons timely appealed.

ISSUES

1. Whether the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim because the Londons did not show that the termination had an adverse effect on competition.

2. Whether the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' state law claims for breach of contract and fraud.

3. Whether the district court properly granted Fieldale's motion for summary judgment on the Londons' PSA retaliation claim.

4. Whether the district court properly granted Fieldale's motion for summary judgment on the Londons' PSA improper weighing claims.

STANDARDS OF REVIEW

This court reviews *de novo* the district court's order granting a party's motion for judgment as a matter of law. A judgment as a matter of law is warranted only '[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' This court also reviews *de novo* the district court's order granting summary judgment, applying the same legal standards that governed the district court's decision.

DISCUSSION

A. *Statutory Provision*

At issue in this case is Section 202 of the PSA which provides that:

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

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

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

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

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

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

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

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

The PSA was enacted in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers." *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir.1974). At the time Congress enacted the PSA, "[t]he chief evil feared [was] 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." *Stafford v. Wallace*, 258 U.S. 495, 514-15, 42 S.Ct. 397, 401, 66 L.Ed. 735 (1922). "Section 202 of the original Act made it unlawful for any 'packer' to engage in any anticompetitive, monopolistic, discriminatory, or deceptive practices." *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 281 (2nd Cir.1982). In 1935, Congress amended the PSA to include "live poultry dealers and handlers," and later included swine contractors. The PSA authorizes the Secretary of Agriculture to enjoin violations of Section 202(a) by packers and swine contractors. The PSA does not, however, authorize the Secretary to enjoin violations by live poultry dealers.[56] Persons injured as a result of a violation by a live poultry dealer may bring an action in federal district court to recover "the full amount of damages sustained in consequence of such violation."

B. *Issues*1. Section 202(a) requires an anti-competitive effect.
The Londons contend that the district court erred in granting Fieldale's motion for judgment as a matter of law on their PSA termination claim because Fieldale terminated their grower contracts without sufficient economic justification in violation of 7 U.S.C. § 192(a) and (b). Section 192(a) prohibits packers from engaging in or using any "unfair, unjustly discriminatory, or deceptive practice or device." Section 192(b) prohibits packers from subjecting "any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." The statute does not define what constitutes an "unfair, unjustly discriminatory, or deceptive practice." The Londons and *amicus* United States Department of Agriculture ("DOA") contend that the plain language of the statute, the purpose of the PSA, and the DOA's interpretation all indicate that in order to prove that any practice is "unfair" under § 202(a), it is not necessary to prove predatory intent, competitive injury, or likelihood of injury. Fieldale and *amicus* National Chicken Council counter that the district court properly determined that plaintiffs must show that the unfair, discriminatory or deceptive practice adversely affected competition in order to prevail under the PSA. This is an issue of first impression for our circuit.

"As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.,* 464 U.S. 30, 36, 104 S.Ct. 304, 307, 78 L.Ed.2d 29 (1983) *see also United States v. Gonzalez,* 671 F.2d 441, 443 (11th Cir.1982) (noting that "this court's task is to construe the statute in light of the purposes Congress sought to serve"). Along those lines, courts have construed the PSA "against the backdrop of corruption the Act was intended to prevent." *Philson v. Cold Creek Farms,* 947 F.Supp. 197, 200 (E.D.N.C.1996).

[56] There is no question that Fieldale is a "poultry dealer" under the PSA. A "live poultry dealer" is "any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another."

The primary purpose of the PSA was "to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." H.R.Rep. No. 85-1048 at p. 1 (1958) *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. At the time of enactment, the chief evil Congress feared was the monopoly of the packers. *Stafford,* 258 U.S. at 514-15, 42 S.Ct. at 401. The Act "was aimed at halting 'a general course of action for the purpose of destroying competition.' " *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir.1968) (quoting House Report No. 1297, 66th Cong.3d Sess. (1921), p. 11).

Relying upon the PSA's antitrust ancestry, several courts have held that only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA. *See Farrow v. Dep't of Agric.*, 760 F.2d 211, 214 (8th Cir.1985); *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir.1976); *Armour & Co.*, 402 F.2d at 722-23; *Griffin v. Smithfield Foods, Inc.*, 183 F.Supp.2d 824, 827 (E.D.Va.2002); *Cold Creek Farms*, 947 F.Supp. at 200; *see also Philson v. Goldsboro Milling Co.*, 164 F.3d 625, No. 96-2542, 96-2631, 1998 WL 709324, at *4 (4th Cir. Oct.5, 1998) (finding that the district court did not err in instructing the jury that the plaintiffs were required to prove that the defendants' conduct was likely to adversely affect competition in order to prevail on their claims under the PSA and noting that the plaintiff must establish that the challenged act is *likely* to produce the type of injury that the Act was designed to prevent). *But see Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1454-55 (9th Cir.1988); *Wilson & Co. v. Benson*, 286 F.2d 891, 895-96 (7th Cir.1961).[57] We join those circuits that hold that in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition.

The *Armour* decision is instructive on this issue. In *Armour*, the Seventh Circuit considered the legislative history of the PSA and noted its antitrust roots. The court inferred that the PSA might be broader than antecedent antitrust legislation, but found that "there [was] no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers." The court reasoned:

Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed "unfair" by the Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic. However, in Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust

[57] The Londons and the Government rely on *Wilson* for their contention that Section 202(a) does not require an adverse effect on competition. However, as the district court noted, *Wilson* did not abdicate the need for a competitive injury. The *Armour* court held that "the *Wilson* case does not support the ... view that neither intent nor some kind of competitive injury is necessary for the operation of Section 202(a)." *Armour*, 402 F.2d at 718.

policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged.

Recognizing that Section 202(a) "authorize[s] the Secretary of Agriculture to regulate anticompetitive trade practices in the livestock and meat industry," the Eighth Circuit held that "[a] practice is 'unfair' ... if it injures or is likely to injure competition." *Farrow,* 760 F.2d at 214. Similarly, the Ninth Circuit has held that, at the very least, Section 202(a) requires "a reasonable likelihood that ... the result [of a practice] will be an undue restraint of competition." *De Jong Packing Co. v. United States Dep't of Agric.,* 618 F.2d 1329, 1337 (9th Cir.1980). The Fourth Circuit likewise has held that a Section 202(a) plaintiff must establish at least "the likelihood that an arrangement will result in competitive injury." *Philson v. Goldsboro Milling Co.,* 1998 WL 709324, at *4.

Policy considerations also weigh in our decision-making. We note that elimination of a competitive impact requirement would subvert the policy justifications for the PSA's adoption. As the *Armour* court noted, the main Congressional motivation for the PSA's passage was the need for "specialized regulation of the many-tiered packing industry, with its unique problems." Thus, Congress selected the Secretary as overseer, but established some restrictions with regard to the Secretary's authority. "Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged." Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA's creation. Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised.

Moreover, we do not give *Chevron* deference to the Secretary's interpretation of Section 202(a). This court gives *Chevron* deference to agency interpretations of regulations promulgated pursuant to congressional authority. The PSA does not delegate authority to the Secretary to adjudicate alleged violations of Section 202 by live poultry dealers. Congress left that task exclusively to the federal courts. *See Jackson v. Swift Eckrich, Inc.,* 53 F.3d 1452, 1456-57 (8th Cir.1995). The absence of such delegation compels courts to afford no *Chevron* deference to the Secretary's construction of Section 202(a). *See, e.g., United States v. Mead Corp.,* 533 U.S. 218, 226-27, 121 S.Ct. 2164, 2171, 150 L.Ed.2d 292 (2001) (stating that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). Because Congress plainly intended to prohibit "only those unfair, discriminatory or deceptive practices adversely affecting competition," *see Philson,* 947 F.Supp. at 200, a contrary interpretation of Section 202(a) deserves no deference. *See Heimmermann v. First Union Mortgage Corp.,* 305 F.3d 1257, 1261 (11th Cir.2002) ("No deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted."), *cert. denied*, 539 U.S. 970, 123 S.Ct. 2641, 156 L.Ed.2d 675 (2003).[58]

In conclusion, we hold that in order to prevail under the PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition.[59] Therefore, the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim because the Londons did not present any evidence at trial that Fieldale's termination of their grower contracts adversely affected or was likely to adversely affect competition. The Londons did not present any evidence as to the total number of chicken growers or buyers in the north Georgia area. The Londons did not present any evidence regarding the percentage of the chicken market Fieldale controlled. Furthermore, the Londons did not present any evidence of their or Fieldale's relative stature within the chicken industry. Accordingly, we affirm the district court's order granting Fieldale's motion for judgment as a matter of law on the Londons' PSA termination claim.[60]

2. Judgment as a Matter of Law was proper on state law claims.

[58] We note that the Government contends that the Secretary "has consistently interpreted the [PSA] to prohibit all unfair practices, regardless of whether those practices cause a competitive injury." In support of this "consistent view," the Government relies on one agency decision: *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336 (1990). We do not consider one agency decision to establish a "consistent view;" rather, this one agency decision only supports the Government's litigating position.

[59] We decline to adopt a disjunctive test for proving Section 202(a) violations: anticompetitive injury or predatory intent. We decline such a test because the Londons failed to preserve the question of predatory intent for appellate review. They did not argue in the district court that their case was a special circumstances case from which predatory intent could be inferred. Because the question of predatory intent was not preserved for appeal, we deem it to be abandoned. However, assuming *arguendo* that we did adopt a disjunctive test for proving Section 202(a) violations, the Londons still would not prevail in this case. At trial, they did not present any evidence of Fieldale's alleged predatory intent in terminating the grower contracts.

[60] The Londons based their claim on their contention that Fieldale wrongfully terminated their contract because Harold testified in a race discrimination case against Fieldale. From this, the Londons asserted that the jury could infer an anticompetitive effect; i.e., the growers would not complain about any adverse Fieldale business practice for fear that Fieldale would terminate their contracts. For the reasons stated in our opinion, the district court properly granted summary judgment on the Londons' retaliation claim. They did not present any evidence that Fieldale retaliated against them after Harold testified in the discrimination lawsuit. Because the Londons did not present any evidence to support their claim of retaliation, the jury could not infer that such a deceptive, unfair practice (termination of contracts in retaliation for Harold's testimony) had an anticompetitive effect.

The Londons claimed that Fieldale breached the broiler contracts by providing poor quality and sick birds, failing to weigh the chickens accurately, and failing to provide sufficient medication and vaccinations for the flocks. The Londons did not support their claim with any reference to a specific contract provision that they allege Fieldale breached. At the close of the Londons' case, the district court granted Fieldale's motion for judgment as a matter of law on the breach of contract claim. The district court did not err in so ruling. The broiler contracts only obligated Fieldale to provide to the grower the "necessary feed, vaccines, medications, and boot wash supplies" for raising the birds to processing age. Contrary to the Londons' assertion, Fieldale did not have a specific contractual duty to vaccinate the birds for gumboro prior to delivery. In sum, as the district court found, the Londons did not present any evidence to support their breach of contract claim.

The Londons alleged that Fieldale supplied them with settlement statements that Fieldale knew to be false, and they relied on those statements in accepting the sums Fieldale paid for the broilers. The Londons claimed they were damaged as a result of their reliance on these false settlement statements. At the close of the Londons' case, the district court granted Fieldale's motion for judgment as a matter of law on the Londons' fraud claim. The district court correctly found that there was no evidence of an affirmative act or injury to support the Londons' fraud claim. Furthermore, the Londons proffered no evidence from which a jury could calculate any alleged loss with reasonable certainty. *See Brooks v. Dime Saving Bank of New York*, 217 Ga.App. 441, 457 S.E.2d 706, 708 (1995) (stating that a plaintiff must show that he has been damaged and he must "establish the amount of [his] damages by providing the factfinder with evidence from which it can calculate the amount of loss with reasonable certainty"). Accordingly, the district court properly granted Fieldale's motion for judgment as a matter of law on the Londons' state law breach of contract and fraud claims.

3. Summary Judgment was proper on PSA retaliation claim.

The Londons argue that the district court improperly granted Fieldale's motion for summary judgment on their PSA retaliation claim. The Londons contend that they presented sufficient evidence from which a jury could infer that because of Harold's adverse testimony in the racial discrimination case, Fieldale retaliated against the Londons by terminating their grower contracts. The Londons claim that they presented evidence that their flock performance was average prior to Harold's testimony; that after his testimony, their flock supervisors became increasingly critical on their service reports; that the Londons' chick quality declined and Fieldale delivered sick birds; and that the Londons were not Fieldale's worse performing growers when Fieldale terminated their contracts.

The district court did not err in granting summary judgment on the Londons' PSA retaliation claim. The Londons failed to provide any evidence of causation: that Fieldale terminated their contracts *because of* Harold's testimony in the racial discrimination case. First, the evidence shows that for the flocks where the ages of the supplying hens are available, all of the Londons' chicks came from hens between 26 and 66 weeks old, which is within industry age standards. Thus, the Londons had no evidence to support their assertion that Fieldale was purposefully supplying them with substandard chicks. Moreover, the Londons failed to show that they were singled out to receive poor chicks as a form of retaliation. *See Philson,* 947 F.Supp. at 201-2 (noting that providing low quality birds can violate the PSA when it is done for an illegal reason, but requiring some proof that the illegal reason was the motivation behind the decision to supply the substandard birds).

Second, the evidence shows that the Londons' production declined significantly in 1997 and 1998. Of their 35 flocks in that time period, only nine were above average. Thus, the Londons' below average flocks during that time frame support Fieldale's assertion that it terminated the contract with the Londons due to sub-standard performance. In sum, the Londons did not present any evidence showing a causal connection between the contract termination and Harold London's testimony. Hence, the district court did not err in granting Fieldale's motion for summary judgment on the Londons' PSA retaliation claim.

4. Summary Judgment was proper on PSA misweighing claims.

The Londons argue that the district court erred in granting summary judgment to Fieldale on their misweighing claims for the loss of fuel weight in transit of the birds from their Green Meadows No. 1 Farm and their Green Meadows No. 2 Farm. The two contracts that cover these farms both provided that the weighing procedure would not include any adjustment for vehicle fuel used during transportation. The Londons do not provide any case law to indicate that two contracting parties would violate the PSA by inserting a provision regarding whether fuel usage would be considered during the weighing process. Instead, they rely on a regulation promulgated by the Grain, Inspection, and Packers and Stockyards Administration, pursuant to the PSA, that requires that poultry growers be paid based on the actual weight of the live poultry.

Congress passed the PSA to protect farmers and growers, but Congress did not intend for the PSA to supplant the “traditional principles of freedom of contract.” The Londons presented no evidence that they did not enter into these contracts voluntarily, and throughout most of their growing relationship with Fieldale, the Londons never complained about the weighing of the birds. Moreover, we find the Londons' reliance on the regulation to be unavailing because that section notes that any adjustment to the actual weight shall be explained on any statements. Fieldale did just that: it inserted contractual provisions in their grower contracts informing the Londons that no fuel adjustment would be made at weigh-in. Accordingly, the district court properly granted summary judgment to Fieldale on the Londons' fuel adjustment claims on their grower contracts for the Green Meadows Farms.

CONCLUSION

> In deciding the question whether Section 202(a) of the PSA requires a showing of anti-competitive effect, we are guided by the PSA's antitrust ancestry, case law, and policy considerations in holding that in order to prevail under the PSA, a plaintiff must show that the defendant's "unfair, unjustly discriminatory, or deceptive practices" either had an adverse economic impact or were likely to produce an adverse economic impact. To hold otherwise would subvert the purpose of the PSA. Accordingly, we affirm the district court's order granting judgment as a matter of law on the Londons' PSA termination claim. We also affirm the district court's orders granting judgment as a matter of law to Fieldale on the Londons' state law claims, and granting summary judgment to Fieldale on the Londons' PSA retaliation and misweighing claims.
>
> AFFIRMED.

In ***Pickett v. Tyson Fresh Meats Inc.***,[61] cattle producers brought the first ever class action lawsuit under the Packers and Stockyards Act against a meat packer, alleging that Tyson's use of captive supply transactions to acquire fed cattle for slaughter violated the Act. At trial, both parties moved for judgment as matter of law, which the District Court took under advisement until after jury returned verdict for producers, awarding $1,281,690,000.00 ($1.28 billion) in damages. The United States District Court for the Middle District of Alabama granted Tyson's motion, and the producers appealed.

The Eleventh Circuit Court of Appeals held that:

> (1) to succeed on "unfair, unjustly discriminatory, or deceptive practices" claim, or on price manipulation claim, under the Packers and Stockyards Act (PSA), plaintiff must show that defendant's conduct adversely affects, or is likely to adversely affect, competition; and
>
> (2) meat packer's practice of entering into marketing agreements for large percentage of cattle that it needed to keep its meat processing plants operating at full capacity, and of not relying exclusively on purchase of cattle by bidding therefore on open market, served various competitive purposes and thus did not violate either provision of the PSA.

[61] *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005).

United States Court of Appeals for the Eleventh Circuit

Henry Lee "Leroy" PICKETT, Mike Callicrate, et al., Plaintiffs-Appellants,
v.
TYSON FRESH MEATS, INC., Defendant-Appellee.

No. 04-12137.
Aug. 16, 2005.

Henry Lee Pickett is the owner of a cattle-producing farm located thirty-five miles south of Montgomery, Alabama. In this class action lawsuit he is the lead plaintiff representing a national class of cattle producers who sell their fed cattle-cows raised specifically for slaughter-to meat-packing plants exclusively on the cash market.

Tyson Fresh Meats, Inc., formerly Iowa Beef Processors, Inc. (IBP), is the largest meat-packing company in the United States. It processes thirty-five to forty percent of the steaks, hamburgers, and other consumer beef products sold in restaurants and supermarkets nationwide. Tyson purchases some cattle on the cash market from producers like Pickett. Since 1994 Tyson has also purchased a significant portion of its cattle through marketing agreements with cattle producers instead of from the cash market.

Pickett contends that Tyson has used marketing agreements to deflate the price of fed cattle on the cash market and the market as a whole in order to reap the benefits of lower prices. To stop Tyson from using marketing agreements and to recover for losses incurred from the lower prices that resulted on the cash market, Pickett sued Tyson. He brought the lawsuit on behalf of all cash market sellers claiming that Tyson had engaged in unfair practices and manipulated prices in violation of the Packers and Stockyards Act of 1921.

The issues this case raises, and its procedural history, are best understood after a discussion of the cattle and meat-packing industries and the market where they meet.

I.

"Fed cattle" are born, raised, and marketed exclusively for slaughter. The process begins with the birth of a calf on a cattle-producing farm which exists solely to breed and raise cattle, feed them, and then sell them to meat-packing plants for processing into beef products. The first 200 days of a calf's life are spent feeding from her mother. After that, the calf is weaned and spends the next 200 days eating feed, grass, or wheat.

After the calf has been fed for 400 days, the producer sends it along with all the other calves being raised at the same time to a feed yard. The feed yard is a farm specifically designed to feed the calves intensively so they are in peak condition when sold to the meat packers. Some producers have feed yards on their farms, while others send their calves to third party feed yards which not only finish feeding them but also broker the cattle to the meat packers on the producer's behalf.

At the feed yards, each calf is put into a pen with fifty to 200 other calves for the intensive feeding program, which usually lasts 120 days. When the feeding program is finished, each animal ideally weighs 1250 pounds, the industry's target weight.

Once the cattle in a pen have been fed intensively for 120 days, and have hopefully reached the target weight, they must be sold to a meat-packing plant within two weeks. If the fed cattle are not sold within that time period, they become too expensive for the feed yard to maintain and also become less desirable to the meat packers. They become too expensive because cattle gain usable weight more slowly after reaching 1250 pounds and eventually stop gaining it at all, but they still must be fed. They become less desirable to meat packers because the cattle start to gain more fat and the market is for meat not fat. The point is that the two-week window for selling fed cattle after they have been at a feed yard for 120 days is critical to the producers, the feed yards, and the meat packers. (For ease of reference, from this point on we will refer to fed cattle as simply "cattle," except where quoting.)

