Reparations Procedure Under the Perishable Agricultural Commodities Act of 1930

by

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REPARATIONS PROCEDURE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT OF 1930

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I. INTRODUCTION

Among the manifold duties of the Secretary of Agriculture is one that has been largely ignored by the legal profession and by the general public. There have been no scandals to engage the attentions of a legislative investigating committee or of newsmen, and there have been but few important cases involving opinions likely to catch the eye of a law review editor.

Nevertheless in the fiscal year 1959 the Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Regulatory Branch, received over 2320 complaints. Of these cases 2313 were closed including 951 cases in which friendly settlements were effected, with payments amounting to a total of $856,171.77. Moreover, in addition to the complaints filed and handled by the Fruit and Vegetable Division, it was estimated by the Department that the Washington office and the five field offices answered over 8000 inquires by telephone, wire, or letter from shippers and receivers seeking counsel and advice; and thereby assistance was given in settling thousands of disputes which never reached the stage of filing even an informal complaint with the Department.[1]

The complaints received by the Department involved charges of unfair practices by various individuals or corporations against dealers, brokers, and commission merchants licensed to engage in the interstate carlot produce business. On June 30, 1959 there were 24,955

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[1] DEP'T OF AGRICULTURE, ANNUAL PROGRESS REPORT OF REGULATORY BRANCH, FRUIT AND VEGETABLE DIVISION (1959). This report is labeled "not for publication" but the Department has given permission to use the figures in it for this study. It will be cited hereinafter as ANNUAL PROGRESS REPORT 1959.

licenses in effect, a slight decrease from the total of 25,032 in effect at the end of June 1958.[2] The figures on licenses and the slightly decreasing trend are not much different from those over the preceding five years.[3]

The "Industry Conference on the Perishable Agricultural Commodities Act," was held in Washington, D. C. on June 27-28, 1958. At this conference representatives of the United States Department of Agriculture[4] and leaders in the fresh fruit and vegetable industry reviewed the objectives and the administration of the PACA. A general agreement that the Act or the regulations needed some amendments seems to offer an opportunity for the legal profession to examine the workings and procedures of the PACA with special attention to the judicial functions of the Secretary in administering it.[5]

Before 1930 the Department of Agriculture had had some experience in the regulation of an entire industry. It had been ordered to regulate the meat and stockyards industries under the Packers and Stockyards Act of 1921.[6] But the Packers and Stockyards Act was enacted to break up monopolies and the "unfair trade practices" which were commonly thought to accompany the big trusts.[7] When the enactment of the Perishable Agricultural Commodities Act was being considered, the problem was not one of unfair trade practices growing out of large concentrations of economic power, but rather one of unrestricted competition which led to unfair methods, or, in many cases, dishonesty.[8] There had never been any great threat of monopoly in the producing areas. By 1900 the existence of a fleet of refrigerator cars owned and operated by the Santa Fe Railroad System had effectively destroyed the monopoly which Armour had

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[2] ANNUAL PROGRESS REPORT 1959.

[3] ANNUAL PROGRESS REPORT 1955-59.

[4] The Department members were: Mr. S. R. Smith, Director, Fruit & Vegetable Division, Agricultural Marketing Service; Mr. G. R. Grange, Deputy Director, Fruit & Vegetable Division; Mr. J. J. Dimond, Chief, Regulatory Branch, Fruit & Vegetable Division; Mr. J. J. Gardner, Head Complaints Section, Regulatory Branch; Mr. W. E. Paulson, Head Licensing Section, Regulatory Branch; Mr. J. E. Horton, Office of General Counsel.

[5] DEP'T OF AGRICULTURE, REPORT OF CONFERENCE PROCEEDINGS ON PERISHABLE AGRICULTURAL COMMODITIES ACT, WASHINGTON, D. C. (1958).

[6] 42 Stat. 159 (1921), as amended, 7 U.S.C. §§ 181-229 (1958).

[7] FTC, REPORT ON THE MEAT PACKING INDUSTRY (1918-1920).

[8] *Hearings on H.R. 5663 Before the House Committee on Agriculture,* 71st Cong., 2d Sess. (1930). See Statement of Ralph H. Taylor, Executive Secretary, Agricultural Legislative Committee of California. *Id.* at 6-14.

held in the field of refrigerated transportation up until the end of the nineteenth century.[9] There was no monopoly, therefore, in the transportation of fresh fruits and vegetables from the truck gardens of the South and West, and there never had existed the threat of such a monopoly in the East.

The problems of the produce men came much more from the nature of the commodities they were handling than from the existence of giants in the industry. A typical complaint of the shippers in the industry in the hearings before the Committee on Agriculture of the House of Representatives in February of 1930 was this one of Mr. Perham:

> As shippers representing growers of fruits from the Northwest, we feel that this bill is very vital to the success of the fruit industry. Without having an opportunity of viewing yourselves the many abuses in the trade on the unjust rejections and allowances demanded on shipments of perishables, it is probably difficult for you to realize how necessary it is to have this bill passed as quickly as possible so that it will be operative for our next year's crop. Therefore, I am taking the liberty of giving you just one of many instances of these abuses. I could write you pages in our own experience of these abuses.
>
> We have a case in Pittsburgh, Pa., where we sold a buyer two cars of apples, and which he took acceptance of at shipping point on Federal inspections which were first taken before loading the cars, and wired to him. When the cars arrived at destination, the market had declined on these commodities, with the result that the buyer refused to take the cars, claiming they were not what he purchased. We agreed to leave the matter as to whether the quality was what he purchased, to a verification of our Federal inspection at point of shipping to a verification by a Federal inspection at point of destination, which was Pittsburgh. However, the buyer refused to do this. We again agreed to leave the matter to the arbitration board of our national fruit associations, which he also refused to do. The cars sold at a considerable loss. We brought suit against the buyer over three years ago, and the case has not yet come to trial. Through various methods, the buyer's attorneys have been able to delay this case coming to trial at a definite date. This has caused us up to this time, probably as much expense, or nearly so, as the original loss; and yet we are no place.
>
> Where cases arise of rejections and demands for allowances by the trade, unless they run into amounts of around $1000 loss per transaction, it is useless to attempt to force through the courts any

[9] LEECH & CARROLL, ARMOUR AND HIS TIMES 159 (1938).

> redress. We have each year dozens and dozens of cases where buyers demand allowances from $100 to $200 and $300 per car; and the cheapest way out of it is to concede to these demands. This has caused a bad situation in the markets; for even if one buyer in the market desires to handle his business on a clean, ethical basis, you can see how he would be handicapped against a competitor who demands and receives allowances unjustly. The buyer who wants to conduct his business on an ethical basis is put to a disadvantage, because if he accepts a car at the invoice price, and his competitor in turn has received an allowance on his car, the competitor may sell to the same trade at a less price.[10]

The testimony before the committee, and the complaints in the produce press, were generally in accord with the above quoted statement.[11] The main abuses complained of were unreasonable rejections of goods, misrepresentation of quality, place of origin, size or weight, and lack of a prompt and efficient remedy for such wrongs.[12] The fluctuations in this market are violent even in normal times, the producers and dealers depending to a large extent on climatic conditions for the amount and quality of the commodities. The commodities have to be turned over in a hurry; they cannot be stored for long. These factors make the market a natural one for speculators and fly-by-night operators who hope to make a quick profit and do not have the financial responsibility to take sizeable reverses.[13]

Before 1930 there was a general demand on the part of both shippers and buyers that the federal government regulate the produce business.[14] The witnesses told the Committee that mere state licensing could not take care of the situation in interstate commerce.[15] Whoever was to regulate the produce trade in interstate commerce would have to be able to regulate the parties at either end of the transaction.[16]

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[10] *Hearings on H.R. 5663, supra* note 8, at 20-21.

[11] *E.g.,* Statement of J.C. Briggs, President, Maine Potato Shippers and Growers Association. *Hearings on H.R. 5663, supra* note 8, at 28-37.

[12] *Hearings on H.R. 5663, supra* note 8, at 28-37. See questions of Congressman Kincheloe to Mr. Briggs, *id.* at 37, and to Mr. Adkins, another witness, *id.* at 26-27.

[13] In 1959, as in 1958, most of the licenses suspended by operation of law were suspended for failure to pay a reparations award. Often these licensees were already in bankruptcy.

[14] There was some small opposition from organizations like the Produce Reporter, which operated a conciliation service. But voluntary conciliation had not been effective on a large scale.

[15] See statement of Ralph H. Taylor, *supra* note 8.

[16] For an account of the workings of one market, see DEUPREE, THE WHOLESALE MARKETING OF FRUITS AND VEGETABLES IN BALTIMORE, 17 THE JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (1939).

The industry was ready to pay a sufficient fee for a license to defray the cost of administering the Act.[17]

The Perishable Agricultural Commodities Act was passed in 1930. The purpose of this article is to examine its operation during the past thirty years, to evaluate the Act and its administration, and to suggest improvements. The principal interest will be the special reparations process whereby the Secretary of Agriculture determines whether, and to what amount, an individual or corporation has been injured by a violation of the Act by a licensee. The Secretary may, if he finds a violation of the Act and the resulting damage to the individual, order that the injured party be paid the amount of such damage by the licensee. To a lawyer this procedure looks like a judicial process, and raises questions as to the function of adjudication in the process of administrative law.[18]

II. The Informal Procedures

From the figures and facts mentioned above it can be seen that the advice and counsel of the administrators of the Agricultural Marketing Service has a considerable influence in settling the rights of parties engaged in disputes over interstate sales of produce.[19]

The informal procedures of the Secretary in regulating the interstate produce business, besides enforcement of licensing regulations and advice on individual disputes, largely take the form of education of the industry and counsel by the on-the-spot administrators. The Department believes that a complete understanding and coordination between the industry and the Department are essential in a continual solution of the industry's problems on a satisfactory and effective basis.[20] The administrators have constantly to keep in mind not only the interests of the individuals in trouble but also the overall interests of the industry where there is question of a violation of the Act. Moreover, the Fruit and Vegetable Division is primarily a

[17] The original fee was to be a sum of not less than $10, which has been raised twice; the present fee is not more than $25. 70 Stat. 726 (1956), 7 U.S.C. § 499c(b) (1958).

