

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY

Docket No. 12-0213¹

In re:

CLAUSEN MEAT PACKING INC.,
MICHELLE TSAO, and
KENNETH KHOO,

Respondents.

DECISION AND ORDER ON THE RECORD

I. INTRODUCTION

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”; “Complainant”) against Clausen Meat Packing Inc., Michelle Tsao, and Kenneth Khoo (“Respondents”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”). The Complaint alleges that Respondents failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

II. ISSUES

1. Whether a hearing is necessary in this matter;
2. Whether Respondents failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and

¹ Associated cases assigned docket numbers for accounting purposes, 12-0214 and 12-0215, are included in this disposition.

3. If Respondents willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

On January 27, 2012 Complainant filed a complaint against Respondents with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On February 23, 2012, Respondents filed an Answer with the Hearing Clerk, acting *pro se*. References to the Answer in this Decision and Order shall be denoted as “RX-1”. By Order issued March 22, 2012, I set deadlines for the parties’ submissions in advance of setting a hearing date.

On May 9, 2012, Complainant timely filed pre-hearing submissions in accordance with my Order. Respondents did not file pre-hearing submissions, and on July 5, 2012, I issued an Order to Respondents to show cause why a Decision and Order on the Record should not be entered. On July 23, 2012, Respondents filed a response to my Order, hereby identified as RX-2. On July 24, 2012, Complainant filed Proposed Findings of Fact, Conclusions of Law, Order and Brief (“Proposed Findings”), as well as evidence hereby identified as CX-1 through CX-16. On that date Complainant also filed Declarations by Amy Blechinger and James Morcaldi, which are hereby identified respectively as CX-17 and CX-18. All of Complainant’s and Respondents’ evidence is hereby admitted to the record. The matter is ripe for adjudication and the record is closed.

1. Statutory and Regulatory Authority

7 C.F.R. § 1.1.39 provides, in pertinent part:

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or

failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 day after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing...

7 C.F.R. § 1.1.39.

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. Id. The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. Id. Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a).

The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. See, *S.S. Farms Linn County*, 50 Agric. Dec. 476 (1991).

B. Summary of the Facts

On or about July 29, 2010, GIPSA sent written notice to Respondents that it had come to GIPSA's attention that Respondents had failed to timely mail checks that were meant as payment for livestock purchases in violation of the Act. CX-5. The letter was acknowledged as received by Respondents on August 5, 2010. Thereafter, GIPSA's Resident Agent in California, James

Morcaldi, conducted a follow up investigation and determined that Respondents had failed to timely pay for transactions made during the period from September 15, 2010 through October 19, 2010. CX-17, ¶ 2.

Agent Morcaldi documented his findings with copies of invoices, checks, and mailing envelopes involving nine separate transactions during this period. CX-18, ¶ 7; CX-7 through CX-16. Agent Morcaldi concluded that Respondents had dated checks for purchases on the dates of the transactions, affixed postage through a postal meter machine that marked the envelopes with the dates that payments were due, and deposited the envelopes in the mail for delivery as many as eighteen days late. CX-18, ¶8. This information formed the underpinnings for USDA's complaint against Respondents.

In the Answer that they filed, Respondents admitted that they had made late payments in violation of the Act. CX-1. This admission was reiterated in their response to my Order to show cause. CX-2. In justification for their actions, Respondents asserted that their suppliers did not complain, and they were not the only company making late payments. Further, Respondents noted that their customers have never been faced with non-payment due to non-sufficient funds. They observed that economic circumstances have produced an unfavorable situation, in which they receive untimely payments from creditors, or have accounts that result in uncollectible judgments because of business bankruptcies or dissolutions. Respondents further assert that they have agreements with suppliers to deduct from the amount due specific amounts for animals that have died or were damaged. CX-1. Respondents repeated these assertions in their response to my Order to show cause. CX-2.

Amy Blechinger is a Program Analyst for GIPSA whose duties include reviewing investigations and making recommendations regarding the propriety of sanctions. CX-17, ¶¶ 1.

Ms. Blechinger reviewed Respondents' file and concluded that they had willfully violated the Act by purchasing livestock and failing to pay the full amount within the time period required by the Act. CX-17, ¶ 3. In her opinion, Respondents acted willfully by failing to make payments after being given notice by GIPSA that such failure represented violation of the Act. CX-17, ¶ 4.

Analyst Blechinger concluded that a civil penalty of \$4,000.00 should be assessed against the Respondents, jointly and severally. CX-17, ¶¶ 3, 4. Ms. Blechinger noted that the Act allowed a greater amount of penalty, but she considered Respondents' reports that their liabilities exceeded assets for the period from July 1, 2010 through June 30, 2011, and recommended a reduction in the penalty. CX-17, ¶ 5.

