Congress intended the Secretary to exercise his extraordinarily broad regulatory powers to induce healthy competition by preventing conditions under which packers could gain control of the livestock market.

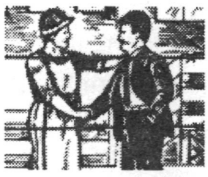
g. Authority to issue substantive rules

There was extensive debate in the Senate over whether the regulatory body should be allowed to issue rules or regulations for which packers could be held civilly and criminally liable. This debate was ultimately resolved when the Senate amended the House bill by adding a *second* provision granting the Secretary authority to issue rules and regulations necessary to carry out the provisions of the Act. The conference report on the bill explains how the two houses dealt with this double grant of authority to issue rules and regulations:

"On Amendment No. 17: This amendment adds to the House bill a provision empowering the Secretary of Agriculture to 'make such rules, regulations, and orders as may be necessary to carry out the provisions of this act.' The House bill did not contain this specific provision, but did make applicable to the jurisdiction and powers of the Secretary of Agriculture in enforcing the act the powers given to the Federal Trade Commission by section 6 of the Federal Trade Commission act, one of the provisions of which authorized that commission to make rules and regulations for the enforcement of the act, the two being substantially the same; and the House recedes."[117]

Representative Haugen, the chief author of the bill that eventually was enacted, also similarly references this amendment in his comments on the conference report.[118]

The fact that the Senate defeated an amendment that would have limited the Secretary's authority to issue rules only "as to procedures"[119] is perhaps as significant as the double grant of authority to issue rules.



2.3 Judicial case law supports rulemaking authority

a. Agency has the authority to regulate prohibited packer practices

Despite the congressional grant of extraordinarily broad rulemaking authority and its intent that the Agriculture Secretary amend its rules as necessary to ensure packer compliance with the Act as industry structure changes, in the past the Secretary has asserted that he has no authority to issue rules prohibiting packer captive supply and vertical coordination procurement practices. In Secretary Glickman's letter dated October 3, 1995, to Representative Pat Williams, he asserts that the Grain Inspection and Packers and Stockyards Administration's policy is "to promote fair and open competition among packers and not to dictate or regulate the specific methods and terms of sale to be utilized." The Secretary cites *Swift & Co. v. Wallace,* 105 F.2d 848 (7th Cir. 1939), to support this policy. He states that the court in that case noted that Section 202 "does not purport to confer upon the Secretary of Agriculture any authority directly to regulate prices, or discounts, or sales methods; and clearly does not contemplate the exercise of any authority to establish uniformity of practice with respect thereto."

The Secretary's reliance on the *Swift* case as justification for a general refusal to issue any type of rules prohibiting such packer practices is misplaced. The *Swift* decision does not support his assertion. In fact, the court in *Swift* explicitly states that the Secretary has the authority to restrict packer practices that violate Section 202 of the Packers and Stockyards Act.[120]

i. USDA has the authority to restrict unlawful packer practices

The sentence immediately following the quote used by the Secretary recognizes that the Secretary does have the authority to regulate practices if "in fact" they constitute unfair, unjustly discriminatory, or deceptive practices, or if they provide undue or unreasonable preference or advantage as between persons or locali-

ties. The court states:

"Differences or variations in prices, or in the terms of credit, or amounts of discount, or in practices do not come within the ban of the act unless they in fact constitute engaging in or using an unfair or unjustly discriminatory or deceptive practice or device in commerce or unless they constitute a making or giving, in commerce, of an undue or unreasonable preference or advantage, or result in undue or unreasonable prejudice or disadvantage as between persons or localities."[121]

Later in the decision, the court makes clear that the Secretary has the authority to restrict packer practices that violate Section 202. The court states:

"If a practice in respect to the giving of discount or terms of credit in fact constitutes an undue and unreasonable preference or advantage, or subjects some person or locality to undue and unreasonable prejudice or disadvantage, then clearly the Secretary of Agriculture has the power to restrict the practice to the point where it is fair and reasonable . . ."[122]