[18] For a general study of this problem, see Chamberlain, Dowling & Hays, The Judicial Function In Federal Administrative Agencies (1942).

[19] "Produce" is the trade term for "Perishable Agricultural Commodities" defined in the Act as: "any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character; and cherries in brine. . . ." 54 Stat. 696 (1940), 7 U.S.C. § 499a(4)(A) (B) (1958).

[20] Dep't of Agriculture Press Release No. 1885-58, July 1, 1958.

service organization, rather than a regulatory organization.[21] It was probably the fact that the whole Department of Agriculture was originally conceived as a governmental service rather than as a regulatory body that enabled the Fruit and Vegetable Division to propose as a topic of its Industry Conference in June 1958, the question whether the produce industry still needed a regulatory law at all. This was, of course, a loaded question. It is fairly obvious that if federal regulation were taken away there would be no regulation at all, and everybody agrees that many of the reasons for the enactment of the PACA in 1930 still potentially exist in the fiercely competitive and violently fluctuating produce business. This was the Department's way of beginning the Conference with a ringing endorsement of the Act.[22]

The administration of the PACA began under a couple of men who were universally respected by the industry, and who made themselves available for consultation at any time, on any question pertaining to a produce deal. This tradition has been built up and continued by the present administration. When any produce men's convention is held, such as that of the Western Packers and Canners Association, the association will often procure office space for members of the Fruit and Vegetable Division precisely for the purpose of enabling the members to avail themselves of the advice and mediation of the members of the Department. In addition, the Division will hold "clinics" at various markets to inform the dealers of latest developments and to give advice, counsel, and mediation service. In October 1957, PACA-Marketing Clinics were conducted at Weslaco, Laredo, and Hereford, in Texas; and in April 1958, a similar clinic was held for the terminal market dealers at Atlanta, Georgia.[23] The Department would appear to think that meetings of this type improve relations between the Department and the produce industry, and afford those attending a better opportunity to learn and understand the programs and procedures of the Regulatory Branch, Fruit and Vegetable Division.

The Department of Agriculture is organized into Offices and Serv-

[21] Even the Regulatory Branch spends a good deal of time in "educational" work in the industry. The 1958 *Annual Progress Report* lists about twenty conventions attended by the personnel.

[22] "Industry spokesmen emphasized their views that the PAC Act is needed as much today as it was when enacted 28 years ago." Dep't of Agriculture Press Release, *supra* note 20.

[23] The Chief of the Branch was in attendance at these clinics himself.

ices. This study deals with the Office of the Secretary, under whom is placed the Judicial Officer in charge of writing the Secretary's quasi-judicial opinions; the Office of General Counsel, which has a PACA Division charged with developing the facts and law for the Secretary's decisions; and the Agricultural Marketing Service, Fruit and Vegetable Division, which is charged with the administration of the Perishable Agricultural Commodities Act of 1930[24] and other statutes.

The Fruit and Vegetable Division has a Regulatory Branch which carries out the regulatory provisions of the Acts administered by the Division. The Director of the Division is in Washington, D.C. and there are Deputy Directors in the markets of Chicago, Fort Worth, Los Angeles, Winter Haven (Fla.), and New York City. The Directors (and the Deputies) generally preside over the produce markets in those large market areas, and through assistants handle other smaller markets. Their primary function is service, which is exemplified by the detailed reports sent to the industry on growing, marketing, and transportation conditions.[25] It is important to realize that the Department attempts to co-ordinate all its services, for the Secretary may, as will be seen later, take official notice of any publication of his Department. These publications—daily, weekly, monthly, annually, occasionally—set out the findings of the Secretary on everything from how to make a cake to how to bring a complaint under the PACA. Actually, the Secretary would have to have the wisdom of Solomon, the perseverance of Hercules, and the lifetimes of the patriarchs to know all the things he knows officially.[26] But his administration works under that fiction, and does a fairly creditable job.

Mr. J. J. Dimond, the present Chief of the Regulatory Branch of the Fruit and Vegetable Division, contributed an article to one of the Secretary's publications, *The Agricultural Situation*, about four

[24] For an organizational chart of the Department of Agriculture and an explanation thereof, see: HOUSE COMM. ON GOVERNMENT OPERATIONS, 85th CONG., 1st SESS., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES BY THE COMMITTEE ON GOVERNMENT OPERATIONS: AGENCY RESPONSE TO QUESTIONNAIRE: PART 1—DEPARTMENT OF AGRICULTURE 14 (Comm. Print 1957).

[25] In S. N. Beard Company, 9 Agri. Dec. 893 (1950), the Secretary took judicial notice of both his standards for bunched carrots. In the same case quotations appearing in *Federal-State Market News Service*, published by the Agriculture Department, were used to fix the amount of damages.

[26] On this problem generally see, 2 DAVIS, ADMINISTRATIVE LAW TREATISE, Ch. 15, "Official Notice" (1958).

years ago, giving in ordinary non-legal language the procedures for bringing up a claim before the Secretary under the PACA.[27] The tone of the article, which I shall attempt to reproduce in abridging it, is that of a sympathetic administrator, and shows how the Department feels about complaints in their initial stages.

"Have you ever had trouble getting paid for produce you shipped?" the article begins. Suppose a farmer producing fruits and vegetables has shipped a carload of produce across country to a dealer at a distant terminal market. The produce was to be sold by the dealer for the account of the shipper, with the shipper agreeing to pay the transportation and the dealer's selling commission. At the time of the shipment the produce was of good quality as per agreement, and it arrived in good condition. "You already have an investment of several hundred dollars. But you are in no position to keep tab on the merchant hundreds and thousands of miles away to whom you have entrusted your merchandise." [28]

Mr. Dimond advised the farmer to wait a reasonable length of time for an accounting and for the share from the sale of the produce. When some time has elapsed and there has been no accounting, the farmer is to wire, phone, or write letters to the dealer. If there is still no answer, the farmer is pictured in a quandary, finding that court action will probably cost more than the farmer could hope to recover. But there is a remedy. "There is no reason why you should be bilked on a transaction of this type. And generally speaking there is no reason to pay additional money to recover what is justly yours." [29]

The Regulatory Branch of the Fruit and Vegetable Division is the place to contact. A phone call to one of the offices of the Regulatory Branch is sufficient to get advice, without charge, on the farmer's rights and liabilities in connection with the transaction. Mr. Dimond says:

> Though the title of the act may sound formidable and the pro-

[27] Dimond, *Fruit and Vegetable Growers Protected by the Perishables Act*, 39 Agricultural Situation, p. 13 (August, 1955).

[28] The same sympathetic tone is detectable in Childress, *Do you Know Who Is Required to Be Licensed Under the Perishable Agricultural Commodities Act? What Protection Do Growers and Handlers Have Under the Act?*. 84 Market Growers Journal, p. 5 (September, 1955). At the time of writing that article Mr. Childress was a member of the Regulatory Branch.

[29] The Dimond and Childress articles indicate why there is not likely to be any forum shopping on the part of complainants.

> visions of the act are couched in a legal terminology, the activities of the Department's Regulatory Branch for fruits and vegetables are strictly down to earth. Speedy action is taken on complaints filed with the branch; investigations are a part of a normal day's business . . . . The Branch is always on the lookout for persons engaging in unfair practices in buying and selling fruits and vegetables.[30]

The Regulatory Branch will advise the farmer to submit his entire file of papers on the deal to them. As soon as the papers and the statement of complaint are in, the PACA office of the Agricultural Marketing Service goes into action. The dealer against whom the complaint is filed is given notice of the nature of the complaint, and is given an opportunity to make satisfactory adjustments. An investigator will be assigned the complaint, and he assembles the records with the help of both the complainant and the respondent. And finally, if a formal complaint is filed, a copy of the investigation report is sent to the complainant and to the respondent.

The Rules of the Office of the Secretary provide that records in adjudications and formal rule-making proceedings be made available to interested persons at the Office of the General Counsel, Department of Agriculture.[31] An examination of these records uniformly showed that the informal process, at least in the cases that later reached a formal stage, was calculated to make a record that would bear scrutiny for proper notice of complaint and for probable cause in the complaint. It has been suggested that the Department promulgate a rule that it will not look into a case on which it has received any complaint not accompanied by the documents required for proof of a violation. It seems that the industry would prefer to have the Department look into all complaints, and then advise the complainant of the situation if the complainant does not have proper written proof to substantiate his claims.[32]

There is one problem that was mentioned in interviews with members of the industry regarding the alleged practice of unwarranted rejection of produce by large chain stores and other large buyers. Usually PACA complaints are not filed against such buyers, and

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[30] *Supra* note 27, at 13.

[31] 7 C.F.R. § 1.4 (1959).

[32] Owing to membership practice, the members of the industry have a good bit of sympathy for dealers who do not have writings to prove their deals. But they have even more sympathy for the licensee who cannot get discovery proceedings to obtain records of the complainants.

consequently it would appear that big buyers and chains may be getting away with rejecting shipments when they do not want them, but that small buyers have to take shipments in similar circumstances or have complaints filed against them under PACA. When parties do not complain to the Department about rejections, the Department has no specific basis for knowing of the alleged violation, and, ordinarily, will not enter the matter even informally. Members of the industry thought that complaints and threatened complaints against large buyers are practically non-existent because the individual shipper or terminal market operator believes that he cannot take the risk of alienating such customers though he might be successful in forcing them to accept the particular shipment in question. Consideration will be given to a rule for this sort of case in the recommendations later in this article.

