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The Packers and Stockyards Act, 1921

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THE PACKERS AND STOCKYARDS ACT, 1921

*Thomas J. Flavin**

I. INTRODUCTION

Current legislative proposals to transfer the regulation of the trade practices of meatpackers in whole or in part from the Secretary of Agriculture to the Federal Trade Commission have brought the Packers and Stockyards Act¹ to renewed public attention.²

The act constitutes one of the early major entries of the Federal Government into the regulation of private industry and is antedated in this respect only by the establishment of the Interstate Commerce Commission in 1887 and of the Federal Trade Commission in 1914. For years prior to the enactment of the act in 1921, the largest meat-packing companies had been charged with conspiring to control the purchases of livestock, the preparation of meat and meat products and the distribution thereof in this country and abroad. In 1917 President Wilson directed the Federal Trade Commission to investigate the facts relating to the meatpacking industry and the Commission issued a report in July 1918 which concluded that the "Big Five" (Swift, Armour, Cudahy, Wilson and Morris) controlled the market in which they bought their supplies and the market in which they sold their products and were reaching for mastery of the trade in meat substitutes such as cheese, eggs, etc., as well. The report pointed out that the monopolistic position of the "Big Five" was based primarily upon their ownership or control of stockyards and essential facilities for the distribution of perishable foods and that control of stockyards carried with it dominance over commission firms, dealers, cattle-loan banks, trade publications, etc.³

* Judicial Officer, United States Department of Agriculture. The views expressed herein are those of the author personally and do not necessarily coincide with those of the United States Department of Agriculture.

¹ 42 STAT. 159 (1921), as amended, 7 U.S.C. § 181-229 (1952).

² S. 1356, 85th Cong., 1st Sess. (1957), reported out favorably by the Senate Committee on the Judiciary, S. REP. No. 704, transfers to the Federal Trade Commission from the Department of Agriculture jurisdiction over unfair trade practices of meat packers in all their activities. H.R. 9020, 85th Cong., 1st Sess. (1957), as reported out by the House Committee on Agriculture, H.R. REP. No. 1048, 85th Cong., 1st Sess. (1957), provides for placing in the Secretary of Agriculture jurisdiction over the activities of packers relating to livestock, poultry, meat products, livestock products, etc., and for placing in the Federal Trade Commission jurisdiction over all other activities of packers.

³ The Commission recommended that the Federal Government acquire and operate all livestock cars, stockyards, refrigerator cars and such branch houses, cold storage plants, warehouses, etc., as might be necessary for the competitive marketing of food

Following issuance of the report, the Department of Justice instituted an antitrust proceeding against the Big Five which ended in a consent decree in 1920 whereby the defendants disposed of their interests in stockyards, terminal railroads, market publications, and warehouses, and agreed to refrain from engaging in the retail meat business and from dealing in a large number of non-meat foods.

The report also precipitated action by Congress which resulted in 1921 in the enactment of the Packers and Stockyards Act. As finally passed after several years of stormy controversy the act provided for its administration by the Secretary of Agriculture, although at different stages in the legislative process bills on the subject had called for administration by a separate commission, for regulation of the packers by the Federal Trade Commission and of the stockyards by the Interstate Commerce Commission.

The Chairman of the House Committee on Agriculture in reporting out the bill that became the act said: "A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act."⁴

In general outline, the act includes two separate schemes of regulation, one for meatpackers contained in Title II, and the other for stockyards and the operations thereon provided by Title III. Title I contains definitions. Title IV contains general provisions applicable to the entire act, including the adoption of provisions of the Federal Trade Commission Act relating to reports from those subject to the act, investigations and subpoenas. Title IV also maintains intact the jurisdiction of the Interstate Commerce Commission,⁵ but removes from the Federal Trade Commission power over matters given to the Secretary for administration except that the Secretary is authorized to call upon the Federal Trade Commission for investigation and a report in any case. Title V of the act was added in 1935 and covers

products in the principal centers of distribution and consumption. See the Commission's Summary of Report on Meat-Packing Industry, July 3, 1918, pp. 1855-1910, *Hearings on Meat-Packer Legislation Before the House Committee on Agriculture*, 66th Cong., 2d Sess. (1918).

⁴ H.R. REP. No. 77, 67th Cong., 1st Sess. 2 (1921).

⁵ *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 295 U.S. 193 (1935).

the regulation of live poultry handling in areas designated by the Secretary in a manner similar to the regulation of market agencies and dealers at posted stockyards. This addition to the act grew out of racketeering in the handling of live poultry in urban centers, particularly in the New York City area.