C. Discussion

The record is undisputed that Respondents failed to make timely payments within the mandates of the Act. Respondents have essentially admitted that they failed to make timely payments. Respondents allude to agreements with suppliers to make other kind of payment arrangements. However, despite at least three opportunities to produce such evidence, none is of record. Respondents did not provide any specific information about that defense in their Answer to the Complaint; Respondents failed to file a list of evidence or witnesses in their defense; and Respondents failed to provide specific information or evidence in response to the Order to show cause that I issued.

Further, Respondents did not comply with the payment provisions of the Act despite being given notice of their violations by GIPSA. The Secretary has found that "...once a licensee has been adequately warned, if he subsequently violated the Act the agency may proceed to suspend his license without any further warning, notice or opportunity to demonstrate informally that he

did not violate the Act”. In re: Jeff Palmer, 50 Agric. Dec. 1762 at 17802(1991). Accordingly, I find it appropriate to issue this Decision and Order on the record, pursuant to 7 C.F.R. §1.139.

I find that Respondents have willfully violated the Act by failing to make payments when due. The Secretary has concluded that the failure to pay the full amount of the purchase price within the time period required by the Act constitutes an unfair and deceptive practice in willful violation of the Act. In re: Great American Veal, Inc., 48 Agric. Dec. 183, 202-203 (1989). Respondents withheld payments in nine transactions conducted after receiving a notice from GIPSA advising them that their payment practices violated the Act. I conclude that their continued practice of making late payments despite notice constitutes substantial evidence of willfulness.

I credit Respondents’ explanation that their cash flow has suffered during the current economy, and I even sympathize with their position. Nevertheless, Respondents’ financial problems are not a meritorious defense to their failure to make payments. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. In re: Great American Veal Inc., supra. at 211. Moreover, the Secretary has concluded that Respondents who admit to the allegations in a complaint are in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. In re: Hardin County Stockyards, Inc., 53 Agric. Dec. 654, 656 (1994). I note that Complainant considered Respondents’ liabilities and assets when Ms. Blechinger recommended a reduced monetary sanction. Complainant has not proposed suspending or otherwise hampering Respondents’ ability to engage in the business of buying and selling livestock, despite its authority to do so. See, In re: Jeff Palmer, supra.

Respondents' actions also support the imposition of an Order directing them to cease and desist their practice of late payment. GIPSA's notice to Respondents failed to Act as a suitable deterrence from their practice of making late payments. I agree with GIPSA's assessment of penalties, and find that both a cease and desist Order and monetary penalties should persuade Respondents to comply with the prompt payment requirements of the Act in the future.

D. Findings of Fact

1. Respondent Clausen Meat Packing, Inc. ("Clausen") is a corporation organized and existing under the laws of the State of California, and its registered agent for service of process is Michelle Tsao.
2. At all times material herein, Clausen was engaged in the business of buying livestock in commerce for the purpose of slaughter, and was a packer within the meaning of the Act.
3. Michelle Tsao and Kenneth Khoo are individuals whose current mailing address is in the State of California. At all times material herein, Michelle Tsao was the president, treasurer, registered agent, and owner of 50% of the stock of Clausen Meat Packing Inc., and was, together with Kenneth Khoo, responsible for the direction, management and control of Clausen.
4. At all times material herein, Kenneth Khoo was the vice-president, secretary, and owner of 50% of the stock of Clausen Meat Packing Inc., and was, together with Michelle Tsao, responsible for the direction, management and control of Clausen.
5. On July 29, 2010, GIPSA sent Respondents written notification advising them that the agency had concluded that they were not mailing checks for livestock purchases in a timely manner, which correspondence was received by Respondents on August 5, 2010.

6. Respondents purchased livestock and failed to pay the full amount of the purchase price within the time period required by the Act on nine occasions between September 15, 2010 and October 19, 2010, as documented at Attachment “A” hereto.
7. Respondents failed to make timely payments in nine transactions after being notified by GIPSA that this practice constituted a violation of the Act.

E. Conclusions of Law

Respondents willfully violated 7 U.S.C. § 192(a) and § 228b of the Act by failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Sanctions are appropriate to deter Respondents and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. §193(b).

ORDER

Respondents Clausen Meat Packing, Inc., Michelle Tsao and Kenneth Khoo, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

Pursuant to 7 U.S.C. § 193(b), Respondents are assessed, jointly and severally, a civil penalty in the amount of four thousand dollars (\$4,000.00). Respondents’ payment shall be made out to the “U.S. Department of Agriculture” and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335. Respondents shall include on the payment instrument a reference to this case, Docket No. 12-0213.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the

U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 8th day of August, 2012 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge