

PSM PRODUCE, INC. v. BOYER PRODUCE, INC.
PACA Docket No. R-99-0007.
Decision and Order.
Filed September 20, 2001.

Contracts, failure to show breach – Inspections, not necessary, show count under certain circumstances.

Where a purchase and sale contract called for numerous bulk loads to contain a specific number of pumpkins, and for payment to be made on the basis of a per pound price for the total weight of the loads, but limited to the total poundage assuming a 15 pound per pumpkin average, the delivery of loads containing pumpkins which averaged more than 15 pounds was not a breach of contract, and no notice of breach was required. The inventory count performed by the receiving retail stores was accepted as adequate evidence of the number of pumpkins delivered where such count was adequately documented, and no federal inspection was necessary to prove the count received.

George S. Whitten, Presiding Officer.

Byron E. White, for Complainant.

Tyrie A. Boyer, for Respondent.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of \$28,747.33 in connection with multiple transactions in interstate commerce involving pumpkins.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Following the timely filing of the answer Respondent filed a motion to permit the late filing of a counterclaim, together with a proposed counterclaim. The proposed counterclaim arose out of the same transactions as those which are the subject of the formal complaint. Although the motion had not been ruled upon, and the counterclaim was a proposed counterclaim which had not been timely filed, it was nevertheless inadvertently served upon Complainant, and Complainant filed a reply thereto. Since Respondent's counterclaim alleged damages in the amount of \$34,482.33, and Respondent requested an oral hearing, the matter was initially handled as an oral hearing case. Pursuant to the request of Respondent the deposition of Phil Ratliff, president of Complainant, was taken. Subsequently the presiding officer noted the mistake, denied Respondent's motion for permission to file a counterclaim, and ruled that the counterclaim should not have been served, and should be rejected. Respondent filed a petition to the Secretary for reconsideration of this ruling, and on December 14, 1999, we issued an order affirming the ruling of the presiding officer.

The amount claimed in the formal complaint does not exceed \$30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement which included the deposition of Phil Ratliff, Complainant's president, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, PSM Produce, Inc. (hereafter sometimes PSM), is a corporation whose address is P. O. Box 543, Green Valley, Arizona.

2. Respondent, Boyer Produce, Inc. (hereafter sometimes Boyer), is a corporation whose address is 15A SW2nd Avenue, Williston, Florida. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 15, 1997, CDC Sales (hereafter sometimes CDC), of McAllen, Texas, through its owner and principal Dean Bearden, and acting as an agent for Complainant which was CDC's undisclosed principal, entered into an agreement to supply pumpkins to Respondent to meet the needs of Respondent's customers, primarily Walmart, but also Albertson's. It was agreed between Dean Bearden and Kennedy G. Boyer, president of Respondent, that the pumpkins to be shipped to Walmart would average 15 pounds, and that the smallest would be the approximate size of a volleyball. The pumpkins shipped to Albertson's would average 18 pounds and be shipped in bins instead of in bulk. All of the Albertson's loads were shipped to Plant City, Florida and were priced at 8.5 cents per pound f.o.b. Shipments of the bulk pumpkins to Walmart were to be on a delivered basis. Pricing was to be established upon a base price of \$.065 per pound with freight cost added in so that the delivered price would vary depending on the destination. The total delivered prices were to be 10 cents per pound on shipments to Alabama, 9.5 cents per pound on shipments to Mississippi, 10.5 cents per pound on shipments to Georgia, and 11 cents per pound on shipments to Florida. It was also agreed that, as to the 15 pound average pumpkins to be shipped to Walmart, the number of pounds to be paid by Respondent would not exceed the actual number of pumpkins received multiplied by 15. The agreement as to the pumpkins to be shipped in bulk to Walmart was memorialized by the following writing:

FAX

DATE: 9/15/97

TO: Dean

ATTENTION:

FROM: Ken

CONTENTS: 25 loads of pumpkins at

0.10	¢/lb Dlvd to Alb
0.095	¢ Dlvd to Miss
0.105	¢/lb. Dlvd to Ga
0.11	¢/lb. Dlvd to Fla.

Starting 9/27 thru 10 Oct 97

Will pay on pumpkins receive/and (sic) 15 lb Ave.

Approx down size is volley ball¹

CDC to arrange transportation.

/s/ Dean Bearden Thank you,

/s/ Ken Boyer

4. CDC issued "confirmations" which were generally dated the day following shipment. Instead of stating the names of the seller and buyer, these "confirmations" stated near the top of the page, on the left, under the designation "SHIP TO:," "PACIFIC SOUTHWEST MARKETING, P.O. BOX 543, GREENVALLEY, AZ, 85614, and parallel to this on the right, also under the designation "SHIP TO:," "BOYER PROD. WILLISTON, FLA." Generally, a purchase order number was also stated next to "BOYER PROD.," and underneath was a third "SHIP TO;" which was generally followed by a statement of the ultimate destination or destinations. The body of the "confirmation" contained a statement of the quantity in pounds followed by a description. A typical specimen of one of the descriptions reads: "BULK PUMPKINS 15# AVE. AT .065 PER # FOB. APPROX. CT. 3050 FREIGHT: A&A WILL INVOICE BOYER .035 PER #"

5. PSM issued invoices as to each load. These were usually dated on, or the day after, the date of CDC's "confirmations." However, a few were dated the day before the "confirmations," and a few were dated three to twenty-one days following the date on the "confirmations." All of the invoices gave the name and address of Boyer under both the headings "Bill To," and "Ship To." In addition, the same poundage as on the "confirmations" was given, together with a computation of the amount due at \$.065 per pound on the bulk loads, or \$.085 per pound on the loads shipped in bins. One load was billed on a delivered basis at \$.1025 per pound, and accompanied by the statement that freight was prepaid by the shipper.

6. On September 25, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 35,660 pounds total [PSM Inv. 1450; CDC Conf. 5076; Boyer load 3443]. The pumpkins were shipped on September 25, 1997, by Complainant from loading point in New Mexico, to

¹ A regulation volley ball is approximately 8.27 inches in diameter.

Respondent's customer, Albertson's in Plant City, Florida. CDC's "confirmation" shows the price as \$.085 per pound, f.o.b., but Complainant invoiced Respondent at \$.065 per pound, f.o.b. On September 30, 1997, trouble was reported by the receiver to Boyer, and by Boyer to CDC as follows: "Truck delivered to Walmart instead of Albertson's - Hired WestWind to p/u from Wal-Mart and re-del to Albertson's. Albertson's rejected for size. . . . FINAL SETTLEMENT: Sent to Meeks Farms to rework & Re-del. To Albertson's on 10/2." A federal inspection was performed at the place of business of Albertson's in Plant City, Florida, on 10/1/97, at 7:10 a.m., with the following results in relevant part:

LOT: A
 TEMPERATURES: 77 to 82°F
 PRODUCT: Pumpkins
 BRAND/MARKINGS: "No Brand"
 ORIGINS: TX
 LOT ID.:
 NUMBER OF CONTAINERS: 44 Bins
 INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A					Weight 2 to 33 ¾ mostly 4 to 24 (illegible) lbs per pumpkin average 15.43 lbs.

GRADE:

REMARKS: Weight reported only at applicant's request.

