

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 01-0002
)
Janet S. Orloff,)
Merna K. Jacobson, and)
Terry A. Jacobson,)
) **Decision and Order as to**
Petitioners) **Merna K. Jacobson**

PROCEDURAL HISTORY

On February 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Merna K. Jacobson¹ [hereinafter Petitioner] was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, a period during which Jacobson Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)

¹Respondent s February 21, 2001, determination letter (CARX 14) and a number of other exhibits and filings in this proceeding refer to Petitioner as Myrna K. Jacobson. Petitioner s name is Merna K. Jacobson (Amendment of Case Caption, Deadlines for Filing Outstanding Evidence, Request for Settlement Documents, and Briefing Schedule).

[hereinafter the PACA].² On March 5, 2001, Petitioner filed a Petition for Review pursuant to the PACA 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] seeking reversal of Respondent's determination that she was responsibly connected with Jacobson Produce, Inc., during the period Jacobson Produce, Inc., violated the PACA.

On July 12, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in New York, New York. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On November 30, 2001, Petitioner filed Petitioner's Brief and Proposed Finding of Fact. On January 31, 2002, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order.

²During June 1999 through January 2000, Jacobson Produce, Inc., failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc., purchased, received, and accepted in interstate and foreign commerce. Jacobson Produce, Inc.'s failures to make full payment promptly constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Jacobson Produce, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision and Order) (CARX 15).

On August 13, 2002, the ALJ issued a Decision [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's determination that Petitioner was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, a period during which Jacobson Produce, Inc., violated the PACA (Initial Decision and Order at 12).

On October 16, 2002, Petitioner appealed to the Judicial Officer. On November 15, 2002, Respondent filed Respondent's Response to Petitioner's Appeal Petition. On November 18, 2002, the Hearing Clerk transferred the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with many of the ALJ's findings of fact and conclusions of law and the ALJ's affirming Respondent's determination that Petitioner was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, a period during which Jacobson Produce, Inc., violated the PACA. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

Petitioner introduced no exhibits. Respondent introduced 17 exhibits admitted into evidence at the July 12, 2001, hearing. The 15 Certified Agency Record exhibits introduced by Respondent are designated by CARX. Two additional exhibits

introduced by Respondent are designated by AX. Transcript references are designated by Tr.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7 AGRICULTURE

.....

CHAPTER 20A PERISHABLE AGRICULTURAL COMMODITIES

.....

§ 499a. Short title and definitions

.....

(b) Definitions

For purposes of this chapter:

.....

(9) The term responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

.....

§ 499b. Unfair conduct

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

....

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this

provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

....

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

.....

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a

reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days[] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(b)(A)-(B), (c), 499h(b).

**ADMINISTRATIVE LAW JUDGE S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Decision Summary

Based on the reasoning in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), I conclude Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc., willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Issue

Did Petitioner prove by a preponderance of the evidence that she was not actively involved in any of the activities that resulted in Jacobson Produce, Inc.'s PACA violations during the period June 1999 through January 2000?

Findings of Fact

1. Before his death, Sidney Jacobson was an equal owner with Aaron (Eddie) Gisser of Jacobson Produce, Inc. Each owned 50 percent of Jacobson Produce, Inc., and together they ran the business. (AX 1; Tr. 164.)
2. After Sidney Jacobson died in 1980, the responsibility for running Jacobson Produce, Inc., fell to Aaron Gisser alone. Aaron Gisser assumed the joint roles of chief financial officer and chief executive officer and served as president and secretary, the only two corporate offices, until the business closed in April 2000. (AX 1, AX 2; Tr. 67-68, 123-24.)
3. None of Sidney Jacobson s heirs assumed his management role in the business: not Petitioner, his surviving spouse, nor any of his three children, Kenneth D. Jacobson, Janet S. Orloff, and Terry A. Jacobson (AX 1; Tr. 122-23).
4. Petitioner worked for Jacobson Produce, Inc., from 1971 until the business closed in April 2000 (Tr. 142, 166).
5. After Sidney Jacobson died, Petitioner did not become more of a participant in the decision-making of Jacobson Produce, Inc., and did not change what she did for Jacobson Produce, Inc., which was to manage the frozen foods department. During the period June 1999 through January 2000, Petitioner was a buyer for and managed Jacobson Produce, Inc. s frozen foods department. (AX 1, CARX 7, CARX 8; Tr. 132, 143, 168.)

6. Petitioner was Aaron Gisser's sister-in-law, which accounts in large part for his testimony that he considered her as a partner rather than his employee and his feeling that he did not have the authority to fire her if she were not doing a good job (Tr. 132-33).