Once a meat packer purchases a pen of cattle, it has those cattle hauled to its factory and slaughters them. The packer then processes the carcasses into different cuts of meat (e.g., hamburger, New York strip, and filet mignon), packages the different cuts, and sells them to meat wholesalers, restaurants, and grocery stores.

The process we have described has been used to prepare cattle for the market since packers began buying pens of cattle directly from producers on the cash market about sixty years ago. (Before that, the buying and selling of cattle was done through agents at stockyards in major cities in the Midwest with Chicago being the largest.) During all but the last decade or so, packers purchased cattle almost exclusively through the cash market.

This is how the cash market works. Buyers from the meat-packing companies spread out around the country to the different feed yards and inspect the pens of cattle that are ready to be sold. If the buyer likes the cattle in a pen, he makes an offer to the producer or feed yard operator. The producer or operator is free to accept or reject the packer's offer; in deciding whether to do so, he often considers offers being made for other pens of cattle around the country. (Much of this information is relayed over the telephone from one producer or operator to another.) Often, the producer or feed yard operator and the buyer from the packing plant haggle over the price. If they eventually agree on a price, the cattle in the pen are delivered to the packing plant seven days from the date of the agreement on price. The price the packer paid for the pen of cattle is reported to a central office and average prices are published each week.

In the mid-1980s a number of cattle producers began looking for a new method of marketing their cattle to packers, one that did not require as much time and hassle as negotiating every pen of cattle on the cash market. They came up with marketing agreements and eventually persuaded the packers, including Tyson, to begin using those agreements for some of their purchases. The use of marketing agreements spread slowly throughout the industry at first but began to pick up steam in the 1990s. By 1994 Tyson, among others, was using marketing agreements to procure a substantial part of the cattle it needed.

Under the typical marketing agreement, a feed yard operator will call and tell the meat packer's buyer that he has a pen of cattle at its peak and ready to be sold. The feed yard operator promises to have the cattle delivered to the factory for slaughter within two weeks, with the packer getting to pick the exact date of delivery within that two-week period. The price paid for the cattle under the marketing agreement is pegged at the publicly released average cash-market price for the week prior to when the agreement is made. The agreement commonly provides that after the cattle are processed the price will be adjusted up or down based on the quality or the yield of the carcasses. The adjustment is quickly and easily calculated by Tyson as a matter of course in processing the cattle.

To summarize, the difference is that with marketing agreements, unlike cash-market purchases, the price is set not through bidding but automatically at the cash-market price the week before the agreement is made, the price is usually adjusted based on post-slaughter quality or yield, and the packer picks the actual delivery date within the two-week period that begins when the agreement is made.

II.

Pickett, and the class members he represents, sell their cattle exclusively on the cash market. They claim that through marketing agreements Tyson has been able to manipulate the price of cattle on the cash market.[62] Tyson

[62] In his complaint, Pickett claims that Tyson violated the Packers and Stockyards Act through the use of captive supply arrangements. “Captive supply” is Pickett's pejorative term for Tyson's procurement of cattle through either of two methods for purchasing cattle outside the cash market: marketing agreements and forward contracts. The parties agree that Tyson buys only about three percent of its cattle through

is the largest meat packer in the country. It processes forty percent of all hamburgers and steaks on American dinner tables. Tyson slaughters 10 million cattle each year, nearly one-half of the 25 million cattle that are purchased and slaughtered by meat-packing plants in this country.

Pickett's theory is that Tyson has used marketing agreements and its large market share to artificially reduce prices on the cash market. Prices for cattle on the cash market are responsive to supply and demand. Pickett claims that by using marketing agreements Tyson has withdrawn a large amount of demand from the cash market, thereby substantially decreasing price pressure there. The result, in Pickett's view, is that producers selling on the cash market have gotten a lower price for their cattle. A reduced cash-market price benefits Tyson in two ways. First, Tyson is able to obtain the cattle that it still purchases on the cash market (millions of head each year) at a lower price. Second, because the price Tyson pays for marketing-agreement cattle is pegged to the average cash-market price, it pays less for those cattle too.

According to Pickett, the lower prices that Tyson pays for cattle are not an unintended consequence of its heavy use of marketing agreements to purchase much of its needs. To the contrary, Pickett alleges that those lower prices are the primary, intended consequence of marketing agreements. He claims that achieving lower prices in that manner constitutes an unfair practice and the manipulation of prices in violation of the Packers and Stockyards Act.

The case was tried for four weeks. Before the case was submitted to the jury, Tyson moved the district court for judgment as a matter of law under Fed.R.Civ.P. 50(a). The motion asserted, among other grounds, that Tyson had proven a number of competitive justifications for using marketing agreements, the factual existence of which were not disputed by any evidence. The district court almost granted Tyson's Rule 50(a) motion, observing that Pickett had presented "a very thin case," but it decided to reserve ruling on the motion to see what the jury would do. The district court explained that granting the motion before the jury verdict risked having to re-do the whole trial if the appellate court disagreed, and a retrial would be long and costly.

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forward contracts, which is too little to have any effect on the cash market price. For that reason, the briefs essentially ignore forward contracts, and we will too. Marketing agreements account for a significant amount of Tyson's cattle purchases, enough to affect price, and for that reason they are the focus of the briefs and this opinion. We will not be referring to marketing agreements as "captive supply" arrangements because, as the district court pointed out, the term is a misnomer. Under marketing agreements, a producer's cattle is captive for no more than two weeks. *Pickett v. Tyson Fresh Meats, Inc.*, 315 F.Supp.2d 1172, 1175 n. 1 (M.D.Ala.2004). Moreover, "captive" means nothing more in this context than that Tyson has a contractual right to delivery of the cattle in exchange for which it must pay the purchase price. It would be as descriptive to refer to these cattle as "contractual supply."

The jury's “verdict” consisted of answers to a number of interrogatories. Specifically, the jury was asked-“yes” or “no”-whether it found, by a preponderance of the evidence:

1. That there is a nationwide market for fed cattle?

2. That the defendant's use of [marketing agreements] had an anti-competitive effect on the cash market for fed cattle?

3. That the defendant lacked a legitimate business reason or competitive justification for using [marketing agreements]?

4. That the defendant's use of [marketing agreements] proximately caused the cash market price to be lower than it otherwise would have been?

5. That the defendant's use of [marketing agreements] injured each and every member of the plaintiffs' class?[63]

The jury answered “yes” to each of those five questions.

The verdict form instructed the jury that, if it did answer “yes” to all of those questions, it should answer these additional questions:

6. What amount, if any, do you find that defendant's use of [marketing agreements] damaged the cash market price of fed cattle sold to [the defendant] during the period from February 1, 1994, through October 31, 2002?

7. Did the defendant's use of [marketing agreements] depress the cash market price for fed cattle purchased by [the defendant] by an equal percentage for each year of the class period? If your answer is yes, by what percent?

The jury wrote “$1,281,690,000.00” in the question number 6 blank.[64] It answered question number 7 “no.”

Following the verdict the district court granted Tyson's Rule 50(b) renewed motion for judgment as a matter of law, ruling that [Pickett's]

[63] We have substituted “marketing agreement” for the term “captive supply” in the verdict form.

[64] Before submitting the questions to the jury, the district court had made clear to the parties that even if it entered a judgment for Pickett and the class, it had no intention of using as the amount of damages the jury's answer to question number 6: “I'm not-and no matter what verdict this jury comes back with, I'm not going to enter a judgment on that number if they bring one in because what we're talking about here includes people who are not members of the class.” The court's point was that the amount of reduction in the cash market price of cattle was too broad a measure of damages, because it included those who sold some cattle outside the cash market, and those producers were not in the class

evidence is insufficient to support a finding that [Tyson] lacked a legitimate business justification for its use of [marketing agreements]. It entered final judgment for Tyson. This is Pickett's appeal from that judgment.[65]

III.

We review *de novo* a district court's grant of judgment as a matter of law, applying the same standard as the district court. A district court should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action. *Id.* The court should deny it if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiff's case. In order to survive a defendant's motion for judgment as a matter of law ... the plaintiff must present evidence that would permit a reasonable jury to find in the plaintiff's favor on each and every element of the claim.

A.

Pickett and his fellow class members contend that Tyson's marketing agreements violated the Packers and Stockyards Act. The relevant sections of the PSA make it:

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

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

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

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[65] Before we get into the merits of the issues raised in this appeal, there is a procedural issue arising from the jury verdict form that we need to address. The form is unusual because it did not ask the jury to return a general verdict and the jury did not return one, even though it answered all of the interrogatories in favor of Pickett. A question arose at oral argument about whether an order granting Rule 50(b) relief properly may be entered where there has been no general verdict for either party. *Cf.* Fed.R.Civ.P. 49(a); *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274 (11th Cir.2002) ("When Rule 49(a) is employed, the jury makes specific factual findings; and the judge makes the ultimate legal conclusions based on those facts.").

The answer is found in Rule 50(b)(2)(B), which provides that "if no verdict was returned" by the jury, the district court is authorized to "direct entry of judgment as a matter of law" on a renewed motion for it. Fed.R.Civ.P. 50(b)(2)(B). This result makes sense. If the evidence that the plaintiff presented at trial is insufficient for the jury reasonably to return a verdict for the plaintiff, the defendant is entitled to judgment regardless of whether the jury did return a verdict. The absence of a verdict in these circumstances is not materially different from the situation where the district court grants a defendant's motion for judgment as a matter of law before the case is submitted to the jury, which is authorized under Rule 50(a).

Packers and Stockyards Act § 202(a), (e).

It is undisputed that Tyson is a meat packer and that the PSA applies to its business. The dispute is over what is an "unfair" practice and what constitutes "any act for the purpose or with the effect of manipulating or controlling prices." Pickett contends he has established unfairness and price control or manipulation under the PSA by proving that Tyson's marketing agreements caused the cash-market price, and the overall market price, for cattle to be lower than it otherwise would be. If that were all Pickett were required to prove he might win, because there was evidence at trial to support the jury's finding that the use of marketing agreements has resulted in lower prices for cattle both on the cash market and the market as a whole.[66]

Tyson, of course, urges a contrary reading of the PSA. It takes the position that because the PSA was meant as a protection against anti-competitive practices by meat packers, Pickett must establish more than that the use of marketing agreements have decreased the price for cattle. He must establish that their use has adversely affected competition, which requires showing that marketing agreements have no pro-competitive justifications.

The district court resolved this issue in Tyson's favor. After it did so, this Court resolved the meaning of "unfair" practice in PSA § 202(a) in the same way. In *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir.2005), we held that "in order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition." This, we explained, is consistent with the purpose and intent behind the PSA. At the time of enactment, the chief evil Congress feared was the monopoly of the packers. The primary purpose of the PSA was 'to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry.' " It was aimed at halting practices whose purpose was to destroy competition. The *London* decision settles in this circuit that by "unfair" practice, PSA § 202(a) means a practice that does or is likely to adversely affect competition.

In the *London* case there was no PSA § 202(e) price manipulation or control claim, as there is in this case, but the principles and purposes

[66] We say that Pickett "might win" because the critical evidence that the use of marketing agreements caused lower prices in the markets was the testimony of Professor Taylor, an expert witness for Pickett, and there are *Daubert* issues involving his testimony. *See* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The existence and seriousness of those issues are partly reflected in the district court judge's comment that if he were the factfinder, "I'd say, Dr. Taylor, you're nuts." Given the basis of our decision to affirm the district court's judgment on grounds independent of any *Daubert* issues, we can assume for present purposes that Tyson's use of marketing agreements did lead to lower prices in the cattle markets.

behind these two closely related provisions of the Act are the same. Section 202(e) is aimed at preventing a particular type of unfairness in the meat-packing industry, namely, price manipulation and control and the creation of monopolies. With section 202(e), as with section 202(a), "the chief evil Congress feared was the monopoly of the packers," and the primary purpose "was to assure fair competition and fair trade practices." For the same reasons a section 202(a) unfairness claim requires a plaintiff to show an adverse effect on competition, so does a section 202(e) price manipulation or control claim.

It was not Congress' intent in enacting the PSA to interfere with a meat packer's business practices where those practices did not interfere with competition. *See* *IBP, Inc. v. Glickman*, 187 F.3d 974, 978 (8th Cir.1999) ("[W]e are ... mindful that the purpose behind the Act was not to so upset the traditional principles of freedom of contract, as to require an entirely level playing field for all." (quotation omitted)). If a packer's course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition.

In this case, the jury found that Tyson's use of marketing agreements "had an anti-competitive effect on the cash market for fed cattle" and that Tyson "lacked a legitimate business reason or competitive justification for using" marketing agreements. The district court, in granting Tyson's Rule 50(b) motion for judgment as a matter of law, concluded that Pickett had failed to present any evidence to call into question Tyson's evidence establishing that marketing agreements: (1) allow the company to keep up with competitors in the meat-packing industry who also were reaping the cost benefits of marketing agreements; (2) provide the company with a reliable and consistent supply of cattle to keep its factories at full capacity; (3) reduce the transaction costs of having to negotiate individually for 200,000 pens of cattle a year to meet its needs; and (4) permit the company to match its cattle purchases with the needs of its customers. In the district court's view, "the trial record is barren of any evidence which would permit the jury to conclude that [Tyson] lacked a legitimate business justification for its use of [marketing agreements]."

Pickett contends that the district court got it wrong. He argues that there was evidence to support a finding that all of Tyson's competitive justifications for using marketing agreements were pretextual, thus rendering reasonable the jury's finding that Tyson had no competitive justification for doing so. The pretext issue applied to the justifications Tyson asserted is what this case turns on. If there is evidence from which a jury reasonably could find that none of Tyson's asserted justifications are real, that each one is pretextual, Pickett wins. Otherwise, Tyson wins.

B.

We mentioned earlier in this opinion that marketing agreements were originated by cattle producers, not meat packers. Some cattle producers insist on selling their cattle through those agreements and will not use the cash market. Others prefer to use marketing agreements for some or all of their cattle. Tyson's first competitive justification for using the marketing agreements is that it must use them in order to have access to the cattle of those producers. Otherwise, it will lose all of that supply, which constitutes a significant share of the market, to its competitors who do use the agreements. As the district court found, restricting its own use of marketing agreements “would pose problems for [Tyson], as it would have fewer cattle to choose from, and the quality and reliability of its cattle supply would likely suffer.” In other words, Tyson needs to use marketing agreements to meet the competition.

Tyson presented a number of witnesses who testified to the factual premise of this justification: Tyson's competitors use marketing agreements and Tyson would suffer a serious competitive disadvantage if it did not use them. Some of Pickett's own witnesses testified to the same thing. No one disputed this justification as a factual matter. Instead, Pickett's position is that this justification is legally insufficient. He insists that a practice of purchasers that is unfair to sellers should not be allowed on the ground that all purchasers do it. In other words, there ought not be a “meet the competition” defense to conduct that the PSA otherwise prohibits.

The law does recognize a meet the competition defense in another context. The Robinson-Patman Act, which amended the Clayton Antitrust Act, generally proscribes price discrimination between different purchasers of commodities of like grade and quality. That is, a commodities dealer cannot charge its favored purchasers a lower price while selling at a higher price to others. The Robinson-Patman Act, however, recognizes an exception and provides for an absolute defense if a merchant's lower price to a purchaser “was made in good faith to meet an equally low price of a competitor.” That defense has been roundly criticized.

In any event, the PSA is not the Robinson-Patman Act. Unlike the latter, the PSA does not expressly provide a meet the competition defense. Congress could have written that defense into the PSA just as it did in the Robinson-Patman Act. We would be most reluctant to do Congress' writing for it, especially when the wisdom of the provision we are asked to write into the statute is debatable. But we need not go so far as to reject the meet the competition defense in PSA cases, because in this case that defense would not matter. It would not matter because Tyson has offered other justifications for its use of marketing agreements, and those justifications are legally permissible and factually uncontradicted in the record.

C.
Tyson's second proffered competitive justification for marketing agreements is that their use provides the company with a reliable and stable supply of cattle for its packing plants. This is an unquestionably legitimate justification.

Tyson contends that, because there are not enough cattle in the market to meet the demands of the entire packing industry from week to week, and because it must purchase 200,000 head of cattle each week to keep its processing plants running at full productive capacity, the company has to struggle to keep a constant supply of cattle coming into its plants. Before 1994 Tyson had to negotiate individually for each pen of cattle it purchased. Its competitors were also negotiating on the same pens of cattle, and the producers were free to accept or reject Tyson's offered price for a pen. If Tyson's offers were rejected for enough pens, the company could not fill its factory for the next week and it would not have enough product to meet its customers' demands.

Marketing agreements make the inventory crunch much less crunchy for Tyson. They are negotiated two weeks in advance of delivery of the cattle, and Tyson picks the exact date of delivery within that two-week period. These features provide Tyson with greater ability to plan its purchases and to keep a steady flow of cattle coming into its plants. By contrast, the cash market provides Tyson with no leeway about the delivery date, because cattle purchased on it are always delivered seven days after purchase. On the cash market there is a greater risk that Tyson's buyers will purchase too little cattle for its needs, or too much for its plants to process within the constrictions of the delivery dates. The economic effect of these differences between the two procurement methods is critically important for a large meat packer whose profit depends on keeping its plants operating at full capacity without interruptions.

The underlying facts relating to this justification were not disputed at trial. Both Tyson's and Pickett's witnesses testified to them. James Herring, president of Friona Industries, a collection of feed yards in the Texas panhandle, testified that buying cattle through marketing agreements guarantees for Tyson a certain number of cattle per week. Lee Borck, the president and principal negotiator for the Beef Marketing Group, a consortium of thirteen feed yards in the Midwest, testified that marketing agreements ensure that Tyson will "have a percentage of their cattle that are going to be procured for a plant that's difficult to procure cattle for." Jerry Hausman, an economics professor from the Massachusetts Institute of Technology, testified that "what marketing agreements do is it helps [Tyson] to better schedule its plants. And by cutting down the variability, they're going to get greater capacity utilization and higher profits." And

Bruce Bass, Tyson's head buyer, stated that marketing agreements ensure a consistent supply of cattle for the company's processing plants.

Professor Catherine Durham, one of Pickett's expert economists, agreed with this assessment when she was asked about the use of marketing agreements on cross-examination:

Q. You would agree with me, Professor Durham, that marketing agreements also help [Tyson] guarantee a minimum supply of cattle at the plants that get marketing agreement cattle, right?

A. Yes.

Q. And [Tyson] has a valid business interest in having a steady supply of cattle at its packing plants, right?

A. Yes.

The economics of this are simple. As Professor Hausman explained, being able to keep its processing plants operating at capacity has increased Tyson's efficiency. Keeping the doors to its plants open and the machinery running is a fixed cost for Tyson. No matter how many cattle the plant processes on a given day, Tyson has fixed costs for the facility and equipment, the electricity used to run the plant, and the salaries of a minimum number of employees needed to run the plant. Whether the plant slaughters 2,000 head or 20,000 head of cattle on a given day, the fixed cost will be the same.

If Tyson slaughters 20,000 head of cattle, the fixed costs of operating the plant are divided by a factor that is ten times larger than when it slaughters only 2,000 head. The more cattle Tyson processes on a given day, the less the fixed cost per head. By ensuring that the processing plants are consistently filled and operate at or near capacity, the use of marketing agreements provides Tyson with a more cost-effective operation. This result, which is entirely in harmony with the goals of the PSA, is a legitimate, pro-competitive justification.

Pickett offered no evidence to dispute the existence of this justification. Instead, through examination of Tyson's witnesses, Pickett simply brought out the unremarkable fact that if Tyson were willing to pay “a high enough price” or “throw our billfold out the window” it could get from the cash market as many cattle as it wanted for its processing plants (and even then it would be difficult). Of course, in hypotheticals where economic constraints are assumed away, economic problems are not problems. But this is not a hypothetical case. Tyson is an actual business that operates in the real world through real markets where there are real economic limits.