On the same day, at 3:20 p.m., at the place of business of Meek Farm Produce & Brokerage, Inc., Plant City, Florida, a second federal inspection of the pumpkins was performed with the following results in relevant part:

LOT: A
 TEMPERATURES: 82 to 86°F
 PRODUCT: Pumpkins
 BRAND/MARKINGS: "No Brand"
 ORIGINS: TX
 LOT ID.:
 NUMBER OF CONTAINERS: 44 bins
 INSP. COUNT: Y

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
					SIZE: 8¼ to 14¼ inch in diameter Mostly 9¼ to 12 inch in diameter Average 10.75 inches in diameter with 32% of pumpkins 8¼ inches to 10 inches and 68% of pumpkins 10 to 14¼ inches in diameter

GRADE:

REMARKS: Restricted to size only at applicant's request.

Respondent remitted \$1,122.00, after deducting \$1,195.90 from the \$2,317.90 invoice amount. Complainant has agreed to this deduction, and there is no further amount due on this load.

7. On September 29, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,880 pounds [PSM Inv. 1463; CDC Conf. 5084; Boyer load 3444]. The pumpkins were shipped on September 29, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Huntsville, Alabama. On arrival the load was found to contain 1,592 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,880 pounds, or \$2,982.20. Respondent paid Complainant \$732.00, and Complainant has agreed to accept this amount.

8. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,640 pounds [PSM Inv. 1466; CDC Conf. 5085; Boyer load 3445]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Jasper, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,640 pounds, or \$3,031.60, f.o.b. Respondent paid Complainant \$2,246.60.

9. On September 29, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 41,540 pounds [PSM Inv. 1460; CDC Conf. 5083; Boyer load 3446]. The pumpkins were shipped on September 29, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Prattville, and Selma, Alabama. Walmart in Prattville received 1,052 pumpkins, and Walmart in Selma received 1,300 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 41,540 pounds, or \$2,700.10, f.o.b. Respondent paid Complainant \$2,070.60.

10. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,880 pounds [PSM Inv. 1464; CDC Conf. 5086; Boyer load 3447]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart, in Huntsville, Alabama. Walmart received 2,859 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,880 pounds, or \$2,787.20, f.o.b. Respondent has paid Complainant in full for these pumpkins.

11. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,740 pounds [PSM Inv. 1467; CDC Conf. 5087; Boyer load 3448]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart, in Muscle Shoals, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,740 pounds, or \$2,843.10, f.o.b. Respondent paid Complainant \$2,295.00.

12. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,200 pounds [PSM Inv. 1468; CDC Conf. 5090; Boyer load 3452]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Athens, Alabama, and Lawrenceburg, Tennessee. Walmart received a total of 2,243 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,200 pounds, or \$2,938.00, f.o.b. Respondent paid Complainant \$1,792.00.

13. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,100 pounds [PSM Inv. 1474; CDC Conf. 5093; Boyer load 3453]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Tuscaloosa, Alabama. Walmart received 2,236 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,100 pounds, or \$2,866.50, f.o.b. Respondent paid Complainant \$1,810.50.

14. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,520 pounds [PSM Inv. 1476; CDC Conf. 5094; Boyer load 3454]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Newman, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,520 pounds, or \$3,023.80, f.o.b. Respondent paid Complainant \$2,224.75.

15. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,100 pounds [PSM Inv. 1477; CDC Conf. 5095; Boyer load 3455]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Sylacauga and Bessemer, Alabama. The store in Sylacauga received 975 pumpkins, and the store in Bessemer received 1,400 pumpkins, or a total of 2,375 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,100 pounds, or \$2,801.50, f.o.b. Respondent paid Complainant \$1,896.00.

16. On September 27, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,180 pounds [PSM Inv. 1462; CDC Conf. 5082; Boyer load 3456]. The pumpkins were shipped on September 27, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainsville, Georgia. Walmart received 2,400 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,180 pounds, or \$2,741.70, f.o.b. Respondent paid Complainant \$2,107.20.

17. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,720 pounds [PSM Inv. 1484; CDC Conf. 5097; Boyer load 3457]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Ft. Payne, Georgia, and Cleveland, Tennessee. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,720 pounds, or \$2,906.80, f.o.b. Respondent paid Complainant \$1,439.85.

18. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,360 pounds [PSM Inv. 1487; CDC Conf. 5102; Boyer load 3458]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Florance, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,360 pounds, or \$2,948.40, f.o.b. Respondent paid Complainant \$1,944.90.

19. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,900 pounds [PSM Inv. 1488; CDC Conf. 5103; Boyer load 3459]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Fayetteville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,900 pounds, or \$2,788.50, f.o.b. Walmart received 2,252 pumpkins. Respondent paid Complainant \$1,774.00.

20. On October 7, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,940 pounds [PSM Inv. 1515; CDC Conf. 5140; Boyer load 3460]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cartersville and Marietta, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,940 pounds, or \$2,856.10, f.o.b. Walmart Stores received 1,400 pumpkins at the Cartersville location, and 800 pumpkins at the Marietta location. Respondent paid Complainant \$1,707.40.

21. On October 6, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 47,340 pounds [PSM Inv. 1498; CDC Conf. 5108; Boyer load 3461]. The pumpkins were shipped on October 6, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hiram, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 47,340 pounds, or \$3,077.10, f.o.b. Walmart received 3,122 pumpkins. Respondent paid Complainant \$3,023.55, and has waived any contest as to the remainder of the invoiced amount being due.

22. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,520 pounds [PSM Inv. 1491; CDC Conf. 5099; Boyer load 3462]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Rome, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,520 pounds, or \$3,023.80, f.o.b. Walmart received 2,459 pumpkins. Respondent paid Complainant \$2,012.10.

23. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,560 pounds [PSM Inv. 1486; CDC Conf. 5098; Boyer load 3463]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Thompson and Conyers, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,560 pounds, or \$2,766.40, f.o.b. Walmart Stores

received 1,000 pumpkins at the Thompson location, and 1,124 pumpkins at the Conyers location. Respondent paid Complainant \$1,642.90.

24. On October 6, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,900 pounds [PSM Inv. 1497; CDC Conf. 5109; Boyer load 3464]. The pumpkins were shipped on October 6, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Stockbridge, and Rincon, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,900 pounds, or \$2,983.50, f.o.b. Walmart received 1,200 pumpkins at the Stockbridge location, and 1,500 pumpkins at the Rincon location, of which 54 were damaged and left on the truck. Respondent paid Complainant \$2,355.00.

25. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,410 pounds [PSM Inv. 1489; CDC Conf. 5100; Boyer load 3465]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Calhoun and Ogelthorpe, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,410 pounds, or \$2,951.65, f.o.b. Walmart received 752 pumpkins at the Calhoun location, and 1,500 pumpkins at the Ogelthorpe location. Respondent paid Complainant \$1,730.50.

26. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,780 pounds [PSM Inv. 1470; CDC Conf. 5091; Boyer load 3466]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Russelville, Decatur, and Cullman, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,780 pounds, or \$3,040.70, f.o.b. Walmart Stores received 800 pumpkins at the Russelville location, 800 pumpkins at the Decatur location, and 474 pumpkins at the Cullman location. Respondent paid Complainant \$1,473.70.

27. On September 30, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,220 pounds [PSM Inv. 1461; CDC Conf. 5088; Boyer load 3467]. The pumpkins were shipped on September 30, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Scottsboro, Roanoke, Huntsville, and Northport, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,220 pounds, or \$2,809.30, f.o.b. Respondent paid Complainant \$2,384.30.

28. On October 1, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,460 pounds [PSM Inv. 1469; CDC Conf. 5092; Boyer load

3468]. The pumpkins were shipped on October 1, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Covington, Savanna, and Bremen, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,460 pounds, or \$2,954.90, f.o.b. Walmart Stores received 800 pumpkins at the Covington location, 1,200 pumpkins at the Savanna location, and 724 pumpkins at the Bremen location. Respondent paid Complainant \$2,471.90.