7. Petitioner never exercised control over Jacobson Produce, Inc., as a whole; her management authority was limited to the frozen foods department (AX 1; Tr. 149).

8. Petitioner was never an officer of Jacobson Produce, Inc. (Tr. 66, 149).

9. Petitioner was never a director of Jacobson Produce, Inc. (Tr. 66, 149).

10. Petitioner did not hire or fire employees for Jacobson Produce, Inc. (Tr. 143).

11. Petitioner had no responsibilities regarding payroll for Jacobson Produce, Inc. (Tr. 125-26, 146).

12. Petitioner was a listed signatory on one Jacobson Produce, Inc., bank account for the purpose of having someone available to sign checks if Aaron Gisser were not available (CARX 7; Tr. 125-26).

13. During June 1999 through January 2000, Petitioner wrote no checks and signed no checks on behalf of Jacobson Produce, Inc. (Tr. 126).

14. During June 1999 through January 2000, Jacobson Produce, Inc., failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which

Jacobson Produce, Inc., purchased, received, and accepted in interstate and foreign commerce (CARX 2 at 3-8, CARX 15).

15. Jacobson Produce, Inc., entered into a Consent Decision and Order filed in January 2001 in PACA Docket No. D-00-0023, admitting its failure to make full payment promptly with respect to the transactions described in Finding of Fact 14 (CARX 2 at 3-8, CARX 15).

16. Jacobson Produce, Inc.'s failures to make full payment promptly with respect to the transactions described in Finding of Fact 14 constituted willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and resulted in the revocation of Jacobson Produce, Inc.'s PACA license (CARX 2 at 3-8, CARX 15).

17. Approximately 15, 16, or 17 percent of the business of Jacobson Produce, Inc., was frozen foods (Tr. 129).

18. Of the \$584,326.83 for perishable agricultural commodities that Jacobson Produce, Inc., failed to pay in violation of the PACA, approximately \$127,000 of that was failure to pay for frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52).

19. Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not

promptly paid \$12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

20. Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid \$36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

21. Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc., was not promptly paid \$29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 5; Tr. 51-52).

22. Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc., was not promptly paid \$48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CARX 2 at 6; Tr. 51-52).

23. Petitioner made no decisions regarding what payments Jacobson Produce, Inc., would make (Tr. 123-24, 130-31).

24. Petitioner's participation in the payment process for the purchases she made for Jacobson Produce, Inc., was limited to the performance of ministerial functions only, because, when Jacobson Produce, Inc., received an invoice requesting payment for frozen

foods, Petitioner merely verified the correctness of the prices on the invoice and delivered the invoice to the bookkeeper (Tr. 131-32, 144-45).

25. On or before December 29, 1989, Sidney Jacobson's 50 percent ownership of Jacobson Produce, Inc., was divided among his heirs, with each of his heirs receiving 12.63 percent of Jacobson Produce, Inc., except for Petitioner, who received 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 31-32). (The remaining 0.16 percent of Jacobson Produce, Inc., is not relevant to this proceeding.)

26. During the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000, four people owned more than 10 percent of Jacobson Produce, Inc. Aaron Gisser owned 50 percent of Jacobson Produce, Inc.; Janet S. Orloff owned 12.63 percent of Jacobson Produce, Inc.; Terry A. Jacobson owned 12.63 percent of Jacobson Produce, Inc.; and Petitioner owned 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 13-16.)

27. Initially, Respondent found that each of the four stockholders identified in Finding of Fact 26 was responsibly connected with Jacobson Produce, Inc., during the time of Jacobson Produce, Inc.'s PACA violations (Pet. for Review; Amended Motion to Dismiss as to Janet S. Orloff; Amended Motion to Dismiss as to Terry A. Jacobson; Tr. 9, 78-80, 89-91).

28. Kenneth D. Jacobson had owned 12.63 percent of Jacobson Produce, Inc., until March 16, 1994, when he became a 9.9 percent shareholder (CARX 1 at 29).

29. Janet S. Orloff continued to own 12.63 percent of Jacobson Produce, Inc., until March 23, 2000, when she returned her shares to the corporation (CARX 1 at 4-5, 8).

30. Terry A. Jacobson continued to own 12.63 percent of Jacobson Produce, Inc., until approximately March 23, 2000, when he wrote to the PACA Branch to advise that he had officially surrendered his shares back to the corporation (CARX 1 at 4-5, 10).