Tyson has competitors who stand ready, willing, and able to undercut the price of its product if it pays too much for the raw materials used to produce that product.

D.

Tyson's third proffered competitive justification for purchasing some of its cattle through marketing agreements is that doing so reduces its transaction costs by eliminating the need to negotiate for each individual pen of cattle, as it must on the cash market. With the cash market, buyers for Tyson are constantly on the road inspecting pens of cattle in a never-ending effort to see if the cattle in each pen match the quality the company needs to fill its customers' orders. Once the buyer finds a pen that appears to fit the needs, he places a bid with the producer. The producer usually is conducting simultaneous negotiations with one or more of Tyson's competitors for the same pen. After days of going back and forth, the producer chooses the highest bid, which may or may not be Tyson's. This process is costly for both the producers and Tyson because it takes so much time. Tyson has to successfully outbid other packers for more than 1,000 pens every week (the pens each consisting of between fifty and 200 cattle) in order to meet its need for 200,000 head per week.

As a number of Tyson's witnesses testified, marketing agreements eliminate the time and energy spent by packers and producers negotiating for individual pens. Under the agreements the price of the cattle is set at the average cash-market price (plus a yield adjustment that is determined after processing). Mr. Borck, the principal negotiator for BMG feed yards, testified that when using the cash market he was spending three or four days a week on the phone with meat packers negotiating the price for his peak cattle. This was “not very productive time.” With the marketing agreement system, Mr. Borck estimated that it now takes “half a day a week” to sell the peak cattle to the packer. He spends the rest of this “high-priced management time to try and be more efficient in our operations and in the caretaking of the cattle.”

Other cattle producers and feed yard operators agreed with Mr. Borck. Jim Keller, a feed yard operator in Kansas, testified that he preferred marketing agreements because he “didn't have to waste time talking about prices. Some people like that. They like haggling over price. I don't. I don't. I always think I could probably be doing something different.” Professor Hausman testified that because the price in marketing agreements is set, “marketing agreements are going to decrease transactions costs and therefore decrease the costs for [Tyson] and also likewise for the feedlot operator as well.” This was a valid business justification, he continued, “because it's economically efficient to decrease your transactions costs. Anything that decreases costs like that increases economic efficiency, both for [Tyson], for the feedlot operator, and also for the U.S. economy." Mr. Bass, Tyson's head buyer, confirmed this. He said that from 1994 to 2002, Tyson has been able to decrease the number of buyers it employs by about fifteen percent, partly because of the increasing popularity of marketing agreements among cattle producers and feed yards.

Pickett did not dispute any of this. In fact, many of his witnesses agreed with Tyson's witnesses that marketing agreements relieve producers and packers from the burden of spending their time on negotiating prices, instead of on raising and processing cattle. Brett Gottsch, a cattle producer from Nebraska who testified for Pickett, conceded that with marketing agreements buyers and feed yard operators do not need to "go through the process of bidding and negotiating prices." Robert Rothwell, a cattle producer and feed yard operator in Nebraska, testified that purchasing cattle through marketing agreements requires less time and energy than purchasing cattle through the cash-market system. And Jeff Biegert, another producer from the Midwest, joked that with marketing agreements, the buyers for packing companies "could be playing golf if [they] wanted to, and the cattle will still get marketed."

In sum, it was undisputed at the trial that marketing agreements are a more efficient means for both meat packers and cattle producers to operate in the market. It was undisputed that use of the agreements has lowered the transaction costs of producers and meat packers, including Tyson. Witnesses for both parties recognized that these are pro-competitive benefits for the industry. Those benefits are entirely consistent with the goals of the PSA.

E.

Tyson's final competitive justification for using marketing agreements is that they allow the company to pay for each head of cattle in a pen individually based on the quality of the meat, rather than paying for the entire pen "on the average." Among other benefits, this gives producers an incentive to provide packers with the quality and yield of meat they need to satisfy their customers' demands.

In the cash-market system, buyers for the packing companies pay a single price for an entire pen of cattle which results in an average price per head in the pen. With this "on the average" system, producers can put some of their less desirable cattle-those with less quality meat or lower usable meat yields-in the same pen as high-quality, high-yield cattle. The packer who buys that pen gets some cattle that match its customers' needs and some that do not. The other side of the problem is that producers with a large share of high-quality or high-yield cattle do not always get rewarded for it. This disparity between the quality and yield of the cattle and the price paid for them on the cash market, which is a disparity that can go either way, is the result of buyers not being able to closely inspect and assess the quality and yield of fifty to 200 head of cattle in each of the many pens that they must haggle over in the cash market.

With marketing agreements, meat packers also buy an entire pen of cattle but with an important difference: the price paid for the cattle is adjusted up or down after slaughter to reflect the actual quality and yield of the meat. The final price depends not on the buyer's in-the-field estimate of the meat that a pen of cattle will produce, but on the actual meat that does result after slaughter. This feature of marketing agreements takes away the incentive for producers to mix low-quality and low-yield cattle in with better ones, and it gives them an incentive to increase the overall quality and yield of their cattle. Both results are good for the industry and for competition.

The factual premise for this justification was not disputed at trial. A number of witnesses, both for Tyson and for Pickett, testified to it. Mr. Gottsch, who testified for Pickett, stated that one advantage of marketing agreements is that the packer pays the producer for each cow in the pen based on the quality. Mr. Rothwell, another of Pickett's witnesses, agreed that individual pricing was a “valid business justification” for buying and selling cattle through marketing agreements. And, Mr. Biegert, one of the Nebraska producers testifying for Pickett, conceded that “paying a feedyard a premium for really high quality cattle will create economic incentives that go all the way back to the [producer] and can cause the [producer] to strengthen his cowherd.”

Professor Hausman, Tyson's expert, agreed with the three producers who testified for Pickett. He said that by paying for each head of cattle, rather than paying for the pen on the average, the packer creates an economic incentive for the producers to grow better cattle. He went on to explain that “if you get paid the average, you don't have an economic incentive nearly as much; because if you have some bad cattle and some good cattle, they sort of average out.” Mr. Keller, the feed yard manager from Kansas, concurred with the professor. He testified that one thing that “really bothered” him about the cash market was that “all the cattle were getting sold for the very same price. All cattle, no matter what they were, what quality, everything getting sold on the same price.”

Because price is adjusted to fit actual quality and yield, marketing agreements provide Tyson with another, related competitive benefit. Like most other companies in our complex economy, Tyson has a specific niche market for its products-in its case, steaks and hamburgers. It is a volume meat dealer; its largest customers are supermarket chains. To provide for its customers in the most inexpensive and efficient way, Tyson prefers large, high-yielding cattle to leaner, high-quality cattle. High-yield cattle tend to have middle-grade meat, and that is fine with Tyson. By focusing its procurement on high-yield instead of high-quality cattle, Tyson is better able to meet the needs of its customers at lower costs.

Through marketing agreements, Tyson provides an incentive for producers to raise and sell more high-yield cattle. On the cash market, the best Tyson can do is have its buyers attempt to purchase pens that appear to have the highest number of high-yield cattle. But that is an inexact science. With marketing agreements, the post-slaughter price more closely matches the actual yield, which provides an incentive for producers to supply Tyson with the high-yield cattle it needs.

The factual existence of this pro-competitive benefit was not disputed at trial. Counsel for Tyson asked Professor Hausman: “[I]f a packer is buying cattle under a marketing agreement, can it do anything to try to influence the type of animals that the participating feedyards produce?” Professor Hausman responded:

Yes. It has-it offers money. That's what it does. So it has this grid and it says, you know, if we want higher yield, we'll pay you more money for higher yield. If it pays more money, the feedyard operator is going to say, you know, more money is good for me and my cattle owners, so I'm going to try to increase yield.

And, the incentive works. Since 1994, when it began to significantly increase its use of marketing agreements, the cattle that Tyson has purchased from marketing agreements has had a higher yield than the cattle it has purchased on the cash market.

Instead of producing evidence to dispute the existence of this advantage of marketing agreements, Pickett argues that the benefit could be obtained through the cash market if it were changed. One of Pickett's two experts, Professor Durham, testified that the cash market, like marketing agreements, can also provide incentives for quality by making the same sort of offers and discounts and premiums. She did not, however, contradict the fact that, as Pickett's witnesses described its current operation, the cash market does not provide incentives for quality and yield. We deal with real markets the way they are, not with how they might be redrawn on the blackboard in a classroom.

Pickett also argues that cattle sold on the cash market is of higher quality than cattle sold through marketing agreements. Professor Hausman, Tyson's expert, agreed that “those feedlots that sell cash-only cattle have a significantly higher percentage of prime and choice grades than the feedlots that sell marketing agreement cattle.” That is, however, beside the point because Tyson is not looking for high-quality meat. As we have already explained, Tyson wants high-yield meat, which tends to be middle-quality. Tyson structures its marketing agreements to encourage producers to raise high-yielding cattle, not high-quality cattle. It uses marketing agreements to obtain the kind of meat that it needs to supply its customers at a competitive price. Tyson and its customers, not Pickett, get to decide what kind of meat it needs.

F.

In sum, while Pickett presented evidence at trial that Tyson's marketing agreements have decreased the price of cattle on the cash market and on the market as a whole, he did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements. The evidence is undisputed that marketing agreements provide a more reliable and stable supply of cattle for meat packers, reduce their transaction costs for purchasing cattle, and allow them to better match price to actual quality and yield. A jury could not reasonably find, as the one in this case did, that Tyson had no competitive justification for using marketing agreements.

The jury may have been swayed by more than the evidence relating to competition and markets. In his opening statement, Pickett's counsel sounded this theme:

I want to pause to mention to you that we're talking here about a part of America's economy that is perhaps in some ways the most romanticized part. We celebrate the cattle business in our books and in our music and in our literature and in our movies, and have for years. And over the years, the one thing that the cattle business has stood for during the growth and the development of our country has been independence, fierce independence, meaningful and forceful independence.

While talk about the independence of cattle farmers has emotional appeal, the PSA was not enacted to protect the independence of producers from market forces. It was enacted to prevent unfair practices, price fixing and manipulation, and monopolization. The PSA was enacted to ensure that the market worked, and markets are notoriously unromantic.

The district court in *Griffin v. Smithfield Foods, Inc.* was faced with a similar argument by pork producers against the procurement methods of pork packers. In that case, Smithfield, the largest pork packer, had switched from buying its hogs on the cash market to buying them through marketing agreements or obtaining them from farms that Smithfield itself owned. The producers who did not want to sell their hogs through marketing agreements sued under the PSA, contending, as Pickett contends here, that the packer's conduct was unfair and had the effect of manipulating or controlling prices..

In rejecting the pork producers' claim, the court in that case explained that the lawsuit was premised not on Smithfield's unwillingness to do business with the producers. Instead, the core of the producers' complaint was that Smithfield had “timing and quality control standards that the [producers] find an affront to their independence.” This, the court explained, was not enough to prohibit a more efficient, consistent, and consumer-friendly purchasing method:

While such independence may be a virtue in many respects, the family farm, the corner grocer and the main street specialty store have all fallen victim to the direction in which the country's economy has developed. No degree of sympathy for the [producers'] difficulty in maintaining their traditional way of doing business translates to wrongdoing on the part of [Smithfield].

....

The [producers'] evidence demonstrates that economic developments in their industry have overtaken them; their evidence does not demonstrate that their economic woes were caused by any actionable wrongdoing of Smithfield under the PSA or any other theory.

Exactly the same is true here. Pickett and his fellow class members could have entered into marketing agreements with Tyson. Many of the producers who testified on Pickett's behalf had themselves sold cattle through them. With marketing agreements, producers do lose some of their independence because meat packers get to dictate the date of delivery and adjust the price to the actual yield of the cattle. Some producers find the advantages of marketing agreements worth any loss of independence; it was, after all, producers who came up with the idea of marketing agreements. Other producers, like Pickett, place a higher premium on independence and prefer the cash market. They are entitled to their preferences, but they are not entitled to force those preferences on other producers and on the packers.

AFFIRMED.

In ***Schumacher v. Tyson Fresh Meats, Inc***.,[67] the District Court of South Dakota denied summary judgment to four beef packers because material issues of fact still existed once plaintiff cattle producers established that the producers were not required to show that the packers' deceptive practices adversely affected competition under the Packers and Stockyards Act (PSA).

In a class action lawsuit, cattle producers sought damages for alleged violations of the PSA and unjust enrichment on the part of four major meat packers after the producers

[67] *Schumacher v. Tyson Fresh Meats, Inc*., 434 F.Supp. 2d 748 (D.S.D., 2005).

negotiated the purchase of slaughter cattle using incorrectly reported prices for boxed beef published by USDA. The producers alleged the packers knew the prices were incorrect and that the use of such known incorrect prices constituted an unfair trade practice. The United States District Court for the District of South Dakota rejected the packers' contention that the producers could recover under the PSA only if their actions had an adverse effect on competition.

The Court reasoned that the terms "unfair, unjustly discriminatory, or deceptive practice or device" are not clearly defined by the PSA and should be given a construction consistent with one of the Act's stated purposes, which is to prohibit deceptive practices with respect to the price paid to the producer for livestock. The constructions of the terms are made on a case-by-case basis in order to give effect to the stated intent of the act by protecting the producer from non-market forces that affect price, so the terms are read in the more broad sense and do not limit their application to those practices that only adversely affect competition.

The packers also sought to dispose of the producers' claims on three other grounds: 1) the PSA claim would affect thousands of contracts, 2) there was no distinction between producers who mitigated their damages in the futures market and those who did not, and 3) unjust enrichment could not exist under state law because there was an express contract. The court summarily rejected all of these arguments. First, no case has held that the PSA is inapplicable where the parties have entered into a contract. Second, it is the packers' responsibility to plead and prove the affirmative defense of mitigation. Finally, the packers were in fact unjustly enriched because no meeting of the minds occurred to create the contract due to the mutual mistake of fact associated with the errors in the USDA prices.

United States District Court, D. South Dakota, Northern Division

Herman SCHUMACHER, Michael P. Callicrate, and Roger D. Koch, Plaintiffs,
v.
TYSON FRESH MEATS, INC., Cargill Meat Solutions Corporation, d/b/a/ Excel Corporation, Swift Beef Company, and National Beef Packing Company, L.L.C., Defendants.

March 30, 2006.

INTRODUCTION

> This class action lawsuit was initiated by cattle producers against the four major packers seeking damages for alleged violations of the Packers and Stockyards Act (“PSA”), and for unjust enrichment in violation of state law. Plaintiffs' claims arise out of the United States Department of Agriculture's error in publishing boxed beef prices pursuant to the Livestock Mandatory Reporting Act of 1999 (“LMRA”), between April 2,

2001, and May 14, 2001.[68FN1] Plaintiff cattle producers claim that the defendants knowingly used the inaccurate prices published by USDA to negotiate the purchase of slaughter cattle from plaintiffs at prices substantially lower than would have been economically justified had plaintiffs known the accurate higher prices that defendants were receiving for their boxed beef. Defendants have filed a motion for summary judgment on all claims.

I previously entered an opinion and order (Doc. 515) which summarily denied the motion for summary judgment without any explanation as to why the motion was denied. That is not a good practice for a judge. I had the draft of the present opinion and order, but, for some reason, neglected to complete it, sign it, and file it. I now do so, *nunc pro tunc*, to January 5, 2006.

DECISION

The summary judgment standard is well known and has been set forth by this Court in numerous opinions. Summary Judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Defendants are entitled to summary judgment if plaintiffs fail to establish the existence of an element essential to the plaintiffs' case on which the plaintiff will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the plaintiffs' case necessarily renders all other facts immaterial. A material fact dispute is genuine if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. In considering the motion for summary judgment, this Court must view the facts in the light most favorable to plaintiffs and give plaintiffs the benefit of all reasonable inferences that can be drawn from the facts.

Packers and Stockyards Act Claim.
Plaintiffs claim that the defendants' use of the inaccurately reported boxed beef prices to negotiate the purchase of cattle constituted an unfair trade practice in violation of the PSA. Defendants contend that, in order to prevail on their PSA claim, plaintiffs must show that the packers' alleged conduct in violation of the PSA adversely affected competition. Defendants contend that they are entitled to summary judgment on plaintiffs' PSA claim because plaintiffs cannot establish the existence of the element of adverse effect on competition.

[68] For a more thorough background, see *Schumacher v. Tyson Fresh Meats, Inc.*, 2004 DSD 5, 221 F.R.D. 605 (D.S.D.2004).

Pursuant to Section 202 of the PSA, it is unlawful for any livestock packer to:

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

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

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

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

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

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

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

The regulations provide that no packer shall knowingly make, issue, or circulate any false or misleading reports, records, or representation concerning the market conditions or the prices or sale of any livestock, meat, or live poultry.

When the PSA was enacted in 1921, the chief evil feared [was] 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 the live stock through the stockyards, all made possible by 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 passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer.

The primary purpose of the PSA was thus two-fold-to assure fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry. H.Rep. 85-1048, 1958 U.S.C.C.A.N. 5212, 5213. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. One purpose of the PSA was 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. The PSA was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.

Sections 202(c), (d), and (e) of the PSA, address activities that have an adverse effect on competition by creating a monopoly. However, the language in section 202(a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language. *Wilson & Company v. Benson*, 286 F.2d 891, 895 (7th Cir.1961). Instead, section 202(a) of the PSA refers to "unfair" or "deceptive" practices. The Eighth Circuit has held that a practice is "unfair" under § 192(a) "if it injures or is likely to injure competition." *Farrow v. United States Department of Agriculture*, 760 F.2d 211, 214 (8th Cir.1985). This statement obviously states the law. Defendants would have the court read *Farrow* as holding that a practice is unfair *only* if it injures or is likely to injure competition. That is simply not the law. It is akin to a statement that red is a color. This does not tell us that blue is not a color. The PSA must be broadly construed as condemning "any practices that inhibit the fair trading of livestock" by those persons and entities covered under the Act." *Farrow v. United States Department of Agriculture,* 760 F.2d at 214. The lack of competition between buyers, resulting in the possible depression of producer's prices was *one* of the evils at which the PSA was directed.

The defendants rely upon what they claim is the Eighth Circuit's holding in *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir.1999), that § 192(a) requires that the alleged unfair practice actually or have the potential to reduce competition. However, that case concerned IBP's "group marketing agreement" with a group of Kansas feedlots. That case did not hold that the PSA *in toto* is limited to conduct that reduces competition or has the potential to do so.

The Eleventh Circuit has issued two recent opinions interpreting the PSA upon which the defendants rely. In *London v. Fieldale Farms Corp.,* 410 F.3d 1295, 1302 (11th Cir.2005), the Eleventh Circuit held that "in order to prevail under the PSA, plaintiff must show that defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." The Eleventh Circuit's narrow construction of the term "unfair" was based upon the PSA's anti-trust history and a narrow reading of the case law interpreting the PSA. For example, the *London* panel cited the language in *Stafford v. Wallace* 258 U.S. at 514-15, 42 S.Ct. at 401 that, at the time of the enactment of the PSA, "the chief evil Congress feared was the monopoly of the packers." *London*, 410 F.3d at 1302. However, as set forth above, *Stafford v. Wallace* also recognized Congress' concern that the packers were employing deceptive practices to lower the price to the shipper, that is, the cattle producer.

London also, I respectfully submit, cites incorrectly to cases from other circuits for the claimed proposition that any PSA claim requires a showing that the challenged practice adversely affects competition. *London* cites the Eighth Circuit decision in *Farrow* as standing for the proposition that "only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA." The challenged bidding agreement in *Farrow* did result in the lack of competition between buyers, but, as set forth above, *Farrow* does not state that *only* practices that adversely affect competition are prohibited by the PSA.

