

**In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Remand Order.
Filed August 27, 2001.**

Remand – Full compliance – “No-pay”/“Slow-pay” – Full payment.

The Judicial Officer remanded the proceeding to Chief ALJ James W. Hunt for further proceedings in accordance with the instructions in *Kirby Produce Company, Inc. v. United States Dep’t of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

Eric Paul, for Complainant.

Paul T. Gentile, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on October 20, 1997. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent’s failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV).

On November 12, 1997, Respondent filed an “Answer,” and on December 4, 1997, Respondent filed an “Amended Answer” denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ¹] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full

¹The Secretary of Agriculture appointed James W. Hunt as Chief Administrative Law Judge on November 7, 1999.

payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the Chief ALJ). On November 16, 1998, the Chief ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) "Request for Official Notice" requesting that the Chief ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*; (2) "Motion for Decision Without Hearing by Reason of Admissions" [hereinafter Motion for Default Decision]; and (3) a proposed "Decision Without Hearing by Reason of Admissions." Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed "Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission," stating that Complainant cannot use the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the Chief ALJ issued "Order Canceling Hearing" and "Decision Without Hearing by Reason of Admissions" [hereinafter Initial Decision and Order]. The Chief ALJ: (1) found that Respondent and its creditors consented to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*; (2) found that Respondent's agreement to the June 25, 1996, Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.* and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed "Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions," which the Chief ALJ denied.

On May 28, 1999, Respondent appealed to the Judicial Officer. On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (2) finding that, as of December 2, 1998, \$1,215,723.99 remained past due and unpaid, with \$387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011, 1017-18, 1032 (1999).

On August 19, 1999, Respondent filed a petition for reconsideration of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999), which I denied. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1032 (1999) (Order Denying Pet. for Recons.).

Respondent sought judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999). The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to United States Department of Agriculture to conduct further proceedings. *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001).

On August 22, 2001, counsel for Complainant informed me that Complainant would not seek further judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999), and counsel for Respondent informed me that Respondent would not seek further judicial review of *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. 1011 (1999).

The United States Court of Appeals for the District of Columbia Circuit indicates that, on remand, the United States Department of Agriculture must determine whether Respondent made full payment to the 20 produce sellers identified in the Complaint by January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence. The Court states that such payment would convert the "no-pay" case into a "slow-pay" case and would result in a PACA license suspension rather than a PACA license revocation. *Kirby Produce Company, Inc. v. United States Dep't of Agric.*, 256 F.3d 830 (D.C. Cir. 2001). However, the Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing. Cases in which a respondent had failed to pay by the date of the hearing were referred to as "no-pay" cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay

in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as “slow-pay” cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff’d*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent’s present compliance not involve credit agreements for more than 30 days.

Therefore, I remand the proceeding to the Chief ALJ to determine, after providing the parties with an opportunity for a hearing, whether Respondent is in full compliance with the PACA at the time the hearing in this proceeding actually commences. Using the date the hearing actually commences rather than January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence, to determine whether this is a “no-pay” or a “slow-pay” case, comports with the Judicial Officer’s “no-pay-slow-pay” policy that is applicable to this proceeding and does not adversely affect Respondent. Further, I believe, using the date the hearing actually commences rather than January 13, 1999, the date the Chief ALJ originally scheduled the hearing to commence, to determine whether this is a “no-pay” or a “slow-pay” case, is in accord with the purpose for which the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding to the United States Department of Agriculture.