31. Petitioner continued to own 11.95 percent of Jacobson Produce, Inc., until March 23, 2000, when she returned her shares to the corporation (CARX 1 at 4-6).

32. Aaron Gisser was responsibly connected with Jacobson Produce, Inc., during the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000, and he did not deny it (AX 1, AX 2, CARX 1 at 12-13, 15-16, CARX 6).

33. Petitioner, Janet S. Orloff, and Terry A. Jacobson denied being responsibly connected with Jacobson Produce, Inc., during the time of Jacobson Produce, Inc.'s PACA violations (Pet. for Review).

34. Based on additional information provided regarding Janet S. Orloff and Terry A. Jacobson, Respondent withdrew his determinations that they were each responsibly connected with Jacobson Produce, Inc. (Amended Motion to Dismiss as to Terry A. Jacobson; Amended Motion to Dismiss as to Janet S. Orloff; Order to Dismiss as to Janet S. Orloff; Order to Dismiss as to Terry A. Jacobson).

35. Janet S. Orloff and Terry A. Jacobson were not responsibly connected with Jacobson Produce, Inc., during the time of Jacobson Produce, Inc.'s PACA violations, June 1999 through January 2000.

36. Department managers of Jacobson Produce, Inc., included Petitioner, who handled frozen foods; Larry Gisser, who handled potatoes, onions, cabbage, and turnips; Michael Brewington, who handled western commodities and Florida, Mexico, and southern vegetables; Howard Orloff, who handled citrus and deciduous fruits; and Ken Jacobson, who handled the institutional line (CARX 8; Tr. 68-69).

37. Petitioner was sometimes excluded from meetings the managers would have. When asked why she was excluded, she answered that it was perhaps because she was busy, and they just didn't bother with me. Because, I was a lady, maybe. Who knows? (Tr. 164.)

38. Petitioner's salary from Jacobson Produce, Inc., was comparable to that of other department managers, and also of the salesmen, Aaron Gisser, the foreman, and with their overtime, most of the drivers and half of the porters (Tr. 139-40, 147).

39. Jacobson Produce, Inc., paid Petitioner no salary for about the last 6 months that Jacobson Produce, Inc., was in business, but Petitioner continued to work (Tr. 166-68).

40. Jacobson Produce, Inc., leased a car that Petitioner, and at times, her co-workers, were permitted to drive. Petitioner personally paid some of the car lease

payments in or about late 1999. The car was turned back to the lease company in or about late 1999. (Tr. 148, 165, 168.)

41. Jacobson Produce, Inc., permitted Petitioner the use of one company credit card, a Mobil credit card for gasoline, on an account that was originally opened for the use of her late husband (CARX 12; Tr. 147-48).

42. In or about July or August 1999, Petitioner loaned \$100,000 to Jacobson Produce, Inc., to pay its bills. Petitioner was never repaid for this loan. Petitioner also owed Jacobson Produce, Inc., \$6,000 in October 1999. (CARX 10; Tr. 46-47, 133-37, 148, 151-54, 165.)

43. Petitioner spoke with some produce suppliers when these suppliers called requesting payment for produce that was due and owing from Jacobson Produce, Inc. Petitioner directed these unpaid produce suppliers to Aaron Gisser or Jacobson Produce, Inc.'s bookkeeping department. (Tr. 145-46, 148, 162-63.) Petitioner knew Jacobson Produce, Inc., was a little strapped for cash, but felt it was just a temporary thing. (Tr. 153.)

44. Petitioner is distinguished from other Jacobson Produce, Inc., produce buyers in that she owned more than 10 percent of Jacobson Produce, Inc. (CARX 1 at 12-13, 15-16).

Conclusions of Law

1. Petitioner failed to prove by a preponderance of the evidence that she was not actively involved in any of the activities that resulted in Jacobson Produce, Inc.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during June 1999 through January 2000.

2. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc., willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises one issue in her appeal of the ALJ's Initial Decision and Order. Petitioner asserts her involvement with Jacobson Produce, Inc., was not sufficient to result in her being found responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, the period during which Jacobson Produce, Inc., willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Appeal Pet. at 1).

Petitioner was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc., during the period that Jacobson Produce, Inc., willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in

section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (and), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. If a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners. Petitioner failed to meet the first prong of the statutory test.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. However, the standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set

forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), as follows:

A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 Agric. Dec. at 610-11.