Clearly, the court recognized that once USDA finds that a particular packer practice violates Section 202, it has the authority to restrict that practice until it is fair and reasonable.

ii. Regulating uniform packer practices

The court in the *Swift* case also held that the cease and desist order issued by the Secretary went beyond his authority because it was in effect an affirmative command to require "uniformity" of discount terms, terms of credit, and trade practices.[123] The court interpreted the cease and desist order issued by USDA to affirmatively require Swift to give discounts and particular terms of credit to any customer as a condition to being permitted to continue giving terms of credit or discounts that were found unreasonable and prejudicial. The court held that once a discount, term of credit, or practice was found to be undue or unreasonable preference, or unjustly discriminatory, the Secretary did not have the authority to change the practice into a proper practice by requiring it to be extended to all others who may be affected thereby. ***It held that the Secretary does have the power to restrict a practice to the point where it is fair and reasonable but does not have the power to change the unreasonable preference into a fair practice by affirmatively mandating that it be applied uniformly to all affected.***[124]

The court states: "If a practice in respect to the giving of discount or terms of credit in fact constitutes an undue and unreasonable preference or advantage, or subjects some person or locality to undue and unreasonable prejudice or disadvantage, then clearly the Secretary of Agriculture has the power to restrict the practice to the point where it is fair and reasonable; but we do not believe that the Secretary has the power to change a practice, which is assumed to be unreasonable and to create an unreasonable preference, into a proper practice by requiring it to be extended to all others who may be affected."[125]

The reference to the lack of authority to establish uniform practices in the quote used by Secretary Glickman is explained by this statement. All that the *Swift* court meant was that the Secretary does not have the authority to affirmatively mandate that for an unlawful practice to become lawful, it must be applied uniformly.

The *Swift* case does not support refusal to issue rules that describe the circumstances under which packer captive supply and vertical coordination procurement practices violate Section 202 of the Packers and Stockyards Act.

b. Incipiency theory of enforcement

The legislative history of the Packers and Stockyards Act indicates that the Act seeks "to prohibit the particular conditions under which monopoly is built up, and to prevent a monopoly in the first place and to induce healthy competition."[126]

Such legislative history has been interpreted by courts to mean that one of the purposes of the Packers and Stockyards Act is to prevent "potential injury by stopping unlawful practices in their incipiency" (i.e., at the very beginning of the

practice) and that "proof of a particular injury is not required" to permit regulation of packer practices.[127]

Several courts have affirmed the principle that the Secretary has the authority to prevent unlawful practices in their *incipiency* but require that before doing so he must find either some non-competitive intent or some *likelihood* of competitive injury.[128] These cases *do not require* the Secretary to find *actual injury*. He is *only required* to demonstrate a *likelihood* that injury of the sort the Act is designed to prevent will occur. As the Court of Appeals for the Ninth Circuit has stated:

"Unfair practices under Section 202 are not confined to those where competitive injury has already resulted, but include those where there is a *reasonable likelihood* that the purpose will be achieved and that the result will be an undue restraint of trade."[129]

In *Bosma v. USDA*, the Ninth Circuit Court of Appeals quoted its *Central Coast Meats, Inc.*, holding that the department must show that the challenged conduct "is *likely* to produce the sort of injury the Act is designed to prevent."[130] The court found that actual harm resulted when an auction operator purchased livestock from consignments for speculation.[131] However, the court also held that the failure of the auction operator to inform consignors that he was the actual purchaser of the livestock was "inherently unfair" and "it may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm."[132]

Similarly, in a case involving an agreement by two competitors not to compete for certain cows at an auction market, the Eighth Circuit Court of Appeals held that "actual injury" need not be proven because the "purpose of the Act is to halt unfair trade practices in their incipiency, before the harm is suffered."[133] The court stated that "the Secretary need only establish the *likelihood* that an arrangement will result in competitive injury to establish a violation."[134] The court agreed with the judicial officer that "a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act."[135] The court concluded that "this is so even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had that result."[136]