The use of the definition of "commerce" in Title I was novel and significant in that in addition to the usual definition of the movement of an article from one state to another a transaction with respect to an article is defined to be in commerce if the article is part of the current of commerce usual in the livestock and meatpacking industries whereby livestock or products are sent from one state with the expectation that they will end transit in another state including purchase or sale for slaughter in one state and shipment of the products outside the state of slaughter. During the legislative processes leading to the promulgation of the act considerable doubt was expressed as to the constitutionality of the regulation of transactions at stockyards in the light of prior decisions of the United States Supreme Court in such cases as *Hopkins v. United States*,⁶ which apparently had ruled that activities of commission firms at stockyards in selling livestock were intrastate and beyond the reach of the Sherman Act.⁷ Congress specifically wrote into the act as the definition of "commerce" the language of the Court's opinion in *Swift and Co. v. United States*,⁸ to the effect that there was a "current of commerce among the States" in the meatpacking industry. The *Swift* decision was what we might now call a major "breakthrough" in the problem of governmental authority to supervise and regulate modern nationwide business and industry. The statutory definition of "commerce" came up for study by the Supreme Court less than nine months after the effective date of the act in the celebrated case of *Stafford v. Wallace*,⁹ in which the Court adhered to the view expressed in the *Swift* case and held that activities of market agencies on the Chicago stockyard occurred in the "current" of interstate commerce and were constitutionally subject to the regulations authorized by the act.

II. REGULATION OF PACKERS

Title II provides for the regulation of packers and prohibits them

⁶ 171 U.S. 578 (1898).

⁷ 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1952).

⁸ 196 U.S. 375, 399 (1905).

⁹ 258 U.S. 495 (1922).

from engaging in or using any unfair, unjustly discriminatory or deceptive practice or device in commerce and from engaging in acts or conspiracies which would restrain trade, manipulate or control prices, or create a monopoly. Provisions are made for the issuance of complaints by the Secretary, opportunity for a hearing, findings, etc., and for cease and desist orders. Judicial review of findings of violation of Title II is had in the United States Court of Appeals for the circuit in which the packer has his principal place of business. Violation of a cease and desist order is made punishable by a fine or imprisonment, or both. Each day of failure to comply with the cease and desist order is made a separate offense.

A packer is defined in the act as any person engaged in the business of buying livestock in commerce for purposes of slaughter, or of manufacturing or preparing meats or livestock or meat products for sale or shipment in commerce or of marketing meats, meat food products, livestock (nonedible) products, dairy products, poultry, poultry products or eggs in commerce, except that no person engaged in manufacturing or preparing livestock products for shipment in commerce, or in marketing meats, meat food products, etc., in commerce shall be considered a packer unless such person is also engaged in the business of buying livestock for slaughter or of preparing or manufacturing meats or meat food products for sale or shipment in commerce or has an interest in either such business or there is common stock ownership or control (to the extent of 20 percent) of the business of manufacturing or preparing livestock products or of marketing meat or meat products and the business of buying livestock for slaughter or of preparing or manufacturing meat or meat products.

Since section 406(b) of the act removes from the jurisdiction of the Federal Trade Commission matters committed in the act to the Secretary of Agriculture for administration, the definition of packer and the question as to whether the act deprives the Federal Trade Commission of jurisdiction over a packer's trade practices in connection with non-meat or non-food lines are current matters of national interest. In *United Corporation v. Federal Trade Commission*,¹⁰ it was held that a corporation which marketed canned meat products became a packer under the act and immune from Federal Trade Commission jurisdiction when it acquired a 20 percent interest in its

¹⁰ 110 F.2d 473 (4th Cir. 1940).

two suppliers who were packers under the act. The Federal Trade Commission¹¹ ruled that Food Fair Stores, Inc., a retail grocery chain, is a packer under the act by virtue of slaughtering livestock and processing meat for distribution in commerce and that therefore the Federal Trade Commission has no jurisdiction over charges of seeking and obtaining discriminatory so-called promotional and advertising allowances from suppliers in connection with its retail grocery business. The Commission had previously held in *In the Matter of Armour and Company*,¹² that claimed false advertising of oleomargarine by the respondent-packer was also a matter for consideration by the Secretary of Agriculture rather than the Commission. There are other proceedings pending before the Commission involving the same issues.

The history of formal administrative proceedings against packers under Title II of the act is given on pages 248-256 of the record of joint hearings on June 5, 6, 7, 14 and July 26, 1957, before subcommittees of the House Committee on the Judiciary and the House Committee on Interstate and Foreign Commerce with respect to a number of bills concerning the matter of transferring Title II of the act to the Federal Trade Commission for administration. The administrative enforcement of Title II by the Secretary of Agriculture over a long period of years has been the subject of extensive hearings before the House subcommittees referred to above and also in May 1957 before the antitrust and monopoly subcommittee of the Senate Committee on the Judiciary.

III. REGULATION OF TRANSACTIONS AT STOCKYARDS

The major emphasis in the administration of the act is upon Title III. Title III makes subject to regulation stockyards conducted as public markets which handle livestock in commerce and which exceed 20,000 square yards in size exclusive of alleys, runs and passageways. Such stockyards are posted as subject to the act by the Secretary after investigation or inquiry.

The act does not require that a stockyard establish any need for its existence in the way of obtaining a license or a certificate of public convenience and necessity. Posting of the stockyard makes it

¹¹ FTC Docket No. 6458 (Sept. 27, 1957).