29. On October 2, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,420 pounds [PSM Inv. 1478; CDC Conf. 5096; Boyer load 3469]. The pumpkins were shipped on October 2, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cumming, Moultrie, and Cordele, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,420 pounds, or \$2,952.30, f.o.b. Respondent paid Complainant \$1,963.20.

30. On October 3, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,800 pounds [PSM Inv. 1490; CDC Conf. 5101; Boyer load 3470]. The pumpkins were shipped on October 3, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hazelhurst, Milledgeville, and Stone Mountain, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,800 pounds, or \$2,847.00, f.o.b. Walmart Stores received 800 pumpkins at the Hazelhurst location, 800 pumpkins at the Milledgeville location, 300 pumpkins at the Stone Mountain location, and from Stone Mountain a remaining 345 pumpkins were sent to Walmart Stores in Athens, Georgia, but were to be billed to the Stone Mountain location of Walmart Stores. Ninety four pumpkins were refused and taken to a landfill. Respondent paid Complainant \$1,783.67.

31. On September 27, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 48 bins weighing 38,500 pounds total [PSM Inv. 1465; CDC Conf. 5081; Boyer load 3471]. The pumpkins were shipped on September 27, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart in Plant City, Florida. However, Respondent intended the load for Albertson's, and redirected the load to that firm in Plant City. Albertson's accepted the load under protest as to size, and the protest was communicated by Respondent to CDC. Complainant invoiced Respondent at the rate of \$.085 per pound for the 38,500 pounds, or \$3,272.50, f.o.b. Respondent paid Complainant \$1,401.70.

32. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,420 pounds [PSM Inv. 1504; CDC Conf. 5118; Boyer load 3472]. The pumpkins were shipped on October 9, 1997, by Complainant from

loading point in New Mexico, to Respondent's customer, Walmart Stores, in Hopkinsville, and Madisonville, Kentucky. Complainant invoiced Respondent at the rate of \$.1025 per pound for the 45,420 pounds, or \$4,769.10, delivered. Respondent paid Complainant \$3,717.90.

33. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,120 pounds [PSM Inv. 1503; CDC Conf. 5114; Boyer load 3475]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Bowling Green, Kentucky. Walmart Stores received 2,256 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,120 pounds, or \$2,997.80, f.o.b. Respondent paid Complainant \$1,708.40.

34. On October 9, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 46,320 pounds [PSM Inv. 1501; CDC Conf. 5117; Boyer load 3477]. The pumpkins were shipped on October 9, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Frankfort, Kentucky. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,320 pounds, or \$3,010.80, f.o.b. Respondent paid Complainant \$3,010.80, and nothing further is due on this load.

35. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 42,600 pounds [PSM Inv. 1485; CDC Conf. 5105; Boyer load 3482]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cookeville, Tennessee. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,600 pounds, or \$2,769.00, f.o.b. Respondent paid Complainant \$2,222.47.

36. On October 4, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,760 pounds [PSM Inv. 1492; CDC Conf. 5104; Boyer load 3484]. The pumpkins were shipped on October 4, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainesville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,760 pounds, or \$2,909.40, f.o.b. Respondent paid Complainant in full for this load.

37. On October 8, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 43,560 pounds [PSM Inv. 1495; CDC Conf. 5116; Boyer load 3485]. The pumpkins were shipped on October 8, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Gainesville, Georgia. Walmart stores received 2,556 pumpkins. Complainant

invoiced Respondent at the rate of \$.065 per pound for the 43,560 pounds, or \$2,831.40, f.o.b. Respondent paid Complainant \$2,283.30.

38. On October 7, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 48 bins weighing 35,760 pounds total [PSM Inv. 1495; CDC Conf. 5112; Boyer load 3486]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. The load was rejected by Respondent's customer who reported that there were no bottoms or lids on the bins, and that the pumpkins were muddy and oversized. The pumpkins were taken to Meeks Farm to be reworked. Complainant invoiced Respondent at the rate of \$.085 for 35,760 pounds, or \$3,039.60. Respondent has paid Complainant \$389.12.

39. On October 7, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 45,840 pounds [PSM Inv. 1499; CDC Conf. 5113; Boyer load 3487]. The pumpkins were shipped on October 7, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, in Cummins, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,840 pounds, or \$2,979.60, f.o.b. Respondent paid Complainant \$2,678.78. Respondent admits that there is a balance of \$300.82 still due on this load.

40. On October 12, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 32,960 pounds total [PSM Inv. 1505; CDC Conf. 5119; Boyer load 3489]. The pumpkins were shipped on October 12, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. On arrival the pumpkins were reported by Albertson's to have decay and some green color. The pumpkins were sent to Meeks Farm for reworking. On October 15, 1997, at 11:00 a.m., the pumpkins were federally inspected at the place of business of Meeks Farm Produce & Brokerage, Inc., Plant City, Florida, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	67 to 68 °F	Pumpkins	"No Brand"	NM		42	
	Y						

LOT	AVERAGE	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	15 %	15 %	%	Soft rot (8 to 20%)	Soft rot Mostly early some advanced stages.
	15 %	15 %	%	checksum	Many pumpkins show

green color
affecting 1/4
to 1/2 of
surface not
affecting
grade.

REMARKS: Presence of green color not affecting grade shown only at applicant's request.

Complainant invoiced Respondent at the rate of \$.085 for 32,960 pounds, or \$2,801.60. Respondent did not pay Complainant any amount for this load.

41. On October 12, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 35,360 pounds total [PSM Inv. 1506; CDC Conf. 5120; Boyer load 3491]. The pumpkins were shipped on October 12, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 32,720 pounds, or \$2,781.20. Respondent has paid Complainant the full invoice amount for this load.

42. On October 14, 1997, pursuant to the contract set forth in Finding of Fact 3, CDC, acting as agent for Complainant, sold to Respondent one bulk load of pumpkins weighing 44,260 pounds [PSM Inv. 1510; CDC Conf. 5125; Boyer load 3492]. The pumpkins were shipped on October 14, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Walmart Stores, at eight locations in, Georgia and South Carolina. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,260 pounds, or \$2,876.90, f.o.b. Respondent paid Complainant \$2,771.85. Respondent admits that there is a balance of \$105.05 still due on this load.

43. On October 14, 1997, CDC, acting as agent for Complainant, sold to Respondent one load of pumpkins in 44 bins weighing 34,060 pounds total [PSM Inv. 1509; CDC Conf. 5130; Boyer load 3503]. The pumpkins were shipped on October 14, 1997, by Complainant from loading point in New Mexico, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 34,060 pounds, or \$2,895.10. Respondent has paid Complainant the full invoice amount for this load.

