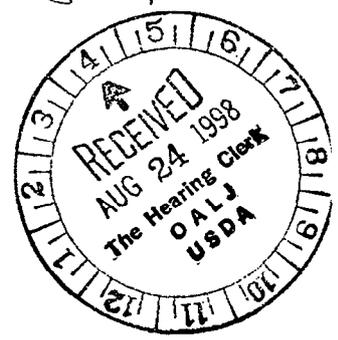


Des No 1995 F15



UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

The Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations promulgated under the Packers and Stockyards Act (9 C.F.R. §§ 201.1-200) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on August 16, 1996.

The Complaint alleges that: (1) James L. Thurn [hereinafter Respondent Thurn] and Deryl D. Hines [hereinafter Respondent Hines] are the *alter egos* of Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock [hereinafter Corporate Respondent] (Compl. ¶ III); and (2) Respondent Thurn, Respondent Hines, and Corporate Respondent [hereinafter Respondents] willfully violated sections 312(a) and 409(a) of the

Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b(a)) by: (a) issuing insufficient funds checks in payment for livestock; (b) failing to pay the full purchase price for livestock; and (c) failing to pay, when due, the full purchase price for livestock (Compl. ¶ II).

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

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

material allegations of fact contained in a complaint constitutes a waiver of hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

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

On April 30, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in which the ALJ: (1) concluded that Respondent Thurn and Respondent Hines are the *alter egos* of Corporate Respondent; (2) concluded that Respondent Thurn, Respondent Hines, and Corporate Respondent willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and section 201.43 of the Regulations (9 C.F.R. § 201.43); (3) ordered Respondent Thurn, Respondent Hines, and Corporate Respondent to cease and desist from (a) issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented, (b) failing to pay, when due, the full purchase price of livestock purchases, and (c) failing to pay the full purchase price for livestock purchases; and (4) suspended Respondent Thurn, Respondent Hines, and Corporate Respondent as registrants under the Packers and Stockyards Act (7 U.S.C. §§ 181-229) for 5 years (Default Decision at 8-9).

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

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

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

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 9—PACKERS AND STOCKYARDS**SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS****§ 201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined**

.....

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

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

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

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

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of

the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

SUBCHAPTER V—GENERAL PROVISIONS

§ 228b. Prompt payment for purchase of livestock

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

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

7 U.S.C. §§ 201(c)-(d), 213, 228b(a).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

.....

**CHAPTER II—GRAIN INSPECTION, PACKERS
AND STOCKYARDS ADMINISTRATION
(PACKERS AND STOCKYARDS PROGRAMS),
DEPARTMENT OF AGRICULTURE**

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

ACCOUNTS AND RECORDS

.....

§ 201.43 Payment and accounting for livestock and live poultry.

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

9 C.F.R. § 201.43(a).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

.....

Respondents' Answer [to Complaint] constitutes the admission of the material allegations of fact contained in the Complaint. The admission of the material allegations of fact contained in a complaint constitutes a waiver of hearing, pursuant to section 1.139

of the Rules of Practice (7 C.F.R. § 1.139). Complainant moved for the issuance of a Default Decision.

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

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

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

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

Accordingly, [this] Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Under the direction, management, and control of Respondent [James L.] Thurn and Respondent [Deryl D.] Hines, [Respondent Hines and Thurn Feedlot, Inc.,

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

Purchase Date	Seller	Check Amount	Check Date	Check Number
10/09/95	Zumbrota Livestock Auction Market, Inc.	\$214,818.66	10/09/95	11824
10/11/95	Zumbrota Livestock Auction Market, Inc.	\$ 7,793.97	10/12/95	11865
10/12/95	Equity Cooperative Livestock Sales Association	\$ 16,804.36	10/12/95	11857
10/12/95	Walnut Auction Sales, Inc.	\$ 55,201.57	10/12/95	11858
10/12/95	Kalona Sales Barn, Inc.	\$ 14,022.45	10/12/95	11860
10/13/95	Lanesboro Sales Commission, Inc.	\$ 60,814.85	10/13/95	11870
10/17/95	Equity Cooperative Livestock Sales Association	\$156,473.06	10/17/95	7776
10/17/95	Equity Cooperative Livestock Sales Association	\$ 20,842.82	10/17/95	11900