The informal proceedings of the Department are based on section 499 g (a):

> If after a hearing on a complaint made by any person . . ., or upon failure of the party complained against to answer a complaint duly served within the time prescribed . . ., and the Secretary determines that the commission merchant, dealer or broker has violated any provision of section 499b of this title, he shall, *unless the offender has already made reparation to the* person complaining, determine the amount of damage . . . and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed by the order.[33]

The informal proceedings generally follow the outlines of Mr. Dimond's article cited above. They consist typically of a letter from the Director or Deputy Director of the Division, to the person accused of an unjustified rejection, and a careful consideration of his reply. The complainant has to furnish to the Director the record (usually photostatic copies) of the correspondence involved, the sales slips, bills of lading, invoices, and of any other relevant documents. The respondent is asked to furnish the originals or copies of any writing he may have in connection with the transaction. The Department will also communicate with parties not involved in the complaint to verify prices reported or credits granted by the par-

[33] 52 Stat. 953 (1938), 7 U.S.C. § 499g(a) (1958). The italicized part of the statute is considered authority to proceed in an informal way toward amicable settlements.

ticipants in connection with consigned shipments. This leads to the problem of the extent of an investigation.

Should the Department go into the other transactions of a licensee against whom a complaint has been filed, or should it confine its investigation to the matter complained about? Generally, if there is just a question of a single sale to a dealer, there would not be much point in going into his complete records. But where a broker or dealer is selling on consignment or under a joint account and fails to account for the proceeds, there can be danger of great pecuniary loss to a number of unsuspecting sellers. Some produce men have said that once a violation of the provision requiring prompt accounting on consigned shipments has been discovered, the Department ought to examine the records of such respondents as thoroughly as possible to develop all the facts, for a complete investigation would show the extent of the respondent's violations. In other words, when a person has been doing business on credit it is important for the creditors to know if their investment is risky, and how risky it is.[34] Some Department officials seem to feel that such investigations are necessary for effective enforcement of the Act.

It should be mentioned that one of the Department's weapons of enforcement is that of suspension or revocation of license to operate under the Act.[35] This weapon is used mainly as a threat, for even a suspension means that the commission man, dealer or broker is quite effectively put out of business. However, during fiscal 1959 of the 24,955 licenses in effect only four licenses were revoked.[36]

The revocation of a license is a formal matter and may only be done for cause. This question brings us to the matter of the formal proceedings under the reparations section of the Act, for the main reason for revoking a license is several repeated violations of the Act, and/or repeated failures to pay reparations awarded by the Secretary.[37]

But before going on to the formal proceedings the process of arbitration should be mentioned. Arbitration, like the informal pro-

[34] See, *e.g.*, the sad tale in Lake Shore Growers Cooperative, 17 Agri. Dec. 199 (1958).

[35] The suspension or revocation of license is the main weapon mentioned by Mr. Dimond. Dimond, *supra* note 27.

[36] ANNUAL PROGRESS REPORT 1959 at 8.

[37] There is also a provision that the license is suspended until the recipient of a reparations order pays the ordered amount. 50 Stat. 729 (1937), 7 U.S.C. § 499g(d) (1958).

ceedings themselves, has no explicit authorization in the Act. The arbitration process is also skipped in the regulations under the Act, but it is well known to the administrators. Arbitration puts the case completely in the hands of the administrators, and the agreement form to be signed is designed to keep the case out of court and away from the technicalities of law.[38]

The writer has been unable to find any settled rules for the arbitration procedure by questioning lawyers (who would not consent to arbitration), members of the industry, and members of the Department's legal staff. The arbitrator, apparently, is always some member of the administrative staff. The one case on the subject[39] has not questioned the arbitration; it only held that the lower court would have to follow the arbitration award unless it was manifestly erroneous. The litigants had agreed to the arbitration as per an agreement form printed by the Department. The Municipal Court of Appeals for the District of Columbia held that the arbitration was like any other arbitration, and it could be set aside only "for such reasons as are sufficient in other courts: for exceeding the power conferred by the submission, for manifest mistake of law, for fraud and for all the reasons on which awards are set aside in the court of law or chancery." [40] Thus the arbitration seems to be only an ordinary commercial arbitration conducted by the members of the regulatory division. While the informal proceedings seem to aim at this result, the members of the industry seem to prefer the ordinary formal procedure before the Secretary.

The formal procedure has the advantage of being set out in the statute as the ordinary remedy when the parties prefer not to go to the state or, in appropriate cases, the federal courts for ordinary contract remedies. While those courts are open to the litigants, it appears that the members of the industry prefer the Secretary's procedure. This is the sort of practical result of administrative law that Mr. Brown speaks of in his article, *Administrative Commissions and the Judicial Power.*[41] For all practical purposes the remedy taken by the complainants against licensees under the Act is the Secre-

[38] The formula used is simply: "The undersigned agrees to accept as final and comply with arbitration rendered by your office in the matter of a disagreement with -------- involving ------."

[39] Mancuso v. L. Gillarde Co., 61 A.2d 677 (D.C. Mun. Ct. App. 1948).

[40] *Id.* at 679.

[41] 19 MINN. L. REV. 261 (1935).

tary's procedure—informal, when that is sufficient, and formal where the informal procedure has failed.[42]

To sum up: The informal proceeding is instituted by any interested person desiring to complain of any violation of any provision of the Act by a licensee. The complainant files his complaint by telegram, letter, or by a simple statement of facts, setting forth the essential details of the transaction complained of.[43] The informal complaint should contain the name and address of each person and of the agent, if any, representing him in the transaction involved; the quantity and quality or grade of each kind of produce shipped; date of shipment; car initial and number, if a freight car is involved; the shipping and destination point; the details of the sale or transaction; the amount of damages claimed.[44] The Department will help develop these details, but it will not proceed without a certain minimum of tangible or written evidence. When the complaint is reduced to writing, the Department will look for attached exhibits including shipping documents, letters, telegrams, invoices, manifests, inspection certificates, accounts sales, and the like.

To aid the investigator in developing the material facts, the Agricultural Marketing Service has produced two volumes of *Digest of Decisions of the Secretary of Agriculture under the Perishable Agricultural Commodities Act* designed to help the administrator properly and consistently to interpret the statute and the regulations in the manner insisted upon by the Judicial Officer of the Secretary.[45] Thus the investigator has a quasi-legal research tool to help him find the proper law and to develop the proper facts. The use of the *Digest* also helps the investigator or Director to convince the complainant or the respondent that there is or is not a case presented by the facts.[46]

If the investigation discloses that no violation of the Act has occurred, the Department takes no further action, and the person

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[42] Actually there has been some complaint that the Department in its desire to solve all complaints informally, allows the respondent too much time in delays before the complainant is advised to make his complaint formal.

[43] 7 C.F.R. § 47.3(2) (1959).

[44] 7 C.F.R. § 47.3(2)(i-viii) (1959).

[45] These digests are not completely accurate, for they tend to make the cases say what the administrators want them to say. But they are useful. They are not generally available, but are given to libraries that request them.

[46] There are copies of *Agriculture Decisions* in many administrative offices of the Department. Whether investigators check the *Digest* reference against the case or not is unknown; some have said in interviews with the author that they did as a general practice.

filing the informal complaint is so informed.[47] If the Department thinks there has been a violation, the Director, "in an effort to effect an amicable or informal adjustment of the matter," is supposed to give written notice to the person complained against of the facts concerning the complaint made, and is directed to afford the person an opportunity, within a reasonable time fixed by the Director, to demonstrate or achieve compliance with the proper requirements of the Act and the regulations promulgated thereunder.[48] The letters indicate that the Secretary deems a period of twenty days as a reasonable time within which to achieve a settlement or compliance.

In the event of non-compliance the complainant is advised by the Department to make out a formal complaint.[49] It should be noted that if the investigation fails to convince the investigator that there very likely has been a violation, the Department washes its hands of the case unless the complainant can bring forward more evidence. This action does not preclude the complainant from taking any action his lawyer deems wise in a court of proper jurisdiction, but it could quite effectively cut off the remedy afforded by the Secretary's formal proceedings.[50] However, the Department does not work that way. The complainant may, and on occasion does, file a formal complaint with the Secretary and avails himself of the remedy on his own initiative. The Department takes the position that such is his privilege.

There are certain advantages in substantive law in trying the case under the Secretary's rules, but if there has been any "forum shopping" on this account it has escaped my observation. The members of the trade interviewed think that the Department knows its rules best, and they are likely to get a decision in accordance with the understandings of trade.

III. Formal Proceedings

If the procedure just outlined fails to effect an amicable or informal adjustment and indicates the probability of a violation of the Act, the person filing the informal complaint may, if further proceedings

[47] 7 C.F.R. § 47.3(3)(b)(1) (1959).

[48] 7 C.F.R. § 47.3(3)(b)(2) (1959).

[49] 7 C.F.R. § 47.6(a) (1959).

[50] The way the regulations are phrased seems to invite this result. "If such [informal] investigation discloses that no violation of the act has occurred, no further action shall be taken and the person filing the informal complaint shall be so informed." 7 C.F.R. § 47.3(3)(b)(1) (1959).

are desired, file with the Regulatory Branch of the Fruit and Vegetable Division of the Agricultural Marketing Service a formal complaint setting forth the information and accompanied by the papers used in the informal complaint, together with a statement of the amount of damages claimed, the basis therefore, and the methods of their determination.[51] It is fairly easy for the Department to keep track of the respondents in the cases that come before it, for to be a respondent in a case one has to be a licensee under the PACA; consequently the Department has the correct name and address. The name and address of the complainant must also be given before the Department will investigate a complaint.[52]

The complaint, to be sufficient basis for an award by the Secretary, must allege facts which established the jurisdiction of the Secretary over the controversy and which will substantiate an award if the award is to be given. The Ninth Circuit laid down several rules for sufficiency of complaint to uphold an order of the Secretary for reparations in *Iwata v. Western Fruit Growers, Inc.*[53] There the complaint alleged that the action was brought under the provisions of the Perishable Agricultural Commodities Act of June 10, 1930, and that the district court had jurisdiction by reason of the Act. No other ground of jurisdiction was asserted. The court held that the complaint should give the grounds for jurisdiction, *e.g.*, the respondent was a licensee or was eligible for a license under the Act, and that there was a transaction of produce in interstate commerce. Moreover, the charge should be stated clearly; in *Iwata* the complaint merely charged the defendant with nonpayment, which did not constitute failure to account truly and correctly within the meaning of the Act. The Court said:

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[51] 7 C.F.R. § 47.6(a) (1959).