44. The formal complaint was filed on May 18, 1998, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant, PSM, brings this action to recover balances alleged due on 38 loads of pumpkins sold to Respondent by CDC over a three week period in late September and early October of 1997. The evidence clearly shows that CDC, in making the sales, was acting as an agent for PSM who was, initially at least, in the position of an undisclosed principal. At some point prior to the close of the

shipment period PSM's existence as the principal was disclosed. It is not material to ascertain exactly when this took place since PSM clearly has standing, both as an undisclosed principal and a disclosed principal, to bring this action.² It is also clear that, under the close agency relationship that existed between PSM and CDC, even after disclosure of PSM as the principal, CDC was able to bind its principal, and able to receive all contractual notice in place of its principal.³

The primary issue that underlies most of the disputed transactions concerns the proper interpretation of the written contract set forth in Finding of Fact 3. The evidence shows that, except as to one load, Complainant unilaterally changed the terms of the contract to f.o.b., and proceeded to bill on an f.o.b. basis. CDC furthered this change in the contract by noting on it's a confirmation@ the new f.o.b. terms, and that the freight charge would be billed to Respondent by the trucking firms. This would have been a clear breach of the contract, except that Respondent acquiesced in the change, thus creating a modification of the original contract terms. However, the crucial provision: AWill pay on pumpkins receive/and (sic) 15 lb Ave.@ was never changed, and must be viewed as governing all the bulk load transactions. Respondent asserts that the meaning of this provision was based upon Walmart's requirements that entailed the sale of the pumpkins to the ultimate consumer on a per pumpkin basis. Walmart wanted pumpkins that averaged 15 pounds, but as long as the pumpkins were at least the size of a volley ball, was not concerned if they were moderately oversized. However, since they would be selling the pumpkins at a fixed per pumpkin price, rather than on the basis of weight, they intended to pay on a per pumpkin basis as though each pumpkin weighed 15 pounds. This, at any rate, is Respondent's view of the background against which the meaning of the provision quoted above must be assessed. Respondent maintains that it is liable to Complainant only for the number of pumpkins received, and that the price paid for the pumpkins received is to be governed by the agreed maximum of 15 pounds per pumpkin. It would not be a breach of the contract if the weight received exceeded the 15 pound average, but such average would limit the amount to be paid under the contract.

Complainant, in its opening statement, discounted the written contract signed by its agent Charles Bearden, and asserted that the pumpkins were sold on a transaction by transaction basis. Complainant attached the affidavit of Charles Bearden in which Mr. Bearden stated:

²See *Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994).

³See *Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (1979); *Johnson Produce v. R. L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743 (1978); and *George Arakelian v. Leonard O'Day*, 31 Agric. Dec. 1395 (1972).

Mr. Ken Boyer's so called "contract" was just an understanding on general pricing structure and weights to be shipped to general locations. When Mr. Boyer contacted myself in an effort to purchase pumpkins, we did not discuss specific locations and times that the pumpkins were to be shipped and delivered. This was not a contract, by any means, but a general understanding on general pricing structure and no specific details were known at that time. The only contract we had between PSM Produce, Inc. and Boyer Produce, Inc. was the confirmation of sales.

Complainant, no doubt led astray by Mr. Bearden's specious reasoning in his statement quoted above, never addressed the crucial question of the meaning of the contract signed by its agent. This is unfortunate, for Respondent's assessment of its meaning is essentially unopposed in the record. While the important clause, "Will pay on pumpkins receive/and (sic) 15 lb Ave.," is certainly susceptible of the interpretation urged by Respondent, the clause is not a model of clarity. However, the meaning was clarified early in the series of transactions. The third of the bulk loads, shipped on September 27, 1997, contained 45,880 pounds of pumpkins, but the produce manager at Walmart in Huntsville, Alabama noted on the bill of lading that the load contained only 1,592 pumpkins, or an average weight per pumpkin of 28.82 pounds. Bearden made the following handwritten note on the "confirmation":

10/2

Upon Del. Rec. said (illegible) was to (sic)
Big. Could only pay by each. Reported same
to Phil.

By the making of this note, and by reporting the message to Complainant, Bearden, in effect, acknowledged the correctness of Respondent's view of the meaning of the phrase: "Will pay on pumpkins receive/and (sic) 15 lb Ave." We conclude that the meaning of the phrase is that attributed to it by Respondent.

Complainant's Phil Ratliff, in his deposition, accepted the fact that the parties had agreed that the pumpkins should average 15 pounds. However, he maintained that a substantial variation from that average would be a breach of contract which would have to be proven by a federal inspection, and that notice of the breach would have to be given in a timely fashion. We see no basis for such an interpretation. A variation upwards from the 15 pound average was never viewed by any of the Walmart stores as a breach of the contract such stores had with Respondent, and, under what we have concluded is the proper interpretation of the crucial clause of the written contract, such a variation would not be a breach of the contract between Complainant and Respondent. Consequently, no notice of a breach would be required when a load arrived that exceed a 15 pound average weight.

The question of proof is another matter. We have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damage.⁴ However, the reason for this requirement primarily concerns the need for a standardized assessment of the damage according to established categories, and based on statistically valid sampling methods. It is also helpful that the methods used by federal inspectors accord with the Department's published grade standards, and the allowed tolerances under those standards, and under the suitable shipping condition rule applicable in f.o.b. sales. The fact that a federal inspection is neutral adds credence to the results. However, here there was no reason for Walmart, or Respondent, to call for a federal inspection in the absence of a breach. Moreover, the counting of the pumpkins was a normal and necessary function for Walmart to receive the pumpkins into its inventory, since they would be sold by Walmart to its customers on a per pumpkin basis, and paid for by Walmart on a per pumpkin basis. The pertinent evidentiary problem concerns whether the alleged arrival count is adequately documented (in some cases it is not), and the evident conflict with the number of pumpkins stated on CDC's "confirmations." As to this latter problem, we note that the "confirmations" state that the count is approximate. In some instances it is evident that this approximate count was arrived at by simply dividing the weight by 15. In other instances it is not apparent how the approximate number was arrived at. The figure comes from Bearden, and there was no showing that he was present at the loading, nor was there any showing as to who might have reported the approximate pumpkin count to him. We conclude that the actual count at destination, when properly documented, takes precedence over the approximate count on CDC's "confirmations."

Part of Respondent's deduction from the invoice prices billed by Complainant was for excess freight. Respondent does not explain this deduction. Freight is most often billed at a flat rate. Respondent did not offer in evidence any of the freight bills, and we have no way of knowing that any excess freight was actually incurred by Respondent. Accordingly, we will disallow all of Respondent's deductions for excess freight.

We now must deal with each transaction. Complainant had difficulty making up its mind whether it wished to admit that no further payment is due on the first transaction, that covered by Finding of Fact 6.⁵ In the formal complaint, as well as in the informal complaint, Complainant submitted its invoices as to each

⁴*Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); See also *Tyre Farm, Inc. v. Dandrea Produce, Inc.*, 45 Agric. Dec. 796 (1986); *G. J. Albert, Inc. v. Salvo*, 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Company, Inc.*, 32 Agric. Dec. 1732 (1973); and *B. G. Anderson Company, Inc. v. Mountain Produce Co.*, 29 Agric. Dec. 513 (1970)

⁵This problem is present as to most of the admissions noted in the Findings of Fact, but will be dealt with in detail only here.

transaction, but merely stated the total amounts paid by Respondent in several large payments, and the total amount it deemed due on the total of all the transactions, namely \$31,525.52, less two allowances of \$1,870.00 on PSM invoice 1465 (Finding of Fact 31), and \$906.76 on PSM invoice 1505 (Finding of Fact 40), or a net amount of \$28,747.96. It is only when we examine the answer of Respondent that we are enabled to see the amounts paid by Respondent on each transaction, and the balances in dispute. Complainant never challenged these amounts. Respondent has asserted that Complainant admitted in the deposition of Phil Ratliff, taken December 7, 1998, that no further amount was due from Respondent on the first load. In that deposition the following exchange took place:

Q. All right, sir. Now, did you look at Exhibit 26 to see what I was talking about up there at the load number one? That is 3443. You invoiced for 35,660 pounds. You invoiced for \$2,317.90. And Boyer paid \$1122.60 (sic). And you've told me that you don't have any argument with Boyer being credited for those expenses. Is that correct?