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

Purchase Date	Seller	Purchase Amount	Due Date
10/19/95	Aplington Sales Commission, Inc.	\$ 31,057.73	10/20/95
10/19/95	Aplington Sales Commission, Inc.	\$ 10,507.72	10/20/95

Purchase Date	Seller	Purchase Amount	Due Date
10/16/95	Cresco Livestock Market	\$ 21,767.09	10/17/95
10/16/95	Belle Plaine Livestock Exchange, Inc.	\$ 35,784.41	10/17/95
10/16/95	Dolan Lundeman Sunderland & Co.	\$ 8,792.55	10/17/95
10/09/95	Farmers Livestock Auction Market	\$ 70,431.56	10/10/95
10/14/95	Farmers Livestock Auction Market	\$ 34,692.74	10/15/95
10/16/95	Farmers Livestock Auction Market	\$ 74,953.35	10/17/95
10/10/95	Galesburg Livestock Sales, Inc.	\$ 11,416.03	10/11/95
10/17/95	Galesburg Livestock Sales, Inc.	\$ 66,226.18	10/18/95
10/16/95	H.D. Copeland	\$ 18,277.42	10/17/95
10/16/95	H.D. Copeland	\$ 18,774.92	10/17/95
10/14/95	John E. Connery	\$ 24,256.78	10/15/95
10/16/95	John E. Connery	\$ 275.90	10/17/95
10/17/95	John E. Connery	\$ 31,979.37	10/18/95
10/18/95	John E. Connery	\$ 32,594.39	10/19/95
10/19/95	John E. Connery	\$ 12,626.69	10/20/95
10/19/95	Kalona Sales Barn, Inc.	\$ 5,472.26	10/20/95
10/12/95	Kane Livestock Sales, Inc.	\$ 2,765.78	10/13/95
10/16/95	Kane Livestock Sales, Inc.	\$ 12,336.73	10/17/95
10/16/95	Kane Livestock Sales, Inc.	\$ 4,670.35	10/17/95
10/17/95	Kane Livestock Sales, Inc.	\$ 10,810.18	10/18/95
10/17/95	Kane Livestock Sales, Inc.	\$ 7,480.70	10/18/95
10/18/95	Kane Livestock Sales, Inc.	\$ 2,322.60	10/19/95
10/19/95	Kane Livestock Sales, Inc.	\$ 12,084.15	10/20/95
10/18/95	Lanesboro Sales Commission, Inc.	\$ 174,848.72	10/19/95
10/18/95	Lanny R. Minnaert	\$ 26,853.76	10/19/95
10/17/95	Manchester Livestock Auction	\$ 125,324.95	10/18/95
10/17/95	Manchester Livestock Auction	\$ 2,511.36	10/18/95
10/10/95	Michigan Livestock Exchange	\$ 38,533.30	10/11/95

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

9. As of September 16, 1996, \$853,266.06¹ of the amounts due from the transactions set forth in Findings of Fact 7 and 8 remained unpaid.

Conclusions [of Law]

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

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

¹In [Answer to Complaint,] Respondents contend that \$1,107,235.70 of the amounts alleged in the Complaint had been paid. Respondents admit that the balance of \$853,266.06 of the amounts alleged [in the Complaint] is unpaid. No evidence was presented to verify or disprove Respondents' contention that [they] paid the . . . \$1,107,235.70 Respondents' admission that \$853,266.06 is unpaid is sufficient to compel a finding that Respondents failed to pay livestock debt in violation of the Packers and Stockyards Act.

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

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

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

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

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

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

§ 1.136 Answer.

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

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

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

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

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

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

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

Respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 7.