London also cites the Seventh Circuit's opinion in *Pacific Trading Co. v. Wilson & Co.,* 547 F.2d 367, 369-70 (7th Cir.1976). In that case, plaintiffs claimed that defendant's sale of "off-condition" frozen hams constituted a breach of contract, violated the PSA, the U.S. Warehouse Act, 7 U.S.C. § 270, the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 331, and the Federal Meat Inspection Act, 21 U.S.C. Sec. 610. The Seventh Circuit, in analyzing the PSA claim, held that the PSA "is a statute prohibiting a variety of unfair business practices which adversely affect competition."

Neither the PSA's purpose of preventing monopolistic practices nor its purpose of protecting producers from receiving less than the true market value of their livestock was impacted by the facts in *Pacific Trading Co.* It therefore is not instructive in this case. The Seventh Circuit has held that, where dealers engaged in conduct which "created a profit not dictated by normal market forces," such actions would violate "the prohibition against unfair or deceptive practices" in the dealer portion of the PSA, *United States v. Lehman*, 887 F.2d 1328, 1330 (7th Cir.1989). That case is more on point than *Pacific Trading Co.* The Seventh Circuit has also noted that a dealer practice of obtaining price quotes from packers would be illegal under the PSA if made for the purpose of manipulating livestock prices or controlling the movement of livestock. *Swift & Co. v. United States*, 308 F.2d 849, 854 (7th Cir.1962). The Seventh Circuit has not limited the PSA to circumstances adversely affecting competition

Defendants also rely upon the Eleventh Circuit's opinion in *Pickett v. Tyson Fresh Meats, Inc.,* 420 F.3d 1272 (11th Cir.2005), for the proposition that plaintiffs must show that defendants' alleged use of misreported boxed beef prices adversely affected competition. *Pickett* held that a § 202(a) unfairness claim and a § 202(e) price manipulation or control claim both require a plaintiff to show an adverse effect on competition. The Eleventh Circuit concluded that the use of marketing agreements to purchase a portion of Tyson's weekly fed cattle needs was not a violation of § 202(a) of the PSA because Tyson showed pro-competitive justification for the use of such agreements.

The Supreme Court denied the petition for a writ of *certiorari* in *London v. Fieldale Farms Corp.,* --- U.S. ----, 126 S.Ct. 752, 163 L.Ed.2d 574 (2005). The Supreme Court also denied the petition for a writ of *certiorari* in *Pickett. Pickett v. Tyson Fresh Meats, Inc.,* --- U.S. ----, 126 S.Ct. 1619, 164 L.Ed.2d 333 (2006).

I decline to follow the Eleventh Circuit's opinions in *London* and *Pickett.* Section 202 of the PSA is broader than its antecedent antitrust legislation and in some cases proscribes practices which the antitrust Acts would permit. *De Jong Packing Co. v. United States Dep't. of Agriculture,* 618 F.2d 1329, 1335 n. 7 (9th Cir.1980). The "[p]ackers and Stockyards Act is remedial legislation and should be liberally construed to further its life and fully effectuate its public purpose." *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dept. of Agriculture*, 438 F.2d 1332, 1336 (8th Cir.1971). "The terms 'unfair, unjustly discriminatory, or deceptive practice or device,' " as used in the PSA "are not defined, and their meaning must be determined by the facts of each case within the purposes of the Packers and Stockyards Act." *Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir.1965). One of the purposes was to prohibit deceptive practices with respect to the price paid to the producer for livestock. Section 202 of the PSA does not prohibit only those unfair and deceptive practices which adversely affect competition.

Plaintiffs assert that this court should give *Chevron*[69] deference to the USDA's interpretation of the PSA, which plaintiffs claim supports the

[69] *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984), held that, if the intent of Congress is not clearly expressed, the courts must give deference to the construction of an ambiguous statute by the administrative agency charged with administering the statute.

conclusion that no anti-competitive effect is required. Even before *Chevron*, the Eighth Circuit recognized that great deference should be accorded the Secretary of Agriculture's construction of the PSA. *Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir.1978). Defendants contend that the USDA has not consistently ruled on that issue. It is unnecessary to address this issue because the PSA and its legislative history clearly do not require that a § 192(a) claimant show that the alleged unfair practice adversely affected competition.

Defendants contend that plaintiffs' PSA claims must be rejected because plaintiffs are effectively asking “the Court to rewrite thousands of cattle purchase contracts, years after the fact.” That argument is rejected. No case has held that the PSA is inapplicable where the parties have entered into a contract. A party to a contract who engages in conduct contrary to expressed federal law cannot defend on the basis that the plaintiff waived any federal rights solely by entering into the contract.

Defendants contend that plaintiffs' PSA claims must be rejected because plaintiffs have failed to discover which class members sold cattle to defendants during the class period which cattle were hedged in the futures market. Defendants contend that if class members succeeded in locking in a price by hedging in the futures market, then they suffered no damages. Mitigation of damages is an affirmative defense which must be plead and proved by defendants. Plaintiffs are under no duty to discover and offer proof as to class members who hedged.

Genuine issues of material fact exist precluding summary judgment.

Now, therefore,

IT IS ORDERED that, *nunc pro tunc* to January 5, 2006, defendants' motion for summary judgment, Doc. 464, is denied.

United States Court of Appeals for the Eighth Circuit[70]

Herman SCHUMACHER; Michael P. Callicrate; Roger D. Koch, Plaintiff/Appellees,
v.
CARGILL MEAT SOLUTIONS CORP., doing business as Excel Corporation, Defendant/Appellant.
Swift Beef Company, formerly known as ConAgra Beef Company; National Beef Packing Company; Tyson Fresh Meats, Inc., Defendants.

Herman Schumacher; Michael P. Callicrate; Roger D. Koch, Plaintiff/Appellees,
v.
Cargill Meat Solutions Corp., doing business as Excel Corporation, Defendant,
Swift Beef Company, former known as ConAgra Beef Company, Defendant/Appellant, National Beef Packing Company; Tyson Fresh Meats, Inc., Defendants.

Herman Schumacher; Michael P. Callicrate; Roger D. Koch, Plaintiff/Appellees,
v.
Cargill Meat Solutions Corp., doing business as Excel Corporation; Swift Beef Company, formerly known as ConAgra Beef Company; National Beef Packing Company, Defendants,
Tyson Fresh Meats, Inc., Defendant/Appellant.

Submitted: Nov. 14, 2007.
Filed: Jan. 29, 2008.

Cargill Meat Solutions Corporation, Swift Beef Company, and Tyson Fresh Meats, Inc. (collectively the "Packers") appeal the district court's judgment entered after a jury trial in a class action brought under the Packers and Stockyards Act (PSA). The Packers argue, inter alia, that the district court improperly instructed the jury that the Packers could be liable for violating § 202(e) of the PSA even if they acted unintentionally.[71] Because we hold that a showing of intent is required under § 202(e), we reverse the district court's judgment.

[70] *Schumacher v. Cargill Meat Solutions*, 515 F.3d 867 (2008).
[71] Because we decide this appeal on the Packers' improper-jury-instruction argument, we need not address the Packers' other claims.

I. BACKGROUND

Plaintiffs, a class comprised of live cattle sellers, filed suit under the PSA against four packers-Cargill, Swift, Tyson, and Farmland National Beef Packing Company, L.P. The plaintiffs' beef: the packers violated § 202(a) and (e) of the PSA by taking advantage of the United States Department of Agriculture's (USDA) error in calculating cutout values, which error lowered the prices the packers paid the plaintiffs for their cattle.

The Livestock Mandatory Reporting Act (LMRA) controls the USDA's reporting of cutout values. Pursuant to the LMRA, packers are required to report to the Secretary of the USDA, at least twice a day, information on most boxed beef sales, including the price received for each negotiated boxed beef transaction. Once the USDA receives this information, it must make it available to the public.

The USDA reports two categories of information to the public. The first type of information is the price for the fifty-six individual cuts of beef from a head of cattle. The USDA did not err in reporting this information. The second type of information the USDA provides, which was affected by the USDA's error, is the "cutout value." The USDA publishes the "cutout value" for choice and select grades of beef and for both heavy and light cattle. A "cutout value" is calculated by taking the average price of the fifty-six individual cuts of beef and inputting them into a formula to arrive at an average price for all cuts of beef.

The boxed beef prices that the packers report to the USDA, and the USDA subsequently releases to the public, are important to cattle sellers like the plaintiffs because research has shown that the boxed beef prices are related to fed cattle prices, that is, the amount per pound a cattle seller receives for a marketed animal. Thus, sellers look to the boxed beef prices, among other factors, to help them negotiate an appropriate selling price.

The USDA erroneously reported the cutout values to the public over a six-week period-April 2, 2001, to May 11, 2001. This error purportedly lowered the prices that the Packers paid individual sellers for their choice and select grade cattle. On May 16, 2001, the USDA issued a press release informing the public of its error in calculating the cutout values. The USDA then recalculated the errant values. These new values showed that the originally computed averages were incorrect and, indeed, lower than they should have been.

Once the putative class members learned of this error, several filed suit under the PSA alleging that four packers violated § 202(a) and (e). The district court ordered the plaintiffs to bring the suit as a class action. The suit then progressed to trial, and after each party's closing argument, the district court instructed the jury on the law of the case.

In jury instruction eleven, the district court instructed the jury that to find a violation of § 202(e), it must find that the defendant "[e]ngaged in any course of business or did any act for the purpose or with the effect of manipulating or controlling prices paid to class members." The district court further stated that "[p]laintiffs need not prove that defendants acted intentionally or with the intent to violate [§ 202(e)]." This was the only guidance the district court provided the jury on the PSA's legal standard. After deliberation, the jury returned a verdict finding the Packers violated § 202(e), but not § 202(a).

The Packers now appeal, hoping to show us how the cow ate the cabbage.[72] In this regard, the Packers contend the district court's guidance in jury instruction eleven incorrectly stated § 202(e)'s legal standard. Thus, the determinative issue in this appeal is what legal standard § 202(e) imposes on a plaintiff trying to prove a § 202(e) violation, and whether the district court's instruction complied with this standard. This appears to be a question of first impression.

II. DISCUSSION

Congress enacted the PSA in 1921 to, in part, regulate packers by preventing them from forming monopolies that would enable them to "unduly and arbitrarily ... lower prices." Section 202(e) of the PSA makes it unlawful for any packer to "[e]ngage in any course of business or do any act for the *purpose or with the effect of manipulating or controlling* prices...." The PSA does not provide a definition for any of the italicized words, and Congress did not articulate the legal standard anywhere in the legislative history.

In the absence of a statutory definition or clear contrary legislative intent, statutory terms are given their plain, ordinary, and commonly understood meaning. This court often turns to a commonly used dictionary to ascertain a word's ordinary meaning. Merriam-Webster's Collegiate Dictionary defines "manipulate" as follows: "to manage or utilize skillfully," or "to control or play upon by artful, unfair, or insidious means esp[ecially] to one's own advantage" or "to change by artful or unfair means so as to serve one's purpose." *Merriam-Webster's Collegiate Dictionary* 756 (11th ed.2007). "Control," according to the same dictionary, means "[t]o exercise restraining or directing influence over," or "to have power over." *Id.* at 272. By using words such as "manage," "artful," "insidious," and "exercise," both definitions suggest that some culpability, such as intent, is required to violate the PSA.

[72] "How the cow ate the cabbage" is a southern expression used to indicate that the speaker is "telling it like it is" or telling someone what he needs to know but may not want to hear. Robert Hendrickson, *Encyclopedia of Word and Phrase Origins,* New York 1997.

Additionally, we have read similar statutory language as requiring proof of intent. For instance, in *Utesch v. Dittmer,* we held that "manipulate," as used in the Commodities Exchange Act, requires the defendant to "intentionally engage[ ] in" conduct. 947 F.2d 321, 327 (8th Cir.1991). The United States Supreme Court, in the securities fraud context, has also interpreted "manipulation" to require "intentional or willful conduct." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

What is more, the plaintiffs concede that the "purpose" tine of § 202(e) requires a showing of intent; however, they argue that the "effect" tine does not. We disagree. As we have already suggested, Congress' use of "manipulate" and "control" requires a showing of intent regardless of whether modified by "purpose" or "effect." And, Congress' use of "or" to separate "manipulating" and "controlling" does not require us to adopt a different interpretation. The word "or" as used in the phrase "manipulate *or* control," is used as a word of explanation showing the relationship between the word preceding it (manipulating) and the word following it (controlling). While the use of "or" generally connotes a disjunctive interpretation, this is not always the case. Indeed, sometimes "or" is interpretative or expository of the preceding word. For instance, "or" is often used in the sense of "to wit," "that is to say," or simply a broadened or narrowed explanation of the same thing.

We find that Congress intended "or" to be given an explanatory interpretation. Indeed, "manipulate," according to Merriam-Webster's Collegiate Dictionary, is defined in terms of control. Thus, under the statute, control is simply a more benign and slightly less invidious way of achieving manipulation, both requiring an intentional act to animate the result.

In sum, we conclude that to prove a violation of § 202(e), a plaintiff must show that a packer *intentionally* committed unlawful conduct. Therefore, the district court erred when it instructed the jury that a showing of intent was not required and reversal of the district court is necessary.

Although we reverse the district court's judgment, which it entered after a jury trial, we need not remand the case for a new trial. When the "evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the proper[ ]" legal standard, we can properly direct the district court to enter judgment for the appellant, without a new trial. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). Here, the plaintiffs produced no evidence that the Packers intentionally violated the PSA by manipulating or controlling (or

> attempting to manipulate or control) cattle prices.[73] Thus, we reverse and direct the district court to enter judgment for the Packers.
>
> **III. CONCLUSION**
> For the foregoing reasons, we reverse the district court's judgment and remand to the district court with directions to enter judgment in favor of the Packers.

The Supreme Court declined to hear any of the cases above. Whether the Supreme Court will rule on this issue is yet to be seen. There are cases moving through the courts today that could spark the high Court's interest. The question moved one step closer to the Supreme Court in a 2008 decision by the fifth circuit. In *Wheeler, et. al v. Pilgrim's Pride Corp.* the Fifth Circuit handed down a decision opposite those of the other circuits mentioned above. Following, but not mentioning, the amicus brief filed by DOJ on behalf of USDA, the court said a violation of the P&S Act can be found without a showing of injury to competition. The fifth circuit wrote:

> "Section 192(a) prohibits 'unfair, justly discriminatory, or deceptive' practices or devices. Section 192(b) prohibits 'undue or unreasonable' preferences, advantages or disadvantages. Neither section contains language limiting its application to only those acts or devices, which have an adverse effect on competition, such as 'restrain commerce.' Under well-settled principles, we must refrain from reading additional terms, such as those that would require an adverse effect on competition into these sections."
>
> And:
> "[i]f Congress had intended for the courts to read 'restraining commerce' into every section of the PSA, then we see no reason why Congress would have included 'restraining commerce' only in sections 192(c)-(e). Because we will not read additional terms into a statute when we believe that Congress intentionally omitted them, we cannot adopt a reading of the PSA that engrafts an adverse effect on competition requirement onto sections 192(a)-(b)."

The *Wheeler* decision is not final however. On July 27, 2009, the Fifth Circuit Court of Appeals ordered the *Wheeler* case to be reheard en banc.[74] Oral argument is scheduled for September 24, 2009 in New Orleans, Louisiana.

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[73] The plaintiffs also failed to produce legally sufficient evidence that the Packers knew or should have known of the USDA's error, or that the Packers had any duty to inform the plaintiffs if they did have such knowledge.

[74] "En banc" refers to the case being heard by the full bench, or in other words, by all of the judges of the Fifth Circuit. The *Wheeler* decision included here was heard by a panel of three judges from the Fifth Circuit. The Court is currently composed of 16 active judges with 1 vacancy.

United States Court of Appeals,
Fifth Circuit.
Cody WHEELER; Don Davis; Davey Williams, Plaintiffs-Appellees,
v.
PILGRIM'S PRIDE CORP., Defendant-Appellant.

No. 07-40651.
July 21, 2008.

This appeal presents a single narrow question: whether a plaintiff must prove an adverse effect on competition to prevail in a suit alleging a violation of Packers and Stockyards Act Sections 202(a)-(b), ("PSA"). The District Court answered this question in the negative despite the fact that the great weight of authority in our sister Circuits is to the contrary. Based on a plain-text reading of the PSA, we agree with the District Court. Therefore, we hold that a plaintiff need not prove an adverse effect on competition to prevail under 7 U.S.C. §§ 192(a)-(b). We disagree with those decisions of our sister Circuits that conflict with this holding and acknowledge that in so doing we create a circuit-split on this issue. We AFFIRM.

I

Plaintiffs-Appellees Cody Wheeler, Don Davis, and Davey Williams (together, the "Growers") are chicken farmers who grow chickens known as "broilers" for Defendant-Appellant Pilgrim's Pride Corporation ("PPC"), a chicken processor and dealer referred to as an "integrator" in the chicken industry. The Growers and PPC operate within a contractual relationship whereby PPC provides the Growers with the chicks, feed, and supplies required to raise chickens. In exchange, the Growers care for the chickens until they reach maturity and are returned to PPC. We say "returned" because the chicks, maturing chickens, feed, and medicine remain the property of PPC at all times. This is known as the "grow-out" process. It takes approximately two months to grow-out a flock. The Growers' operations (and the operations of other growers) are geographically clustered into areas called "complexes." PPC compensates the Growers under a "tournament system." In essence, PPC ranks the Growers against one another and against the other growers operating in their complex. PPC then compensates the Growers based on the quality of their broilers, the number that survive the grow-out process, and the amount of feed and supplies the Growers used.

At least one grower operates under a different system than the Growers. Lonnie "Bo" Pilgrim ("Mr. Pilgrim"), PPC's founder and chairman, purchases chicks, feed, and supplies from PPC rather than having them consigned to him. Operating in a different complex than the Growers, Mr. Pilgrim then raises the chickens at his farm ("LTD Farm") and sells them back to PPC. Rather than compensating Mr. Pilgrim under the tournament system, PPC pays Mr. Pilgrim the lesser of a weekly quoted market price or 102% of his costs. According to the Growers, Mr. Pilgrim earns more under his arrangement with PPC than they earn under their arrangements with PPC. The Growers further contend that PPC refused to offer them growing arrangements similar to Mr. Pilgrim's.

The Growers sued PPC under the PSA. Specifically, the Growers alleged that PPC's refusal to afford them an opportunity to operate under the same terms as an insider, is "unfair and unjustly discriminatory" and affords Mr. Pilgrim an "undue or unreasonable preference or advantage" in violation of sections 192(a)-(b). The Growers raised additional claims against PPC, as well, that we need not describe in detail for the purposes of the appeal. PPC moved for summary judgment arguing that the Growers did not allege an adverse effect on competition, as required to prevail under sections 192(a)- (b). The District Court found no such requirement in the PSA and denied the motion for summary judgment. Pursuant to 28 U.S.C. § 1292(b), the District Court then entered an order certifying the following issue for appeal: "whether a plaintiff must prove an adverse effect on competition in order to prevail under 7 U.S.C. §§ 192(a)- (b)." We permitted the appeal.

II

We may review an otherwise unappealable order of a District Court pursuant to 28 U.S.C. § 1292(b), if a District Court enters an order stating that it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Under 28 U.S.C. § 1292(b), "it is not merely the controlling question of law which is certified for appeal; it is the entire *order* entered by the trial court." *Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 984 n. 16 (5th Cir.1985). Thus, we *may* address all issues material to the order in question and are not limited to the "controlling question of law." Indeed, some Circuits have held that we are "obliged to address the order that was certified rather than the controlling question of law framed by the district court." Here, we constrain ourselves to the question of statutory interpretation that the District Court identified and that the parties briefed because that question controls this appeal. We review an issue of statutory interpretation, such as the PSA's construction, *de novo*.