¹² FTC Docket No. 6409 (March 30, 1956).

and the transactions at the stockyard¹³ subject to the supervision and control of the Secretary but confers no franchise or charter upon the stockyard company. Fundamentally Title III superimposes the act's supervision and control upon an industry which has its own rules and regulations such as those of the stockyard company and, at terminal stockyards, those of the Livestock Exchange consisting of the market agencies at the stockyard and of the Traders Exchange made up of the dealers at the stockyard. For example, the regulations issued by the Secretary under the act are prefaced by the statement:

§ 201.4 . . . (a) The regulations in this part shall not prevent the legitimate application or enforcement of any valid bylaw, rule or regulation, or requirement of any exchange, association, or other organization, or any other valid law, rule or regulation, or requirement to which any packer, stockyard owner, market agency, dealer, or licensee shall be subject which is not inconsistent or in conflict with the act and the regulations in this part.¹⁴

Posted stockyards may be either markets for which the stockyard company furnishes the plant and facilities for the sale of livestock by market agencies such as is the case at the terminal stockyards in Chicago, Illinois, Omaha, Nebraska, Sioux City, Iowa, Fort Worth, Texas, East St. Louis, Illinois, etc., or auction stockyards at which the stockyard operator sells the livestock at auction. In the terminal stockyards the livestock is generally sold for the consignor by commission merchants,¹⁵ that is, market agencies which sell the livestock on a commission basis. The usual method of sale here is by private treaty rather than by auction because the market agency negotiates with one prospective purchaser at a time. The stockyard company's charges for yardage and feed and the selling agency's commission are deducted from the proceeds of the sale and the balance remitted to the shipper.¹⁶ The shippers consign their livestock to a specific

¹³ The Secretary has the right to examine books and records of a dealer at a posted stockyard which concern his disposition off the stockyard of livestock purchased at the posted stockyard. *Woerth v. United States*, 231 F.2d 822 (8th Cir. 1955).

¹⁴ 9 C.F.R. § 201.4 (a) (Supp. 1957).

¹⁵ Farmers have a right to sell their livestock themselves at a stockyard and most stockyard tariffs so specify.

¹⁶ Pending legislative proposals would authorize checkoffs from shippers' proceeds of sale to finance the promotion of meat sales. See *Hearing on Self-Help Meat Promotion Program (checkoff) Before the Subcommittee on Livestock and Feed Grains, House Committee on Agriculture*, April 3, 1957.

commission firm for sale or in many cases the shipper may leave to the trucker of his livestock the selection of a market agency. The buyers at the stockyard are market agencies who buy for their principals upon a commission basis, dealers who buy for their own account and for resale, packer-buyers who purchase slaughter livestock for their employers, or farmers who buy livestock for feeding or other purposes.

Once a stockyard is posted under the act all market agencies and dealers doing business at the stockyard must be registered with the Secretary of Agriculture. This includes employees of packers who buy livestock at the stockyard for their employers,¹⁷ and persons engaged in the business of buying livestock at posted stockyards for resale elsewhere.¹⁸ In *State of Colorado v. United States*,¹⁹ the State of Colorado was required to register with the Secretary of Agriculture as a market agency supplying a stockyard service, brand inspection, at a posted stockyard.

The Secretary of Agriculture is given by the act substantially the same powers over the rates, regulations and practices at posted stockyards as the Interstate Commerce Commission is given over railroads.²⁰

A. Control of Rates for Stockyard Services.

Section 306 of the act requires that all rates and charges for stockyard services furnished by a stockyard or market agencies at a posted stockyard be publicly posted and filed with the Secretary of Agriculture. The term "stockyard services" is defined by section 301 (b) of the act to mean "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock." By amendment of the act in 1942,²¹ the Secretary may authorize the making of a charge for brand or mark inspection of livestock originating in a State where branding or marking livestock to determine ownership prevails by custom or by statute, such service and charge

¹⁷ *Amshoff v. United States*, 228 F.2d 261 (7th Cir. 1955), *cert. denied*, 351 U.S. 939 (1956).

¹⁸ *Kelly v. United States*, 202 F.2d 838 (10th Cir. 1953).

¹⁹ 219 F.2d 474 (10th Cir. 1954).

²⁰ H.R. REP. No. 77, 67th Cong., 1st Sess. 10 (1921); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 435 (1930).

²¹ 56 STAT. 372 (1942), 7 U.S.C. § 217a (1953).

to be made by a State agency or livestock association with only one organization authorized to do so for each such State.

Section 306 also provides that no change in schedules of rates filed shall be effective except after ten days' notice to the Secretary and to the public unless the Secretary for good cause provides otherwise. Whenever the Secretary, either upon his own initiative or as the result of a complaint, challenges any new rate or charge or any new regulation or practice affecting any rate or charge as violative of the act, he may suspend the operation of the schedule filed for a period of not more than 60 days pending the outcome of a hearing upon the matter. If the hearing is not concluded within the 60 days, which is usually the case, the challenged rates may go into effect until an order is issued after hearing prescribing otherwise. This part of the act of course prohibits deviations from published tariffs, rebates, etc., and it also provides civil penalties for violation thereof or of regulations or orders of the Secretary thereunder and criminal sanctions for any such violations that are wilful.

