AGRICULTURE DECISIONS

Volume 72

Book One

Part Two (P & S)

Pages 371 – 434

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2013

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

DOUGLAS BUTLER.
Docket No. D-12-0033.
Decision and Order. 371

RONALD RYAN SHEPARD, JR., A/K/A RONALD RYAN SHEPPARD, JR., A/K/A RON SHEPARD; JEREMY E. PIERCE; AND BROOKFIELD CATTLE CO., LLC.
Docket No. D-12-0357.
Decision and Order. 384

BRUCE MEDLEY, D/B/A B & M LIVESTOCK.
Docket No. 12-0169.
Decision and Order. 393

TYSON FARMS, INC.
Docket No. 12-0123.
Decision and Order. 399

PERKINS LIVESTOCK, LLC AND ROBB TAYLOR.
Docket No. 13-0134.
Decision and Order. 409

--

PACKERS AND STOCKYARDS ACT

MISCELLAENOUS ORDERS

MARSHALL M. CHERNIN.
Docket No. 13-0117.
Miscellaneous Order 419

DOUGLAS BUTLER.
Docket No. D-12-0033.
Order Granting in Part Petition to Reopen 419

GARY FULTON.
Docket No. 12-0542.
Miscellaneous Order 421

TODD SYVERSON, D/B/A SYVERSON LIVESTOCK BROTHERS.
Docket No. D-05-0005.
Order Granting Motion to Modify Suspension Order 421

PIEDMONT LIVESTOCK, INC. AND JOSEPH RAY JONES.
Docket No. 13-0087.
Order Denying Late Appeal 422

--

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

RICARDO JURADO.
Docket No. 12-0597.
Default Decision 428

PIEDMONT LIVESTOCK, INC. AND JOSEPH RAY JONES.
Docket No. 13-0087.
Default Decision 428

JAMES EMANUEL MOWERY.
Docket No. 13-0007.
Default Decision 428

DAVID BYRD, D/B/A DB CATTLE CO., D/B/A AD BYRD CATTLE.
Docket No. 12-0550.
Default Decision 428

MARK KASMIERSKY.
Docket No. 12-0600.
Default Decision 428

ABE CUESTA, A/K/A ABRAM CUESTA, D/B/A QUALITY CATTLE.
Docket No. 12-0533.
Default Decision 429

CAMBRIDGE VALLEY LIVESTOCK MARKET, INC.
Docket No. 13-0162.
Default Decision 429

TONY E. LYON, D/B/A LYON FARMS.
Docket No. 13-0121.
Default Decision 429

--

<u>**PACKERS AND STOCKYARDS ACT**</u>

CONSENT DECISIONS

Consent Decisions 430

In re: DOUGLAS BUTLER.
Docket No. D-12-0033.
Decision and Order.
Filed January 16, 2013.

PS-D – Cease and desist order – Civil penalty – Dealer – Sanction policy.

Jonathan D. Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on October 19, 2011. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges: (1) Douglas Butler, in six transaction which occurred on May 16, 2009, May 17, 2009, May 28, 2009, July 12, 2009, and July 22, 2009, and in the summer of 2009, failed to pay M.R. Pollock & Sons, Inc., for livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; and (2) Mr. Butler failed to keep records that fully and correctly disclose transactions between himself and M.R. Pollock & Sons, Inc., in violation of 7 U.S.C. § 221.[1] On November 18, 2011, Mr. Butler filed an Answer in which he admitted the jurisdictional allegations of the Complaint, denied the material allegations of the Complaint, and raised two affirmative defenses.

[1] Compl. ¶¶ II-IV.