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

CERTIFIED RECEIPT REQUESTED

August 19, 1996

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

Gentlemen:

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

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

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

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

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

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

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

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

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

Moreover, Respondents admit the material allegations of the Complaint in their untimely Answer to Complaint and pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the admission of the material allegations contained in the Complaint constitutes a waiver of hearing. Specifically, Respondents admit: (1) issuing insufficient fund checks for the purchase of livestock; (2) failing to pay, when due, for livestock; and (3) failing to pay for livestock purchases (Answer to Complaint). Respondents reiterate these admissions in Respondents' Objection to Motion for Decision Without Hearing and Respondents' Appeal Petition.

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

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

violator's intent in committing those acts, even if the conduct resulted from careless disregard for statutory or regulatory requirements" (Default Decision at 3).

I agree with the ALJ. An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.³ Respondents' argument that they issued insufficient funds checks and failed to pay for livestock because Northwestern Cattle failed to pay Respondents does not mitigate against a finding that Respondents willfully violated sections 312(a) and 409 of the Packers and

³*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations would still be found willful.

Stockyards Act, or the 5-year suspension of Respondents' registration as a result of their violations of the Packers and Stockyards Act.

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

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

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

⁵See generally *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997)

(continued...)

⁵(...continued)

(holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal docketed*, No. 96-7124 (11th Cir. Nov. 8, 1996); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed);
(continued...)

⁵(...continued)

respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed);

(continued...)

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

The requirement in the Rules of Practice that a respondent deny or explain any allegation of a complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its large workload in an expeditious and economical manner. The United States Department of Agriculture's four administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 40 to 60 cases per year. As such, the courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁶ If Respondents were permitted to contest some of the allegations of fact after

⁵(...continued)

In re Randy & Mary Berhow, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

⁶*See Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to

(continued...)

failing to file a timely answer and after filing a late Answer to Complaint, which admits the material allegations of the Complaint, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

Accordingly, the Default Decision was properly issued in this proceeding.

Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution.⁷

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

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

⁶(...continued)

the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

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

Corporate Respondent, Hines and Thurn Feedlot, Inc., its officers, directors, agents, and employees, successors and assigns, directly or through any corporate device and Respondent James L. Thurn and Respondent Deryl D. Hines, their agents and employees, directly or through any corporate device in connection with their activities subject to the P&S Act, shall cease and desist from:

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

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

Default Decision at 8-9.

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

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

Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act and section 201.43 of the Regulations by: (1) purchasing livestock and in purported payment for the livestock, issuing 8 checks in amounts totaling \$546,771.74 which were returned unpaid by the bank upon which they were drawn because Corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented; (2) purchasing livestock for a purchase price of over \$1,000,000, and failing to pay, when due, the full purchase price of the livestock; and (3) failing to pay \$853,266.06 for livestock.

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

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

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

Respondents claim that they and the livestock producers that sold to Respondents are victims of Northwestern Cattle's failure to pay Respondents and that most, if not all, of Respondents' creditors support Respondents' return to employment immediately (Respondents' Appeal Pet. at 3). Respondents' alleged victimization and creditors' preference are irrelevant considerations in determining sanctions for Respondents' serious violations of the Packers and Stockyards Act. As the court held in *Van Wyk*, Respondents' claim that their inability to meet their obligations is a debtor/creditor problem and is irrelevant to disposition of the proceeding. *Van Wyk v. Bergland*, 570

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

F.2d 701, 704 (8th Cir. 1978) (stating that failure to pay shipper promptly is a proscribed deceptive practice under the Packers and Stockyards Act).

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

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

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

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

Order

Paragraph I.

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

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

Paragraph II.

Corporate Respondent, Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, Respondent James L. Thurn, and Respondent Deryl D. Hines are suspended

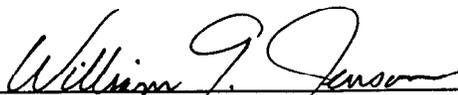
as registrants under the Packers and Stockyards Act for 5 years: *Provided*, That upon application to the Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of Respondents at any time after 2 years upon demonstration that all livestock sellers identified in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

Paragraph III.

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

Done at Washington, D.C.

August 24, 1998



William G. Jenson
Judicial Officer