In formal rate proceedings, reasonable rates for stockyard services by stockyard companies are determined in much the same way as rates are arrived at by public utility commissions, that is, by setting up a rate base and prescribing a reasonable rate of return upon the rate after allowance for costs of operation. Many stockyard companies, however, engage in activities which are not the furnishing of stockyard services but some other kind of service such as transportation. Property not used and useful for the rendering of stockyard services, such as property devoted to transportation or to livestock show purposes, is not included in the rate base and rates or charges are not prescribed for activities that do not involve the furnishing of stockyard services.²² The validity of the administrative methods used in fixing reasonable rates for stockyard companies has been upheld in several United States Supreme Court decisions.²³ In the *St. Josephs Stockyards* case²⁴ the Court considered the scope of judicial review upon the issue of alleged confiscation of property by reason of the rates fixed and approved the exercise of independent

²² See *In re St. Louis National Stockyards Co.*, 2 A.D. 664 (1943). The citation is to "Agriculture Decisions" a monthly publication reporting the decisions and orders in formal rate and adjudicatory proceedings under the regulatory laws administered by the United States Department of Agriculture.

²³ *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938); *St. Josephs Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

²⁴ *Supra* note 23.

judgment by the District Court upon the facts in the record made before the Secretary.

Reasonable rates for market agencies present a somewhat unique undertaking since there is relatively little investment in these businesses and the principal element for consideration is the cost of performing the services. The method utilized in arriving at reasonable rates for market agencies is the building up of the rates from the reasonable cost of performing each part of the service such as salesmen's salaries, office expenses, etc. Representative sampling of the market agencies is agreed upon, that is, a sample is taken which includes large, medium, and small agencies and the costs of each for each part of the service are ascertained and a judgment figure of reasonable cost for the part of the service is derived from this examination. The amount so arrived at plus allowances for profits make up the rate. Of course uniform rates are fixed for all market agencies at a stockyard.²⁵

While the techniques for determining reasonable rates for market agencies survived the scrutiny of the United States Supreme Court,²⁶ the hearing procedures gave birth to the landmark *Morgan* decisions of the United States Supreme Court in the field of administrative law. In the first *Morgan* case,²⁷ attacking the rates ordered by the Secretary for the market agencies at the Kansas City Stockyards, the District Court had stricken from the complaint allegations that the market agencies had not been afforded the hearing prescribed by the act in that, in part, no hearing examiner's report had issued to which exceptions could be filed and argument heard, that the Secretary had unlawfully delegated to the Acting Secretary the determination of issues with respect to the reasonableness of the rates involved and that the Secretary had not personally read or heard the evidence and had not heard or considered oral argument made by the market agencies.

In restoring the attacks on the procedure and remanding the case to the District Court, the Supreme Court said that while it would have been good practice for a hearing examiner's report to have issued, it could not say that this step was essential to the validity of the procedure because the statutory requirement of "full hearing"

²⁵ See *In re Market Agencies at Sioux City Stockyards*, 9 A.D. 19 (1950).

²⁶ *Acker v. United States*, 298 U.S. 426 (1936); *Tagg Bros. & Moorhead v. United States*, *supra* note 20.

²⁷ *Morgan v. United States*, 298 U.S. 468 (1936).

related to substance rather than form. The Court also said there was no invalid delegation to the Acting Secretary because the Acting Secretary heard the oral argument. But with respect to the charges that the Secretary did not hear or consider the evidence or argument, the Court ruled that the proceeding was one resembling a judicial proceeding, that the obligation of considering evidence and argument was not an "institutional" one for the Department but one for the Secretary whose duty was "akin to that of a judge" and that he "who decides must hear."

Upon remand to the District Court, Secretary Wallace testified that he considered the evidence taken before he assumed office, that he read the transcript of the oral argument held by the Acting Secretary and that he accepted the findings of the Bureau of Animal Industry save for certain rate alterations. In the second *Morgan* case,²⁸ the Supreme Court held that the right to a hearing embraces not only the right to present evidence but to know the claims of the opposing party and to meet them and that no such opportunity had been given the market agencies without a more definite complaint by the Department and in the absence of any hearing examiner's report or suggested findings by the Department.²⁹ The Supreme Court denied rehearing, the Secretary reopened the proceeding, the market agencies sought distribution of funds impounded in the District Court, the Supreme Court overruled the District Court's order for the distribution of the funds,³⁰ and finally in *United States v. Morgan*,³¹ the rates fixed by the reopened proceeding were upheld and the Secretary was not regarded as disqualified from acting as deciding officer in the matter because he had written a letter to the New York Times criticizing the Court's opinion in the second *Morgan* decision.

Since World War II formal full-scale rate hearings have not been many. Stockyard and market agency rates fixed as the result of formal proceedings have been modified from time to time on a temporary basis after public notice and subject to reduction upon the basis of reports of receipts and expenditures required to be filed. Where rates are not under formal order, informal negotiations have been utilized in connection with rates considered excessive.

²⁸ 304 U.S. 1 (1938).

²⁹ See GELLHORN, ADMINISTRATIVE LAW 717-719 (2d ed., 1947), for a description of the furor over this decision.

³⁰ *United States v. Morgan*, 307 U.S. 183 (1939).

³¹ *United States v. Morgan*, 313 U.S. 409 (1941).

B. *The Furnishing of Stockyard Services.*

Section 304 of the act states that every stockyard owner and market agency shall furnish upon reasonable request reasonable stockyard services, and section 307 of the act prohibits unjust, unreasonable or discriminatory regulations with respect to the furnishing of stockyard services.

