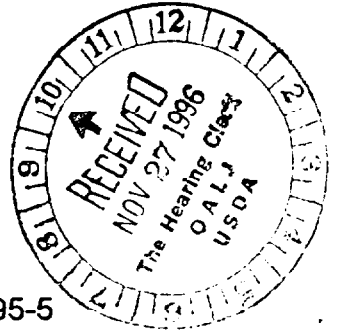


UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE



McKean and McKean Livestock )  
Services )  
Complainant )  
v. )  
Nosse Livestock, Inc., and )  
Larry J. Nosse )  
Respondents )

P & S Docket No. R-95-5  
  
  
  
  
Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.). A complaint was filed on January 4, 1994, in which complainant seeks reparation against the respondents in the amount of \$72,520.10, in connection with three transactions involving the purchase of 189 head of livestock.

The complainant, and, jointly, the respondents, were served with a copy of the Department's report of investigation. In addition, the respondents were served with a copy of the formal complaint. The respondents filed answers thereto in which they admit some money is owed to the complainants but say the correct amount is in dispute. The respondents matched all but a portion of their liability against a duplicate payment made on an earlier transaction and unpaid profits they claim are owed them. Although the amount claimed in reparation did exceed \$10,000.00, neither the complainant nor the respondents, requested an oral hearing. It is our feeling that the written record contains sufficient evidence upon which a finding may be based. Hence, the written hearing procedure provided in Rule 13 of the Rules of Practice (9 C.F.R. §202.113) was followed.

In accordance with the Rules of Practice, the parties were given an opportunity to submit further evidence in this matter. The complainant and respondents elected to file additional evidence. In addition, the parties were given an opportunity to submit briefs. The complainant and the respondents filed briefs.

### Findings of Fact

1. Complainant, McKean and McKean Livestock Services ("M&M"), is a general partnership whose partners are Robert E. McKean and Gregory L. McKean. M&M's mailing address is 1093 Airport Road, Mercer, Pennsylvania 16137. M&M, at all times material herein, was engaged in buying livestock in commerce on a commission basis as a market agency. Complainant also owned a livestock buying station facility in Mercer, Pennsylvania.

2. Respondent, Nosse Livestock, Inc. ("Nosse, Inc."), is an Ohio corporation, whose business mailing address is 4545 Parks West Road, Middlefield, OH 44062. At all times material herein, Nosse, Inc. was in the business of buying and selling livestock in commerce for its own account as a dealer. Nosse, Inc. was registered with the Secretary under the Act to buy livestock on commission as a market agency, and as a dealer, buying and selling in commerce livestock for its own account or as an agent of the vendor or purchaser.

3. Respondent, Larry J. Nosse ("Nosse"), is an individual whose mailing address is 4545 Parks West Road, Middlefield, OH 44062. Nosse, at all times material herein, was President and one-hundred percent owner of Nosse, Inc.

4. Nosse, Inc. purchased livestock using the buying station owned by M&M. The original arrangement between Nosse, Inc. and M&M was for Nosse to have M&M checks issued to the livestock sellers in payment for the livestock Nosse, Inc. purchased from them. At the end of each day on which livestock purchases had been made, Nosse would issue a Nosse, Inc. check to M&M in an amount equal to the total cost of livestock purchased that day with M&M checks, plus commissions. As a part of their arrangement, Nosse, Inc. was to pay commissions to M&M for "handling and paying". The commission rates were: \$6.00 per head on non-feeder cattle; \$4.00 per head on feeder cattle; and \$1.00 per head on hogs, sheep, and goats. Nosse, Inc. then resold the livestock and deposited the sale proceeds into its account.

5. On August 24, 1993, Nosse, Inc. issued two checks to M&M in payment for 91 head of livestock costing \$34,273.55, and commissions of \$436.00. The total amount of the two checks was \$34,709.55.