On June 5th and 6th, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing in Burlington, Vermont. Jonathan D. Gordy, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. Peter F. Langrock, Langrock Sperry & Wool, LLP, Middlebury, Vermont, represented Mr. Butler. The Deputy Administrator called four witnesses. Mr. Butler testified on his own behalf and called his son, McGregor Butler, as a witness.[2] The Deputy Administrator introduced 12 exhibits identified as CX 1-CX 12. Mr. Butler introduced three exhibits identified as RX 1-RX 3. In addition, on January 15, 2013, I reopened the proceeding and received in evidence a jury verdict form entered in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11.[3]

On August 31, 2012, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding that in six transactions which occurred on May 16, 2009, May 17, 2009, May 28, 2009, July 12, 2009, and July 22, 2009, and at the end of July 2009, Mr. Butler failed to pay M.R. Pollock & Sons, Inc., the purchase price of $92,750 for 107 cattle, when due, in willful violation of 7 U.S.C. §§ 213(a) and 228b; (2) concluding that Mr. Butler failed to keep adequate records of transactions between M.R. Pollock & Sons, Inc., and himself, in willful violation of 7 U.S.C. § 221; (3) ordering Mr. Butler to cease and desist from violations of the Packers and Stockyards Act; (4) suspending Mr. Butler as a registrant under the Packers and Stockyards Act for a period of 5 years; and (5) assessing Mr. Butler a $66,000 civil penalty.[4]

On September 26, 2012, Mr. Butler filed Respondent's Appeal Petition. On October 25, 2012, the Deputy Administrator filed Response to Respondent's Appeal Petition. On November 19, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

---

[2] References to the transcript of the June 5th and 6th, 2012, hearing are indicated as "Tr." with the page reference.
[3] Butler, No. D-12-0033, 72 Agric. Dec. ___, 2013 WL 8208300, at *1 (U.S.D.A. Jan. 15, 2013) (Order Granting in Part Pet. to Reopen).
[4] Chief ALJ's Decision and Order at 8-9.

Based upon a careful review of the record that was before the Chief ALJ, I agree with the Chief ALJ's Decision and Order; however, on January 15, 2013, I reopened the proceeding and received in evidence a jury verdict form entered in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11.[5] The jury verdict form establishes that the jury in *Pollock v. Butler* found the May 17, 2009, May 28, 2009, and July 12, 2009, transactions that are at issue in this proceeding involve Mr. Butler's purchase of cattle from M.R. Pollock & Sons, Inc. The jury verdict raises some doubt regarding the nature of the May 16, 2009, July 22, 2009, and end of July 2009 transactions between M.R. Pollock & Sons, Inc., and Mr. Butler. Therefore, I give Mr. Butler the benefit of the doubt raised by the jury verdict in *Pollock v. Butler* and modify the Chief ALJ's Decision and Order. I conclude Mr. Butler failed to pay M.R. Pollock & Sons, Inc., the purchase price for cattle, when due, in willful violation of 7 U.S.C. §§ 213(a) and 228b, only with respect to those transactions which both the Chief ALJ and the jury in *Pollock v. Butler* found involve Mr. Butler's purchase of cattle from M.R. Pollock & Sons, Inc. I also reduce the Chief ALJ's period of suspension of Mr. Butler as a registrant under the Packers and Stockyards Act and the amount of the civil penalty assessed against Mr. Butler by the Chief ALJ.

DECISION

Discussion

The purpose of the Packers and Stockyards Act, as expressed in connection with a 1958 amendment to the Packers and Stockyards Act is, as follows:

> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of the Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and

---

[5] *See Butler*, *supra* note 3.

meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.

H.R. Rep. No. 85-1048, at 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. Included in the major provisions of the Packers and Stockyards Act are a prohibition against any unfair, unjustly discriminatory, or deceptive practice;[6] record keeping requirements;[7] and requirements for the prompt payment of the full amount of the purchase price for livestock purchased by a dealer.[8]

The record establishes that in late August 2010, Ronald Pollock contacted Packers and Stockyards Program officials and complained that Mr. Butler had not paid for cattle purchases that had been negotiated on Ronald Pollack's behalf by Mike Lane, an individual who worked with Ronald Pollack (Tr. 20-21). Jaime Ziem, a Packers and Stockyards Program resident agent, investigated the matter, collecting copies of sales invoices from Ronald Pollock; taking statements from Mike Lane (CX 3), Ronald Pollock (CX 4), Milton Pollock (CX 5), and Mr. Butler (CX 6); and reviewing Mr. Butler's records (Tr. 21-37). At the June 5th and 6th, 2012, hearing, Ms. Ziem identified the records produced during the course of the investigation, as well as the statements that had been given to her (Tr. 13-50).