The requirement that a stockyard company supply, upon reasonable request, reasonable stockyard services presents some interesting problems concerning the relationship of the stockyard company to the market agencies and dealers at the stockyard. In *Sioux City Stockyards Co. v. United States*,³² upholding *Carpenter-Walsh Commission Company v. The Sioux City Stock Yards Company*,³³ it was held that the Secretary had power under the act to review the action of a stockyard company in denying continued use of its stockyard facilities to an existing market agency because the market agency did not do a satisfactory amount of business and that the action of the stockyard company was unreasonable upon the facts present. A stockyard company was ordered to supply pen space and facilities for a dealer where there was available space and the refusal of the company to assign space was considered arbitrary.³⁴ On the other hand, in several cases, a stockyard company has been found not to have violated this part of the act where prospective market agencies sought pen space and facilities in order to do business upon a stockyard and the facts showed that refusal of the stockyard company was not unreasonable in the light of existing facilities and the number of market agencies using them.³⁵

In a currently pending case upon the subject,³⁶ it was ruled that regulations of the stockyard company restricting business activities of market agencies and dealers outside the stockyard that diverted livestock from the stockyard were not invalid upon their face. The complainant had refrained from going to a hearing upon the facts and staked the outcome of the proceeding on the invalidity of the regulations upon their face. The United States Court of Appeals

³² 49 F. Supp. 801 (N.D. Iowa 1943).

³³ 1 A.D. 738 (1942).

³⁴ *In re Union Stockyards Company of Fargo*, 13 A.D. 602, 781 (1954).

³⁵ *Smith v. Union Stock Yards Co.*, 9 A.D. 588 (1950); *Flynn v. Kansas City Stock Yards Co.*, 12 A.D. 14 (1953).

³⁶ *Producers Livestock Marketing Ass'n. v. The Denver Union Stock Yard Co.*, 15 A.D. 638 (1956).

reversed,³⁷ and the United States Supreme Court has granted certiorari.³⁸ An additional aspect of the situation is presented in another pending proceeding in *In re Belt Rail Road and Stock Yards Company*,³⁹ in which the Department complains that a stockyard company has refused stockyard services to the wholly-owned dealer subsidiary of a cooperative market agency pursuant to stockyard company regulations limiting a market agency and any related organization to either the selling or the buying side of a transaction although regulations issued by the Secretary under the act do not go this far. In *Carnes v. St. Paul Union Stockyards Co.*,⁴⁰ it was found that the stockyard company was justified in excluding from its premises a partner in a market agency who had been suspended from the Livestock Exchange for misconduct in dealings with shippers, but an injunction to prohibit the person from operating in the livestock commission business in the future was denied. Another court case on the subject is *Nashville Union Stockyards, Inc. v. Grissim*,⁴¹ in which the plaintiff was denied an injunction to keep the defendant, a commission merchant, from entering the stockyard premises to conduct his business because the bill was without equity. The duties of the stockyard company as a public corporation were discussed, however, in the Court's opinion which said that "we fail to see anything in the Packers and Stockyards Act that requires defendant or his employer to transact all of their business . . . on complainant's premises . . ." ⁴²

The rendering of stockyard services by market agencies has been the subject of controversy with respect to the question of livestock sold for a principal who does not have good title because the livestock was stolen, unpaid for, or subject to a chattel mortgage. In the administration of the act a market agency is not considered to violate the act when it sells such livestock and remits the proceeds to its principal if it does not know or have reason to know that the seller is not the true owner.⁴³ Insofar as the law of a state regarding the liability of factors for conversion is concerned where the com-

³⁷ *Producers Livestock Marketing Ass'n v. United States*, 241 F.2d 192 (10th Cir. 1957).

³⁸ *Benson v. Producers Livestock Marketing Ass'n.*, 353 U.S. 982 (1957).

³⁹ P & S Docket No. 2276 (1957).

⁴⁰ 175 Minn. 294, 221 N.W. 20 (1928).

⁴¹ 153 Tenn. 225, 280 S.W. 1015 (1926).

⁴² *Id.* at 1019.

⁴³ *Spence v. Southwest Commission Co.*, 15 A.D. 920 (1956).

mission firm's principal does not have good title to the livestock sold, the prevailing view seems to be otherwise and the act has been held not to supersede state law in this respect.⁴⁴

*Houfburg v. Kansas City Stock Yards Company of Maine*⁴⁵ also finds that the question of the liability of a stockyard company to an employee of a market agency for injury due to a defective water trough is to be settled under state landlord and tenant law and not under the act.⁴⁶ The Court said that "subject to reasonable regulation, the right to control and conduct the business of a stockyard company remains in the company just as it did before the enactment of the Act."⁴⁷

C. Trade Practices Violating the Act.

A great deal of the administrative enforcement of the act is pursuant to section 312 which makes it 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 the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock."⁴⁸ Of course, insofar as stockyard companies and market agencies are concerned, this section overlaps to some degree section 307 prohibiting unjust, unreasonable or discriminatory practices in connection with the furnishing of stockyard services and section 304 prescribing reasonable stockyard services upon reasonable request.