[52] There is a possibility that a respondent will not receive personal notice of the proceeding against him. For if the registered mail is refused or returned undelivered, the Secretary may send a notice by regular mail to the same address and use the certificate of the person who mailed the same matter by regular mail as a proof of service. If the respondent refuses to accept the complaint, it would appear that the Department should serve him by United States Marshal. If there had been a mistake in the address, the regular mail is hardly calculated to remedy that mistake and is not likely to make the service personal. Examination of the files did not reveal any abuse of service by regular mail. However, that does not necessarily indicate that the provision is not needed. When the provision is such that abuse is possible or that its need is questionable, it should be changed on the grounds that it is either dangerous or mere surplusage. The statute (48 Stat. 586-87 (1934), 7 U.S.C. § 499f(c) (1958)) requires service "by registered mail or otherwise" and it seems that "or otherwise" should be interpreted as meaning some other method equally or better calculated to achieve the aim of giving notice.

[53] 90 F.2d 575 (9th Cir. 1937).

> Since the complaint in this action does not allege that appellee was a commission merchant, dealer, or broker, or that the transaction between the appellant and the appellee was a transaction in interstate or foreign commerce, or that appellee has failed or refused truly and correctly to account promptly to appellant in respect of that transaction, or that appellee has in any other respect violated Section 2 of the Perishable Agricultural Commodities Act, we must and do assume that the complaint filed with the Department was equally defective, and that no valid reparation order was or could be predicated thereon.[54]

The Department makes quite sure that its complaints include the basis for jurisdiction, and that the charges are clear. Amendments are rather freely admitted as long as they do not prejudice the respondent by referring to events occurring prior to the PACA statute of limitations.[55]

The limitation section reads: "Any person complaining of any violation of any provision of section 499b of this title by any . . . [licensee] . . . may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition . . . ." [56] The nine-month limitation applies to the informal proceedings and does not mean that the formal proceeding must be brought within that time.[57]

The respondent is customarily given twenty days to answer the complaint, and this he may do in a letter in triplicate which contains: (1) a precise statement of the facts which constitute the grounds of defense, including any set-off or counterclaim, and specifically admits, denies, or explains each of the allegations of the complaint, unless he is without knowledge, in which case he must so state; or (2) a statement that the respondent admits all of the allegations of the complaint; or (3) a statement containing an admission of liability in an amount less than that alleged in the complaint, and a denial of

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[54] *Id.* at 578.

[55] 46 Stat. 534 (1930), 7 U.S.C. § 499f(a) (1958). The period is nine months after the cause occurred.

[56] *Ibid.*

[57] Schoenburg, 14 Agri. Dec. 380 (1955): "It is well established that only the filing of an informal complaint within the nine-month period prescribed by the act is necessary to invoke the jurisdiction of the Secretary. If the informal complaint is filed within that period, the formal complaint may be filed after the nine months have expired. The Auster Co., 8 Agri. Dec. 798 (1949)."

The same effect is had when the licensee files a counterclaim against a licensee complainant. Anonymous, 8 Agri. Dec. 403 (1949).

liability as to the remaining amount. The respondent may waive the hearing in his answer.[58]

Failure to file an answer within the time prescribed constitutes a waiver of hearing and an admission of the facts alleged in the complaint.[59] If the facts deemed admitted are considered insufficient to support the amount of reparations sought, the proceedings continue only on the question of damages.[60] The one who makes this decision on the sufficiency or insufficiency of the answer is the Judicial Officer of the Department.[61]

The amendment of complaints and of answers is rather freely permitted by application to the Hearing Officer, for the whole proceeding is subject to an appeal in the form of a trial de novo in the appropriate federal district court. The Judicial Officer has freely permitted amendments so that the litigants can have all the issues decided without the necessity of re-hearings or of appeals to the district court.[62]

As soon as the pleadings in the reparations proceedings have been filed, or at the time that the answer to the complaint is due, all the files of the case are transferred from the Fruit and Vegetable Branch to the Office of the Hearing Clerk. At that point the case becomes a charge of the Office of the General Counsel for the Department, and an Officer in Charge of the case is appointed. This officer is not one of the regular hearing examiners from the Office of Hearing Examiner, but is usually a member of the General Counsel's staff in Washington or a member of the staff of the Regional Counsel, whichever may be the more convenient.[63]

The complainant may be any person who has been injured by

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[58] 7 C.F.R. § 47.8(b)(3) (1959).

[59] A default in the filing of an answer required or authorized under the regulation may be set aside and the party in default allowed ten days within which to file an answer by the examiner or by the Judicial Officer upon a motion made within a reasonable time after the time for filing the answer has expired if, in the judgment of the examiner or the Judicial Officer, there is a good reason for granting such relief. 7 C.F.R. § 47.25(e) (1959). This rather vague standard for re-opening a defaulted case is probably justified by the failure to receive notice, or some other reason that is important to the Secretary's jurisdiction. Aroostook Growers, Inc., 14 Agri. Dec. 759, 787 (1955), *reopened after default,* 15 Agri. Dec. 1331 (1956).

[60] 7 C.F.R. § 47.8(c) (1959).

[61] This duty is usually delegated to the presiding officer.

[62] Charles R. Allen, Inc., 15 Agri. Dec. 388 (1956).

[63] Since the hearings under the PACA do not come within the Administrative Procedure Act, the custom has been introduced of having a member of the General Counsel's PACA section hear any oral arguments and preside over the case generally.

the alleged infraction of the Act. He may not be a party to any disciplinary proceeding which may be instituted as a result of the informal complaint, and this latter class may not have any status in the proceeding except possibly as witnesses under subpoena.[64]

The respondent, on the other hand, must be a licensee under the Act or someone who is required to be a licensee but is not. If a produce dealer is supposed to be a licensee but through ignorance or some other just cause he has not obtained his license, he will be allowed to obtain a license—possibly on the payment of a fine for his previous illegal operation.[65] The respondent, however, is not on an equal footing with the complainant unless the complainant is also a licensee under the Act. The Secretary does not have jurisdiction to decide counterclaims where the complainant—the respondent on the counterclaim—is not within his jurisdiction as a licensee. Presumably the non-licensee cannot commit an unfair practice prohibited by the Act, for he is, of course, neither a commission man, a dealer, nor a broker in the interstate commerce in produce. The Act had as its object the suppression of unfair practices by a licensee, and hence such practices by a non-licensee are beyond the scope of the Act.[66] The Secretary seems to be acting properly in denying such counterclaims a hearing, for he is not charged with all the offenses that may be committed by produce men, but only those forbidden by section 499b and committed by licensees. Occasionally, this results in unequal treatment, but it must be conceded that the Congress intended a certain amount of inequality in procedure, which it thought was balanced by the needs of the absent seller.[67]

In this sort of proceeding intervention by other parties is precluded except to the extent that the examiner or hearing officer determines that a person shows a substantial interest in the outcome of the proceeding. Such an intervenor is permitted to file a brief and to be heard in oral argument.[68]

The officer in charge is generally the hearing officer and is addressed as "Mr. Examiner." [69] As officer in charge, he has charge of all the orders, rulings, and motions in the case; he grants stays and

[64] 7 C.F.R. §§ 47.3(1) 47.3(3)(c) (1959).
[65] Long Island Produce & Fertilizer Company, 10 Agri. Dec. 1125 (1951).
[66] Provision is made only for payment of reparations by licensees.
[67] S. REP. No. 6, 71st Cong., 1st Sess. (1929).
[68] 7 C.F.R. § 47.12 (1959).
[69] 7 C.F.R. § 47.11 (1959).

continuances, gives orders for depositions, and generally conducts the formal proceeding up to the filing of a "Proposed Order" with the Judicial Officer.[70]

Since the parties need not be represented by counsel, and, in fact, often are not so represented, the hearing officer has to see to it that the proceeding is conducted as fairly as possible where both parties are ignorant, and maybe even suspicious, of legal terms and procedures. His job is to build a record and to insist that proper proof be presented, and, in so far as possible, incompetent evidence be excluded.[71]

To develop the case fully, the hearing officer has power to subpoena or to grant subpoenas either to the complainant or to the respondent.[72] And he may "do all acts and take all measures necessary for the maintenance of order at the hearing and for the efficient conduct of the proceeding." [73]

One of the things the examiner or hearing officer may do is to conduct a pre-hearing conference when it seems to him that such procedure will expedite the proceeding. This he may do at any time prior to or during the course of the oral hearing, requesting the parties or their counsel to appear to consider the simplification of issues, the necessity or desirability of amendments to pleadings, the possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof, the limitation of the number of expert or other witnesses, or such other matters as may expedite and aid in the disposition of the proceeding.[74] Often, perhaps even customarily when the parties live at great distance from each other, this hearing is scheduled immediately before the oral hearing.[75] When there is no oral hearing or for some other good reason such a conference is impracticable, the examiner may request the parties to correspond with him for the purpose of accomplishing any of the objects for which a pre-hearing conference is normally held. The examiner in that case forwards copies of letters and documents to the parties as the circumstances require. This correspondence is not part of the

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[70] *Ibid.*

[71] This task is very difficult when one of the parties is not represented by counsel.

[72] 7 C.F.R. § 47.11(c)(4) (1959).