One of the checks was written in the amount of \$24,282.22. This check was returned dishonored due to insufficient funds. On October 25, 1993, Nosse signed a second Nosse, Inc. check written in the amount of \$24,282.22. This check was check number 5590, dated October 25, 1993. Check 5590 was written to replace the dishonored check from the August 24, 1993, transaction. Check 5590 was also returned dishonored due to insufficient funds.

6. On September 28, 1993, Nosse, Inc. issued two checks to M&M in payment for 55 head of livestock costing \$35,571.11, and commissions of \$333.00. The total amount of the two checks was \$35,904.11. One of the checks was written in the amount of \$20,904.11. This check was returned dishonored due to insufficient funds. On October 18, 1993, Nosse signed a second Nosse, Inc. check written in the amount of \$20,904.11. This check was check number 5586, dated October 18, 1993. Check 5586 was written to replace the dishonored check from the September 28, 1993, transaction. Check 5586 was also returned dishonored due to insufficient funds.

7. On October 25, 1993, Nosse issued a Nosse, Inc. check to M&M in payment for 43 head of livestock costing \$27,095.77, commissions of \$213.00, and a \$25.00 amount for "bank". The total amount of the check was \$27,333.77. This check was check number 5589, dated October 25, 1993. Check 5589 was returned dishonored due to insufficient funds.

8. On February 26, 1994, Nosse, Inc. provided M&M with a bank check, number 334694, in the amount of \$27,333.77. Check 334694 was issued as a replacement to check 5589 which had been issued in payment for the October 25, 1993, transaction. Check 334694 did provide payment in full to M&M for this transaction.

9. Nosse, Inc. raises, in it's defense, the issue of a double payment made by Nosse, Inc. to M&M. On June 29, 1993, Nosse issued a Nosse, Inc. check to M&M in payment for 55 head of livestock costing \$33,583.84, and commissions of \$315.00. The total amount of the check was \$33,898.84. This check was check number 5467, dated June 29, 1993. Check 5467 was returned dishonored due to insufficient funds. Nosse issued a Nosse, Inc. check to M&M as a replacement to check number 5467. This replacement check was check number 5488, dated July 13, 1993. Check 5488 was written in the amount of \$33,898.84. On July 15, 1993, check 5488 cleared the checking account upon which it was drawn. Nosse mistakenly

issued a second Nosse, Inc. check to M&M as a replacement to check number 5467. This second replacement check was check number 5507, dated August 3, 1993. Check 5507 was written in the amount of \$33,898.84. On August 11, 1993, check 5507 cleared the checking account upon which it was drawn.

10. On or about November 1, 1993; Nosse, Robert E. McKean, Gregory L. McKean, and Ronald J. Chech, Sr. ("Chech") met to discuss the working arrangement Nosse, Inc. had with M&M. Chech was Nosse's accountant. The meeting was prompted by the three insufficient funds checks given M&M from the August 24, September 28, and October 25, 1993, transactions. It was decided that M&M checks would continue to be issued to the livestock sellers in payment for their livestock. The firms buying the livestock from Nosse, Inc., however, would be instructed to pay M&M directly. M&M would then deduct from the monies received an amount equal to the original cost of the livestock plus M&M's commissions. The profits from a transaction, if any, would then be paid by M&M to Nosse, Inc. Losses would be deducted from profits. This arrangement lasted until the end of December, 1993. In it's defense, Nosse, Inc. claims it is owed net profits from transactions conducted under this new agreement. M&M agrees Nosse, Inc. is owed net profits from these transactions but contents a lesser amount is owed than what Nosse, Inc. claims.

11. As of January 1, 1994, M&M terminated it's relationship with Nosse and Nosse, Inc.

12. M&M filed a reparation seeking recovery of \$72,520.10. This was the cumulative amount of the three insufficient funds checks from the August 24, September 28, and October 25, 1993, transactions (\$24,282.22; \$20,904.11; and \$27,333.77 respectively).

13. M&M filed their reparation on January 4, 1994.

14. The respondents do not dispute their involvement in the transactions complained of as being that of livestock dealers in interstate commerce.