Many and varied practices at stockyards have been proscribed in formal proceedings as violative of the act. Numerous kinds of re-

⁴⁴ *John Clay & Co. v. Clements*, 214 F.2d 803 (5th Cir. 1954); *Sig Ellinson & Co. v. DeVries*, 199 F.2d 677 (8th Cir. 1952); *Seymour v. Austin*, 101 F. Supp. 915 (D. Ore. 1951); *Kelly v. Lang*, 62 N.W.2d 770 (N. Dak. 1954); *Walker v. Caviness*, 256 S.W.2d 880 (Tex. Civ. App. 1953); *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W.2d 39 (1947), *cert. denied*, 332 U.S. 768 (1947); *Citizens State Bank of Dalhart v. Farmers Livestock Coop. Co.*, 165 Kan. 96, 193 P.2d 636 (1948); *Mason City Production Credit Ass'n. v. Sig Ellinson & Co.*, 205 Minn. 537, 286 N.W. 713, *cert. denied*, 308 U.S. 599 (1939); *Moderie v. Schmidt*, 6 Wash. 2d 592, 108 P.2d 331 (1940); *First Nat. Bank v. Siman*, 67 S.D. 118, 289 N.W. 416 (1939). *Contra*, *Sullivan Co. v. Wells*, 89 F. Supp. 317 (D. Neb. 1950). *Cf.* *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 Mont. 66, 230 P.2d 955 (1951).

⁴⁵ 283 S.W.2d 539 (Mo. 1955).

⁴⁶ Citing *Acker v. United States*, 12 F. Supp. 776 (N.D. Ill. 1935), *aff'd*, 298 U.S. 426 (1936), *Farmers Union Livestock Ass'n. v. St. Paul Union Stockyards Co.*, 97 F. Supp. 539 (D. Montana 1951), and *Fort Worth Stockyards Co. v. Brown*, 161 S.W.2d 549 (Tex. Civ. App. 1942).

⁴⁷ *Supra* note 45 at 544.

⁴⁸ 42 STAT. 167 (1921), 7 U.S.C. § 213 (1952).

straint of trade and monopoly have been prohibited such as recognition by market agencies of a "turn" system among dealers in the sale of stocker and feeder cattle to the exclusion of other prospective buyers,⁴⁹ monopoly of the business at a stockyard in particular types of livestock,⁵⁰ bribing of market agency employees by a dealer to secure favored treatment in the sale of livestock,⁵¹ giving livestock truckers gratuities to influence them in consigning livestock to a market agency for sale on behalf of the shipper,⁵² selling livestock exclusively to a particular buyer,⁵³ and the turning over by order buyers of orders to purchase for filling by dealers.⁵⁴

There is too a long list of various unfair, discriminatory, or deceptive practices other than those of a restraint of trade nature which have been forbidden as the result of formal proceedings. Some of these are self-evident such as the false accounting by market agencies for consigned livestock, the making of false records, failure to remit to the consignor the rightful amounts due him, etc. In addition to practices that are of a *malum in se* nature, there have been many other cease and desist orders issued against market agencies on conflict of interest grounds, for example, the selling of consigned livestock by a market agency to its employees or to itself for speculative purposes.⁵⁵

One of the most newsworthy items of unfair dealing during recent years concerned proceedings against 56 hog dealers at a stockyard for bribing weighmasters to give them false weights, that is, to reduce the weight falsely when the dealers purchased hogs or to increase the weight falsely when they sold, or both. The evidence of the violations consisted of testimony by some of the weighmasters involved and tapes from electronic weight recorders which had been secretly installed for months under a number of livestock scales at the stockyard to check the weights recorded by the weighmasters. Two of the cases were appealed and the administrative decisions and sanctions upheld.⁵⁶

⁴⁹ *In re* Berigan, 16 A.D. 503 (1957).

⁵⁰ *In re* Clancy, 16 A.D. 313 (1957).

⁵¹ *In re* McNulty, 13 A.D. 345 (1954).

⁵² *In re* Crosby, 2 A.D. 228 (1943), *aff'd*, *Midwest Farmers Inc. v. United States*, 64 F. Supp. 91 (D. Minn. 1945).

⁵³ *Id.*, *In re* Crosby.

⁵⁴ *In re* Chicago Commission Co., 10 A.D. 495 (1951).

⁵⁵ See *e.g.*, *In re* Haas Commission Co., 2 A.D. 211 (1943).

⁵⁶ *Cella v. United States*, 208 F.2d 783 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *Meyer v. United States*, 211 F.2d 406 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954).

Administrative sanctions for violations of Title III include not only the issuance of a cease and desist order under section 310 or 312 of the act (the violation of which is subject to civil penalties of \$500 for each day of violation) or an order under section 401 for the keeping of complete and accurate records (the violation of which is subject to criminal penalties) but also an order suspending a registrant for a "reasonable specified period." This authority for suspending registrants for violation of the act is given by supplementary legislation,⁵⁷ and has been upheld in *Cella v. United States*.⁵⁸ By this legislation the Secretary may also prescribe the filing of bonds by market agencies and dealers and may suspend registrants for failure to file bonds or for insolvency. Formal disciplinary proceedings, that is, those looking to the issuance of a cease and desist order, the suspension of a registrant or an order commanding the keeping of records may be instituted only by Department officials except that an informal complaint concerning the furnishing of stockyard services may serve as the formal complaint if the Director, Livestock Division, Agricultural Marketing Service, so determines.⁵⁹