[73] 7 C.F.R. § 47.11(c)(9) (1959).

[74] 7 C.F.R. § 47.14 (1959).

[75] For practical reasons the best time for such a pre-trial conference is immediately before the oral hearing.

record, but the examiner submits as part of the record a written summary where any agreement is reached.[76]

The Secretary is allowed to make regulations as to the books and records which the licensees have to keep under the Act.[77] Bills of lading, diversion orders, paid freight and other bills, car manifests, express receipts, confirmations and memorandums of sales, letter and wire correspondence, inspection certificates, invoices on purchases, receiving records, sales tickets, copies of statements, bills of sales to customers, accounts of sales, papers relating to loss and damage claims against carriers, records as to reconditioning, shrinkage and dumping, daily inventories by lots, a consolidated record of all rebates and allowances made or received in connection with shipments handled for the account of another, an itemized daily record of cash receipts, ledger records in which sales as shown by sales tickets can be verified, and all other pertinent papers relating to the shipment handling, delivery and sale of each lot of produce must be preserved for a period of at least two years.[78] These records are required to be stored in an orderly manner and in keeping with sound business practices. They must be filed in order of dates, by serial numbers, alphabetically or by any other proper methods which will enable the licensee to promptly locate and produce the records. Moreover, every licensee must permit any duly authorized representative of the Department to enter his place of business during business hours and inspect such accounts, records and so on, as may be material in the investigation of complaints under the Act.[79] A licensee who will not permit such inspection will be subject to suspension of his license.[80]

Regulations, such as those summarized above, make available to the hearing officer anything the licensee may have that would be material to the disposition of a reparations case. Normally, he need not resort to subpoena; a telephone call or a wire to the nearest representative of the Department will get him what he needs by return mail.[81]

One other point should be mentioned before coming to the actual

[76] 7 C.F.R. § 47.14 (1959).
[77] 46 Stat. 535 (1930), 7 U.S.C. § 499 i (1958).
[78] 7 C.F.R. § 46.19 (1959).
[79] 7 C.F.R. § 46.20 (1959).
[80] 46 Stat. 535 (1930), 7 U.S.C. § 499i (1958).
[81] Such is the reported experience of presiding officers.

hearing process and the process of decision, and that is the question of the Department's inspection service, which plays an important role in determining questions of quality of produce involved in a transaction. It has been found possible to grade and to establish standards for all sorts of fresh vegetables and fruits. The standards have been published and agreed upon by the industry and the Department. The inspectors have been chosen after passing rigid tests as to their ability to judge between the different grades and standards in products. If the first inspection is not satisfactory, the person asking for the inspection may have an "appeal inspection," for which there is a standard form of request.[82] The Department's standards for apples, bunched beets, freshly shelled lima beans, husked corn on the cob, and the like are objective, and the chances of error on the part of the inspectors is remarkably small.[83] Standards differ, in proper circumstances, for different times of the year. There is a set of standards for "summer and fall" pears, and another set for "winter" pears.[84] Occasionally, a trade magazine will ask for different standards in the interests of the trade. This aspect of the service gives a person a great deal of confidence in the Secretary's reparations decision based thereon. Actually, the Secretary's inspections are rarely if ever challenged in reparation proceedings.[85]

With misunderstanding substantially eliminated as to the meaning of many of the trade terms, with an inspection system furnishing written reports concerning the quality and condition of produce, and with the Secretary's requirement that licensees keep their records for a period of at least two years, judgment can very often be given without the necessity of having an oral hearing. These same facts justify the statutory provision eliminating the oral hearing in cases involving $500 or less.[86]

The Secretary's regulations provide that whenever it appears to the examiner who is assigned to a proceeding that the proof may be fairly and adequately presented by use of the "informal" procedure provided in this section, he is to suggest to the parties that they con-

[82] 7 C.F.R. § 51.24 (1959).

[83] The dealers and Department employees are unanimous in this regard. The inspector's word is usually final unless there is extraordinary reason to think otherwise; only then is the appeal inspection taken.

[84] 7 C.F.R. § 51.1260-1321 (1959).

[85] Certainly none is to be found in the *Agriculture Decisions*. Many of the "private" inspection services use mostly ex-Department employees.

[86] 48 Stat. 586 (1934), 7 U.S.C. § 499f(c) (1958).

sent to the use of such procedure.[87] The respondent may waive an oral hearing in his answer.[88] The request for the shortened procedure need not originate with the examiner; any party may address a request to the examiner asking that the shortened procedure be used. When the examiner does suggest the shortened procedure, he is to set a period of time in which the parties may indicate their consent to the suggestion. Usually the period is a maximum of 15 days, at the end of which time the examiner notifies the parties that the shortened procedure will or will not be used. All these requests, suggestions, notices, and answers are to be filed with the hearing clerk of the Department and become a part of the PACA docket.[89]

In the shortened form the complainant may file an opening statement and such depositions as he has applied for, or he may simply file the depositions in lieu of an opening statement. Within ten days after receiving the opening statement or deposition, the respondent is to put in any requests he has for orders for depositions and within five more days he must have his answering statement of facts filed with the hearing clerk. These statements may be accompanied by supporting documents or other evidence, and the hearing clerk sends copies to the opposing party. Normally, the shortened procedure is ended with the reply of complainant to the respondent's answering statement.[90] At this point the hearing examiner files with the hearing clerk a notice that the parties may file proposed findings of fact, conclusions, and orders within ten days after service of such notice. Upon the expiration of the date set for the filing of proposed findings, the examiner is to prepare his report, and the same procedure is followed, as will be outlined, for the conclusion of the more formal oral hearings.[91]

One can guess from the description of the shortened form of formal[92] proceeding that it will be quicker and less drawn out than an oral hearing which may take months to arrange. The members of the trade seem to think that the shortened form is preferable. At the June 1958 PACA Conference in Washington, the industry repre-

87 7 C.F.R. § 47.3(b)(2) (1959).

88 7 C.F.R. § 47.8(b) (1959).

89 7 C.F.R. § 47.10 (1959).

90 7 C.F.R. § 47.20(k) (1959).

91 *Ibid.*

92 These hearings or proceedings are "informal" only in the sense that there is no hearing involved. The better term would be "shortened" proceedings.

sentatives were unanimous in their affirmative answer to the question whether the Department should continue to follow the shortened procedure wherever possible.[93] The only criticism relating to formal procedures that the industry offered in that conference was that it takes too long to get a decision from the time that a formal complaint is filed. During 1957 when the Department settled some 208 formal complaints, the average time from formal complaint to decision was thirteen months.[94] When the delays that often occur in the negotiations in the informal stage are added to the period of time taken by the formal procedure, the total elapsed time can be around two years.

Of all the elements in the formal proceeding, the oral hearing usually takes the most time. The members of the industry suggested at the conference that the $500 limit be raised to about $1500. It was recalled that the limit of $500 had been set in 1930 because that amount was pretty close to the average price for a carload of produce. At the present time the same standard would call for an amount in the neighborhood of $1500. The old amount of $500 no longer seems realistic.[95] The Department figures show that during the past four years 33% of the cases on which an oral hearing was requested were in the $500-$999 category; 22% in the $1,500-$1,999 category; and 34% over $2,000.[96] These figures tend to show that formal proceedings could be speeded up if it were not necessary to hold oral hearings on many cases where relatively small amounts of money are involved. In view of the relatively easy availability of objective records of the facts, an amendment to the Act raising the amount of money to $1,500 is recommended.

In general, the rule of evidence in the formal proceeding is put in a negative way: "The examiner shall exclude, insofar as practicable, evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely." [97] This rule leaves the matter to the discretion of the examiner, but the examiners are usually people who have been

[93] FRUIT AND VEGETABLE DIVISION, DEP'T OF AGRICULTURE, REPORT OF THE CONFERENCE PROCEEDINGS ON PERISHABLE AGRICULTURAL COMMODITIES ACT, JUNE 27-28, 1958, WASHINGTON, D.C. 6 (1958).

[94] *Id.* at 13.

[95] Some produce dealers have said that if a claim does not involve more than $200, they do not bother with it unless too many such disputes originate with the same party.

[96] REPORT OF THE PACA CONFERENCE, *supra* note 93, at 6.

[97] 7 C.F.R. § 47.15(f)(1)(iii) (1959).

trained in law, and must base their orders upon evidence acceptable in a court of law. The whole proceeding may be heard *de novo* before a district court, and so the examiner must see to it that there is evidence that will stand up under the Federal Rules of Civil Procedure.[98] The examiner may decide not to exclude proffered evidence but will accept it with the reservation that he will not consider it if it is not proper evidence.[99] All testimony from witnesses in oral hearings and upon depositions is under oath or affirmation, and is subject to cross-examination.[100]

If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, he is supposed to state briefly the grounds for his objections; an exception is not necessary. The rulings of the examiner become part of the transcript, but this is not necessarily true of any argument on the admissibility or non-admissibility of evidence.[101] However, any offer of proof is to be included in the evidence; it must be a brief statement describing the evidence to be offered.[102]

One of the problems of evidence in a hearing is the vast amount of facts and data of which the Secretary, in his judicial capacity under the PACA, can take official notice. He is entitled to take official notice of any publication of any part of the Department of Agriculture and the contents thereof. Whenever a litigant asks that the Secretary take official notice of the contents of one of the Department's publications, he is asked to supply the hearing officer and the other party to the litigation with copies.[103] When official notice

[98] Alexander Marketing Co. v. Harrisburg Daily Market, 9 F.R.D. 248 (M.D. Pa. 1949).