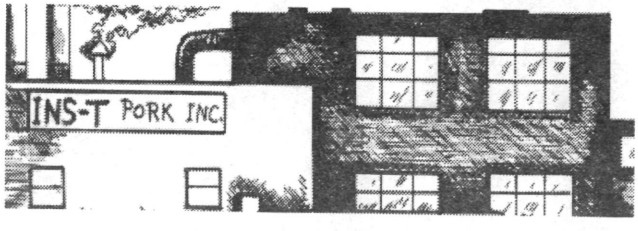
These cases firmly establish that the Secretary may take action to prevent unlawful packer practices in their incipiency if he finds that these practices are reasonably likely to produce the sort of injury the Act is intended to prevent.

The incipiency theory of enforcement of the Packers and Stockyards Act can be applied in the rulemaking process as well as in an administrative complaint proceeding. In the rulemaking process the Secretary makes the necessary findings with regard to the packer practices in general, whereas in an administrative complaint proceeding the necessary finding would be made as to a particular situation.

2.4 The relevance of competition in an undue preference case

The Seventh Circuit Court of Appeals has held that when considering whether a packer practice provides an undue and unreasonable preference or is unjustly discriminatory, the effect on competition as between the party alleged to have obtained the preferential treatment and the party alleged to have been discriminated against is of primary importance. Even good faith competition between packers will not prevent a finding of discrimination or unreasonable preference if the parties preferred or discriminated against are not other packers.[137]

When considering whether the packers' captive supply and vertical coordination procurement methods result in undue and unreasonable preferences or unjust discrimination, their effect on the competition between livestock producers must be considered.



B. SECRETARY'S AUTHORITY TO ISSUE RULES MANDATING PRICE REPORTING

Editor's Note: *In this section, "United States Code" is abbreviated as* **U.S.C.** *"Code of Federal Regulations" is shortened to* **C.F.R.**

The Agricultural Marketing Act of 1946 authorizes the Secretary of Agriculture to collect and report on livestock and meat prices. The congressional purpose for passing this Act is clearly expressed in the statute. Of primary concern to Congress was that USDA marketing programs, including the price reporting programs, be designed to improve the profitability of American farms and the orderly distribution of the commodities they produce and to reduce the price spread between the producer and the consumer. Expressed Congressional purpose is:

"[T]hat marketing methods and facilities may be improved, that distribution costs may be reduced and *the price spread between the producer and consumer may be narrowed*, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be *disposed of usefully, economically, profitably, and in an orderly manner*" **7 U.S.C. § 1621**.

Pursuant to the Act: "The Secretary of Agriculture is *directed* and authorized . . . to collect and disseminate marketing information, including adequate outlook information on a market area basis, for the purpose of anticipating and meeting consumer requirements, *aiding in the maintenance of farm income* and bringing about a balance between production and utilization of agricultural products" **7 U.S.C. § 1622 g**.

"The Secretary has the authority to promulgate rules he finds appropriate to implementing this statutory provision and which furthers the congressional intent to improve profitability for livestock farmers and ensure orderly disposal of their animals" **7 U.S.C. § 1624 (b)**.

AMS Market News livestock and meat price collection and reporting systems are voluntary. Those buyers and sellers contacted by USDA for price information are not required to report any information. They may choose not to report at all or to report selectively. The recent trend is that more and more persons contacted are declining to participate in this voluntary reporting system. In addition, the dramatic increase in the use of captive supply livestock procurement contracts and arrangements, which are not reported, are causing a significant decline in the volume of trades reported. Failure to report on prices paid for captive supplies, which represent a significant supply, creates a serious question as to whether the AMS Market News reports accurately reflect the true value of livestock.

The current AMS Market News livestock and meat price reporting programs are failing to meet the congressionally stated purposes of the authorizing Act. They have not improved marketing methods. Rather, they have allowed a large percentage of livestock to be acquired though captive supply procurement methods, the prices for which are not even reported by USDA. The current voluntary reporting program does not assist livestock producers in disposing of their animals profitably because it does not ensure that adequate or even accurate information about livestock values is made available to them.