D. Reparation Proceedings Under Title III.

Additionally Title III makes available reparation proceedings to those who seek money damages for violations of Title III pertaining to rates or charges or the furnishing of stockyard services. To form the basis for a reparation award a complaint even though informal must be filed within 90 days after the accrual of the cause of action. Reparation cases usually involve claims of failure to render reasonable stockyard service or violation of the act by unfair or deceptive practices or devices rather than unreasonableness of rates or charges. Frequently they concern such matters as livestock lost or stolen at the stockyard, inaccurate weighing of livestock, overcharges by order buyers or dealers or other similar grievances in which the complainant may be reimbursed by a money award. An award of this kind in an unusual situation was that in *Illinois Packing Company v. Union Stock Yard and Transit Company of Chicago*,⁶⁰ where it was decided that the stockyard company had failed to furnish reasonable

⁵⁷ 57 STAT. 442 (1943), 7 U.S.C. § 204 (1952).

⁵⁸ 208 F.2d 783, 790 (1953).

⁵⁹ See Rules of Practice Governing Proceedings Under the Packers and Stockyards Acts, 9 C.F.R. § § 202.1, 202.6(b) (1949).

⁶⁰ 15 A.D. 1101 (1956), 16 A.D. 305 (1957).

stockyard services concerning cattle being held for packers which died from continuous exposure to extreme heat. Reparation awards if not paid must be sued upon in a district court of the United States.

Section 308(b) provides that reparation liability may also be enforced by a complaint in any district court of the United States of competent jurisdiction and that the reparation provisions of the act do not abridge or alter common-law or statutory remedies but are in addition thereto. In *Kirk v. St. Joseph Stock Yards Co.*,⁶¹ which involved an action brought originally in a United States district court for reparation under the act, the stockyard company was found not to have breached the act by failing to provide a watchman to guard from dogs lambs being fed at the stockyard. It was pointed out that the owner of the lambs had consigned them to himself in care of a market agency which had leased the facilities from the stockyard company for sheep feeding purposes, that under the stockyard company's tariff feeding of livestock was under the supervision of the owner, that special services such as watchmen were available by special agreement, that neither the owner of sheep nor the market agency had made arrangements for a watchman and that it was not illegal discrimination for the stockyard company to provide a watchman for Swift and Company which also fed sheep at the stockyard and had requested and paid for watchman service.

The doctrine of primary jurisdiction, however, was applied in *Kelly v. Union Stockyards & Transit Co. of Chicago*,⁶² where certain dealers complained that they were denied credit by the stockyard company by being taken off the "open order" list because they were alleged to have participated in the bribing of weighmasters. The complainants sought damages and an injunction but the Court decided that the issues concerned facts and technical matters which should first be passed on by the Secretary of Agriculture.

E. Judicial Review.

Judicial review of decisions and orders under Title III, except for reparation cases (and revocation of a brand inspection authorization under section 317 of the act which is not subject to judicial review) is obtained under the so-called Hobbs Act.⁶³ This act supersedes

⁶¹ 206 F.2d 283, 287 (8th Cir. 1953).

⁶² 190 F.2d 860 (7th Cir. 1951).

⁶³ 64 STAT. 1129 (1950), 5 U.S.C. § 1032 (1952).

the review procedure formerly applicable under the Urgent Deficiencies Act of 1913,⁶⁴ with respect to orders of the Interstate Commerce Commission and made applicable to orders under the Packers and Stockyards Act by section 316 of the Packers and Stockyards Act. Jurisdiction is vested in the United States Courts of Appeal by the Hobbs Act and in the Supreme Court on a petition for certiorari.

F. Regulation of Live Poultry Handling Under Title V.

In Title V of the act, designed to suppress unfair, deceptive and fraudulent practices and devices in the handling of live poultry for consumption in large centers of population, the Secretary is authorized and directed to ascertain the cities where such practices or devices exist and the markets and places in or near such cities where live poultry is received and handled in sufficient quantity to be an important influence on the supply and price of live poultry. After public announcement of designated areas by the Secretary, no person except a packer under Title II or a railroad can lawfully engage in, furnish or conduct any service in connection with the receiving, buying, selling, feeding, weighing, loading, unloading, etc., of live poultry in the designated area without a license from the Secretary of Agriculture. Licensing covers transportation, coop rentals and even handling at the retail level.

A license may be refused an applicant after opportunity for a hearing if the Secretary finds that the applicant is unfit because within two years prior thereto he engaged in any practice of the character prohibited by the act or because he is financially unable to fulfill the obligations he would incur as a licensee. Licensees may also be suspended for up to 90 days for any violation of the act and may be revoked for flagrant or repeated violations. Title V also adopts the provisions applicable to packers in Title II and the provisions of Title III with respect to rates and charges and regulations and practices.

G. Scope of Act's Coverage.

The formal administrative proceedings pending on October 1, 1957, illustrate the wide scope of the act's coverage. These proceedings concern alleged violations of Titles II, III and V and relate

⁶⁴ 38 STAT. 220 (1913).

to such subjects as discriminatory pricing by packers, unfair advertising by packers, false weights, monopoly of the sheep market at a stockyard by a dealer, "kickbacks" of one kind or another from packers or packer-buyers to dealers, market agencies or auction stockyards, fraudulent markups in price for livestock purchased by packers on an order basis from dealers, loans by a dealer to commission firm salesmen, misuse of shippers' proceeds by market agencies, failure to pay by a dealer for livestock purchased, the charging by a market agency or a live poultry handler of commissions different in amounts from those in the schedule filed with the Secretary, the selling of livestock in which a market agency has an interest in competition with consigned livestock, false accounting by market agencies to their principals and the making of false records.