Petitioner was the manager of and a buyer for Jacobson Produce, Inc.'s frozen foods department. During the period in which Petitioner managed the frozen foods department and bought produce, Jacobson Produce, Inc., failed to pay 28 sellers the agreed purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc., purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These failures to pay, in violation of the PACA, included Jacobson Produce, Inc.'s failures to pay for 31 lots of frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52). Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid \$12,542.40, in

violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid \$36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc., was not promptly paid \$29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc., was not promptly paid \$48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (CARX 2 at 5-6; Tr. 51-52.) Petitioner's purchase of, or responsibility for the purchase of, these 31 lots of frozen foods is active involvement in activities that resulted in Jacobson Produce, Inc.'s failures to pay for perishable agricultural commodities in willful, repeated, and flagrant violation of section 2(4) the PACA (7 U.S.C. § 499b(4)).

Moreover, Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of frozen foods was limited to the performance of ministerial functions only. To the contrary, the record establishes Petitioner was the manager of the frozen foods department and either purchased or was responsible for the purchase of frozen foods during the period that Jacobson Produce, Inc., violated the

PACA. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make purchases of frozen foods on behalf of Jacobson Produce, Inc., and chose to do so even though she knew or should have known that Jacobson Produce, Inc., was not paying produce suppliers for perishable agricultural commodities in accordance with the PACA.³

Petitioner asserts frozen foods accounted for less than 18 percent of Jacobson Produce, Inc.'s business; Petitioner was never an officer or director of Jacobson Produce, Inc.; Petitioner had no authority to hire or fire Jacobson Produce, Inc., employees; Petitioner had no authority to engage professionals; and Petitioner had no authority to secure insurance on behalf of Jacobson Produce, Inc. (Appeal Pet. at 2).

I agree with Petitioner. However, Petitioner's limited authority within Jacobson Produce, Inc., does not, by itself, demonstrate that she was not actively involved in

³Petitioner asserts she was not aware of Jacobson Produce, Inc.'s PACA violations (Appeal Pet. at 2). I disagree. I find Petitioner knew or should have known Jacobson Produce, Inc., was not paying produce sellers for perishable agricultural commodities based on the loan Petitioner made to Jacobson Produce, Inc., in July or August 1999, in order to pay Jacobson Produce, Inc.'s bills (Tr. 133-37, 148, 151-54, 165) and the telephone calls Petitioner received from produce sellers requesting payment that was due and owing from Jacobson Produce, Inc., for perishable agricultural commodities (Tr. 145-46, 148, 162-63). Moreover, even if I found Petitioner did not know or have reason to know that Jacobson Produce, Inc., was not paying produce sellers for perishable agricultural commodities in accordance with the PACA, I would still find that she was actively involved in activities resulting in Jacobson Produce, Inc.'s violations of the PACA. See *In re Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999) (Decision and Order on Remand).

activities that resulted in Jacobson Produce, Inc.'s violations of the PACA. The issue of limited authority is addressed in *Norinsberg*, as follows:

I do not agree that an alleged responsibly connected individual's demonstration by a preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA. An individual who exercises authority over only one limited area of corporate activities could be responsibly connected due to his or her active involvement in activities resulting in a violation of the PACA.

In re Michael Norinsberg, 58 Agric. Dec. 604, 615 (1999) (Decision and Order on Remand).

Petitioner was the buyer of produce or responsible for buying produce for which Jacobson Produce, Inc., failed to make prompt payment in accordance with the PACA. Therefore, despite the limits on Petitioner's authority within Jacobson Produce, Inc., she was actively involved in an activity resulting in Jacobson Produce, Inc.'s violations of the PACA.

Petitioner asserts she had no authority to pay bills and did not participate in any management decisions (Appeal Pet. at 2).

The record does not support Petitioner's assertion that she had no authority to pay bills. To the contrary, the record establishes that she was a signatory on one Jacobson Produce, Inc., bank account and authorized to sign checks if Aaron Gisser were not available (CARX 7; Tr. 125-26). Moreover, the record does not support Petitioner's

assertion that she did not participate in any management decisions. Instead, while the record establishes that Petitioner did not exercise control over Jacobson Produce, Inc., as a whole, Petitioner was the manager of Jacobson Produce, Inc.'s frozen foods department (AX 1, CARX 7, CARX 8; Tr. 149).

Petitioner asserts [t]he activity that resulted in violation of the PACA by Jacobson consisted solely in not promptly paying for produce that had been purchased and received. Purchasing produce is not a violation of the PACA, only failing to pay promptly. (Appeal Pet. at 2 (emphasis in original).)

I agree with Petitioner's assertions that Jacobson Produce, Inc.'s purchases of perishable agricultural commodities during June 1999 through January 2000, were not violations of the PACA and that Jacobson Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when it failed to make full payment promptly for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce during June 1999 through January 2000. However, I reject what I find to be Petitioner's argument: that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must actually commit the PACA violation.