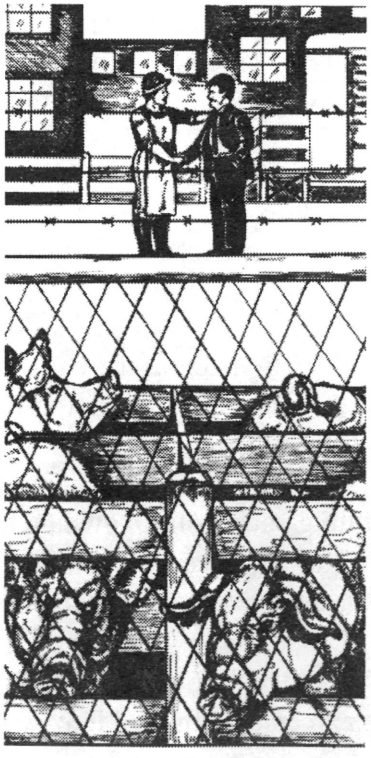
The Secretary's broad authority to issue regulations on livestock and meat reporting programs that will improve marketing methods, reduce the price spread between the producer and the consumer, and ensure profitable and orderly disposal of livestock by American farmers authorizes — and, given the current structure of the livestock industry, necessitates — the establishment of a mandatory reporting system that will include information on both cash-market prices and captive supply agreement terms and prices.

The Packers and Stockyards Act also provides the Secretary with investigative powers that could be used to mandate that packers provide more detailed information regarding

prices paid for livestock and procurement practices used. Under the Packers and Stockyards Act, the Secretary of Agriculture is authorized to mandate, by general or special orders, that packers, stockyard owners, marketing agencies and dealers file "annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing the ... [Secretary] such information as ... [the Secretary] may require as to the organization, business, conduct, practices, management, and relation other corporations, partnerships and individuals" **15 U.S.C. § 46** incorporated by reference **in 7 U.S.C. § 222**. This statutory authorization has been incorporated into the Packers and Stockyards Administration Regulations which state "each packer,...stockyard owner, market agency, and dealer, upon request, shall to the Secretary or his duly authorized representatives in writing or otherwise, and under oath or affirmation if requested by such representatives, any information concerning the business of the packer, ... stockyard owner, market agency, or dealer which may be required in order to carry out the provisions of the Act and regulations..." **9 C.F.R. § 201.970**.

The Act also authorizes the Secretary to release information obtained through special orders to the public when it is in the public interest to do so and when the information is reported in a form which does not disclose any trade secrets or privileged or confidential information: "The [Secretary] shall have the power (f) to make public from time to time such portions of the information obtained by it hereunder as are in the public interest;... Provided, that the [Secretary] shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. ..." **15 U.S.C. § 46** incorporated by reference in **7 U.S.C § 222**. GIPSA does require packers, stockyard owners, market agencies, and dealers to file annual reports on prescribed forms **9 C.F.R § 201.97**.

The information made public from these reports has been of very limited use to producers because of the time it takes to compile and disseminate the information. As yet the agency has not made use of the authority to issue special orders to continually monitor and investigate the procurement and pricing practices of the packers in a timely and effective manner. Issuance of special orders mandating regular reporting of procurement methods and pricing information and making appropriate reports of this information to the public is consistent with Congressional intent in enacting the Packers and Stockyards Act. The legislative history of the Act makes clear that Congress intended the Secretary to use his extraordinarily broad regulatory powers aggressively to prevent conditions under which packers could gain control of the livestock market, and to compel packers to do business in a lawful fashion, and thereby, to induce healthy competition. It is appropriate under this Congressional standard for the Secretary to issue special orders mandating regular timely reports on procurement practices and prices. Only through continuous and timely investigation and monitoring of procurement practices and prices can the Secretary be in a position to prevent violations of and compel compliance with Section 202 provisions of the Packers and Stockyards Act so as to ensure healthy competition in the hog markets.



Recommendations

Based on the findings of this report, we recommend the following actions be taken to remove obstacles to market access for independent hog producers.