A. No. And part of the justification, back to the answer as far as why we invoice him for that in our original filing, is because the paperwork that he provided to me that we worked off of did not have this on it.

Q. All right. But you agree now that he is entitled to that credit.

A. There was never an argument with the inspection, he was entitled.

...

A. The only point of contention I think that was mentioned throughout the shuffle of paperwork and so forth was the authorization of Meeks to sell. But - - as far as the losses that they incurred and so forth in handling. So I don't have any problems with that.

Q. You don't have any problem now after reading that with the authorization of Meeks, do you?

A. I have no problem with the fact that they are entitled to compensation.

Q. And that Boyer is entitled to credit?

A. That's what I said.

...

Q. I see. All right. So that - - that does reflect then that you received \$1122 (sic) from Boyer on load 3443.

A. Correct, when we received his check and his paperwork.

Q. And today you have no argument with that.

A. No. I didn't have an argument with it to begin with.⁶

However, in Complainant's opening statement filed January 20, 2000, Phil Ratliff, on behalf of Complainant, asserted that all the amounts claimed in the formal complaint were still due. In Respondent's answering statement the assertion was made that the unpaid balance as to this load was admitted by Ratliff to not be due, and the deposition of Ratliff was attached. Finally, in the statement in reply, Complainant explicitly and unequivocally admitted that no amount is now claimed due as to this load. However, in its brief, Complainant again asserted that Respondent is not entitled to any damages or deductions from Complainant's invoices," and urged that an "order be issued for the full amount claimed by the complaint." We find this vacillation inexplicable, and conclude that no amount is due on this transaction.

The second transaction is set forth in Finding of Fact 7. Complainant invoiced Respondent for 45,880 pounds of bulk pumpkins shipped to Walmart in Huntsville, Alabama, at the rate of \$.065 per pound, or \$2,982.20. Respondent paid Complainant \$732.00, and Complainant has admitted in Ratliff's deposition (see page 101), and in the Statement in Reply that no further amount is due on this transaction. In spite of the contrary position taken by Complainant in its brief, we find that no further amount is due as to this load.

The transaction covered by Finding of Fact 8 consisted of one bulk load of pumpkins weighing 46,640 pounds shipped to Walmart in Jasper, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,640 pounds, or \$3,031.60, f.o.b, and Respondent paid Complainant \$2,246.60. At an average of 15 pounds per pumpkin the load should have contained 3,109 pumpkins. The CDC "confirmation" states that the approximate count was 3,100. Respondent claims that the load contained only 2,586 pumpkins and paid on that basis, less costs for the excess freight. However, the only evidence that the load contained 2,586 pumpkins was in the form of a handwritten notation on the bill of lading. This notation consisted only of the figure "2586" with a circle drawn around it. Next to the figure was the figure "2500" without a circle. There was no signature, nor were there any initials, clearly associated with either figure. We have already indicated our low regard for the evidence of approximate count contained on the CDC "confirmation." Our regard for this evidence on the bill of lading is even lower. We conclude that Respondent owes Complainant a balance of \$785.00 on this transaction.

The transaction covered by Finding of Fact 9 consisted of one bulk load of pumpkins weighing 41,540 pounds shipped to Walmart Stores, in Prattville, and Selma, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound

⁶Deposition of Phil Ratliff taken December 7, 1998, at the request of Respondent, pp. 95-97.

for the 41,540 pounds, or \$2,700.10, f.o.b. Respondent paid Complainant \$2,070.60. Respondent asserts that the load contained 2,352 pumpkins, which would make the pumpkins average 17.66 pounds. The evidence for the number of pumpkins received consists of a "STORE DROP SHEET" which is a pre-printed form under the Boyer letterhead, with columns for "STORE #," STORE NAME ADDRESS PHONE," "QUANTITY ORDERED," "QUANTITY RECEIVED," "RECEIVER'S SIGNATURE," and the "STORE STAMP." The drop sheets apparently accompanied the loads and were presented to the receiving stores by the trucker to be filled out. The store number column, store name-address-phone column, and quantity ordered column are printed and appear to have been filled out before the truck left. The quantity received, and receiver's signature columns are filled out in hand, and appropriate store stamps also appear on the face of the drop sheet. The amount received at store number 483 at Pratteville, Alabama is stated to be 1,052 pumpkins, and the amount received at store number 700 at Selma, Alabama is stated to be 1,300 pumpkins. We consider this to constitute the preponderant evidence of the actual number of pumpkins contained on this load. Respondent's liability should be calculated on the basis of a total of 2,352 pumpkins with an average weight of 15 pounds, or a total of 35,280 pounds for the load. At \$.065 per pound Respondent's liability for this load was \$2,293.28. Respondent has paid Complainant \$2,070.60, which leaves a balance still due on this load of \$222.68.

The transaction covered by Finding of Fact 10 covered a shipment of bulk pumpkins on September 30, 1997, to Walmart, in Huntsville, Alabama. Respondent submitted a drop sheet which showed that Walmart received 2,859 pumpkins. The shipment weighed 42,880 pounds, or 15 pounds average per pumpkin. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,880 pounds, or \$2,787.20, f.o.b., and Respondent has paid Complainant in full for these pumpkins.

The transaction covered by Finding of Fact 11 was shipped on September 30, 1997, to Walmart, in Muscle Shoals, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,740 pounds contained on the load, or \$2,843.10, f.o.b. Respondent paid Complainant \$2,295.00. Respondent did not submit a drop sheet covering this load. The bill of lading, however, has a store stamp from Walmart Store #01-0660 in Muscle Shoals, Alabama on its face, and at the bottom of the bill of lading, in handwriting different from any other thereon, is the following: "Rec' by store 2550." Respondent would have us accept this as proof that only 2,550 pumpkins were received. The statement at the bottom of the bill of lading is not signed, and may have been written by someone at Respondent's firm for submission in this proceeding. We do not think this is sufficient proof of the number of pumpkins received. We find Respondent is liable for the difference between the \$2,295.00 paid and the \$2,843.10 for which it was invoiced, or \$548.10.

The load of pumpkins covered by Finding of Fact 12 was shipped on October 1, 1997, to Walmart Stores, in Athens, Alabama, and Lawrenceburg, Tennessee. The drop sheet shows that 800 pumpkins were received and signed for at Lawrenceburg, Tennessee, and 1,443 pumpkins were received and signed for at the store in Athens, Alabama. There is also a notation that 30 were trashed. There is no way to discern if the trashed pumpkins were part of the 1,443 pumpkins, or in addition thereto. Since Respondent had the burden of proving the number of pumpkins received we will adopt the assumption most unfavorable to Respondent, and conclude that the 30 trashed pumpkins were in addition to the 1,443. The Regulations require, in the case of produce received on joint account, on consignment, or handled for or on behalf of another person, that "[a] clear and complete record shall be maintained showing justification for dumping of produce" ⁷ If such records are kept, a dump certificate is not necessary if the quantity dumped is not in excess of 5 percent. ⁸ Although the receipt of purchased merchandise is not covered in the regulation, we could allow the dumping of such a small quantity without inspection on the basis of an analogy to the regulation were it not for the fact that no justification for the dumping is alleged. We conclude that Respondent is liable for the 30 pumpkins dumped, and that such pumpkins were in addition to the 1,443 pumpkins received at that location. The total number of pumpkins we find to have been shipped and received for this load is 2,273. This number multiplied by the 15 pound average for which Respondent is liable under the contract yields 34,095 as the poundage for this load. Respondent is liable to Complainant for this amount at \$.065 per pound, or \$2,216.18. Respondent has paid Complainant \$1,792.00, which leaves \$424.18 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 13 was shipped on October 2, 1997, to Walmart Stores, in Tuscaloosa, Alabama, and contained 44,100 pounds. Respondent submitted a drop sheet which showed that Walmart received 2,236 pumpkins. At an average weight of 15 pounds per pumpkin the load would have weighed 33,540 pounds for which Respondent should have been liable under the contract at a rate of \$.065 per pound, or \$2,180.10. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,100 pounds, or \$2,866.50, f.o.b. Respondent paid Complainant \$1,810.50. Respondent owes Complainant a balance of \$369.60 on this load.