III

The parties raise four issues that may bear on our interpretation of the PSA: first, whether the PSA's plain text requires a plaintiff to prove an adverse effect on competition to prevail in a suit under sections 192(a)-(b); second, whether the PSA's legislative history supports an adverse effect on competition requirement under sections 192(a)-(b); third, whether we must defer to the Department of Agriculture's ("USDA") interpretation of the PSA; and fourth, whether the Federal Trade Commission's ("FTC") interpretation of a similarly-worded statute bears on our interpretation of the PSA. If we find that a plaintiff must prove an adverse effect on competition to prevail under sections 192(a)-(b), PPC raises a fifth issue: whether we should dismiss this suit, rather than remanding it, because there is no evidence establishing an adverse effect on competition. Because we hold that the plain text of sections 192(a)-(b) does not require an adverse effect on competition, we need only address the first issue. We do, however, briefly discuss the PSA's legislative history because that is our point of departure from our sister Circuits.

A

We begin, as we should, with the plain text of the statute. The PSA provides:

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

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

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

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

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

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

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

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

The District Court held that the text of sections 192(a)-(b) “on its face” requires no showing of an adverse effect on competition. PPC contends that the District Court erred in this determination without offering a persuasive alternative interpretation of the text. Indeed, the only textual argument PPC can muster is that the District Court should have examined the text, in light of the legislative history, rather than examining the text alone. The Growers endorse the plain-text interpretation of the District Court as the only correct reading of sections 192(a)-(b) and counter that the District Court need not have considered legislative history because the PSA's text is plain, clear, and unambiguous.

“It is well established that when a statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms.” We look first to the specific terms of the sections in question. Section 192(a) prohibits “unfair, unjustly discriminatory, or deceptive” practices or devices. Section 192(b) prohibits “undue or unreasonable” preferences, advantages, or disadvantages. Neither section contains language limiting its application to only those acts or devices, which have an adverse effect on competition, such as “restraining commerce.” Under well-settled principles, we must refrain from reading additional terms, such as those that would require an adverse effect on competition, into these sections. Neither PPC nor the other Circuits have provided an alternative reading of the plain text of sections 192(a)-(b). Nor can we say that it would be absurd to read sections 192(a)-(b) as not requiring an adverse effect on competition. Accordingly, because PPC's construction of the PSA would require us to read absent terms into the statute, we reject it.

Looking to the remaining sections of the PSA, we find further support for our view that sections 192(a)-(b) do not require a plaintiff to prove an adverse effect on competition. Sections 192(c)-(e), unlike sections 192(a)-(b), prohibit only those acts, which have the effect of “restraining commerce” or which produce another common antitrust injury, such as “creating a monopoly.” If Congress had intended to limit the scope of sections 192(a)-(b) to prohibit only those acts with the effect of “restraining commerce,” it could have included the same language it employed in sections 192(c)-(e). Congress did not. This omission is strong evidence that Congress did not intend sections 192(a)-(b) to require a plaintiff to prove an adverse effect on competition. *See* *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972)) (" 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' "). Similarly, if Congress had intended for the courts to read "restraining commerce" into every section of the PSA, then we see no reason why Congress would have included "restraining commerce" only in sections 192(c)- (e). Because we will not read additional terms into a statute when we believe that Congress intentionally omitted them, we cannot adopt a reading of the PSA that engrafts an adverse effect on competition requirement onto sections 192(a)- (b).

We agree with the District Court that the language of sections 192(a)-(b) is plain, clear, and unambiguous, and that it does not require the Growers to prove an adverse effect on competition. Holding that sections 192(a)-(b) plainly, clearly, and unambiguously do not require an adverse effect on competition, we go no further. Accordingly, we affirm the District Court.

B

We acknowledge that our decision today conflicts with nearly every decision of our sister Circuits on this issue.[75] Their decisions, however, generally reached beyond the PSA's clear and unambiguous text, choosing instead to be guided by its legislative history, "antitrust ancestry," and "policy considerations." We believe that their decisions should have been guided by the text. Accordingly, this is where we depart from our sister Circuits. By resting our decision on the PSA's plain text, we follow the better path: "prefer[ring] the plain meaning since that approach respects the words of Congress." "In this manner we," unlike our sister Circuits, "avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."

[75] *See, e.g.*, *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir.2007); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.2005) ("[I]n order to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition."); *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1324 n. 6 (11th Cir.2005); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir.2005); *I.B.P., Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir.1999); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir.1995); *Farrow v. U.S. Dept. of Agric.*, 760 F.2d 211, 215 (8th Cir.1985); *De Jong Packing Co. v. U.S. Dept. Agric.*, 618 F.2d 1329, 1336-37 (9th Cir.1980); *Pac. Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367, 369-70 (7th Cir.1976); *Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir.1968). *But see* *Schumacher v. Tyson Fresh Meats, Inc.*, 434 F.Supp.2d 748, 750-55 (D.S.D.2006) (observing that § 192(a) concerns activities that adversely affect competition, but rejecting the conclusion that § 192(a) is limited to *only* those activities that adversely affect competition); *Kinkaid v. John Morrell & Co.*, 321 F.Supp.2d 1090, 1103 (N.D.Iowa 2004) (citing *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir.1961)) ("[T]his court finds that only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited.").

In our view, our sister Circuits have fallen into the very legislative history pitfall that the Supreme Court identified. Here, the legislative "history creates more confusion than clarity about the congressional intent" because history and policy considerations lend support to conflicting interpretations. To illustrate the point, we consider the two primary "legislative history" and "policy" bases upon which our sister Circuits rest their findings of an adverse effect on competition requirement. First, they rely on H.R. 85-1048 (1958), which states: "the primary purpose of [the PSA] is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." Second, they rely on *Stafford v. Wallace*, 258 U.S. 495, 514-15, 42 S.Ct. 397, 66 L.Ed. 735 (1922), which observed that the "chief evil" Congress feared in passing the PSA was the monopoly of meat industry packers. Most obviously, we observe that Congress spoke of assuring fair competition as the PSA's "primary" purpose, not as the PSA's only purpose, and that the Supreme Court spoke of monopoly as the "chief" evil against which the PSA protects, not as the "only" evil. Thus, *Stafford* does not foreclose us from holding that the PSA protects against harms that have no adverse effect on competition. Moreover, a closer look at the House Report shows that it may not limit the PSA as much as the other Circuits think.

By examining the context of the very passages of the House Report upon which our sister Circuits rely, we find that we may read them to support the contrary proposition; namely, that sections 192(a)-(b) may not require a plaintiff to prove an adverse effect on competition. Although the other Circuits rightly point out that the PSA's "primary purpose" is to assure "fair competition and fair trade practices," the House described other purposes as well:

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

***

The act provides that meatpackers subject to its provisions shall not engage in practices that restrain commerce or create monopoly. They are prohibited from buying or selling any article for the purpose of or with the effect of manipulating or controlling prices in commerce. They are also prohibited from engaging in any unfair, deceptive, or unjustly discriminatory practice or device in the conduct of their business, or conspiring, combining, agreeing, or arranging with other persons to do any of these acts.

H.R. 85-1048 at 1-2. There is little doubt that these passages support the view that the PSA's primary purpose is to protect fair competition. But the PSA goes further. It also was intended to "protect consumers from unfair business practices," to protect members of the livestock marketing and meat industries from "unfair, deceptive, and unjustly discriminatory" practices, and to prohibit meatpackers, more generally, from "engaging in any unfair, deceptive, or unjustly discriminatory practice or device in the conduct of their business." Indeed, by using "also prohibited" to separate "unfair, deceptive, or unjustly discriminatory practice and device" from language describing injuries to competition such as "restrain[ing] commerce," "creat[ing] monopoly," and "manipulating or controlling prices," Congress may have evinced its intent for the PSA to sweep more broadly than only those injuries, which have an adverse effect on competition. These passages from the House do not paint a clear picture of Congress's intent. They create uncertainty. That is the point. "These uncertainties illustrate the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text." Better, we think, especially where Congress's intentions and concerns are less than crystal clear, to be guided by the basic precept: "it is ultimately the provisions of our laws rather than the principal [or the 'primary' or the 'chief'] concerns of our legislators by which we are governed." In reading an adverse effect on competition requirement into sections 192(a)-(b), the other Circuits have departed from this basic rule. We will not. We rest on a plain-text reading of the PSA for our holding that sections 192(a)-(b) do not require a plaintiff to prove an adverse effect on competition to prevail thereunder. Accordingly, we need not address the remaining issues raised by the parties.

IV

For the foregoing reasons, we agree with the order of the District Court.

AFFIRMED.

USDA has also filed an amicus brief in another case currently pending in the Sixth Circuit, *Alton T. Terry v. Tyson Farms, Inc.* If the Sixth Circuit follows the initial *Wheeler* decision in the Fifth Circuit, it may be time for the Supreme Court to step in and decide once and for all. And, if the Supreme Court hears a case on the issue, perhaps it will look back to 1922, when it decided *Stafford v. Wallace*. The Court in *Stafford* referenced the purpose behind the Act, stating:

> "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 the livestock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other.* (Emphasis added.)

While Congress was concerned with adverse effects on competition in the form of the monopoly of the packers, they were also concerned with ridding the industry of deceptive trade practices.

Agency Heads, 2000 to 2009

Donna Reifschneider (2002 – 2004)

Donna Reifschneider reported as administrator of the Grain Inspection, Packers and Stockyards Administration on April 15, 2002. Before joining USDA, since 1971 Reifschneider owned and operated, with her family, a 600-sow, 1,000-acre hog and grain farm in southern Illinois. During that time she served as an executive committee member of the Meat Export Federation from 1999-2001.

From 1996-2000 Reifschneider also served as an officer with the Des Moines, Iowa-based National Pork Producers Council, including serving as president from 1998-99 and vice president from 1996-97. During those four years she worked at coordinating that organization's state and national policy and strategy and negotiating with U.S., Canadian, and Mexican pork organizations on trade issues. She chaired the Council's Pork Quality Assurance Committee from 1992-98 and its Food Safety Committee from 1995-98, and served on its Pork Trade Committee from 1999-2002, participating in trade missions to China, Japan, Argentina, and Brazil.

A native of Belleville, Ill., Reifschneider holds a B.S. degree in education from Southern Illinois University.

James E. Link (October 17, 2005 – November 2, 2008)

James E. Link was named administrator of USDA's Grain Inspection, Packers and Stockyards Administration on October 17, 2005. Prior to joining GIPSA, Mr. Link was director of the Ranch Management Program at Texas Christian University. He had previously served as assistant director and associate director with the program.

Link had previously served as a committee member for the National Cattlemen's Beef Association, director of the Texas and Southwestern Cattle Raiser's Association, on the board of directors of the Southwestern Exposition and Livestock Show, as a committee member for the State Fair of Texas, and on the Tarrant County Farm Bureau Board of Directors.

He was assistant vice president and manager of the ranch management department at Oppenheimer Industries, Inc., in Kansas City, Missouri, where he managed nine client-owned ranches located in six different states. These ranches comprised over one million acres and carried over 18,500 cows and several thousand stocker cattle. He was responsible for the property management of 22 client-owned ranches that were leased to private operators. Previously, he managed trust and estate property for the El Paso National Bank.

Mr. Link has a bachelor's degree in business with minors in economics and psychology from Emporia State University and an MBA and a Certificate of Ranch Management from Texas Christian University.

Link and his wife Karin have two sons and four grandchildren. They had been in the cattle business for most of their adult lives, including being owners of the Link Cattle Company of Crowley, Texas immediately prior to Link’s appointment as GIPSA Administrator.

On November 2, 2008, Mr. Link left GIPSA to take over as Administrator of the Agricultural Marketing Service (AMS), a role he filled through the end of the George W. Bush administration on January 20, 2009.

Terry Van Doren (November 3, 2008 – January 3, 2009)

Terry Van Doren grew up on a grain and livestock farm in Macoupin County, Illinois. He graduated from the University of Illinois in 1994 with a bachelor's degree in Animal Sciences and received a master's degree in Agricultural Sciences from Colorado State University in 1996. After graduation, Van Doren was active in agricultural policy, serving as Associate Director of Agricultural Policy for the National Cattlemen's Beef Association. In 1999, he joined the staff of U.S. Senator Peter G. Fitzgerald of Illinois. Van Doren first served as Agriculture Subcommittee Staff Director and later as Senator Fitzgerald's Legislative Director.

Van Doren joined USDA in 2005 to work on research, education and economic policy issues and then as senior advisor to the under secretary for Marketing and Regulatory Programs. Van Doren took a one-year leave of absence from USDA in 2007 to work for U.S. Senate Republican Leader Mitch McConnell during the development of the 2008 Farm Bill.

Van Doren currently serves as Legislative Director for United States Senator, and former Secretary of Agriculture, Mike Johanns of Nebraska.

J. Dudley Butler (May 11, 2009 – present)

Mr. Butler has been an attorney for over three decades and is a certified mediator and arbitrator. He's also been involved in cattle, timber, and farming operations.

Mr. Butler has consistently worked on both the state and national level to protect the rights of farmers and ranchers to ensure that family farms and rural America continue to prosper. He has testified before Congress on matters involving agriculture and arbitration and served on a mandatory price reporting task force that lead to the passage of a Mandatory Price Reporting law by Congress.

Mr. Butler started his career serving as a legislative assistant for Mississippi Governor Cliff Finch. He was subsequently named Attorney and Special Assistant to the Commissioner of the Mississippi Department of Corrections, where he was responsible for legal work involving the Department, including proposed legislation. He also served as a liaison to the Legislature and was responsible for various executive management duties assigned by the Commissioner.

Mr. Butler is a member of the Mississippi Bar Association and has served as a Bar Commissioner for the Mississippi Bar, co-chairman of the Arbitration Committee of the Mississippi Bar, and as a member of the Bench/Bar Liaison Committee.

Looking Ahead…

The livestock, meat and poultry industries continue to evolve. The old stockyards of the 19th and 20th centuries continue to disappear. In 2008, we saw the closing of the South St. Paul Stockyards, which was one of the original posted stockyards in 1921. The Sioux Falls Stockyards, another from the group posted in 1921, closed its doors in 2009. Recent times have also seen mergers in the packing industry and an acquisition that placed ownership of one of the largest U.S. packers in a South American company.

What will the future hold for Packers and Stockyards? A few things are certain:

- 2010 will see P&S implementing a number of new regulations, including those mandated by the 2008 Farm Bill as well as others.
- Congress will continue to debate legislation aimed at improving enforcement of the P&S Act.

The rest is uncertain. In 88 years, Packers and Stockyards USDA has endured challenging times, perhaps none so challenging as the present, as we emerge from a period of unrest and criticism. There have been numerous attempts to move administration of the Act from USDA to another federal agency, including a proposal in the 2008 Farm Bill deliberations that would have created an Office of Special Counsel within USDA responsible for investigating and prosecuting violations of the P&S Act.

Appendices

EXHIBIT A

ESTABLISHING GIPSA

[Federal Register: December 27, 1994]

VOL. 59, NO. 247

Tuesday, December 27, 1994

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Department Reorganization

AGENCY: Office of the Secretary, Department of Agriculture (USDA).

ACTION: Notice.

SUMMARY: Notice is hereby given of the creation of subcabinet positions, the creation of new agencies, the abolition of positions and agencies, the assignment of functions in USDA, and the transfer of assets, rights, and obligations to the new agencies.

FOR FURTHER INFORMATION CONTACT: James Michael Kelly, Associate General Counsel, Room 2043 South Building, Washington, D.C. 20250; telephone (202)-720-7219.

SUPPLEMENTARY INFORMATION: The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Public Law No. 103-354, signed by the President on October 13, 1994, permits the Secretary of Agriculture to accomplish the reorganization of USDA. Pursuant to that authority, on October 20, 1994, the Secretary took the following actions:

(1) Establishment of Subcabinet Positions

The following subcabinet positions were established within USDA:

(A) Under Secretary of Agriculture for Farm and Foreign Agricultural Services

The Under Secretary of Agriculture for Farm and Foreign Agricultural Services supervises all activities of the Consolidated Farm Service Agency including the Federal Crop Insurance Corporation, and the Foreign Agricultural Service, and performs such other functions related to farm and foreign agricultural services as are assigned.

(B) Under Secretary of Agriculture for Rural Economic and Community Development

The Under Secretary of Agriculture for Rural Economic and Community Development supervises all activities of the Rural Utilities Service, the Rural Housing and Community Development Service, and the Rural Business and Cooperative Development Service, and performs such other functions related to rural economic and community development as are assigned.

(C) Under Secretary of Agriculture for Food, Nutrition, and Consumer Services

The Under Secretary of Agriculture for Food, Nutrition, and Consumer Services supervises all activities of the Food and Consumer Service, coordinates functions related to nutrition policy and education, and performs such other functions related to food, nutrition, and consumer services as are assigned.

(D) Under Secretary of Agriculture for Natural Resources and Environment

The Under Secretary of Agriculture for Natural Resources and Environment supervises all activities of the Forest Service and the Natural Resources Conservation Service, coordinates functions related to agricultural environmental quality, and performs such other functions related to natural resources and environment as are assigned.

(E) Under Secretary of Agriculture for Research, Education, and Economics

The Under Secretary of Agriculture for Research, Education, and Economics supervises all activities of the Agricultural Research Service, the Cooperative State Research, Education, and Extension Service, the Economic Research Service, and the National Agricultural Statistics Service, and performs such other functions related to research, education, and economics as are assigned.

(F) Under Secretary of Agriculture for Food Safety

The position of Under Secretary of Agriculture for Food Safety is established by the Act. The Under Secretary supervises all activities of the Food Safety and Inspection Service, as well as functions under the Egg Products Inspection Act formerly performed by the Agricultural Marketing Service, and the salmonella enteritidis reduction program and pathogen reduction activities formerly performed by the Animal and Plant Health Inspection Service, and performs such other functions related to food safety as are assigned.

(G) Assistant Secretary of Agriculture for Marketing and Regulatory Programs

The Assistant Secretary of Agriculture for Marketing and Regulatory Programs supervises those activities of the Agricultural Marketing Service and the Animal and Plant Health Inspection Service which do not relate primarily to food safety, as well as all activities of the Grain Inspection, Packers and **Stockyards** Administration, and performs such other functions related to marketing and regulatory programs as are assigned.

(H) Assistant Secretary of Agriculture for Congressional Relations

The Assistant Secretary of Agriculture for Congressional Relations supervises all activities of USDA and its agencies and offices related to relationships with the Congress and with its committees and members, as well as functions related to intergovernmental relations, and performs such other functions as are assigned.

(I) Assistant Secretary of Agriculture for Administration

The Assistant Secretary of Agriculture for Administration supervises all activities of the Office of Civil Rights Enforcement, the Office of Information Resources Management, the Office of Operations, and the Office of Personnel, and provides administrative management for the Office of Administrative Law Judges, the Board of Contract Appeals, and the Judicial Officer, and performs such other functions related to administrative management as are assigned.

(J) Chief Economist

There shall be in USDA a Chief Economist who reports to the Secretary. The Chief Economist supervises all activities of the Economic Analysis Staff, the Office of Risk Assessment and Cost-Benefit Analysis, and the World Agricultural Outlook Board, and is assigned responsibility for advising the Secretary with respect to the economic effects of all proposed major programs and activities of USDA and for preparing economic analyses of USDA's principal initiatives.

(2) Establishment of Agencies and Offices

The following agencies and offices were established within USDA:

(A) Consolidated Farm Service Agency

The Consolidated Farm Service Agency is headed by an Administrator who reports to the Under Secretary of Agriculture for Farm and Foreign Agricultural Services. The Agency is assigned responsibility for agricultural price and income support programs, production adjustment programs, and the conservation reserve and agricultural conservation programs formerly performed by the Agricultural Stabilization and Conservation Service, supervision of the Federal Crop Insurance Corporation, farm-related agricultural credit programs formerly performed by the Farmers Home Administration, and such other programs related to farm services as are assigned.

(B) Rural Utilities Service

The Rural Utilities Service is headed by an Administrator who reports to the Under Secretary of Agriculture for Rural Economic and Community Development. The Service is assigned responsibility for electric and telephone loan programs formerly performed by the Rural Electrification Administration, water and waste facility loans and grants formerly assigned to the Rural Development Administration, and such other functions related to rural utilities services as are assigned.