Federal Policy

The Packers and Stockyards Act and other antitrust laws provide a sound legal framework for the free market system of trade in the livestock industries. Aggressive enforcement of these laws will help ensure that family farm livestock producers will continue to have open access to markets and receive competitive prices for their animals.

1. The USDA and the Department of Justice should ***immediately*** develop and make public a coordinated plan for consultation, communication, investigation, and enforcement of all antitrust laws in the livestock packing and production industries. The plan should include regular consultation and review of both activities that affect concentration of market share by packers on a local or regional market basis and captive supply procurement and other practices that are used to vertically integrate the industry.

2. USDA should issue substantive regulations that identify specific packer captive supply procurement and vertical coordination practices and the circumstances under which these practices in the hog industry will be considered violations of Section 202 of the Packers and Stockyards Act. Examples of appropriate regulations include:

☛ Prohibiting packers from owning hogs through the production cycle, unless those hogs are sold for slaughter in an open, public market.

☛ Requiring that all forward contracts and marketing agreements entered into by packers contain a fixed dollar amount as a base price and are traded in an open, public market.

☛ Prohibiting packer ownership or financing of livestock production operations, feedlots, or marketing facilities.

☛ Prohibiting packers from acquiring hogs for slaughter through joint ventures or alliances with certain preferred production operations.

2. Issue regulations that identify the circumstances under which volume premiums, inconsistent application of grade and yield, and other terms of purchase violate Section 202 because they are unfair, unjustly discriminatory, provide undue preferences for certain producers over other producers, and/or have the effect of manipulating or controlling prices. For example:

☛ Prohibit packers from paying large-volume hog producers higher prices than they pay to independent family farm producers for comparable quality animals.

3. The USDA should be aggressive in bringing administrative complaints against hog packers to enforce Section 202 of the Packers and Stockyards Act to ensure open, competitive markets for independent hog producers and to prevent unjust discrimination, undue preference for large-scale producers, and manipulation or control of producer prices.

4. The USDA should require packers to report all packer purchases of hogs (whether contracted or by other means), the price of these purchases,

and the substantive provisions of any forward contract, marketing agreement or production contract through which the hogs were acquired.

Economists & Other Researchers

(*government and land grant*)

USDA and land grant researchers should increase investigation and study of the impact of contract production, captive supply procurement, and vertical coordination practices in the hog industry on independent, family farm hog producers' access to markets and fair prices. Examples of research needing to be conducted (in some cases, furthering studies already begun) are:

1. Analyze the impacts on cash market prices that result as the percentage of packers' slaughter inventory that is categorized as captive varies and the impact on cash prices as the percentage of total slaughter that is categorized as captive varies.

2. Analyze the pattern of buying station closures, packing plant closures, packer mergers, and packer purchases, and evaluate their impact on access to markets for independent hog producers. Analyze whether the patterns of consolidation of the industry result in a division of market turf among the major packers.

3. Conduct research on how the level of prices for slaughter hogs differs in the cash market and under forward contracts or marketing agreements, including how volume premiums and grade and yield standards affect these price terms.

4. Conduct research on how packers' joint ventures and alliances with production facilities affects independent family farm producers' access to markets and cash market prices.

5. Conduct research on cash market and contract prices paid for slaughter hogs, with an emphasis on how these prices vary by size of producer.

6. Analyze which producers are offered or obtain forward contracts and/or marketing agreements with packers based on size of operation, methods of production and location.

7. Conduct socio-economic research that describes the impact the consolidation of market and production share in the hog industry has on agricultural communities. This research should also investigate the impact reduction in market access for family farmers has on agricultural communities.

State Policymakers

1. Specifically prohibit packers from owning hogs or hog operations in your state.

2. Prohibit packers with 15 percent or greater relevant market share from maintaining more than 15 percent of each packing plant's capacity in captive supplies at any given time.

3. Develop practical proposals for support of producer-owned and controlled processing facilities.

4. Develop and fund programs to support marketing ventures by family farm hog producers.

5. Push for action by Federal agencies such as GIPSA and the Department of Justice.

Independent Hog Producers

1. Advise the regional Grain Inspection, Packers and Stockyards Administration (GIPSA) office of concrete evidence of disparate treatment between contract producers and independent producers regarding price or other terms of sale.