The transaction covered by Finding of Fact 14 was shipped on October 2, 1997, to Walmart Stores, in Newman, Georgia. Respondent did not submit a drop sheet as to this load. A note on the bill of lading states "Rec' by store 2,550." This

⁷ 7 C.F.R. § 46.22.

⁸ Ibid.

note is in a different hand from anything else on the bill of lading, and is unsigned. We do not think that this amounts to adequate proof of the number of pumpkins received. However, CDC's "confirmation" states that the approximate count was 2,907 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load, Respondent is liable for this number multiplied by 15 pounds, or 43,605 pounds. At \$.065 per pound Respondent's liability to Complainant is \$2,834.32. Complainant invoiced Respondent for the 46,520 pounds, or \$3,023.80, f.o.b. Respondent paid Complainant \$2,224.75. We conclude that Respondent owes Complainant the difference between \$2,834.32, and the \$2,224.75 already paid, or a balance of \$609.57 on this load.

The transaction covered by Finding of Fact 15 consisted of one bulk load of pumpkins weighing 43,100 pounds shipped on October 2, 1997, to Walmart Stores, in Sylacauga and Bessemer, Alabama. The drop sheet shows that the store in Sylacauga received 975 pumpkins, and the store in Bessemer received 1,400 pumpkins, or a total of 2,375 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,100 pounds, or \$2,801.50, f.o.b. Respondent's liability on the basis of 2,375 pumpkins weighing an average of 15 pounds, or 35,625 pounds, is \$2,315.62. Respondent has already paid Complainant \$1,896.00, which leaves a balance still due from Respondent to Complainant of \$419.62.

Finding of Fact 16 covers a bulk load containing 42,180 pumpkins shipped September 27, 1997, to Walmart Stores, in Gainsville, Georgia. The drop sheet showed that Walmart received 2,400 pumpkins. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,180 pounds, or \$2,741.70, f.o.b. Respondent's liability on the basis of 2,400 pumpkins weighing an average of 15 pounds, or 36,000 pounds, is \$2,340.00. Respondent has already paid Complainant \$2,107.20, which leaves the sum of \$232.80 still due from Respondent to Complainant.

The transaction covered by Finding of Fact 17 consisted of a bulk load of 44,720 pumpkins shipped on October 3, 1997, to Walmart Stores, in Ft. Payne, Georgia, and Cleveland, Tennessee. The drop sheet shows the quantity ordered for each store, and a signature beside the quantity ordered for the Tennessee store. There is no signature beside the quantity ordered for the Georgia store, and no quantity received is shown for either store. We conclude that Respondent has not shown the quantity received. However, CDC's "confirmation" states that the approximate count was 2,795 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load Respondent is liable for this number multiplied by 15 pounds, or 41,925 pounds. At \$.065 per pound Respondent's liability to Complainant is \$2,725.12. Complainant invoiced Respondent for the 44,720 pounds, or \$2,906.80, f.o.b. Respondent paid Complainant \$1,439.85. We conclude that Respondent owes Complainant the difference between \$2,725.12, and the \$1,439.85 already paid, or a balance of \$1,285.27 on this load.

Finding of Fact 18 covers a load of bulk pumpkins weighing 45,360 pounds shipped on October 4, 1997, to Walmart Stores, in Florance, Alabama. There is no drop sheet. The bill of lading has a notation on its face: "2355 cnt#." This note is in a hand different from any other on the bill of lading, and there is no signature beside it. We conclude that Respondent has not shown the quantity received. However, CDC's "confirmation" states that the approximate count was 2,835 pumpkins. If we take this as an accurate reflection of the number of pumpkins on this load Respondent is liable for this number multiplied by 15 pounds, or 42,525 pounds. At \$.065 per pound Respondent's liability to Complainant is \$2,764.12. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,360 pounds, or \$2,948.40, f.o.b. Respondent paid Complainant \$1,944.90. We conclude that Respondent owes Complainant the difference between \$2,764.12, and the \$1,944.90 already paid, or a balance of \$819.22 on this load.

Finding of Fact 19 concerns a bulk load containing 42,900 pounds of pumpkins shipped October 4, 1997, to Walmart Stores, in Fayetteville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,900 pounds, or \$2,788.50, f.o.b. The drop sheet shows that Walmart received 2,252 pumpkins, and the notation is signed by a Walmart official and accompanied by the store stamp. We conclude that 2,252 pumpkins were received. The bill of lading has a notation that 21 pumpkins were rotten, and this notation is initialed with the same initials as those of the Walmart official who signed the drop sheet. Moreover, the same official signed the face of the bill of lading. We accept the representation that 21 pumpkins were rotten.⁹ However, how are we to know whether the 21 rotten pumpkins were in addition to the 2,252 noted on the drop sheet as received, or a part of that number? Respondent's computations appear to assume that the rotten pumpkins were a part of the 2,252 received, but how this was determined is not stated. Since Respondent had the burden of proof in regard to this point and has not addressed the issue, we find that the 2,252 pumpkins shown as received on the drop sheet did not include the rotten pumpkins. Respondent's basic liability to Complainant was for the 2,252 pumpkins at an average of 15 pounds, or 33,780 pounds at \$.065 per pound, or \$2,195.70. Respondent has paid Complainant \$1,774.00, and owes Complainant the balance of \$421.70.

The transaction covered by Finding of Fact 20 consisted of a bulk load containing 43,940 pounds of pumpkins shipped on October 7, 1997 to Walmart Stores, in Cartersville and Marietta, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,940 pounds, or \$2,856.10, f.o.b. The drop sheet shows that Walmart Stores received 1,400 pumpkins at the Cartersville location, and 800 pumpkins at the Marietta location. At an average of 15 pounds per pumpkin Respondent's basic liability was for 33,000 pounds at \$.065 per pound, or

⁹See discussion above covering the transaction covered by Finding of Fact 12.

\$2,145.00. Respondent has paid Complainant \$1,707.40, and owes Complainant the balance of \$437.60.

Finding of Fact 21 covers a bulk load containing 47,340 pounds shipped to Walmart Stores, in Hiram, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 47,340 pounds, or \$3,077.10, f.o.b. Respondent paid Complainant \$3,023.55, and has waived any contest as to the remainder of the invoiced amount being due. Accordingly, Respondent is liable to Complainant for the balance of \$53.55.

Finding of Fact 22 covers a bulk load of pumpkins shipped to Rome, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for 46,520 pounds, or \$3,023.80, f.o.b. The drop sheet shows that Walmart received 2,459 pumpkins. At an average weight of 15 pounds per pumpkin Respondent's liability was for 36,885 pounds at \$.065 per pound, or \$2,397.52. Respondent has paid Complainant \$2,012.10, and owes Complainant the balance of \$385.42.