[99] The Department's doctrine and practice is set out in Goldsby-Evans Produce Company, 9 Agri. Dec. 228, 236-7 (1950):

> Numerous objections were made by counsel for respondent to the introduction of evidence by complainant at the hearing. All of these objections were overruled. While it may be that some of these objections would have been sustained if made in a trial of the action in a court of law, it must be remembered that these cases are decided by the Secretary of Agriculture, or his delegate, not by the presiding officer who conducts the hearing. The presiding officers are expected to resolve any doubt in favor of admissibility of evidence. . . . Careful consideration has been given to respondent's objections. No useful purpose would be served by undertaking to discuss each of them. It is sufficient to say that we are of the opinion that complainant has sustained the burden of proving its contentions by a preponderance of competent evidence before us.

[100] 7 C.F.R. § 47.16(d) (1959).

[101] 7 C.F.R. § 47.15(f)(2) (1959).

[102] 7 C.F.R. §§ 47.15(f)(2)(i), 47.15(f)(8) (1959).

[103] This practice is not explicitly in the rules, except for the copy to be furnished the adversary. The practice is for the examiner to require one for himself and one for every interested party. 7 C.F.R. §§ 47.15(f)(6)(i), 47.15(f)(7) (1959).

is so taken there does not seem to be any objection to the practice. However, when the hearing examiner takes official notice of publications or regulations of the Department not adverted to by either the complainant or respondent, it would seem that there is a problem with regard to official notice. This problem will be considered when the process of decision-making is taken up later. With regard to the official notice taken for use in the formal proceeding, whether oral or the shortened form, the regulations of the Secretary are sound and they are followed.[104]

The reparations proceedings under the PACA are not under the Administrative Procedure Act, for they are proceedings subject to a trial *de novo* in federal district court.[105] Still, because the Secretary's decision is final in so many instances, it is well to examine the formal procedures to see whether the elements of a "fair trial" are present.

The Department has no direct interest in the outcome of the case, and the hearing examiners are quite fair and impartial and disinterested. Moreover, their work and their proposed orders are all reviewed by the Judicial Officer of the Department, who is independent of all but the Secretary. The review by the Judicial Officer is really the ultimate judgment in the case; he makes the final order from the whole record compiled under the hearing officer, including the hearing officer's recommended order, upon which the litigants have the opportunity to submit briefs.[106]

Interviews with four of the General Counsel's staff indicate that the hearing officers work constantly in PACA litigation and build up a familiarity with the decisions interpreting the PACA. They are also thoroughly familiar with the Secretary's rules of procedure. Often the parties are not represented by counsel, and the hearing officer has to see to it that the rules are observed. To do so he is almost obliged to act as counsel for both sides. This experience leads him to ask questions, the answers to which make certain there is evidence to support either the complainant or the defense in their essential elements. There is a certain zeal in establishing a record; for the Judicial Officer or the chief lawyer for the PACA exercises a

[104] This seemed evident from files examined at the Department; there were no complaints of surprise by the use of official notice.

[105] The Administrative Procedure Act, § 5(1) explicitly excludes from its operation "any matter subject to a subsequent trial of the law and the facts de novo in any court." 60 Stat. 239 (1946), 5 U.S.C. § 1004(1) (1958).

[106] 7 C.F.R. § 47.23 (1959).

supervisory function over the hearing officers. If the record shows too many "off the record" conferences or statements, the superior officers will want to know why.[107] Moreover, any party may file with the hearing clerk a timely request, in affidavit form, for the disqualification of the examiner. A denial of such a request becomes, of course, part of the record.[108] No person who has any pecuniary interest in any matter of business involved in the proceeding, or is related within the third degree by blood or marriage to any of the persons involved in the proceeding is allowed to serve as examiner in these proceedings.[109] The Department has made a good attempt to see that the hearing examiner is impartial.[110]

When all the written evidence has been collected, and when the respondent has asked that there be an oral hearing on the reparations case,[111] the examiner orders the proceeding set down for oral hearing at a time that he decides is convenient to the complainant and the respondent. Unless the parties otherwise agree, the hearing is required to be held at the place in which the respondent has his business.[112] The respondent by demanding his oral hearing, can therefore make the complainant travel many hundreds of miles if the complainant wishes to be present at the oral hearing, which very often develops nothing in the line of new evidence.[113] This consideration has led members of the trade to favor enlarging the amount required for a right to a hearing.

A verbatim record is made of the hearing. Copies of this record may be obtained from the reporter's company, and one copy is sent to Washington to be part of the hearing examiner's file on the case.[114] The hearing is only for the purpose of taking evidence, and argument is all written unless there be a special request for oral argument before

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[107] This was the hearing officer's reason in an explanation to a Canadian lawyer as to why he should cease asking "to go off the record," during an oral hearing on PACA Docket No. 7015 in Chicago, May 1958.

[108] 7 C.F.R. § 47.11(b) (1959).

[109] 7 C.F.R. § 47.11(a) (Supp. 1960).

[110] Impartiality as between the parties is much easier for the hearing officer to preserve than it is for the investigators. The investigating administrators hear a lot of talk about the reputations of others in the business, and can, and on occasion do, form opinions that "so-and-so is a shady operator."

[111] 7 C.F.R. § 47.15(b) (1959).

[112] 7 C.F.R. § 47.15(c) (1959).

[113] Some dealers complain that some respondents are using the PACA reparations proceedings in the same stalling way as dealers had used the court proceedings before PACA.

[114] 7 C.F.R. § 47.15(h) (1959).

the Secretary's Judicial Officer.[115] The examiner may permit oral argument at the hearing or at some other time prior to transmitting the record to the Secretary. He may also limit the argument to any extent that he finds necessary.[116] The general practice is to restrict argument to written briefs. Having completed the taking of the evidence, the hearing examiner must transmit to the hearing clerk, the transcript of the testimony and the original and all copies of the exhibits not already on file in the hearing clerk's office. He must certify to the hearing clerk that "to the best of his knowledge and belief, the transcript is a true, correct, and complete transcript of the testimony given at the hearing, except in such particulars as he shall specify, and that the exhibits transmitted are all the exhibits received in evidence at the hearing, with such exceptions as he shall specify." [117] When the hearing clerk has all the documents on file, and the parties have handed in all their briefs or proposed findings of fact, conclusions, and order, the examiner, "with the assistance and collaboration of such employees of the Department as may be assigned for the purpose . . . shall prepare, upon the basis of the evidence received at the hearing, and shall file with the hearing clerk, his report." [118] The report takes the form of a proposed final order for the signature of the Secretary, but it may not be served upon the parties, unless and until the Secretary shall have signed it by his Judicial Officer.[119]

In the final decision-making process a factor enters that is not provided for, or insufficiently provided for, in the Secretary's Rules of Practice Under the PACA. It is said that the hearing officer is to make his proposed order, and that this is to be done with the help of such employees of the Department as shall be assigned thereto. The proposed order is, in practice, assigned to a member of the staff of the General Counsel for review before presenting it to the Judicial Officer for his signature. The offices of the General Counsel are in close contact with the administrators in the Fruit and Vegetable Division, and customarily the reviewing lawyer will send the order to the administrative officers for an informal review before it is

[115] 7 C.F.R. § 47.15(g) (1959) allows for argument before the examiner if the examiner will permit it. The practice is not to permit argument before the examiner.

[116] 7 C.F.R. § 47.15(g) (1959).

[117] 7 C.F.R. § 47.19(a)(1) (1959).

[118] 7 C.F.R. § 47.19(d) (1959).

[119] *Ibid.*

published. The purpose of this procedure is to find out whether the Department's experts have anything to suggest in the way of modifying the order to make it conform to the Department's practices or whether some regulation of the Department was overlooked.[120]

If the administrators of the Fruit and Vegetable Division conclude that some other regulation ought to be adverted to, and the reviewing lawyer thinks it necessary in order to do justice to the case, the reviewing lawyer fits it into the final order. The lawyers who work in the Department are diligent both to carry out the Act and to see that a just result is achieved thereunder, but it would seem that when such a situation arises, the reviewing lawyer should recommend to the Judicial Officer that the point be called to the attention of the parties before a decision is made in which the opinion of the administrators is made controlling.[121]

When the Judicial Officer has decided upon his order, he serves it on the parties. The order provides for either dismissal or the payment of a given amount of money within thirty days of the time the order is dated.[122]

Petitions for rehearing, reargument of the proceedings, or reconsideration of the order are made by petition to the Secretary, filed within ten days after the date of service of the order. If the Secretary (Judicial Officer) concludes that the questions raised in the petition have been sufficiently considered in the issuance of the order, he is to dismiss the petition without service on the other party. Otherwise he has the other party served. Of course, the filing of a petition to rehear or reargue or for reconsideration automatically operates to set aside the order pending final action on the petition.[123]

The decisions spoken of as made by the Secretary are actually made by the Judicial Officer of the Office of the Secretary,[124] to

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[120] The administrators do make suggestions for changes in the order—some relatively small, but some important enough to change the decision. See Ligon Produce Co., 13 Agri. Dec. 515 (1954). See also, C. Basil Company, 15 Agri. Dec. 126 (1956), where the presiding officer awarded respondent damages from complainant in the proposed order, and the Judicial Officer ruled that the damages were cancelled out by a counterclaim.

[121] Calling attention to the parties' mistakes may lengthen the proceedings, but the mistakes do not occur frequently enough to prolong the average length of the proceedings.

[122] The time for payment is stayed upon petition for a rehearing or for reargument. 7 C.F.R. § 47.24(a) (1959).