(C) Rural Housing and Community Development Service

The Rural Housing and Community Development Service is headed by an Administrator who reports to the Under Secretary of Agriculture for Rural Economic and Community Development. The Service is assigned responsibility for housing loan programs formerly performed by the Farmers Home Administration, community facilities loan programs formerly performed by the Rural Development Administration, and such other programs related to rural housing and community development as are assigned.

(D) Rural Business and Cooperative Development Service

The Rural Business and Cooperative Development Service is headed by an Administrator who reports to the Under Secretary of Agriculture for Rural Economic and Community Development. The Service is assigned responsibility for business and industry loan programs and assistance programs for cooperatives formerly performed by the Rural Development Administration, and such other functions related to rural business and cooperative development as are assigned.

(E) Food and Consumer Service

The Food and Consumer Service is headed by an Administrator who reports to the Under Secretary of Agriculture for Food, Nutrition, and Consumer Services. The Service is assigned responsibility for all food stamp, school lunch, child nutrition, and special feeding programs formerly performed by the Food and Nutrition Service, and for such other functions related to food and consumer services as are assigned.

(F) Natural Resources Conservation Service

The Natural Resources Conservation Service is headed by a Chief who reports to the Under Secretary of Agriculture for Natural Resources and Environment. The Service is assigned responsibility for all soil and water conservation programs formerly performed by the Soil Conservation Service, the Wetlands Reserve, Water Bank, Colorado River Basin Salinity Control, and Forestry Incentives programs formerly performed by the Agricultural Stabilization and Conservation Service, the Farms for the Future Act program formerly performed by the Farmers Home Administration, and such other functions related to natural resources conservation as are assigned.

(G) Cooperative State Research, Education, and Extension Service

The Cooperative State Research, Education, and Extension Service is established by the Act. It is headed by an Administrator who reports to the Under Secretary of Agriculture for Research, Education, and Economics. The Service is assigned responsibility for all cooperative State and other research programs formerly performed by the Cooperative State Research Service, all cooperative education and extension programs formerly performed by the Extension Service, and such other functions related to cooperative research, education, and extension as are assigned.

(H) Grain Inspection, Packers and **Stockyards** Administration

The Grain Inspection, Packers and **Stockyards** Administration is headed by an Administrator who reports to the Assistant Secretary of Agriculture for Marketing and Regulatory Programs. The Administration is assigned responsibility for all programs and activities formerly by the Federal Grain Inspection Service and by the Packers and **Stockyards** Administration, and such other functions related to regulatory programs as are assigned.

(I) National Appeals Division

The National Appeals Division is headed by a Director who reports to the Secretary. The Division is assigned responsibility for all administrative appeals formerly performed by the National Appeals Division of the Agricultural Stabilization and Conservation Service and by the National Appeals Staff of the Farmers Home Administration, appeals arising from decisions of the Federal Crop Insurance Corporation and the Soil Conservation Service, appeals arising from decisions of the successors to these agencies established by this Memorandum, and such other administrative appeals arising from decisions of agencies and offices of USDA as are assigned.

(J) Office of Risk Assessment and Cost-Benefit Analysis

The Office of Risk Assessment and Cost-Benefit Analysis is headed by a Director who reports to the Chief Economist. The Office is assigned responsibility for assessing the risks to human health, human safety, or the environment, and for preparing cost-benefit analyses, with respect to proposed major regulations, and for publishing such assessments and analyses in the Federal Register. The Office also has responsibility for such other analytical functions as are assigned.

(3) Positions Abolished

The following subcabinet positions were abolished:
(A) Under Secretary of Agriculture for International Affairs and Commodity Programs.
(B) Under Secretary of Agriculture for Small Community and Rural Development.
(C) Assistant Secretary of Agriculture for Economics.
(D) Assistant Secretary of Agriculture for Food and Consumer Services.
(E) Assistant Secretary of Agriculture for Marketing and Inspection Services.
(F) Assistant Secretary of Agriculture for Natural Resources and Environment.
(G) Assistant Secretary of Agriculture for Science and Education.

(4) Agencies and Offices Abolished

The following agencies and offices within USDA were abolished:
(A) Agricultural Stabilization and Conservation Service.
(B) Farmers Home Administration.
(C) Rural Electrification Administration.
(E) Food and Nutrition Service.
(F) Soil Conservation Service.

(G) Cooperative State Research Service.
(H) Extension Service.
(I) National Agricultural Library.
(J) Federal Grain Inspection Service.
(K) Packers and **Stockyards** Administration.
(L) Office of the Executive Secretariat.

(5) Transfer of Assets, Rights, Obligations, and Delegations of Authority

All references in any statute or regulation to an agency abolished by the Secretary shall be deemed to refer to its successor agency. All assets, rights, interests, privileges, immunities, duties, powers, and obligations of an agency abolished by the Secretary shall become the assets, rights, interests, privileges, immunities, duties, powers, and obligations of the successor agency. All delegations to and from an agency abolished by the Secretary shall be deemed to be delegations to and from the successor agency.

(6) Status of Prior Authority and Directives

Prior delegations of authority, administrative regulations, and other directives not inconsistent with the provisions of this Notice shall remain in full force and effect until superseded or otherwise modified.

Done this 23rd day of November, 1994.
Richard E. Rominger,
Acting Secretary of Agriculture.
[FR Doc. 94-29603 Filed 12-23-94; 8:45 am]
BILLING CODE 3410-01-M

EXHIBIT B

Secretaries of Agriculture since the Passage of

The Packers and Stockyards Act of 1921

Henry C. Wallace (1921-1924)

Henry Cantwell (Harry) Wallace was born in 1866 in Rock Island, Illinois and served as United States Secretary of Agriculture from 1921 to 1924.

Wallace graduated from and was a professor of dairy science at Iowa State College. He farmed near Orient, Iowa, where his son Henry A. Wallace, who would later also serve as Secretary of Agriculture, was born. Harry handled much of the daily details at *Wallaces' Farmer* and became editor when his father died in 1916. He served as editor until 1921. Wallace helped establish 4-H clubs and extension programs in Iowa, and helped start the Iowa Farm Bureau.

He served as the longtime president of the Cornbelt Meat Producers Association. Wallace was appointed Secretary of Agriculture by President Warren G. Harding in 1921, and served until his death in 1924. Harry Wallace promoted programs for American farmers struggling against over-production and the collapse of farm prices following the First World War His book, *Our Debt and Duty to the Farmer*, was published posthumously.

Howard Mason Gore (1924 – 1925)

Howard Mason Gore was born October 12, 1877, on a Harrison County farm near Clarksburg, West Virginia, that had been in his mother's family since 1778. He received the degree of Bachelor of Arts in Agriculture from the University of West Virginia. Gore directed the operation of several farms in West Virginia and became known as a breeder of fine cattle and hogs. He worked in the USDA Bureau of Animal Industry and the Packers and Stockyards Administration.[76] He was

[76] Gore was the original Chief of the Trade Practices Division of the Packers and Stockyards Administration. While with the P&SA, Gore obtained the appointment of Assistant Secretary of

appointed as Assistant Secretary of Agriculture on September 17, 1923. He became Acting Secretary when Henry C. Wallace died, October 25, 1924. Gore was designated as Secretary of Agriculture by President Calvin Coolidge on November 22, 1924, remaining in the position until March 4, 1925, when he resigned to become Governor of West Virginia. Later he was Commissioner of Agriculture for West Virginia and was director of several banks in the State. He returned to Federal service and worked in the Farm Security Administration.

As West Virginia's governor, Gore improved the state's agricultural programs and acted on requests from rural areas for reforms in handling state funds. Through a bipartisan commission, he was able to disperse more tax money to counties and municipalities. In addition, his support of road construction earned Gore the nickname, "road building governor."

In 1931, Governor William Gustavus Conley appointed Gore as state Commissioner of Agriculture. Gore was defeated in attempts to be re-elected commissioner in 1932 and 1940. During these years, he was a leader in the development of livestock auction markets. Gore was named director of the federal government's rural rehabilitation program for Harrison County in 1935 and served on the Public Service Commission from 1941 to 1947. He died in Clarksburg, West Virginia June 20, 1947.

William Marion Jardine (1925 - 1929)

William Marion Jardine was born in Oneida County, Idaho on January 16, 1879. He graduated from the Agricultural College of Utah State University and attended graduate school at the University of Illinois. Although Jardine had a strong interest in practical farming, he was also attracted to opportunities in education. He began teaching at his alma mater in Utah, where he soon became a professor of agronomy. In 1910, Jardine moved to Manhattan, Kansas where he had accepted the position of agronomist at the Kansas State Agricultural College. Three years later, Jardine was made dean of the Division of Agriculture and director of the Agriculture Experiment Station.

On 1918, Jardine became president of Kansas State University. During his time in office, he penned several handbooks, such as "Suggestions for Teachers Giving Practical Instruction to City Boys in (a) Care and Handling of Work Horses (b) Care, Adjustment, and Use of Farm Machinery (c) Care and Handling of Dairy Cows and Milk."

Jardine achieved an outstanding reputation for his work in agricultural education that extended far beyond the borders of the state of Kansas. In 1925, President Calvin

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Agriculture, which led to him filling the position of Acting Secretary and then Secretary upon the death of Henry C. Wallace.

Coolidge appointed him Secretary of Agriculture. Jardine played an integral part in the 1926 formation of the Board of Trade Clearing Corporation after the Chicago Board of Trade adopted his suggestions for regular reporting of large trader positions, a business conduct committee and the formation of a centralized clearing house.

Jardine served the Hoover Administration as United States Ambassador to Egypt from October 13, 1930 to September 5, 1933. After returning to Kansas in 1933, Jardine became president of the Municipal University of Wichita and on October 2, 1933 was appointed as the Kansas State Treasurer. He served in this capacity until April 1, 1934 when he resigned. William Jardine's very active career in education and government service ended with his death on January 17, 1955 in San Antonio, Texas.

Arthur Mastick Hyde (1929 – 1933)

Arthur Mastick Hyde was born in Princeton, Missouri, on July 12, 1877. Hyde graduated from the University of Michigan and the law school of the State University of Iowa. He was a lawyer, businessman, and insurance executive before being elected Governor of Missouri in 1920. Hyde served as Secretary of Agriculture from March 6, 1929, to March 4, 1933. He returned to private law practice in Trenton, Missouri, and died October 17, 1947.

Some of his family members were also involved in politics. His father, Ira B. Hyde, was a representative from Missouri, and his brother, Laurance M. Hyde, was a chief justice of the Missouri supreme court.

Henry Agard Wallace (1933 – 1940)

Henry Agard Wallace was born on a farm near Orient in Adair County, Iowa. After graduating from Iowa State College in 1910, Wallace worked on the editorial staff of *Wallace’s Farmer* in Des Moines, serving as editor after his father’s death in 1924 until 1929. Wallace experimented with breeding high-yielding strains of corn and authored many publications on agriculture. In 1915, he devised the first corn-hog ratio charts indicating the probable course of markets. With a small inheritance that had been left to his wife, the former Ilo Browne, whom he married in 1914, Wallace founded Hi-Bred Corn, which later became Pioneer Hi-Bred, a major agriculture corporation.

In 1933, President Franklin Delano Roosevelt appointed Wallace Secretary of Agriculture, a position he would hold until September 1940 when he resigned after being nominated for Vice President as Roosevelt’s running mate in the 1940 presidential election.

Wallace was elected in November 1940 as Vice President on the Democratic Party ticket with President Franklin D. Roosevelt. His inauguration took place on January 20, 1941 for the term ending January 20, 1945.

On May 8, 1942, Wallace delivered his most famous speech, which became known by the phrase "Century of the Common Man", to the Free World Association in New York City. This speech, grounded in Christian references, laid out a positive vision for the war beyond the simple defeat of the Nazis. The speech, and the book of the same name which appeared the following year, proved quite popular, but it earned him enemies among the Democratic leadership, among important allied leaders like Winston Churchill, and among business leaders and conservatives.

Wallace spoke out during race riots in Detroit in 1943, declaring that the nation could not "fight to crush Nazi brutality abroad and condone race riots at home."

After Wallace feuded publicly with Secretary of Commerce Jesse Jones and other high officials, Roosevelt stripped him of all responsibilities and made it clear Wallace would not be on the ticket again. The Democratic Party, with concern being expressed privately about FDR being able to make it through another term, chose Harry S. Truman as FDR's running mate.

Roosevelt later appointed Wallace Secretary of Commerce. Wallace served in this post from March 1945 to September 1946, when he was fired by President Harry S. Truman because Wallace disagreed with Truman's hard-line policy toward the Soviet Union.

After leaving office, Wallace resumed his farming interests, and resided in South Salem, New York. In 1952, Wallace published *Where I Was Wrong*, in which he explained that his seemingly-trusting stance toward the Soviet Union and Stalin stemmed from inadequate information about Stalin's excesses and that he, too, now considered himself an anti-Communist. During his later years he made a number of advances in the field of agricultural science. . His many accomplishments included a breed of chicken that at one point accounted for the overwhelming majority of all egg-laying chickens sold across the globe. He died in Danbury, Connecticut in 1965. His remains were cremated at Grace Cemetery in Bridgeport, Connecticut, and the ashes interred in Glendale Cemetery, Des Moines, Iowa.

The Henry A. Wallace Beltsville Agricultural Research Center, the largest agricultural research complex in the world, is named for him.

Claude Raymond Wickard (1940 -1945)

Claude Raymond Wickard was born in Carroll County, Indiana, on February 28, 1893. He graduated from Purdue University, specializing in animal husbandry, and returned to farming. He served as a member of the Indiana State Senate. During the 1930's he worked in the Agricultural Adjustment Administration. On March 1, 1940, he became Under Secretary, and on September 5, 1940, was appointed Secretary of Agriculture. On June 29, 1945, he was appointed Administrator of the Rural Electrification Administration, holding the position until 1953. Then, he returned to farming until his death.

Clinton Presba Anderson (1945 – 1948)

Clinton Presba Anderson was born in Centerville, South Dakota on October 23, 1895. He attended Dakota Wesleyan University (1913-1915) and the University of Michigan (1915-1916), but did not receive a degree from either.

When Anderson’s father broke his back in 1916, Anderson left the University of Michigan to go home to help support his family. He worked for several months for a newspaper until he became seriously ill with tuberculosis.

In 1919, after a lengthy recovery, Anderson worked for the *Albuquerque Herald* covering the New Mexico legislature. His long career of public service began as Executive Secretary of the New Mexico Public Health Association in 1919. There he raised money to fight tuberculosis, established county health programs and was instrumental in founding the state public health department.

Anderson became Chairman of the New Mexico Democratic Party in 1928, and was appointed State Treasurer of New Mexico in 1933. That was followed by appointments as director of the Bureau of Revenue, Relief Administrator for the State of New Mexico, Western States Field Coordinator for the Federal Emergency Relief Administration, State Director of the National Youth Administration, Chairman of the New Mexico Unemployment Security Division, and Managing Director of the Coronado Cuarto Centennial Commission, among others.

In 1940, Anderson ran for and won New Mexico’s only seat in the House of Representatives, beginning a 30 year career in Washington. Anderson became known for his thorough investigative work and during his three terms in the House of

Representatives, was assigned to several special committees, including the chairmanship of the Special Committee to Investigate Food Shortages in 1945. The committee argued for a streamlined food distribution system and emphasized long-range planning for increasing food production. It was his success in that assignment, along with their personal friendship, that led to his appointment by Harry Truman as Secretary of Agriculture.

U.S. food production and world wide distribution was stabilized by 1948 and Anderson decided to retire from the Cabinet. As with every project he had undertaken, Anderson only stayed until he had resolved the problems it faced.

Due to his age and growing health problems, he retired in 1973 after serving four terms in the Senate. He died in Albuquerque on November 11, 1975.

Charles Franklin Brannan (1948 – 1953)

Charles Franklin Brannan was born in Denver, Colorado on August 23, 1903. He received his law degree from the University of Denver in 1929. Beginning in 1935, he held a series of legal and administrative position with the United States government, culminating as the Secretary of Agriculture in 1948.

In 1949, he advocated the Brannan plan, as part of President Truman's Fair Deal program. Brannan wanted to guarantee farmer's income, while letting the free market forces determine the prices of commodities. That plan was not enacted by the republican controlled congress, which was focusing on the Cold War.

After leaving the government following the election of Dwight D. Eisenhower in 1953, Brannan became the general counsel of the National Farmer's Union until 1990. He died on July 2, 1992 in Denver, Colorado. Prior to his death, Brannan had been the last surviving member of the Truman Cabinet.

Benson, Ezra Taft (1953 – 1961)

Ezra Taft Benson, oldest of 11 children, was born on a farm in Whitney, Idaho on August 4, 1899. Perhaps best known as President of the Church of Jesus Christ of Latter-day Saints, Benson also served two terms as Secretary of Agriculture under President Eisenhower.

Benson graduated from Brigham Young University in 1926 and pursued a career in agriculture before serving in numerous church leadership positions.

In 1939, Benson moved to Washington, D.C. to become Executive Secretary of the National Council of Farmer Cooperatives, and became the first president of a new LDS Church stake there.

In 1953, Benson was appointed U.S. Secretary of Agriculture by President Eisenhower. Benson accepted this position with the permission of the LDS Church President and therefore served simultaneously in the United States Cabinet and in the Quorum of the Twelve.[77]

Benson served as President of the LDS Church from 1985 until his death in Salt Lake City, Utah on May 30, 1994.

[77] In The Church of Jesus Christ of Latter-day Saints, the Quorum of the Twelve has a leadership role in the church that is second only to the church's First Presidency. The Quorum implicitly follows the First Presidency's policies and pronouncements and its members are chosen by the First Presidency. However, when the First Presidency is dissolved—which is understood to occur upon the death of the President of the Church—the Quorum of the Twelve Apostles becomes the church's supreme governing body (led by the President of the Quorum of the Twelve until they ordain a new President of the Church and he chooses counselors, which completes the reorganization of the First Presidency.

Membership in the Quorum of the Twelve is a lifetime calling, and no member thus far has been given emeritus status, even though many have been incapacitated due to age and ill-health. Members of the Quorum are paid a modest stipend from church funds, and receive other benefits such as housing and travel allowances. They may also receive additional income from book deals. They work on church affairs full-time, spending much of their time traveling and speaking and church gatherings and attending to the administrative activities of the church and its related organizations.

Orville Lothrop Freeman (1961 – 1969)

Orville Freeman (1961)

Orville Lothrop Freeman was born in Minneapolis, Minnesota on May 9, 1918. Freeman graduated from the University of Minnesota in 1940 where he met Hubert Humphrey. Humphrey would become a life-long friend and political ally. Later, in 1946, Freeman would earn his law degree (LL.B.) from the University of Minnesota Law School. During World War II, Freeman served as a combat officer in the United States Marine Corps, achieving the rank of major.

Freeman served as Governor of Minnesota from 1955 to 1961, and as U.S. Secretary of Agriculture from 1961 to 1969 under Presidents John F. Kennedy and Lyndon B. Johnson. During his term as Secretary of Agriculture, Freeman is best remembered for initiating the Food Stamp Program.

Orville Freeman (1993)

After leaving office, Freeman was president of EDP Technology International Inc., and chairman of the Business International Corp. He was also a partner in the law firm of Popham, Schnobrich, Kaufman and Dotz. Freeman died from Alzheimer's disease on February 20, 2003 in Minneapolis, Minnesota.

Clifford Morris Hardin (1969 – 1971)

Clifford Morris Hardin was born near Knightstown, Indiana on October 9, 1915. He earned a B.S. (1937), M.S. (1939) and a Ph.D. (1941) from Purdue University.

Hardin taught Agricultural Economics at Michigan State University from 1944 to 1948. He became the school's Dean of agriculture in 1953 and Chancellor of the University of Nebraska in 1954.