The transaction represented by Finding of Fact 23 consisted of a 42,560 pound bulk load of pumpkins shipped to Walmart Stores, in Thompson and Conyers, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,560 pounds, or \$2,766.40, f.o.b. The drop sheet shows that Walmart Stores received 1,000 pumpkins at the Thompson location, and 1,124 pumpkins at the Conyers location, or a total of 2,124 pumpkins. Accordingly, Respondent's basic liability is for 2,124 pumpkins at an average of 15 pounds per pumpkin, or 31,860 pounds. At \$.065 per pumpkin this amounts to \$2,070.90. Respondent already paid Complainant \$1,642.90, which leaves a balance still due to Complainant of \$428.00.

The transaction covered by Finding of Fact 24 consisted of a bulk load of pumpkins weighing 45,900 pounds shipped to Walmart Stores, in Stockbridge, and Rincon, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,900 pounds, or \$2,983.50, f.o.b. Respondent did not submit a drop sheet covering this load. The bill of lading, however, had two notations on its face, written in different hands. First, was the statement: "#745 Stockbridge 1200 pumpkins," with a signature beside it, and second, was the statement: "store #1011 Received 1446 - left 54 damaged on truck," with a different signature at the side. We consider this to be adequate evidence of the number of pumpkins received, and it seems evident that the 54 left damaged on the truck were not a part of the 1,446 received. We conclude therefore that Respondent received 2,646 pumpkins on this load. Respondent's basic liability should be computed on the basis of 2,646 pumpkins multiplied by the 15 pound average, or 39,690 pounds, at \$.065 per pound, or \$2,579.85. Respondent paid Complainant \$2,355.00, and is, therefore, liable to Complainant for the balance of \$224.85.

Finding of Fact 25 covered a load of 45,410 pounds of bulk pumpkins shipped on October 3, 1997, to Walmart Stores, in Calhoun and Ogelthorpe, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,410

pounds, or \$2,951.65, f.o.b. Respondent submitted a drop sheet showing that Walmart received 752 pumpkins at the Calhoun location, and 1,500 pumpkins at the Ogelthorpe location, or a total of 2,252 pumpkins. At an average of 15 pounds per pumpkin Respondent's basic liability for this load was for 33,780 pounds at \$.065 per pound, or \$2,195.70. Respondent has paid Complainant \$1,730.50, and is liable to Complainant for the balance of \$465.20.

Finding of Fact 26 covers a bulk load of 46,780 pounds of pumpkins shipped on October 1, 1997, to Walmart Stores, in Russelville, Decatur, and Cullman, Alabama. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,780 pounds, or \$3,040.70, f.o.b. Respondent submitted a drop sheet showing that Walmart Stores received 800 pumpkins at the Russelville location, 800 pumpkins at the Decatur location, and 474 pumpkins at the Cullman location, or a total of 2,074 pumpkins. Respondent's basic liability for this number of pumpkins at 15 pounds average was for 31,110 pounds, which multiplied by \$.065 per pound yields \$2,022.15 as the amount which Respondent should have paid to Complainant. Respondent paid Complainant \$1,473.70, which leaves a balance still due of \$548.45.

The transaction represented by Finding of Fact 27 consisted of 43,220 pounds of bulk pumpkins which were shipped to Walmart Stores, in Scottsboro, Roanoke, Huntsville, and Northport, Alabama. Respondent submitted a drop sheet covering this load. However, the drop sheet shows the quantities ordered for each store (650) preprinted under the appropriate column, and then a hand drawn bracket encompassing each of these amounts with the number "2598" beside the bracket. There is no signature associated with this notation, but there are three store stamps at the bottom of the sheet, each of which is signed. We do not know who bracketed the amounts ordered and wrote in the number "2598." In the absence of a count from each of the stores we do not see how the noted amount can have much evidentiary value, and conclude that Respondent has not shown that the number of pumpkins received was 2,598. The approximate count noted on the face of CDC's "confirmation" is 2,881, which is the correct number for an approximate 15 pound average. We conclude that Respondent's basic liability for this load is the amount invoiced by Complainant, or \$2,809.30, f.o.b. Respondent paid Complainant \$2,384.30, which leaves a balance of \$425.00 still due from Respondent to Complainant.

Finding of Fact 28 covered a load of 45,460 pounds of bulk pumpkins shipped on October 1, 1997, to Walmart Stores, in Covington, Savanna, and Bremen, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,460 pounds, or \$2,954.90, f.o.b. The drop sheet shows that Walmart Stores received 800 pumpkins at the Covington location, 1,200 pumpkins at the Savanna location, and 724 pumpkins at the Bremen location, or a total of 2,724. At 15 pounds average per pumpkin Respondent's basic liability for this load was for 40,860 pounds, which at \$.065 per pound amounts to \$2,655.90. Respondent has

already paid Complainant \$2,471.90, which leaves \$181.00 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 29 consisted of a load containing 45,420 pounds of bulk pumpkins shipped on October 2, 1997, to Walmart Stores, in Cumming, Moultrie, and Cordele, Georgia. Respondent submitted a drop sheet covering this transaction, but it was structured in the same manner as that submitted in reference to the load covered by Finding of Fact 27, except that the store stamps were placed in the proper position on the side of the sheet and are not signed. We do not know who bracketed the amounts ordered and wrote in the number "2400." Again, in the absence of a count from each of the stores we do not see how the noted amount can have much evidentiary value, and conclude that Respondent has not shown that the number of pumpkins received was 2,400. CDC represented on the "confirmation" that the load contained 2,838 pumpkins, and we will accept this as the proper count for the shipment. Using this figure Respondent's basic liability was for 42,585 pounds at \$.065, or \$2,768.02. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,420 pounds, or \$2,952.30, f.o.b, and Respondent paid Complainant \$1,963.20. Respondent is liable to Complainant for the balance of \$804.82.

Finding of Fact 30 cover a load of 43,800 pounds of bulk pumpkins shipped on October 3, 1997, to Walmart Stores, in Hazelhurst, Milledgeville, and Stone Mountain, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,800 pounds, or \$2,847.00, f.o.b. The drop sheet shows that Walmart Stores received 800 pumpkins at the Hazelhurst location, 800 pumpkins at the Milledgeville location, 300 pumpkins at the Stone Mountain location, and that from Stone Mountain a remaining 345 pumpkins were sent to Walmart Stores in Athens, Georgia, but were to be billed to the Stone Mountain location of Walmart Stores. At the bottom of the drop sheet it is noted that 94 pumpkins were refused and taken to a landfill. In his deposition Mr. Ratliff conceded that Respondent was entitled to credit for these 94 pumpkins, however, there is no way to ascertain if the 94 were a part of the 345 received at Athens, or in addition to the other pumpkins on the load. Respondent's computations appear to assume that the refused pumpkins were a part of the 2,245 received, but how this was determined is not stated. Since Respondent had the burden of proof in regard to this point and has not addressed the issue, we find that the 2,245 pumpkins shown as received on the drop sheet did not include the refused pumpkins. Respondent's basic liability for these pumpkins at 15 pounds average per pumpkin, or 33,675 pounds, and \$.065 per pound, is \$2,188.87. Respondent has paid Complainant \$1,783.67, which leaves \$405.05 still due from Respondent to Complainant on this load.