2. Call or write the USDA/GIPSA and your elected federal and state representatives to advocate for fair market access and prices for

independent hog producers.

3. If told by a packer that they can't take your hogs, ask why. You have a right to know.

4. Explore innovative marketing strategies that reward you for producing hogs in a sustainable manner that benefits the community.

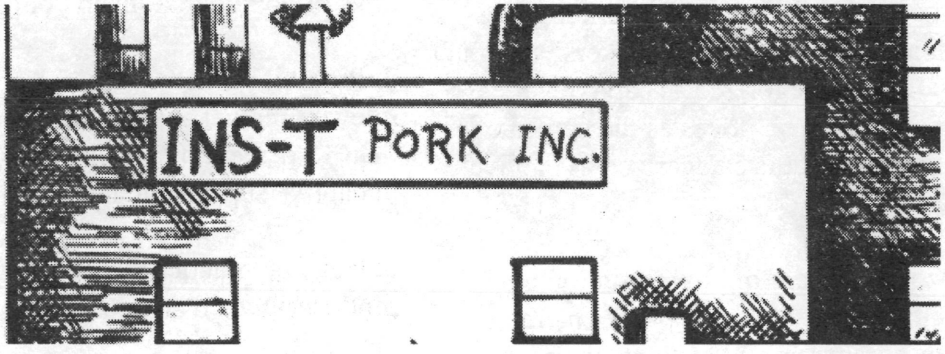
5. Stop supporting research and promotion efforts that benefit vertical integration and the biggest producers. Vote to end the mandatory pork checkoff tax.

Consumers

1. Ask who raises the pork on your supermarket shelves — a family farm, or a factory farm. Tell your store manager you want to buy from family farms.

2. If you learn that hog prices paid to hog farmers are low (e.g. below 40 cents/lb.), find out if pork prices are dropping significantly at the supermarket, and if not, ask your store manager why.

3. Where available, buy pork that is raised locally by sustainable family farmers.



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[95] USDA, *Western Cornbelt Hog Procurement Investigation*

[96] USDA, *Western Cornbelt Hog Procurement Investigation*

[97] USDA, *1997 Annual Report of the Grain Inspection, Packers and Stockyards Administration,* Grain Inspection, Packers and Stockyards Administration, December 1997.

[98] Barshay

[99] 61 Cong. Rec. 1863 (1921).

[100] Heffernan (17).

[101] 61 Cong. Rec. 1809 (1921).

[102] 61 Cong. Rec. 1868 (1921).

[103] Stafford v. Wallace, 258 U.S. 495, 515-516, 42 S.Ct. 397, 401 (1922).

[104] Bosma v. USDA, 754 F.2d 804, 808 (8th Circuit 1984), citing H. Rep. No. 1048, 85th Cong. 2d Session, *reprinted in* 1958 U.S. Code Cong. and Admin. News, 5212, 5213.

[105] Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); citing Stafford v. Wallace, 258 U.S. at 521; and Safeway Stores, Inc. v. Freeman, 369 F.2d 952, 956 (1966); *see also*, Farrow v. USDA, 760 F.2d 211, 214 (8th Circuit 1984).

[106] 61 Cong. Rec. 1861 (1921).

[107] 61 Cong. Rec. 1805 (1921).

[108] H.R. Rep. 77 on Packer Act Amendment of 1924 at 3.

[109] HR Rep No 1048, 85th Cong., 1st Sess 3 (1957).

[110] HR Rep No 1048 (5).

[111] Sen. Rep. No. 94-932, 94th Cong, 2d Sess. 4 (1976).

[112] 1978 USCAAN 2204, Senate Report.

[113] 61 Cong. Rec. 1887 (1921).

[114] 61 Cong. Rec. 1888 (1921)

[115] House Report No 77, 67th Cong., 1st Sess. 2 (1921)

[116] H.R. Rep No. 77, 67th Cong. 1st Sess. 2 (1921); 61 Cong. Rec. 1799 (1921).