In 1969, Hardin was appointed Secretary of Agriculture by President Richard Nixon. As Secretary, he extended the food stamp program, and established both the Food and Nutrition Service to administer food programs for the poor, and the Office of Intergovernmental Affairs to coordinate efforts with state and local officials.

Earl Lauer Butz (1971 – 1976)

Earl Lauer Butz was born in Albion, Indiana, on July 3, 1909. He earned his bachelor's (1932) and doctorate (1937) degrees at Purdue University. He taught there for several years and was head of the Agricultural Economics Department. In 1943 he was a research economist for the Brookings Institute. In 1948, Butz became vice president of the American Agricultural Economics Association. In 1954, he was appointed Assistant Secretary of Agriculture for Marketing and Foreign Agriculture by President Dwight D. Eisenhower and served in that position until returning to Purdue University in 1957 to become Dean of Agriculture. In 1971, President Richard Nixon appointed Butz as Secretary of Agriculture.

Butz resigned on October 4, 1976 after news media reported on a racist remark Butz made on a commercial flight to California. Butz died February 2, 2008, at the age of 98. He had been the oldest living former Cabinet member, regardless of the department or administration in which he served.

John Albert Knebel (1976 –1977)

John Albert Knebel was born October 4, 1936, in Tulsa, Oklahoma. He graduated from the United States Military Acade**1**my at West Point in 1959 and in 1962 earned his M.A. from Creighton University in Omaha, Nebraska. Knebel received his law degree from American University in 1965 and practiced law with the Washington, D.C., firm of Howrey, Simon, Baker and Murchison from 1965 to 1968.

Prior to his appointment in the Gerald Ford administration, Knebel served as general counsel to the department of agriculture and general counsel to the Small Business Administration (1971-1973). Before serving with the SBA, he was assistant counsel to the House Committee on Agriculture (1969-1971). Earlier, he was a legislative assistant to Congressman J. Ernest Wharton of New York (1963-1964).

President Gerald Ford appointed John Albert Knebel Secretary of the Department of Agriculture on November 4, 1976, following the abrupt resignation of Earl Butz. His period in office was brief and ended January 20, 1977, when Jimmy Carter succeeded Ford as President. Afterward, Knebel returned to the practice of law, and served as the head of the American Mining Congress.

Robert Selmer Bergland (1976 – 1981)

Bob Bergland (1977)

Robert Selmer Bergland was born July 22, 1928 in Roseau, Minnesota. He grew up on a farm near Roseau and studied agriculture at the University of Minnesota. He became an official with the Agricultural Stabilization and Conservation Service from 1963 to 1968.

Bergland was elected to the U.S. House of Representatives from 1971 to 1977 after defeating Odin Langen in 1970. In Congress he served on the House Committee on Agriculture's subcommittees for Conservation and Credit, and Livestock, Grains, Dairy, and Poultry.

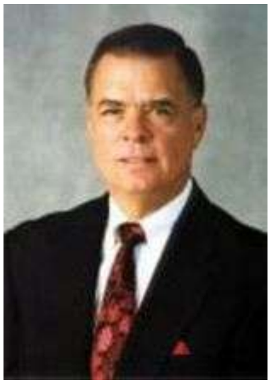
In 1977 he resigned from the House shortly after the beginning of a new term, and was appointed Secretary of Agriculture by President Jimmy Carter, serving in that position until Inauguration Day, 1981.

Bob Bergland (1994)

At the end of the Carter administration in 1981, he became the chairman of Farmland World Trade until 1982 when he became the vice president and general manager of the National Rural Electric Cooperatives Association.

He retired in 1994 and was elected by the Minnesota State Legislature to serve on the University of Minnesota Board of Regents. He retired after one term, and owns a 600 acre farm in Minnesota. He is married to Helen (Grahn) and they are the parents of 7 children (Dianne, Linda, Stevan, Jon, Allan, William, and Franklyn), 15 grandchildren, 5 great grandchildren and 2 step-grandchildren. He is also a guitarist for the Highway 11 Ramblers.

John Rusling Block (1981 – 1986)



John Rusling Block was born February 15, 1935 in Galesburg, Illinois. He came from a rural background and graduated from West Point in 1957. Block served as Illinois State Secretary of Agriculture beginning in 1977. He was the United States Secretary of Agriculture under President Ronald Reagan from 1981 to 1986.

After leaving the USDA, Block was an executive at John Deere and President of Food Distributors International. In 1992 he won the Horatio Alger Award. He has been active in global food programs as well. He currently is a senior policy adviser at Olsson, Frank & Weeda, a Washington, DC law firm.

Richard Edmund Lyng (1986 – 1989)

Richard Edmund Lyng was born June 29, 1918 in San Francisco, California. A 1940 graduate of Notre Dame University, Lyng served in the U.S. Army during World War II. After the war he was president of a seed and bean processing company. He was appointed chief deputy director of the California State Department of Agriculture in 1967 then became USDA Assistant Secretary for Marketing and Consumer Services in March 1969, a post he held until January 1973. From 1973 to 1979, Lyng was President of the American Meat Institute and later served as USDA Deputy Secretary of Agriculture from 1981 to 1985. Lyng was appointed Secretary of Agriculture by President Ronald Reagan in 1986. He served in that capacity until 1989. Lyng died of complications from Parkinson 's disease in Modesto, California on February 1, 2003.

Clayton Keith Yeutter (1989 – 1991)

Clayton Keith Yeutter was born December 10, 1930 in Eustis, Nebraska. He earned his B.S. in animal husbandry from the University of Nebraska in 1952, and served in the Air Force for five years. He earned his law degree in 1963, and in 1966, his Ph.D. in agricultural economics, from the University of Nebraska. Yeutter started his career in agriculture as a farmer and a cattle feeder in 1957. From 1960 to 1966 he served on the staff of the University of Nebraska. From 1966 to 1968 he was a member of the Nebraska governor's staff. In 1968 and 1970, he headed the University of Nebraska's mission to Colombia.

In 1970 and 1971, he was the USDA Administrator for Consumer and Marketing Service and, on January 24, 1973, he became Assistant Secretary for Marketing and Consumer Services. On March 13, 1974 he was appointed Assistant Secretary for International

Affairs and Commodity Programs and remained in that position until June 19, 1975. Between 1975-1977 he served as deputy special trade representative. From 1977 to 1978 Yeutter was a senior partner in the Nebraska law firm of Nelson, Harding, Yeutter, & Leonard. In 1978 he became president of the Chicago Mercantile Exchange. In July 1985 President Reagan appointed Yeutter U.S. Trade Representative. On February 16, 1989, Yeutter was sworn in as the Secretary of Agriculture, serving until March 1, 1991. Yeutter later served as Chairman of the Republican National Committee. Yeutter is currently a senior advisor with the law firm of Hogan & Hartson in Washington, DC.

Edward Rell Madigan (1991 – 1992)

Edward Rell Madigan was born January 13, 1936 in Lincoln, Nebraska. He was elected to the Illinois House of Representatives in 1967 and served until 1972. He was a Illinois Representative in the U.S. House from 1973 until 1991 when he resigned to become Secretary of Agriculture under President George H.W. Bush, from 1991 to 1992.

Madigan died December 7, 1994 in Lincoln, Nebraska. In 1995, the Edward R. Madigan State Fish and Wildlife Area, a state park near Lincoln, was renamed in Madigan's honor.

Alphonso Michael Espy (1993 – 1994)

Mike Espy (1993)

Mike Espy was born November 30, 1953 in Yazoo, Mississippi. He graduated from Howard University in 1975 and earned a law degree from Santa Clara Law School in California in 1978. From 1980 to 1984, he served as assistant secretary for public lands in Mississippi. In 1984 and 1985, he was assistant attorney general for consumer protection in Mississippi. Espy was first elected to Congress in 1986 and served on the Agriculture and Budget Committees. Within these committees, he served on several task forces, including the Natural Resources' Community and Economic Development, the Lower Mississippi Delta Caucus, and the Select Committee on Hunger's Domestic Hunger Task Force. Espy was appointed Secretary of Agriculture by President Bill Clinton on January 22, 1993, and is the first person of African American descent to hold the office. He served until December 31, 1994. He currently works as a private sector attorney, counselor, and agricultural advisor, having his own law and consulting firms: Mike Espy, PLLC, and AE Agritrade, Inc.

Mike Espy (2007)

Daniel Robert Glickman (1995 – 2001)

Daniel Robert "Dan" Glickman was born November 24, 1944 in Wichita, Kansas. After graduating from the University of Michigan with a B.A. in History in 1966, he earned a law degree from George Washington University in 1969.

In 1976, he was elected to the House of Representatives. Glickman was a leading congressional expert on general aviation policy and wrote landmark legislation providing product liability protection for small airplane manufacturers.

Following his defeat in a 1994 re-election bid, he was appointed by President Bill Clinton as Secretary of Agriculture, where he served from 1995 to 2001. After Clinton's term ended, Glickman became the director of the Institute of Politics at Harvard University. In 2004, the Motion Picture Association of America announced that Glickman would be its new Chairman and CEO, a position he continues to hold today.

Ann M. Veneman (2001 – 2005)

Ann Margaret Veneman was born June 29, 1949 and raised on a peach farm in Modesto, California. Veneman earned a Bachelor’s degree in political science from the University of California, Davis and a Master of Public Policy degree from the University of California, Berkeley. Her law degree was earned at the University of California, Hastings College of Law.

Veneman began her career at USDA in 1986, serving as Associate Administrator of the Foreign Agricultural service until 1989. From 1989 to 1991, she served as Deputy Under Secretary for International Affairs and Commodity Programs, and was Deputy Secretary of Agriculture from 1991 to 1993. In 1995, she was appointed Secretary of the California Department of Food and Agriculture.

Veneman was nominated by President George W. Bush, and sworn in as the first female United States Secretary of Agriculture on January 20, 2001. She remained in this position until January 20, 2005.

Veneman assumed the leadership of UNICEF on May 1, 2005, becoming the fifth Executive Director to lead UNICEF in its 60-year history.

Michael Owen Johanns (2005 – 2007)

Mike Johanns was born June 18, 1950 in Osage, Iowa. He grew up living and working on his family's dairy farm before going to college at Saint Mary's University of Minnesota and earning his law degree from Creighton University. He was mayor of Lincoln, Nebraska from 1991 to 1998 when he was elected Governor of Nebraska.

On December 2, 2004, President George W. Bush nominated Johanns to replace outgoing Secretary Ann Veneman. Johanns was sworn in as the 28th Secretary of the U.S. Department of Agriculture on January 21, 2005. . For nearly three years he worked to expand foreign market access for U.S. producers, promoted the growth of the renewable fuels industry and advanced cooperative conservation. Additionally, Johanns developed an in-depth farm bill proposal, which became the foundation for improvements and reforms adopted in the final 2008 farm bill. Johanns resigned on September 20, 2007 to run for the Senate seat vacated by Chuck Hagel.

On January 6, 2009, Mike Johanns was sworn in as U.S. Senator for Nebraska. He won the support of an overwhelming majority of Nebraskans by demonstrating principled leadership throughout 25 years of public service.

Senator Johanns serves on five committees: Agriculture, Nutrition, and Forestry; Banking, Housing, and Urban Affairs; Commerce and Transportation; Veterans' Affairs; and Indian Affairs. He is the Ranking Member on the Agriculture Committee's Domestic and Foreign Marketing, Inspection, and Plant & Animal Health Subcommittee.

Ed Schafer (2008 – 2009)

Ed Schafer was sworn in as the 29th Secretary of the U.S. Department of Agriculture (USDA) on January 28, 2008.

Secretary Schafer brought a record as an innovative two-term governor of North Dakota to USDA along with extensive private sector experience as both an entrepreneur and a business executive.

Schafer served as North Dakota's governor from 1992 to 2000 and made diversifying and expanding North Dakota's economy, reducing the cost of government and advancing agriculture his top priorities in office.

He has had a lifelong interest in conservation and helped arrange the U.S. Forest Service's May 2007 purchase of the 5,200 acre Elkhorn ranch in North Dakota. The site was where Theodore Roosevelt had his home and operated a cattle ranch in the 1880s. It is near the preserved town of Medora—the state's leading tourist attraction.

Born and raised in Bismarck, North Dakota, Schafer graduated from the University of North Dakota in 1969 with a bachelor's degree in Business Administration and earned an MBA from the University of Denver in 1970.

Secretary Schafer's grandfather immigrated to North Dakota from Denmark and homesteaded land in Hettinger County that he turned into a wheat and livestock farm. Schafer spent summers there while growing up. He helped his uncles with chores, tinkered with engines and learned firsthand about agriculture.

Before entering public life, Schafer was an executive with the Gold Seal Company in Bismarck, a successful marketer of nationally-known consumer products such as "Mr. Bubble" bubble bath, "Glass Wax" glass cleaner and "Snowy Bleach." The company had been founded by his father, Harold Schafer.

Thomas J. "Tom" Vilsack (2009 – present)

Tom Vilsack was sworn in as the 30th Secretary of the U.S. Department of Agriculture (USDA) on January 21, 2009. Appointed by President Barack Obama, Vilsack received unanimous support for his confirmation by the U.S. Senate.

Secretary Vilsack has served in the public sector at nearly every level of government, beginning as mayor of Mt. Pleasant, Iowa in 1987, and then as state senator in 1992. In 1998, he was the first Democrat elected Governor of Iowa in more than 30 years, an office he held for two terms.

As Secretary of Agriculture, Vilsack has been candid and direct about the challenges and opportunities facing USDA, and the importance of fulfilling the vast missions of the Department as a champion of rural America, a steward of the environment and a protector of our food supply.

Already he has worked to bring reforms to the Department, cutting waste and saving the American taxpayer tens of millions of dollars by finding efficiencies in programs and administrative processes. The Department will also save millions though a new policy to identify potential fraud and improper payments in farm programs. Vilsack has also made civil rights a top priority, taking definitive action to improve the Department's record and to move USDA into a new era as a model employer and premier service provider.

At USDA, Secretary Vilsack is working to ensure that America's farms, ranches and rural communities expand the capacity of our land to produce alternative forms of energy and lead our nation in the fight against climate change.

Under Vilsack's leadership, USDA is working to promote a safe, sustainable, sufficient and nutritious food supply for all Americans and to end child hunger by 2015. Already, the Department has implemented an increase in SNAP, its main food assistance program, to benefit families in need with an additional $80 per month. And for the first time ever, USDA is providing healthy fruits and vegetables to women and their infant children to encourage nutritious eating, combat the obesity epidemic, and prevent health problems down the road.

To encourage conservation of our natural resources so that we are stewards of our land, forests and wildlife, USDA has implemented programs that create private sector jobs to protect and rehabilitate forests and wetlands. To revitalize rural communities by expanding economic opportunities and supporting the profitability of America's farmers and ranchers, USDA has invested in housing and community facilities like fire departments and health clinics.

Throughout his time as Governor, Vilsack articulated a vision for making Iowa the Food Capital of the World and focusing on creating economic opportunity in rural communities and small towns through value-added agriculture. As Governor, he created the Iowa Food Policy Council to advance local food systems, enhance family farm profitability, and combat hunger and malnutrition. He led trade missions to foreign countries to market agricultural products and attended the Seattle meeting of the World Trade Organization (WTO) to push for expanded agricultural trade negotiations. In addition, he worked to support independent farmers and ranchers by enacting livestock market reform and mandatory price reporting legislation in 1999.

Vilsack was a leader among his colleagues. In addition to serving on the National Governors Association Executive Committee, he also served as chair of the Governors Ethanol Coalition, chair of the Democratic Governors Association, and founding member and chair of the Governors Biotechnology Partnership. As chair of the National Governors Association Committee on Natural Resources, Vilsack promoted private lands conservation and advanced the concept of tying farm payments to conservation commodities. Vilsack's national Private Lands, Public Benefits conference focused attention on the need to address conservation challenges by providing incentives to private landowners to implement conservation practices resulting in clean air, clean water, and enhanced wildlife habitat. He also created a comprehensive conservation program in Iowa to encourage and assist landowners in installing buffer strips, restoring wetlands, and rewarding good conservation practices.

During his tenure as Governor, Tom Vilsack initiated a comprehensive effort to increase economic opportunity and create good-paying jobs. He started Vision Iowa, a program to invest in cultural and recreational infrastructure throughout the state. A combination of venture capital initiatives created an entrepreneurial environment for innovation and new ideas to get started; and the Iowa Values Fund provided an economic growth strategy focused on creating and retaining jobs in targeted sectors including life sciences, financial services, and advanced manufacturing. Each of these initiatives created under Vilsack's administration contributed to the rebuilding of local economies in small towns and rural communities across the state.

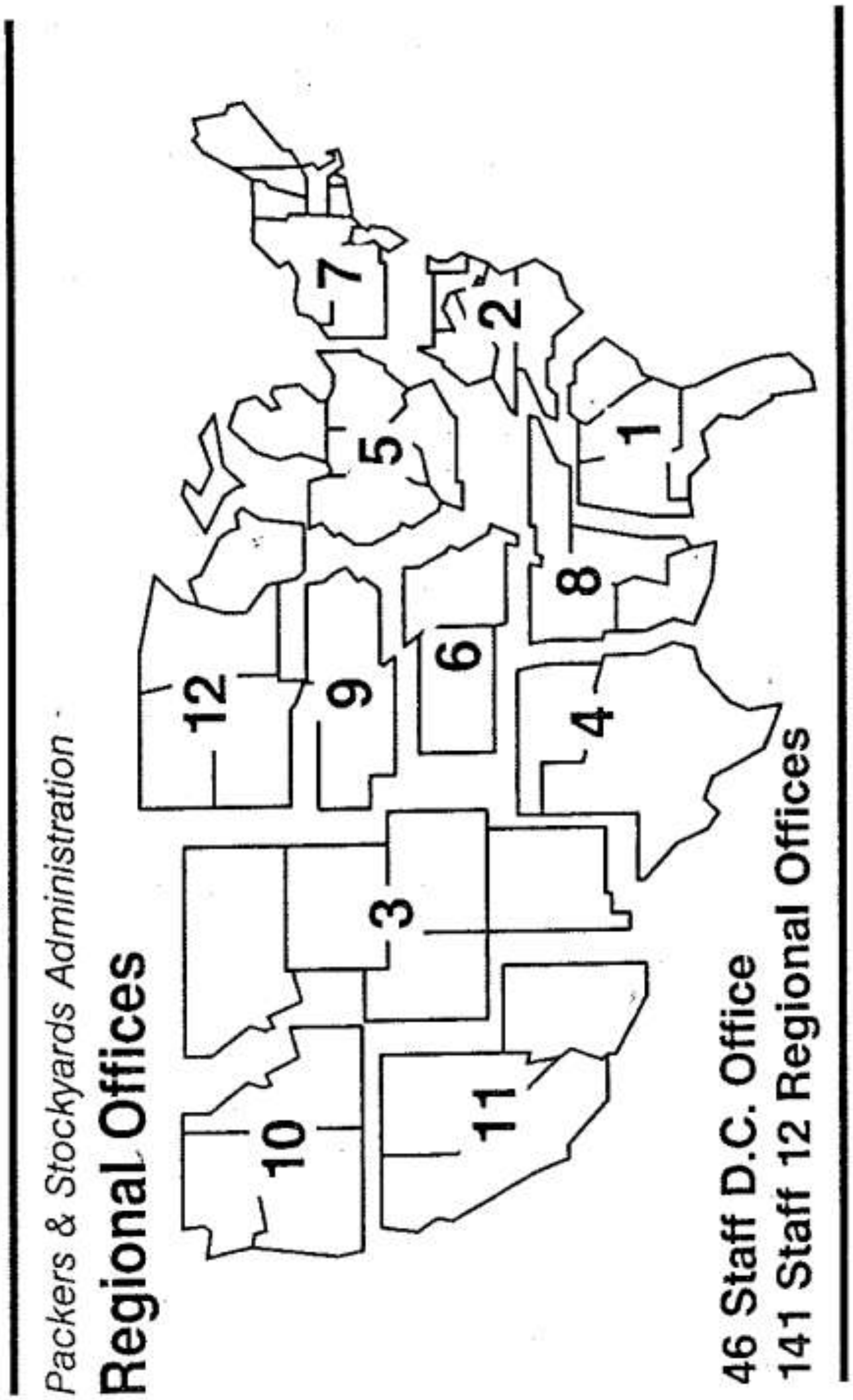
In addition to state economic investment, Vilsack's leadership and vision were instrumental in transforming Iowa to an energy state. His policies led to the construction of Iowa's first power facility in two decades and made Iowa a leader in alternative energy and renewable fuels. Vilsack created a regulatory and financial environment in Iowa for wind energy to develop to the point that it now makes up 5.5% of the state's generation, the largest percentage of any state. Iowa also emerged as a leader in the production of ethanol and biodiesel during his tenure.