The transaction covered by Finding of Fact 31 consisted of a 38,500 pound load of pumpkins in 48 bins shipped on September 27, 1997 to Respondent's customer, Walmart in Plant City, Florida. However, Respondent intended the load for Albertson's, and redirected the load to that firm in Plant City. Albertson's accepted

the load under protest as to size, and a preponderance of the evidence indicates that the protest was communicated by Respondent to CDC. Complainant invoiced Respondent at the rate of \$.085 per pound for the 38,500 pounds, or \$3,272.50, f.o.b. Respondent paid Complainant \$1,401.70. Complainant has agreed, in its statement in reply, to the deduction of \$1,870.80 taken by Respondent, and, in spite of the contrary position taken in Complainant's brief, we find that there is no balance due from Respondent to Complainant on this load.

Finding of Fact 32 concerns a 45,420 pound bulk load of pumpkins shipped on October 9, 1997, to Walmart Stores, in Hopkinsville, and Madisonville, Kentucky. Respondent did not submit a drop sheet as to this load, but the bill of lading has a notation as to the number of pumpkins received. A handwritten note on the face of the bill of lading states:

Store 653 – Total 1,130 pumpkins

Store 655 – Total 1,100 pumpkins

Jerry Bailey driver did not help unload

In addition, there is an unsigned handwritten note in a different hand on the right margin which states: "Store rec' 2430." If we assume that Jerry Bailey wrote the first note, we still do not know who Jerry Bailey is, or what his position of responsibility was. We find that the notes on the bill of lading do not furnish sufficient evidence of the number of pumpkins received. The notation on CDC's bill of lading appears to state that approximately 3,026 pumpkins were loaded. This closely approximates a 15 pound average. We find that Respondent is not entitled to a deduction on this load. Complainant stated that the trucker refused to invoice Respondent for the freight. Complainant, therefore, invoiced Respondent at the rate of \$.1025 per pound for the 45,420 pounds, or \$4,769.10, delivered. Respondent paid Complainant \$3,717.90. Respondent owes Complainant the balance of \$1,051.20.

Finding of Fact 33 covered a 46,120 pound bulk load of pumpkins shipped on October 9, 1997, to Walmart Stores, in Bowling Green, Kentucky. Respondent submitted a drop sheet showing that Walmart Stores received 2,256 pumpkins. At 15 pounds average the weight of the pumpkins received would have been 33,840 pounds. At \$.065 per pound Respondent's basic liability for this load would have been \$2,199.60. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,120 pounds, or \$2,997.80, f.o.b. Respondent paid Complainant \$1,708.40. Respondent owes Complainant a balance on this load of \$491.20.

The transaction covered by Finding of Fact 34 consisted of a 46,320 pound load of bulk pumpkins shipped on October 9, 1997, to Walmart Stores, in Frankfort, Kentucky. Complainant invoiced Respondent at the rate of \$.065 per pound for the 46,320 pounds, or \$3,010.80, f.o.b. Respondent paid Complainant \$3,010.80, and nothing further is due on this load. The transaction covered by Finding of Fact 35

consisted of 42,600 pounds of bulk pumpkins shipped on October 4, 1997, to Walmart Stores, in Cookville, Tennessee. Respondent did not submit a drop sheet covering this load, and the bill of lading merely has an unsigned notation on the face that states: "count 2493." This is not sufficient to establish the number of pumpkins received. CDC's "confirmation" states that 2,653 pumpkins were shipped, and we will accept this number as a basis for computing Respondent's liability. The 2,653 pounds at an average weight of 15 pounds would total 39,795 pounds, which at \$.065 per pound results in a basic liability for Respondent of \$2,586.67. Complainant invoiced Respondent at the rate of \$.065 per pound for the 42,6000 pounds, or \$2,769.00, f.o.b. Respondent paid Complainant \$2,222.47. Accordingly, Respondent is liable to Complainant for the balance of \$364.20.

Finding of Fact 36 covered a load of bulk pumpkins weighing 44,760 pounds shipped to Walmart Stores, in Gainsville, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,760 pounds, or \$2,909.40, f.o.b. Respondent has paid Complainant in full for this load.

Finding of Fact 37 covered a 43,560 pound load of bulk pumpkins shipped on October 8, 1997, to Walmart Stores, in Gainsville, Georgia. Respondent submitted a drop sheet showing that 2,556 pumpkins were received. Respondent's basic liability for these pumpkins at an average of 15 pounds per pumpkin is for 38,340 pounds at \$.065 per pound, or \$2,492.10. Complainant invoiced Respondent at the rate of \$.065 per pound for the 43,560 pounds, or \$2,831.40, f.o.b. Respondent paid Complainant \$2,283.30, and is liable to Complainant for the balance of \$208.80.

The transaction covered by Finding of Fact 38 consisted of a load of 35,760 pounds of pumpkins in 48 bins shipped to Albertson's, in Plant City, Florida. The load was rejected by Respondent's customer who reported that there were no bottoms or lids on the bins, and that the pumpkins were muddy and oversized. The pumpkins were taken to Meeks Farm to be reworked. Complainant invoiced Respondent at the rate of \$.085 for 35,760 pounds, or \$3,039.60. Respondent has paid Complainant \$389.12, and Complainant admitted in its statement in reply that Respondent is entitled to a deduction of \$2,650.43. We conclude that no further payment is due from Respondent to Complainant on this load.

Finding of Fact 39 covered a load containing 45,840 pounds of bulk pumpkins shipped to Walmart Stores, in Cummins, Georgia. Complainant invoiced Respondent at the rate of \$.065 per pound for the 45,840 pounds, or \$2,979.60, f.o.b. Respondent paid Complainant \$2,678.78. Respondent admits that there is a balance of \$300.82 still due on this load.

The transaction covered by Finding of Fact 40 consisted of a load of pumpkins in 44 bins weighing 32,960 pounds total. The pumpkins were shipped on October 12, 1997, to Respondent's customer, Albertson's, in Plant City, Florida. On arrival the pumpkins were reported by Albertson's to have decay and some green color, and a federal inspection confirmed the presence of significant soft rot. The pumpkins were sent to Meeks Farm for reworking. Complainant invoiced Respondent at the

rate of \$.085 for 32,960 pounds, or \$2,801.60. Respondent did not pay Complainant any amount for this load, and Complainant admitted in its statement in reply that Respondent is entitled to a deduction of the entire invoice amount on this load.

The transaction covered by Finding of Fact 41 consisted of a load pumpkins in 44 bins weighing 35,360 pounds shipped to Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 32,720 pounds, or \$2,781.20. Respondent has paid Complainant the full invoice amount for this load.

Finding of Fact 42 covered a bulk load of pumpkins weighing 44,260 pounds shipped to Walmart Stores, at eight locations in, Georgia and South Carolina. Complainant invoiced Respondent at the rate of \$.065 per pound for the 44,260 pounds, or \$2,876.90, f.o.b. Respondent paid Complainant \$2,771.85. Respondent admits that there is a balance of \$105.05 still due on this load.

Finding of Fact 43 covered a load of pumpkins in 44 bins weighing 34,060 pounds total. The pumpkins were shipped on October 14, 1997, to Respondent's customer, Albertson's, in Plant City, Florida. Complainant invoiced Respondent at the rate of \$.085 for 34,060 pounds, or \$2,895.10. Respondent has paid Complainant the full invoice amount for this load.

The total we have found due and owing from Respondent to Complainant is \$13,017.95. Respondent's failure to pay Complainant this amount is violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.¹⁰ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.¹¹ We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a \$300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$13,017.95, with interest thereon at the rate of 10% per annum from November 1, 1997, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

¹⁰*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

¹¹See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