[123] *Ibid.*

[124] Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture,* 26 GEO.WASH.L.REV. 277 (1958).

whom the power of decision has been delegated by the Secretary under the Schwellenbach Act of 1940.[125] The Judicial Officer acts as the final deciding officer where the administrative proceedings involving adjudication or rate-making require an administrative hearing or opportunity therefor. While the Administrative Procedure Act does not require a hearing examiner in PACA proceedings, the Act itself does.[126] The Judicial Officer has no responsibility in any way for investigation, prosecution, or advocacy. His job is simply to make the judgment upon the record sent up to him by the hearing officer. Adoption of the recommendations of the hearing officer is usual, but by no means necessary.[127]

The decisions of the Judicial Officer, in the form of orders by the Secretary, are cast in a formula which includes a preliminary statement showing jurisdiction of the Secretary, the allegations of the parties, and the preliminary steps taken in the proceeding. Then follows a section in which the Judicial Officer sets out his "Findings and Facts," followed by a section on "Conclusions" (of Law) and the Secretary's "Order." Since 1942 the decisions have been issued monthly in a periodical "reporter" entitled *Agriculture Decisions*, which contains all the decisions of the Secretary in an orderly form. The principal statutes concerned, at present, are the Agricultural Marketing Agreement Act of 1937,[128] the Packers and Stockyards Act, 1921,[129] and the Perishable Agricultural Commodities Act, 1930.[130]

With the order of the Secretary promulgated to the parties and published in the *Agriculture Decisions* the function of the Department in adjudicating reparations is finished. However,

> Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held . . . . Such suit in the district court shall be a trial *de novo* and shall proceed in all respects like other civil suits for damages, except

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125 54 Stat. 81 (1940), 5 U.S.C. §§ 516a-516e (1958).

126 The Judicial Officer is also the final deciding officer in reparations proceedings under the Packers and Stockyards Act, 42 Stat. 159, 165 (1921), 7 U.S.C. § 209 (1958).

127 Gus H. Kury, 12 Agri. Dec. 411 (1953).

128 50 Stat. 246 (1937), (codified in scattered sections of 7 U.S.C.).

129 42 Stat. 159 (1921), as amended, 7 U.S.C. §§ 81-231 (1958).

130 46 Stat. 531 (1930), as amended, 7 U.S.C. §§ 499a-499s (1958).

> that the findings of facts and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated.[131]

The main points of the law of the de novo review under a similar reparations provision in the Interstate Commerce Commission Act have long ago been decided by the United States Supreme Court, and they have not been raised for many a year.[132] The de novo review takes the proceeding out of the category of strictly administrative determinations because the decision of the Secretary is subject to a complete examination by the courts.

There remains only the question of the enforcement of the Secretary's order. He does not have the right to issue process and compel payment of the reparations that he assesses, but the statute does give him legal weapons to make his orders effective.

The customary form of the order makes the reparations payable within thirty days of the date of the order. If the licensee does not pay the reparation award within the time specified in the Secretary's order, the complainant may, within three years of the date of the order, file suit in the appropriate federal district court, or in any state court having general jurisdiction of the parties.[133] For federal courts the orders, writs, and processes of the Court "may in these cases run, be served, and be returnable anywhere in the United States." [134] The case is tried in the district court like other civil suits for damages, except that the findings and orders of the Secretary are to be given the weight of prima facie evidence as in the appeal procedure. However, the petitioner is not to be liable for court costs in the lower courts.[135] And if his suit is successful, he is to be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.[136] The successful litigant before the Secretary, therefore, gets something less than a judgment, but he does have some advantage, as indicated, in suing before a district court.

However, the most powerful enforcement weapon is the authority of the Secretary to suspend a license for failure to pay reparations

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[131] 46 Stat. 534 (1930), as amended, 7 U.S.C. 499g(c) (1958).

[132] *E.g.*, Meeker v. Lehigh Valley Railroad Company, 236 U.S. 412 (1914).

[133] 46 Stat. 534 (1930), as amended, 7 U.S.C. § 499g(b) (1958).

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.* However, the Secretary does not award attorney's fees as part of a reparation award. There is no statutory warrant for allowing them. Gammage, 2 Agri. Dec. 20 (1943).

awards.[137] The suspension of license ordinarily puts the licensee out of the interstate produce business, if the suspension is to last for as much as thirty days. During the fiscal year 1959 there were forty-two licenses suspended for failure to pay reparation awards, and in 1958 there were forty-four such suspensions. In 1958 subsequent payment of the reparation awards lifted the suspensions in fifteen cases.[138] Most of the suspensions were not lifted because the affected party had become bankrupt.

The Department does not consider publication of decisions in the *Agriculture Decisions* to be "publicity" in the sense of reaching the whole trade. Large awards and license suspensions are given "publicity," by releasing the decisions for reproduction by the trade papers, such as the *Packer, Produce News, The Produce Reporter, Western Canner and Packer,* and the like. In the minds of the produce industry personnel the publication of facts is likely to be viewed as a separate disciplinary measure in and of itself.[139] The Department's policy on "publication of the facts" has been somewhat restricted, with the approval of the industry. But it might be helpful to the industry to be informed of the total amount of the reparations orders that a given licensee has not paid and not just the first unpaid order resulting in automatic suspension of the license. And, now that *Argiculture Decisions* has become of increasing importance as a vehicle of interpretation of the law and regulations of the Department, the Department should perhaps make a practice of publishing items that would be of general interest to the industry, such as new rulings or precedents established in the various cases.[140]

Since the rules of the Department are so important in both the substantive and procedural aspects of the administration of the PACA, a word ought to be said about the Department's procedures in rule-making. Most of the improvements that might be suggested for the PACA will involve either the changing of present rules or the promulgation of new ones. The rule-making procedure was one of the important items in the "Study of Administrative Organization, Procedures, and Practice," conducted by the House Committee on Gov-

[137] 46 Stat. 534 (1930), as amended, 7 U.S.C. § 499g(d) (1958).

[138] ANNUAL PROGRESS REPORT 1959.

[139] There is a highly developed sense of "My word is my bond" in the industry, and the members are very sensitive regarding their reputations for honesty and for ability to judge produce.

[140] This the Department would do by means of news releases, which are generally reprinted by the various industry organs.

ernment Operations during the last session of Congress; and it will continue to be such in the coming session.[141]

When a rule is no longer necessary or adequate to accomplish the purposes for which it was promulgated, it is amended, suspended, or repealed. The officials having responsibility for administration of the PACA program initiate the change either on their own motion or at the request of interested persons. The Department's general regulations provide for petitioning by interested members of the public for amendment, repeal, or suspension of existing rules, or for promulgation of new ones. Such petitions require prompt consideration.[142] Generally, notice of rule-making is published in the *Federal Register* and interested persons are afforded full opportunity to present their views. But procedural rules applicable to cases before the Department do not have the same rule-making procedures.[143] This exception applies mainly to stays and continuances and other procedural matters left to the discretion of a hearing officer; hence it is not a large exception. Also the procedural rules themselves are drawn up mainly by the Office of the General Counsel in the interests of dispatch and ease of administration. A further consideration is to have uniform procedural rules as far as possible, applicable to the different procedures before the Secretary. Such rules generally also have the approval of the Judicial Officer, who is the final judge in cases under them.[144] Otherwise the applicable procedures laid down in the Administrative Procedure Act are to be followed.[145]

The Fruit and Vegetable Division, Regulatory Branch, determines the need for promulgating a substantive rule. It determines the need on the basis of its own experience, investigation, and consultation with members of the trade who would be affected by the rule.[146] After the initial determination, the Branch in cooperation with the

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141 The American Bar Association is very interested in having these hearings. See statement of Donald C. Beelar, Chairman, Administrative Law Section, American Bar Association, in *Hearings on the Study of Administrative Organization, Procedures and Practice Before a Subcommittee of the House Committee on Government Operations,* 85th Cong., 2d Sess. 60 (1958).

142 7 C.F.R. § 1.28 (1959).

143 *Ibid.*

144 See, HOUSE COMM. ON GOVERNMENT OPERATIONS, 85th CONG., 1st SESS., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES BY THE COMMITTEE ON GOVERNMENT OPERATIONS: AGENCY RESPONSE TO QUESTIONNAIRE: PART 1—DEPARTMENT OF AGRICULTURE 30 (Comm. Print 1957).

145 *Id.* at 33.

146 *E.g.,* the PACA Conference in Washington, D. C., June, 1958.

Office of General Counsel prepares a notice of proposed rule-making. The notice is forwarded in a docket, which includes a statement of the appropriate administrative considerations, to the Office of General Counsel for legal clearance. The General Counsel makes any necessary changes in the document and prepares a legal clearance memorandum when the latter is required. Then the docket is forwarded to the Office of the Hearing Examiners which executes an official notice and forwards it to the *Federal Register* for publication. After hearing or submission of written views the final draft of the rule is prepared by the administrative officials, in cooperation with the Office of General Counsel, taking into consideration all the comments it has received in writing or in the oral hearing. A docket is then prepared for clearance by the Office of General Counsel. After promulgation the rule is published in the *Federal Register.*

Substantive rules adopted by the Department are published in the *Federal Register* upon issuance. In most instances, also, pamphlets containing such rules, statements of policy, and interpretations relating to particular programs, such as the enforcement of the PACA licensing or the Fruit and Vegetable misbranding programs, are also published. In addition, there are news releases for the produce trade journals, and the notices of the pamphlets are printed in the trade journals as well.

The Department told the House Committee,

> There have been no instances in which this Department has refrained from publishing or making available to public inspection opinions or orders in adjudication of cases on the basis that they should be held confidential.[147]

The relations of the Department to the produce trade have been indicated above, and there seems to be no suspicion that the relations are likely to change because of any rule-making procedures, or lack of publicity concerning the rules of the Department.