Throughout his public service, Tom Vilsack has pursued an agenda dedicated to the principles of opportunity, responsibility, and security. He is recognized as an innovator on children's issues and education, economic and healthcare policy, and efforts to make government more efficient and accessible. Iowa is known for its strong K-12 education system in part due to Vilsack's initiatives. He developed aggressive early childhood programs, reduced class sizes, created a first-in-the-nation salary initiative to improve teacher quality and student achievement, and enacted a more rigorous high school curriculum. His leadership also led to Iowa becoming a national leader in health insurance coverage, with more than 90% of children covered.

A native of Pittsburgh, Pennsylvania, Vilsack was born into an orphanage and adopted in 1951. He received a bachelor's degree from Hamilton College in Clinton, New York, in 1972 and earned his law degree from Albany Law School in 1975. He moved to Mt. Pleasant - his wife, Christie's, hometown - where he practiced law. The Vilsacks have two adult sons, Jess and Doug, who both grew up in Mt. Pleasant, and a daughter-in-law, Kate, who's married to Jess.

EXHIBIT C

Regional Office Geographic Responsibilities Prior to the 1998 Reorganization



<u>EXHIBIT D</u>

Regional Office Geographic Responsibilities in 2009

Packers and Stockyards Program Regional Structure

EXHIBIT E

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12-10-81
Vol. 46 No. 237
Pages 60411-60564

federal register

Thursday
December 10, 1981

Packers and Stockyards Administration

9 CFR Parts 201, 202, 203, and 204

Regulations, Rules of Practice, Policy Statements and Organization and Functions

AGENCY: Packers and Stockyards Administration, USDA.

ACTION: Final rule.

SUMMARY: This document amends Chapter II of 9 CFR to change the agency to the Packers and Stockyards Administration from Agricultural Marketing Service. The changes are made because the Packers and Stockyards Administration was re-established as a separate agency by Secretary's Memorandum 1000-1 issued June 17, 1981, and the revision of delegation of authority (46 FR 47747).

DATES: Effective December 10, 1981.

FOR FURTHER INFORMATION CONTACT: Calvin W. Watkins, Assistant to the Administrator, Packers and Stockyards Administration, U.S. Department of Agriculture, Washington, D.C. 20250, phone (202) 447-7201.

SUPPLEMENTARY INFORMATION: On June 17, 1981, the Secretary, by Memorandum 1000-1, re-established the Packers and Stockyards Administration as a separate unit within the Department. Parts 201, 202, 203 and 204 of Chapter II, Title 9 of the Code of Federal Regulations, contain the Agricultural Marketing Service as the agency responsible for administering the provisions of the Packers and Stockyards Act, 1921, as amended. Part 204, Organization and Functions, is amended to show the current organization and functions of the Packers and Stockyards Administration. Also, it is amended to set forth the Freedom of Information Act procedures of the agency.

On October 14, 1981 (46 FR 50510), the definitions of terms in 9 CFR Part 201.2 were revised to reflect the reorganizational changes. The definitions in 9 CFR Part 201.2 also apply to 9 CFR Part 202, 9 CFR Part 203 and 9 CFR Part 204.

The chapter title of Title 9, Animals and Animal Products, Chapter II, is changed to read Packers and Stockyards Administration, Department of Agriculture, rather than Agricultural Marketing Service (Packers and Stockyards), Department of Agriculture.

Footnote 1 to 9 CFR Parts 201, 202 and 203 is removed. In addition, Parts 202 and 203 are amended to change the name of the agency to Packers and Stockyards Administration and the Agency head to the Administrator of the Packers and Stockyards Administration.

This rule relates to agency organization, management and personnel, and consequently the requirements of 5 U.S.C. 553 do not apply. Further, since the rule relates to agency organization, management, and personnel, it is exempt from the provisions of Executive Order 12291 by Section 1(a)(3) of that Order. Lastly, this action is not a rule as defined in Public Law 96-354, the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

Accordingly, Chapter II of Title 9 of the Code of Federal Regulations is amended as set forth below:

1. The title of Chapter II is revised to read:

CHAPTER II—PACKERS AND STOCKYARDS ADMINISTRATION, DEPARTMENT OF AGRICULTURE

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

2. Footnote 1 to the Part 201 heading is removed.

PART 202—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE PACKERS AND STOCKYARDS ACT

1. Footnote 1 to the Part 202 heading is removed.

2. Section 202.102 is amended by revising paragraphs (e) and (f) to read as follows:

§ 202.102 Rule 2: Definitions.

* * * * *

(e) "Agency" means those divisions and offices of the Packers and Stockyards Administration of the Department which are charged with administration of the Act;

(f) "Agency Head" means the Administrator, Packers and Stockyards Administration, of the Department, or any officer or employee of the Agency to whom authority is lawfully delegated to act for the Administrator;

* * * * *

PART 203—STATEMENTS OF GENERAL POLICY UNDER THE PACKERS AND STOCKYARDS ACT

1. Footnote 1 to this Part 203 heading is removed.

§ 203.17 [Amended]

2. Section 203.17 is amended by removing the words "Packers and Stockyards—AMS" wherever they appear and inserting in their place the words "The Packers and Stockyards Administration."

(7 U.S.C. 228(a))

1. Part 204 is revised to read as follows:

PART 204—ORGANIZATION AND FUNCTIONS

Public Information

Authority: 5 U.S.C. 552

Public Information

§ 204.1 Introduction.

The Packers and Stockyards Administration hereby describes its central and field organization, indicates the established places at which and methods whereby the public may secure information, directs attention to the general course and method by which its functions are channeled and determines and set forth the procedures governing the availability of opinions, orders, and other records in the files of said Administration.

§ 204.2 Organization.

(a) The Packers and Stockyards Administration consists of a headquarters office located in the South Building of the U.S. Department of Agriculture in Washington, D.C., and 13 regional offices. The Washington headquarters office is organized to include the Office of the Administrator and two Divisions, the Packer and Poultry Division and the Livestock Marketing Division.

(b) *Office of the Administrator.* This office has overall responsibility for administering the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*), for enforcement of the Truth-in-Lending Act (15 U.S.C. 1601-1665) with respect to any activities subject to the Packers and Stockyards Act, 1921, as amended, and for executing assigned civil defense and defense mobilization activities. These responsibilities include formulation of long range and current programs relating to assigned functions; technical and administrative direction and coordination in the execution of approved policies and programs carried out by the Packers and Stockyards Administration; review and evaluation of program operations and determination of remedial measures for improvement; maintenance of relations and communications with producer and industry groups.

(1) *The Administrator.* The Administrator is responsible for the general direction and supervision of programs and activities assigned to the Packers and Stockyards Administration except such activities as are reserved to the Judicial Officer (32 FR 7468). He reports to the Assistant Secretary for Marketing and Inspection Services.

(2) *Deputy Administrator.* The Deputy Administrator shares overall responsibility with the Administrator for the general direction and supervision of programs and activities assigned to the Packers and Stockyards Administration.

(3) *Assistant to the Administrator.* The Assistant to the Administrator participates with the Administrator and Deputy Administrator in the development, administration, and analysis of policies and program and directs the internal administrative management, information, and related activities of the Packers and Stockyards Administration and maintains liaison for management support services.

(4) *Director, Industry Analysis Staff.* The Director of the Industry Analysis Staff serves as the source of economic advice for the Administrator on broad policy questions and on the economic implications of various Administration programs and policies on livestock and poultry producers, on the several segments of the livestock, meat, and poultry marketing, processing, and wholesaling industries, and on consumers.

(c) *Packer and Poultry Division.* This Division carries out the enforcement of the provisions of the Packers and Stockyards Act relating to packers and live poultry dealers and handlers and licensees. These responsibilities and functions include determination of applicability of the provisions of the Act to individual packer and poultry operations, surveillance of these operations, investigation of complaints, initiation of formal proceedings, when warranted, to correct illegal practices, and maintenance of working relationships with the meat packer and poultry industries.

(d) *Livestock Marketing Division.* This Division enforces those provisions of the Packers and Stockyards Act relating to stockyard owners, market agencies, and dealers. Included within these responsibilities and functions are determination of the applicability of the provisions of the Act to individual stockyard operations; posting of stockyards; registration and bonding of market agencies and dealers; bonding of packers; testing of scales and checkweighing; acceptance for filing of schedules of rates and charges; surveillance and investigation of the lawfulness of rates and charges of stockyard owners and market agencies and the adequacy of stockyard services furnished by stockyard owners and market agencies; and surveillance and investigation of trade practices within the purview of the Act, other than packer and poultry marketing practices. The Division also initiates formal proceedings, when warranted, to correct illegal practices, rates, or charges and maintains working relationships with producer and industry groups.

(e) *Field Service.* (1) The Field Service of the Packers and Stockyards Administration is divided into 13 regional offices. These offices are responsible for supervision of the operations of stockyard companies, market agencies, dealers, packers, and poultry dealers and licenses to assure compliance with the Act. They formulate recommendations relating to enforcement of the Act; conduct investigations to determine the existence of and develop evidence of, unfair trade practices; evaluate the adequacy of stockyard facilities and services; receive and investigate complaints including reparation complaints; prepare investigative reports and recommend corrective action, audit books, records, and reports of persons subject to the Act; review applications for registration, licenses, and rate changes for accuracy and compliance; assist in prosecution of cases; and maintain relationships with producers, the trade, States, and other groups interested in the welfare of the livestock and poultry industries concerning enforcement of the Act.

(2) The addresses of these offices, which are under regional supervisors, are as follows:

Atlanta—Room 338, 1720 Peachtree Street, NE., Atlanta, GA 30309
Bedford—Turnpike Road, Box 101E, Bedford, VA 24523
Denver—208 Livestock Exchange Building, Denver, CO 80216
Fort Worth—Room 8A36, Federal Building, 819 Taylor Street, Fort Worth, TX 76102
Indianapolis—Suite 24, 537 Turtle Creek, South Drive, Indianapolis, IN 46227
Kansas City—828 Livestock Exchange Building, Kansas City, MO 64102
Lawndale—15000 Aviation Boulevard, Room 2W6, P.O. Box 6102, Lawndale, CA 90261
Memphis—Room 459, Federal Building, 167 North Main Street, Memphis, TN 38103
North Brunswick—825 Georges Road, Room 303, North Brunswick, NJ 08902
Omaha—909 Livestock Exchange Building, Omaha, NE 68107
Portland—9370 S.W. Greenburg Road, Suite E, Portland, OR 97223
South St. Paul—208 Post Office Building, Box 8, South St. Paul, MN 55075
Springfield—975 Durkin Drive, Suite G, Springfield, IL 62704

§ 204.3 Delegation of authority.

(a) *Deputy Administrator.* Under the direction of the Administrator, the Deputy Administrator is hereby delegated authority to perform all the duties and to exercise all the functions and powers which are now or which may hereafter be, vested in the Administrator (including the power of redelegation).

(b) *Division Directors.* The Directors of the Industry Analysis Staff, Livestock Marketing Division, and the Packer and Poultry Division, under administrative and technical direction of the Administrator and the Deputy Administrator, are hereby individually delegated authority, in connection with the respective functions assigned to each of said organizational units in § 204.2, to perform all the duties and to exercise all the functions and powers which are now, or which may hereafter be, vested in the Administrator (including the power of redelegation) except such authority as is reserved to the Administrator and Deputy Administrator under paragraph (i) of this section.

(c) *Branch Chiefs.* (1) The Chief of the Financial Protection Branch; the Chief of the Marketing Practices Branch; the Chief of the Scales and Weighing Branch of the Livestock Marketing Division; the Chief of the Livestock Procurement Branch, the Chief of the Meat Merchandising Branch, and the Chief of the Poultry Branch of the Packer and Poultry Division are hereby individually delegated authority under the provisions of section 402 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 222), to issue special orders pursuant to the provisions of section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)) and, with respect thereto, to issue notices of default provided for in section 10 of the Federal Trade Commission Act (15 U.S.C. 50).

(2) The Chief of the Financial Protection Branch of the Livestock Marketing Division is hereby delegated authority to perform all acts, functions, and duties with respect to suspending the operation of schedules of rates and charges of stockyard owners and market agencies and extending the time of such suspensions as prescribed in section 306(e) of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 207(e)); all acts, functions and duties as prescribed in § 1.133 of Part 1 of Title 7 (7 CFR 1.133) with respect to the investigation and disposition of information furnished concerning apparent violations involving rates or charges or the application of regulations

of stockyard owners and market agencies, or the alleged failure of such persons to furnish reasonable stockyard services as required by section 304 of the same Act (7 U.S.C. 205); all acts, functions, and duties with respect to the posting and deposting of stockyards pursuant to the provisions of section 302(b) of the same Act (7 U.S.C. 202(b)); perform all acts, functions, and duties of the Administrator with respect to the execution of bonds and trust fund agreements under §§ 201.27 through 201.38 of this chapter, including the power to determine that a bond is inadequate under § 201.30(f) of this chapter, and to determine the amount of bond needed under such paragraph; and perform all acts, functions, and duties with respect to the investigation and disposition of informal complaints for reparation as prescribed in § 202.104 of this chapter and to arrange for the service of documents and perform all other acts, functions, and duties of the Administrator and Administration as prescribed in §§ 202.104 through 202.108 of this chapter.

(3) The Chief of the Poultry Branch of the Packer and Poultry Division is hereby delegated authority to perform all acts, functions, and duties of the Director of said Division with respect to issuing of licenses pursuant to the provisions of section 502(b) of the Packers and Stockyards Act, as amended (7 U.S.C. 218a(b)).

(e) *Regional Supervisors.* (1) The Regional Supervisors of the Packers and Stockyards Administration are hereby individually delegated authority under the provisions of section 402 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 222), to issue special orders pursuant to the provisions of section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)), and, with respect thereto, to issue notices of default provided for in section 10 of the Federal Trade Commission Act (15 U.S.C. 50); to notify persons deemed to be subject to the bonding requirements in 7 U.S.C. 204 of their obligations to file bonds or trust fund agreements in conformity with §§ 201.27 through 201.38 of this chapter; to notify persons deemed to be subject to the reporting requirements in § 201.97 of this chapter of their obligations to file annual reports; and to grant reasonable requests for extension of 30 days or less, of the time for the filing of such annual reports in conformity with § 201.97 of this chapter.

(2) The Regional Supervisors are hereby individually delegated authority, when there is reason to believe that there is a question as to the true ownership of livestock sold by any person, to disclose information relating to such questionable ownership to any interested person.

(f) *Investigative employees.* All employees of the Packers and Stockyards Administration assigned to or responsible for investigations in the enforcement of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*) or the enforcement of the Truth-in-Lending Act (15 U.S.C. 1601–1665) with respect to any activities subject to the Packers and Stockyards Act, 1921, as amended or any other Act with respect to any civil defense or defense mobilization activities assigned to the Administration, are hereby individually delegated authority under the Act of January 31, 1925, 43 Stat. 803, 7 U.S.C. 2217, to administer to or take from any person an oath, affirmation, or affidavit whenever such oath, affirmation, or affidavit is for use in any prosecution or proceeding under or in the enforcement of the aforementioned Acts. This authority may not be redelegated and will automatically expire upon the termination of the employment of such employee with the Packers and Stockyards Administration.

(g) *Concurrent authority and responsibility to the Administrator.* No delegation prescribed herein shall preclude the Administrator or Deputy Administrator from exercising any of the powers or functions or from performing any of the duties conferred upon them, and any such delegation is subject at all times to withdrawal or amendment by the Administrator or Deputy Administrator or the Division Director responsible for the function involved. The officials to whom authority is delegated herein shall (1) maintain close working relationships with the Division Directors and Administrator or Deputy Administrator as the case may be, (2) keep them advised with respect to major problems and developments, and (3) discuss with them proposed actions involving major policy questions or other important considerations or questions, including matters involving relationships with other Federal agencies, other agencies of the Department, other Divisions or offices of the Packers and Stockyards Administration, or other Governmental or private organizations or groups.

(h) All prior delegations and redelegations of authority relating to any function or activity covered by these delegations of authority shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked. Nothing herein shall affect the validity of any action heretofore taken under prior delegations or redelegations of authority or assignment of functions.

(i) *Reservations of authority.* There is hereby reserved to the Administrator and Deputy Administrator the authority with respect to proposed rulemaking and final action for the issuance of regulations (§ 201.1 of this chapter *et seq.*), rules of practice governing proceedings (§ 202.1 of this chapter *et seq.*), and statements of general policy (§ 203.1 of this chapter *et seq.*), and the issuance of moving papers as prescribed in the rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary (7 CFR Part 1, subpart H, 1.133); and the authority to make final determinations in accordance with the provisions of 7 CFR Part 1, Subpart A, as to the availability of official records and information made or obtained in connection with the administration of the Packers and Stockyards Act which are considered exempt from disclosure under § 204.7 of this part.

§ 204.4 Public inspection and copying.

(a) Facilities for public inspection and copying of the indexes and materials required to be made available under 7 CFR 1.2(a) will be provided by Packers and Stockyards Administration during normal hours of operation. Request for this information should be made to the Freedom of Information Act Officer at the following address: Freedom of Information Act Officer, Packers and Stockyards Administration, United States Department of Agriculture, Washington, D.C. 20250.

(b) Copies of such materials may be obtained in person or by mail. Applicable fees for copies will be charged in accordance with the regulations prescribed by the Director, Office of Operations and Finance, USDA.

§ 204.5 Indexes.

Pursuant to the regulations in 7 CFR 1.4(b), the Packers and Stockyards Administration will maintain and make available for public inspection and copying current indexes of all material required to be made available in 7 CFR 1.2(a). Notice is hereby given that publication of these indexes is unnecessary and impractical, since the material is voluminous and does not change often enough to justify the expense of publication.

§ 204.6 Request for records.

(a) Requests for records under 5 U.S.C. 552(a)(3) shall be made in accordance with 7 CFR 1.3(a). Authority to make determinations regarding initial requests in accordance with 7 CFR 1.4(c) is delegated to the Freedom of Information Act Officer of the Packers and Stockyards Administration. Requests should be submitted to the FOIA Officer at the following address: Freedom of Information Act Officer (FOIA Request), Packers and Stockyards Administration, United States Department of Agriculture, Washington, D.C. 20250.

(b) The request shall identify each record with reasonable specificity as prescribed in 7 CFR 1.3.

(c) The FOIA Officer is authorized to receive requests and to exercise the authority to (1) make determination to grant requests or deny initial requests, (2) extend the administrative deadline, (3) make discretionary release of exempt records, and (4) make determinations regarding charges pursuant to the fee schedule.

§ 204.7 Appeals.

Any person whose request under § 204.6 of this Part is denied shall have the right to appeal such denial in accordance with 7 CFR 1.3(e). Appeals shall be addressed to the Administrator, Packers and Stockyards Administration, U.S. Department of Agriculture, Washington, D.C. 20250.

(5 U.S.C. 552).

Done at Washington, D.C., *December 4, 1981.*

James L. Smith,

Acting Administrator, Packers and Stockyards Adminstration.

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NOTES