#### Conclusions

Nosse, Inc. and M&M had formed a contractual arrangement. Nosse, Inc. used M&M funds to pay for livestock Nosse, Inc. was buying for resale as a dealer. At days end Nosse, Inc. was to issue a Nosse, Inc. check to M&M in payment for the cost of livestock purchased that day plus a commission. The commission was intended to compensate M&M for "handling and paying". M&M had a right to expect Nosse, Inc. to act in good faith and issue Nosse, Inc. checks based on collected funds actually on deposit in

it's checking account. On three occasions, from August 24, 1993, through October 25, 1993, this was not the case.

An issue of primary importance is the timeliness with which M&M filed their complaint. The Act states that the complainant has ninety days from the date action accrues in which to file their complaint. If the complainant does not file their complaint within this ninety day statute of limitations, they loose their right to file at a later time. Alan R. McKean, son of Robert E. McKean and the attorney for M&M, signed the reparation complaint form that was filed with Packers and Stockyards (P&S), GIPSA. The complaint form was dated January 4, 1994. According to the investigative report, the written complaint was received by P&S on January 4, 1994.

It is an established rule of law that a cause of action may accrue on a date other than the date of the transaction under certain circumstances. Indeed, where concealment of the cause of action was induced by or resulted from the respondent's fraudulent action, the accrual of the cause of action does not begin until it becomes known or could be discovered with due diligence on the part of the complainant:

...[W]here a party against whom a cause of action has accrued in favor of another prevents such other, by actual fraudulent concealment, from obtaining knowledge thereof, or the fraud is of such a character as to conceal itself, the statute of limitations will begin to run from the time the right of action is discovered or by the exercise of ordinary diligence might have been discovered.

Am. Jur. 2d Limitations of Actions §147. See also, Perlin Packing Co., Inc. v. Harold Shannon and Company, 23 Agric. Dec. 453, 457-59 (1964); and Hopi Agricultural Improvement Association v. Jim Noland and Jerry Noland d/b/a Noland Enterprises, Texhoma Livestock Commission Co., Inc., and Doyle Hatch, 39 Agric. Dec. 934, 943-44 (1980).

There is no evidence to indicate the respondents hid from M&M the fact that there were insufficient funds in their account to cover checks originally written for the transactions upon which this reparation is based. The respondents assert that during this same span of time they were so oblivious to the status of their checking account that they were unaware of a \$33,898.84 double payment made to M&M. The fraud in this case, however, is of a type which would have tended to conceal itself from the complainant. The complainant would have been unaware of any harm until a check was returned to them dishonored.

The accrual of the cause of action regarding the August 24, 1993, transaction would not have begun until M&M was first notified of the dishonored status of the original check. If M&M first became aware of the dishonored status of this check prior to October 6, 1993, their claim would be outside the statute of limitations for filing. October 6, 1993, was the ninetieth day prior to M&M's filing of their complaint. In filing their complaint, M&M refers to October 25, 1993, as the date the cause of action began to accrue for this transaction. It was on October 25, 1993, that M&M was given Nosse, Inc.'s replacement check, number 5590, in payment for the August 24, 1993, transaction. This would not be the beginning of the ninety day statute of limitation unless it was on October 25th that M&M was first notified of the dishonored status of the original check. The report makes no mention of when M&M was first notified of the dishonored status of the original check.

While describing events surrounding a different transaction, Nosse recounts giving a check to M&M on June 29, 1993. On July 13, 1993, exactly two weeks later, M&M was notified the check was being returned for insufficient funds. Nosse's recounting of events regarding this matter were not disputed by the complainant. We do not know if a two week cycle for notification on insufficient fund checks was typical. It would, however, take the greatest stretch of a highly tensile mind to conclude that M&M was not aware of the dishonored status of the original check from the August 24th transaction until on or after October 6, 1993. Our conclusion is that by January 4, 1994, the statute of limitations had expired for monies owed from the August 24th transaction. This portion of M&M's reparation claim must therefore be dismissed as having been untimely filed.