The characterization of the transactions which are the subject of this proceeding, as reflected in the testimony adduced during the June 5th and 6th, 2012, hearing, is in sharp conflict. The Deputy Administrator's witnesses testified that the transactions were all cattle sales and Mr. Butler testified that in each case a form of joint venture was established whereby he would care for the cattle and retain any milk that was produced, and, when the cattle were sold to third parties, he would get half of the sale proceeds.

Mike Lane, the individual who negotiated cattle transactions on Ronald Pollock's behalf (Tr. 52-53, 123-24), testified that on May 17, 2009, he delivered 33 cattle from the Lovewell farm to Mr. Butler (Tr. 58-60). Mr. Butler told Mr. Lane that he had a buyer for the cattle

---

[6] 7 U.S.C. § 213(a).

[7] 7 U.S.C. § 221.

[8] 7 U.S.C. § 228b.

and that payment would be forthcoming once the cattle were resold (Tr. 58-60). Mr. Lane prepared an invoice reflecting a purchase price of $22,300 and gave the invoice to Mr. Butler (Tr. 59-60, 113-14; CX 8).

Another transaction occurred on May 28, 2009, when Mr. Lane delivered six cattle (five bred Holsteins and a bull) to Mr. Butler's farm (Tr. 60-61). The invoice prepared and delivered to Mr. Butler reflected a purchase price of $6,950 (CX 9).

On July 12, 2009, Mr. Lane met Mr. Butler at Santa Claus Village in New Hampshire where eight cattle were unloaded from Mr. Lane's trailer onto Mr. Butler's trailer (Tr. 62-63). Mr. Butler told Mr. Lane he needed some cheaper animals for a neighbor who was going to buy them (Tr. 62-63). An invoice reflecting a purchase price of $5,600 was prepared and given to Mr. Butler (CX 10).

Although the evidence reflected that Mr. Butler sold to third parties a number of the cattle that had been sold to him by M.R. Pollock & Sons, Inc., without remitting to M.R. Pollock & Sons, Inc., any portion of the price paid by third parties (Tr. 68-69, 132-33, 146), Mr. Butler maintained that he and Ronald Pollock had a deal as partners (Tr. 210).[9] Mr. Butler testified that, as part of that deal, Ronald Pollock provided the cattle and Mr. Butler furnished the feed and labor (Tr. 210). Ronald Pollock disputed Mr. Butler's testimony. Throughout his testimony, Ronald Pollock took the position that all of the transactions were sales and he still expects to be paid (Tr. 121-67).

Having read the testimony, I find Mr. Butler's testimony that the May 17, 2009, May 28, 2009, and July 12, 2009, transactions were part of a partnership arrangement or joint venture incredible and unworthy of belief. Not only is there no evidence of a written agreement between the parties, the evidence is clear that many of the cattle purchased were subsequently resold or otherwise disposed of without any remittance to M.R. Pollock & Sons, Inc. (Tr. 69, 133, 146, 155).

---

[9] Mr. Butler admitted that he had not been able to settle up with Ronald Pollock and Mr. Lane (Tr. 210).

The Deputy Administrator seeks a cease and desist order, a 5-year suspension of Mr. Butler as a registrant under the Packers and Stockyards Act, and a $66,000 civil penalty (Tr. 240).