Of course it is true in the administration of this act as well as generally under other regulatory statutes that the formal proceedings represent only a small fraction of the informal administrative work done. The administrative staff is located principally in the field rather than in Washington, D. C., with a market supervisor located at each principal stockyard and informal complaints or grievances running into the thousands are handled and adjusted locally.

Highly important too in addition to formal proceedings proscribing violations of the act are the regulations issued by the Secretary under the act.⁶⁵ These specify in considerable detail the obligations of persons subject to the act and also contain an enumeration of trade practices banned as well as procedure to be followed in connection with the purchase and sale of livestock or poultry.

Under the regulations market agencies, dealers and licensees must be registered and bonded.⁶⁶ A market agency may not use shippers' proceeds for its own purposes prior to payment to the shipper.⁶⁷ Such agencies are required to keep records and to make them available for inspection by owners of livestock.⁶⁸ Market agencies may not sell or dispose of consigned livestock to any person in whose business the market agency has a financial interest or to any person who has a financial interest in the market agency, unless the nature of the relationship is disclosed, and then only if the purchaser's bid exceeds

⁶⁵ 9 C.F.R. § 201.1-201.96 (Supp. 1956).

⁶⁶ *Id.* § 201.10, § 201.31(a).

⁶⁷ *Id.* § 201.40.

⁶⁸ *Id.* § 201.43, § 201.45.

that of other bidders.⁶⁹ Circulation of false information about market conditions is forbidden.⁷⁰ Sales are to be made on the basis of actual weights shown on the scale ticket.⁷¹ Scales are required to be accurate and tested and scale operators to be competent.⁷² Sales are to be made to the highest bidder without intermingling and not conditioned on sales of other consignments.⁷³ A person registered both as a market agency and dealer can buy livestock out of consignments only at a price higher than the highest available bid and if resold at a profit on the same day he must remit the profit to the consignor.⁷⁴ A market agency may not clear or finance dealers, split commissions, employ packers or dealers, or be owned or financed by packers or dealers.⁷⁵ Reasonable care and promptness is required in yarding, feeding, watering, weighing, and handling livestock to prevent waste of feed, shrinkage, injury, death or other avoidable loss.⁷⁶

H. Changes in the Regulated Industry and Problems in Administration of the Act.

It is obvious that great changes have occurred in the marketing and processing of livestock since the act became effective. In 1922 there were 78 stockyards posted under the act which included all stockyards meeting the statutory provisions for coverage. At the end of August 1957, 571 such yards were posted under the act out of an estimate of between 900 and 1,000 subject to posting; 1,981 packers were filing reports; there were 13 designated areas under Title V, and 1,176 live poultry licensees; 1,814 registered market agencies and 4,345 dealers, of whom 2,587 were packer-buyers.

In 1921, most livestock was sent to market by rail and stockyards were located at rail centers where the packing establishments were also concentrated. Over the years since then truck transportation of livestock has increased until it now predominates over rail shipment, decentralization of slaughtering has taken place and much of the livestock needs of packers are filled by direct purchases from

⁶⁹ *Id.* § 201.47.

⁷⁰ *Id.* § 201.53.

⁷¹ *Id.* § 201.55.

⁷² *Id.* § 201.71.

⁷³ *Id.* § 201.58.

⁷⁴ *Id.* § 201.59.

⁷⁵ *Id.* § § 201.61-201.67.

⁷⁶ *Id.* § 201.82.

farms or ranches or at country buying points rather than at terminal stockyards. "Terminal markets are, with few exceptions, becoming local markets, drawing most of their salable receipts from immediately adjacent trade territory."⁷⁷

While the number of persons and operations subject to the act has increased, the Secretary of Agriculture has revealed in "Report on Current Activities and Problems Under the Packers and Stockyards Act" issued April 4, 1957, that the number of positions in the organization for the administration of the act was 260 in 1922 whereas in recent years appropriations have allowed for only about 100 employees.

The Secretary's report also explains that since World War II the emphasis in administration of the act has been upon trade practices and particularly the practices of buyers and sellers of livestock at stockyards. The report describes the main problem areas of administration at the present time as (1) the matter of posting and supervising the stockyards which should be posted under the act but which have not been posted due to lack of adequate funds, (2) the question of how much increased emphasis should be given to trade practices concerning livestock buying and packer operations including merchandising, (3) the question of how investigations and proceedings should be carried forward with respect to practices in the distribution of nonlivestock products by chain stores, dairy products manufacturers, etc., who meet the definition of "packer" under the act, and (4) the adequacy of information concerning the objectives and the results of programs under the act.

⁷⁷ UNITED STATES DEPARTMENT OF AGRICULTURE, SUGGESTIONS FOR IMPROVING SERVICES AND FACILITIES AT PUBLIC TERMINAL STOCKYARDS 4 (1952).