On September 28, 1993, M&M was given two Nosse, Inc. checks in payment for livestock purchases made that day with M&M checks. Both checks were deposited on September 28, 1993, by M&M to M&M's checking account. One of the two checks was returned dishonored due to insufficient funds. This check had been written in the amount of \$20,904.11. The report is silent as to when M&M was first notified of the check's return. The reparation complaint lists October 18, 1993, as the date action began to accrue for this portion of the claim. This was the date M&M was given a replacement check in payment for the \$20,904.11 amount owed from September 28th. The replacement check was also returned for insufficient funds.

We believe M&M would have known, or, with an ordinary degree of diligence, could have become aware of the harm done by October 6, 1993.

M&M had ample incentive compelling it to exercise caution with respect to Nosse, Inc. checks received. In February 1993, Nosse gave M&M a Nosse, Inc. check for \$33,400.00 which was returned for insufficient funds. In June 1993, Nosse gave M&M a Nosse, Inc. check for \$33,898.84 which was returned for insufficient funds. The \$20,904.11 check M&M received for the August 24, 1993, transaction was also returned for insufficient funds. So on September 28, 1993, when given a \$24,282.22 Nosse, Inc. check, M&M should have had concerns about the status of the check's funding.

It is M&M's responsibility to show, through the evidence presented, when it was first aware of the check's dishonored status. No evidence is presented to explain when M&M's right of action was revealed to M&M. We cannot presume that M&M's complaint was timely filed. Lacking evidence to the contrary, we find the portion of M&M's claim based on the transaction of September 28, 1993, untimely filed and thereby dismissed.

On October 25, 1993, M&M was given a Nosse, Inc. check in payment for livestock purchases made that day. This check was returned due to insufficient funds. Without question, this portion of M&M's claim was timely filed. The respondents, however, state that the October 25th transaction had been paid in full. Nosse, Inc. provided M&M with a bank check, number 334694, in the amount of \$27,333.77 on February 26, 1994.

Bank check 334694 was written specifically in payment for the monies owed from the October 25, 1993, transaction. It is undisputed that M&M accepted it as such. The \$27,333.77 payment should be applied toward the October 25, 1993, portion of M&M's claim. It should not merely be applied toward Nosse, Inc.'s account. The October 25th portion of M&M's claim must, therefore, be dismissed for payment received.

The issues of a double payment made by Nosse, Inc. and unpaid profits owed Nosse, Inc., raised in defense against the reparation, are nullified by the dismissal of the reparation claim in its entirety.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to the delegated authority, 7 C.F.R. § 2.35, as authorized by the Act of April 4, 1940,

54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 R.S.C. 1982 Ed., App. pg. 1068. It constitutes "an order for payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. §210(f), which provides for enforcement of such an order by court action begun by complainant.

It is requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D. C. 20250-1400. On a petition to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. § 202.117).

On a complainant's right to judicial review of such an order, see 5 U.S.C. § 702-3 and United States v. I.C.C., 337 U.S. 426 (1949). On a respondent's right to judicial review of such an order, see Maly Livestock Commission v. Hardin et al, 446 F.2d4, 30 Agric. 1063 (8th Cir. 1971); and Fort Scott Sale Co., Inc. v. Hardy, 570 F.Supp 1144, 42 Agric. 1079 (D. Kan. 1983).

#### Order

Complainant's claims for \$24,282.22 from August 24, 1993, and for \$20,904.11 from September 28, 1993, are dismissed as having been untimely filed.

Complainant's claim for \$27,333.77 from October 25, 1993, is dismissed as a result of payment received.

Copies of this order shall be served upon the parties.

Done at Washington, D.C.

NOV 27 1996

**WILLIAM G. JENSON**

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JUDICIAL OFFICER  
Office of the Secretary