The Secretary of Agriculture's sanction policy is as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497, No. 89-03, 1991 WL 290584 (U.S.D.A. Feb. 8, 1991) (Decision as to James Joseph Hickey and Shannon Hansen), *aff'd*, 991 F.2d 803 (9th Cir. 1993). Pursuant to 7 U.S.C. § 213(b), when determining the amount of any civil penalty, the Secretary of Agriculture must also consider "the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." The maximum civil penalty that the Secretary of Agriculture may assess for each of Mr. Butler's violations of 7 U.S.C. § 213(a) is $11,000.[10]

Mr. Butler, in three transactions, purchased 47 cattle for $34,850 from one livestock seller and failed to pay, when due, the full purchase price of the cattle. These three transactions occurred within 2 months of each other; namely, on May 17, 2009, May 28, 2009, and July 12, 2009. As for the size of Mr. Butler's business, in 2009 and 2010, Mr. Butler's livestock purchases totaled almost $1,000,000 (Tr. 241; CX1-CX 2). Peter Jackson, a sanction witness called by the Deputy Administrator,

---

[10] The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) is $10,000 (7 U.S.C. § 213(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 213(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. In 2009, when Mr. Butler violated the Packers and Stockyards Act, the maximum civil penalty for each violation of 7 U.S.C. § 213(a) was $11,000 (7 C.F.R. § 3.91(b)(6)(iv) (2009)).

testified that he could not determine Mr. Butler's ability to continue in business, but, instead, testified that, based upon Mr. Butler's livestock purchases, a civil penalty of "$66,000 is reasonable." (Tr. 241.)

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is "to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock." *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971), *cited in Van Wyk v. Bergland,* 570 F.2d 701, 704 (8th Cir. 1978). The requirement that a livestock purchaser make timely payment effectively prevents livestock sellers from being forced to finance transactions.[11] Mr. Butler contravened the timely payment requirement and his violations directly thwart one of the primary purposes of the Packers and Stockyards Act.[12] In addition, Mr. Butler failed to keep records which fully and correctly disclose all the transactions involved in his business as a dealer, as required by 7 U.S.C. § 221. Mr. Butler's failure to keep complete and accurate records of all transactions involved in his business as a dealer is egregious because that failure thwarts the Secretary of Agriculture's ability to ensure that the purposes of the Packers and Stockyards Act are accomplished.[13]

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry.

[11] *See* Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); Robert Morales Cattle Co., No. D-11-0406, 71 Agric. Dec. ___, slip op. at 19 (U.S.D.A. Mar. 6, 2012) (same); Reece, 70 Agric. Dec. ___, slip op. at 7 (U.S.D.A. Nov. 4, 2011) (Order Den. Pet. to Recons.) (same); Hines & Thurn Feedlot, Inc., No. D-96-0046, 57 Agric. Dec. 1408, 1429, 1998 WL 1806401, at *11 (U.S.D.A. Aug. 24, 1998 (same).

[12] *See* Mahon v. Stowers, 416 U.S. 100, 111 (1974) (per curiam) (dictum) (stating that regulation requiring prompt payment supports policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for their own purposes); Bowman v. U.S. Dep't of Agric., 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

[13] Hyatt v. United States, 276 F.2d 308, 312 (10th Cir. 1960).

However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] While Mr. Butler's violations of the Packers and Stockyards Act warrant a severe sanction, I reject the administrative officials' sanction recommendation because it is based upon a conclusion that Mr. Butler committed all of the violations alleged in the Complaint (Tr. 243). As discussed in this Decision and Order, *supra*, I do not find that Mr. Butler committed all of the violations alleged in the Complaint.

The purpose of an administrative sanction is to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future violations of the Packers and Stockyards Act by the violator and others. Based upon the record before me, I find a cease and desist order, a 2-year suspension of Mr. Butler as a registrant under the Packers and Stockyards Act, and assessment of a $25,000 civil penalty against Mr. Butler necessary to accomplish the remedial purposes of the Packers and Stockyards Act.

On the basis of the entire record, the following findings of fact and conclusions of law are entered.