IV. Conclusions and Recommendations

A rather common complaint among the trade is the length of time that reparations proceedings under the PACA consume. When a respondent makes full use of his rights or customary privileges, in-

[147] "Survey, etc.," *supra* note 144, at 34.

cluding requests for extension of time, the decision can usually be delayed from one to two years after the formal proceedings have been initiated. And, of course, the oral proceedings will take a good deal longer than the "shortened form" because of the necessity of getting a convenient time. In the files there are examples of repeated delays requested by one party or the other for the reason that "the tomato season was just beginning," or the "watermelon season was almost upon them," or the "Texas cantaloupes are in full swing." [148] All of these are good reasons for delays, but it should be recognized that the produce business goes on all year—that the early potato season is followed by the late potato season, which is followed by the preparations for the early potato season. And all during this time, the market has been carrying summer pears, fall pears, and winter pears, June peas and late peas, local season and import season, and the like. Perhaps the hearing officers are too lenient in granting delays of this kind. The Office of General Counsel has given its staff a directive that if the formal proceeding is not cleared up in six months, the presiding officer is to file a report with the Department and state the reasons why.[149]

The greatest time-consumer is the oral hearing and the arrangements the oral hearing entails. One way of eliminating this sort of delay would be to raise the minimum amount involved to $1500, at which point the oral hearing becomes a right of the correspondent. The Conference in Washington in June 1958, recommended that this amendment be made in the statute.[150] The suggested amounts varied from $1000 to $1500. Moreover, there is small indication that prices are going to come down in the immediate future. The relative ease of obtaining reliable evidence on the factual situations by use of official documents or trade documents lends support to the larger amount, for the fact-finding value of the oral hearings is quite limited.[151]

One of the purposes of the Act was to give a speedy remedy, one that would be considerably faster than a court proceeding. With

148 *E.g.*, Barr, 13 Agri. Dec. 1167 (1954).

149 From interview with Assistant General Counsel in July 1958.

150 REPORT OF THE PACA CONFERENCE, *supra* n.93.

151 Since the respondent does not have discovery privileges, he can not bring out many new facts in an oral hearing. The records of the respondent must be kept and be available to the Department for examination at any time during business hours. If discovery were made available to respondents, there would not be much use for oral hearings at all.

the oral hearing reduced in frequency, the time spent on the cases could be materially reduced in that the examiners would be free to set times at the earliest convenience of the parties, rather than to have to take into consideration the itinerary of the hearing officer as well.[152] If the amount of $500 was suited to conditions in 1940 and was thought not to be an unfair curtailment of the rights of respondent then, it would seem that the larger amount today would be as fair.

Some members of the industry have proposed a regulation requiring all buyers and sellers to file a report with the Department whenever a lot of produce has been rejected. Such reports, giving reasons for rejection and other pertinent facts concerning the transaction, could be used by the Department to check on the practices of large receivers without involving the seller specifically in an individual complaint. Members of the Department have wondered whether this could be accomplished by regulation, or whether it would be necessary to amend the Act.[153] It would seem that the Act would not have to be amended to give the Secretary further authority, for he does have power to "make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter (the PACA)." [154] Moreover, section 499f (b) gives any employee of the Department the right to file a complaint "of any violation of any provision of this chapter (the PACA) by any commission merchant, dealer, or broker and may request an investigation of such complaint by the Secretary." [155] The fact that such has not been the practice of the Department could be offset by proper promulgation and publication of the new regulation embodying the new practice. There is the danger that some zealous official of the Department would be eager, in a fit of misdirected righteousness, to "get" the chain stores for their "oppression" of the small merchant. But the danger

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152 The hearing officer operating out of Chicago will try to set up his cases in Topeka, Grand Island, Omaha, Sioux City, and Des Moines, for instance, so that he can cover them all in one trip, instead of arranging an individual trip for each hearing.

153 The legal doubt seems to be based on the fact that this would be a "change" in the Department's interpretation of the Act, and perhaps would not be warranted by the present list of "unfair practices" which should be controlling with regard to the regulations.

154 46 Stat. 537 (1930), as amended, 7 U.S.C. § 499o (1958).

155 46 Stat. 534 (1930), as amended, 7 U.S.C. § 499f(b) (1958).

is no greater if the amendment of the practice is made by statute rather than by regulation.[156]

A rather uniform standard of decision has been in accord with an unwritten policy of the Department to follow a rule of stare decisis in cases of reparations. It is to be noted that the only time in the history of the PACA, when the Department has filed a brief amicus curiae, was the *Dyal* case.[157] The interest of the lawyers of the Department is mainly in the correctness of the interpretation of the Act in line with the policies of the Act. In *Dyal* the court noted the history and consistency of the Department in interpreting the Act, and based its decision to some extent thereon.[158] The key to that consistency over "more than ten years" was the Department's published reports, *Agriculture Decisions.*

It is well established that administrative agencies may depart from the principle of their former decisions and establish new rules of decision. The cases in administrative law have been taken largely from the area of rule-making, rather than from the area of more or less private adjudication.[159] While these cases do not forbid the agencies from changing their rules of decisions, the more consistency there is in the rulings or decisions, the more likely it is that the lawyer will be able to give proper advice to his client. The Attorney General's Report in 1941 found that in almost every instance the agencies expressed the belief that they accorded to the precedents of their respective agencies as much weight as is thought to be given by the highest court of a state to its own prior decisions.[160] Of course, establishing precedents is not an end in itself, but a principle of decision once fairly established should be followed unless overpowering reasons compel its abandonment.

Another factor that influences the Department to follow precedent in deciding cases under PACA is that the Department publishes the opinions with their reasons. If the Department were to publish only the facts and decisions with no reasons given for the decision, perhaps

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156 In fact, such an amendment might be considered to be precisely aimed at making violations more difficult for the buyers who have larger concentrations of purchasing power.

157 161 F.2d 152 (4th Cir. 1947). A member of the Office of General Counsel of the USDA said that the policy of the Department is to file a brief amicus curiae only when there is question of constitutionality of a statute or regulation. The *Dyal* case was the only exception arising under PACA regulations.

158 161 F.2d 152, 159 (4th Cir. 1957).

159 DAVIS, ADMINISTRATIVE LAW 521-562 (1951).

160 S. Doc. No. 8, 77th Cong., 1st Sess. 466 (1941).

it would not feel it necessary to stand by its precedents. But the Judicial Officer does publish his opinions and the reasons for them, citing cases both from courts and from previous volumes of the *Agriculture Decisions*. This practice is an inducement to rely upon the decisions as stating the official interpretation of the Act in individual cases, and the counsel for complainants and respondents so use them.

The regulation of the interstate produce business is directed toward eliminating abuses in a segment of commerce and, postively, furthering good business practices. In such circumstances it is usually desirable that the remedies be availed of in nearly every case. If the case of the large buyers and the chain-stores is to reduce the effectiveness of the PACA remedy, then the suggestion made before that reports be filed in every instance of rejection of merchandise may be necessary to achieve the ends sought by Congress in enacting PACA.

In inquiring how the Department of Agriculture has carried out the objective of Congress we may ask whether the Department has infringed individual rights in carrying out this policy. This "interest in the result" has been characterized as "perhaps the outstanding trait of administrative tribunals." [161] The Department does have an interest in the result; the Fruit and Vegetable Division is most diligent to achieve the results contemplated by the Act. Does this necessary interest affect the fairness with which each case is decided? The general answer to that question would be no.

The discretion of the Department in making and promulgating rules for the trade has been entrusted to men familiar with the produce business. The members of the industry are invited to give their suggestions and opinions whenever any new substantive rules are to be made. The broad scope of "unfair practices" has been interpreted in accordance with the prescriptions of the Act, and with the opinions of the trade. The Department took over a field that had a tradition of regulation by the states through laws on sales of goods. There was nothing new needed in the way of regulation except that a remedy had to be more readily available and less expensive. The Department was given a law and rules to follow. The exercise of discretion was minimal as far as the individual cases were concerned; so there was not so great a temptation to the arbitrary action for which administrative agencies are sometimes criticized. The lack of

[161] COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 20 (1951).

discretionary power, outside the power to try to effect informal settlements of disputed deals, has forced the Department to follow exactly the prescriptions for taking and considering evidence and for deciding in accordance with the regulations and the Act.[162] The zeal of the Department did need some rein in the matter of the definitions of contracts and the remedies to be associated with the definitions. The improvement made by the courts would be more effective if it were written into the regulations.[163]

The Department's rules of procedure are available to the interested parties for the conduct of the reparations proceedings. These rules do, of course, hamper the exercise of discretion, for discretion can be more freely exercised if procedural matters can be settled in accordance with the agency's convenience in each case. The apparent reluctance to publish and promulgate any rules for the "arbitration" so often suggested by the administrators to keep the settlement "informal" is criticized. There is no authorization in the Act for so formal an "informal" proceeding, and to persuade the parties to make the member of the Department an arbitrator does not seem to be within the spirit of the Act. Either it should be formalized, and then it is beyond the scope of the Act; or it should be dropped as a means of settlement. Discretion of the administrators always has a broader range if the agency has not committed itself to any stated bases or principles of decision comparable to the procedural regulations of the Department, but assumes the privilege of deciding each case on its "merits," which permits such departures from the prior criteria of decision as may seem expedient in the particular case. It is true that the parties have to agree to such arbitration before it is undertaken, but there is the distinct possibility that unfair pressures may be brought against a party to bring about his consent. And, having consented, the parties may be in the position of not having the assurance that established procedures and rules of decision will govern the disposition of the particular case.

The PACA system of reparations proceedings combines many of the advantages of the judicial decision with some of the advantages of the institutional decision.[164] The fact that the administrators handle

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[162] 46 Stat. 534 (1930), as amended, 7 U.S.C. § 499f (1958).

[163] The General Counsel for the Department has initiated a review of all the procedures in the Department with a view to their amendment.

[164] See Feller, *Administrative Procedure and the Public Interest—The Results of Due Process*, 25 WASH. U. L. Q. 308 (1916).

the first part of the case, gathering documents, collecting the papers, and making a report of investigation, is some insurance that the fact-finding function of the proceeding will be efficient and comparatively thorough. While enjoying these advantages of the institutional decisions, the PACA proceedings escape the disadvantages of anonymity by making one presiding officer responsible for the whole process up to the proposed order, and making one Judicial Officer responsible for the decision.

The PACA experience having proved quite efficient, and having met with approval by the industry involved, can perhaps teach a lesson or two about regulation of an industry within the American economy.