A petitioner's failure to make full payment promptly is not the only activity that can result in a PACA licensee's failure to make full payment promptly in accordance with the PACA. For example, a petitioner's embezzlement or theft of funds from a PACA

licensee is an activity that could leave the PACA licensee unable to make full payment promptly in accordance with the PACA. In such a case, a petitioner's embezzlement or theft of funds from the PACA licensee would constitute active involvement in an activity resulting in the PACA licensee's violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), but the petitioner would not have actually committed the act of failing to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Norinsberg*, I specifically addressed the issue presented in the instant proceeding, a petitioner's purchase of perishable agricultural commodities resulting in a PACA licensee's failure to pay in accordance with the PACA, as follows:

Thus, if a petitioner buys produce from a seller who is not paid by the partnership, corporation, or association, in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA

In re Michael Norinsberg, 58 Agric. Dec. 604, 617 (1999) (Decision and Order on Remand).

In the instant proceeding, Petitioner purchased, or was responsible for the purchase of, 31 lots of perishable agricultural commodities from four produce suppliers that Jacobson Produce, Inc., failed to pay in accordance with the PACA. Thus, Petitioner was actively involved in the activities resulting in some of Jacobson Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Finally, Petitioner contends [t]he ALJ has misapprehended and misapplied *In re: Michael Norinsberg*, 58 Agric. Dec. 604, 617 (1999). In *Norinsberg* the J.O. decided that

the Petitioner was not responsible [sic] connected even though he was an officer and wrote checks and his involvement was greater than the Petitioner herein. (Appeal Pet. at 2 (emphasis in original).)

I disagree with Petitioner's contention that application of the reasoning in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), to the facts in this proceeding would result in a conclusion that Petitioner was not *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc., willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Norinsberg*, Michael Norinsberg, an individual determined by the Chief of the PACA Branch to be responsibly connected with a PACA licensee during a period when the PACA licensee failed to make full payment promptly to produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), signed 14 checks drawn on the violating PACA licensee's checking accounts. These checks were payable to three persons who had not sold produce to the violating PACA licensee. I found that Michael Norinsberg's activities (signing checks) enabled persons who presented the checks for payment to receive payment and resulted in a substantial reduction of the resources available to the violating PACA licensee to pay produce sellers in accordance with the PACA. I concluded that Michael Norinsberg participated in activities that resulted in the PACA

licensee s violations of the PAC A. However, I did not conclude that Michael Norinsberg was responsibly connected with the violating PACA licensee because he demonstrated by a preponderance of the evidence that his signing checks was a ministerial function only. I described the ministerial nature of his activities, as follows:

[Michael Norinsberg] demonstrated by a preponderance of the evidence that his signing checks was a ministerial function only. The checks were presented to [Michael Norinsberg] for signature with the checks already made out as to payee and amount. [Michael Norinsberg] signed the checks presented to him when the president of [the violating PACA licensee] was not available and at the direction of the president of [the violating PACA licensee]. . . . I find, under these circumstances, that [Michael Norinsberg] did not exercise judgment or discretion with respect to, or control over, the check signing and that [Michael Norinsberg] performed only a ministerial function.

In re Michael Norinsberg, 58 Agric. Dec. 604, 618 (1999) (Decision and Order on Remand).

In the instant proceeding, Petitioner failed to demonstrate by a preponderance of the evidence that her activities (buying frozen foods and managing the frozen foods department) were ministerial acts. Petitioner was the buyer of, or was responsible for buying, 31 lots of frozen foods from four produce suppliers which Jacobson Produce, Inc., failed to pay, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner failed to show that she exercised no judgment, discretion, or control with respect to these produce purchases.

ORDER

I affirm Respondent's February 21, 2001, determination that Petitioner was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, a period during which Jacobson Produce, Inc., violated the PACA.

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 60 days after service of this Order on Petitioner.

Done at Washington, DC

January 7, 2003

William G. Jenson
Judicial Officer

In re: JANET S. ORLOFF, MERNA K. JACOBSON, AND TERRY A. JACOBSON.
PACA-APP Docket No. 01-0002.

Decision and Order as to Merna K. Jacobson filed January 7, 2003.

Ruben D. Rudolph, Jr., for Respondent.

Paul T. Gentile, New York, New York, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

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

Perishable agricultural commodities Failure to make full payment promptly

Responsibly connected Active involvement in activities resulting in violations.