[117] 61 Cong. Rec. 4780 (1921).

[118] 61 Cong. Rec. 4782 (1921).

[119] *See* 61 Cong. Rec. 2674-2675 (1921).

[120] Swift & Co. v. Wallace, 105 F.2d 848, 853 and 863.

[121] Swift & Co. v. Wallace at 853.

[122] Swift & Co. v. Wallace at 863.

[123] Swift & Co. v. Wallace at 862-63.

[124] Swift & Co. v. Wallace at 862-63.

[125] Swift & Co. v. Wallace at 863.

[126] Hearings on H.R. 14, H.R. 232, H.R. 5032, and H.R. 5692 Before the House Committee on Agriculture, 67th Cong, 1st Sess., ser. D, 26 (1921).

[127] Daniels v. United States, 242 F.2d 39, 42 (7th Cir. 1957), *cert. denied*, 354 U.S. 939, *reh'g denied*, 355 U.S. 852 (1957); Bowman v. USDA, 363 F.2d 81, 185 (5th Cir. 1966), quoting *Daniels*.

[128] *See* Armour & Company v. United States, 402 F.2d 712, 717 (7th Cir. 1968), which describes how several previous Seventh Circuit opinions incorporated this concept, including Swift & Co. v. Wallace, 105 F.2d 848 (7th Cir 1939); Wilson & Co. v. Benson, 286 F.2d 891 (7th Cir. 1961); Swift & Co. v. United States, 408 F.2d 849 (7th Cir. 1962); *see also* Corona Livestock v. USDA, 607 F.2d 811, 815 (9th Cir. 1979).

[129] De Jong Packing Co. v. USDA, 618 F.2d 1329, 1336-37 (9th Cir. 1980).

[130] Bosma v. USDA, 754 F.2d 804, 808 (9th Cir. 1984).

[131] Bosma v. USDA at 808-809.

[132] Bosma v. USDA at 808-809.

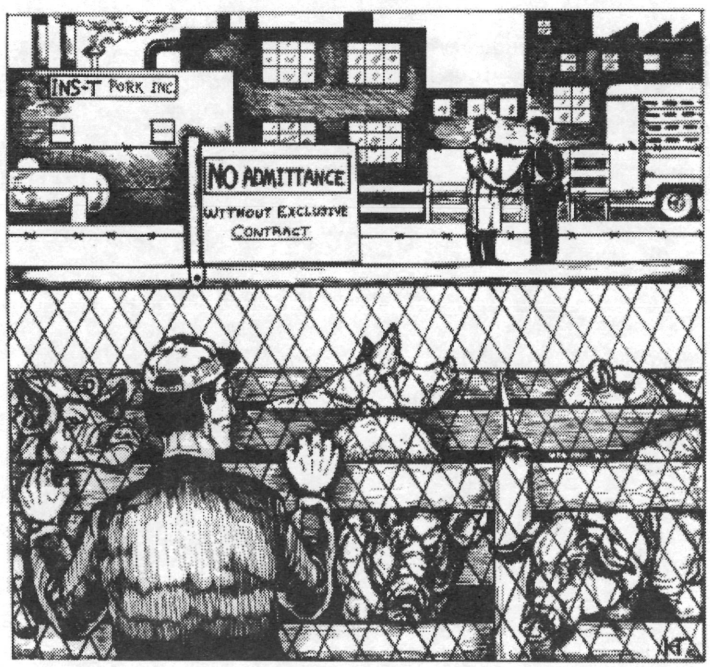
[133] Farrow v. USDA, 760 F.2d 211, 215 (8th Cir. 1985).

[134] Farrow v. USDA, 760 F.2d 211, at 215.

[135] Farrow v. USDA, 760 F.2d 211, at 214.

[136] Farrow v. USDA, 760 F.2d 211, at 214.

[137] *See, e.g.*, Swift & Co. v. Wallace, 105 F.2d 848, at 855-857 (7th Cir. 1939).



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