Findings of Fact

1. Mr. Butler is an individual residing in the State of Vermont who operates a dairy and cattle farm and is also a "dealer" as that term is defined in the Packers and Stockyards Act (Tr. 196).[15]

2. Mr. Butler was, at all times material to this proceeding:

   (a) Engaged in the business of buying and selling livestock, in commerce, as a dealer for his own account; and

[14] Syverson, No. D-05-0005, 69 Agric. Dec. 1500, 1508-09, 2010 WL 10078382, at *6-7 (U.S.D.A. Nov. 16, 2010) (Decision on Remand), *aff'd*, 666 F.3d 1137 (8th Cir. 2012).
[15] 7 U.S.C. § 201(d).

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock for his own account and as a market agency buying livestock on commission.

3. On May 17, 2009, May 28, 2009, and July 12, 2009, Mr. Butler purchased 47 cattle from M.R. Pollock & Sons, Inc., and failed to pay the purchase price of $34,850 for the cattle, when due (CX 8-CX 10; RX 2).

4. Mr. Butler failed to keep adequate records of the transactions between M.R. Pollock & Sons, Inc., and himself in that Mr. Butler had no invoices or records of cattle purchased.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Mr. Butler willfully violated 7 U.S.C. §§ 213(a), 221, and 228b.

Mr. Butler's Request for Oral Argument

Mr. Butler's request for oral argument, which the Judicial Officer may grant, refuse, or limit,[16] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Mr. Butler's Appeal Petition

Mr. Butler raises four issues on appeal. First, Mr. Butler contends "[t]his case does not fall into the protection sought by the 1958 Amendment to the Packers & Stockyards Act. No farmer or rancher has been hurt; no unfair, deceptive, unjustly discrimination or monopolistic practices are alleged." (Respondent's Brief at 1 (footnote omitted).)

The Deputy Administrator alleges that Mr. Butler failed to pay M.R. Pollock & Sons, Inc., for livestock in willful violation of 7 U.S.C. §§ 213(a) and 228b.[17] As a matter of law, a dealer's failure to make prompt payment for livestock is an unfair practice:

---

[16] 7 C.F.R. § 1.145(d).
[17] Compl. ¶¶ II, IV(b).

§ 228b. Prompt payment for purchase of livestock

> . . . .
> **(c) Delay in payment or attempt to delay deemed unfair practice**
>
> Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

7 U.S.C. § 228b(c).[18] Therefore, I reject Mr. Butler's contention that the Deputy Administrator has not alleged that Mr. Butler engaged in an "unfair practice" as that term is used in the Packers and Stockyards Act.

Moreover, Mr. Butler's contention that the prompt payment requirement of the Packers and Stockyards Act does not apply to his purchases of livestock from M.R. Pollock & Sons, Inc., because M.R. Pollock & Sons, Inc., is a livestock dealer, has no merit. The prompt payment requirement of the Packers and Stockyards Act protects all livestock sellers (7 U.S.C. § 228b(a)).

Second, Mr. Butler asserts the Chief ALJ's finding that the transactions in question between Mr. Butler and M.R. Pollock & Sons, Inc., were bona fide sales as opposed to a series of consignment arrangements between two cattle dealers, is error (Respondent's Appeal Pet. at 1 ¶ 1).

---

[18] *See also* Tiemann, No. 6780, 47 Agric. Dec. 1573, 1588, 1998 WL 247015, at *12 (U.S.D.A. Oct. 20, 1998) (stating it is well-settled that failure to pay, in whole or in part, is an unfair and deceptive practice); Farmers & Ranchers Livestock Auction, Inc., No. 6438, 44 Agric. Dec. 1973, 1986-87, 1985 WL 63831, at *9-10 (U.S.D.A. Sept. 13, 1985) (stating the failure to pay, when due, the full purchase price of livestock constitutes an unfair and deceptive practice); Sklar, 31 Agric. Dec. 872, 882 (U.S.D.A. 1972) (stating it has long been held that a person subject to the Packers and Stockyards Act who fails to make payment fully and promptly for livestock engages in or uses an unfair and deceptive practice).

The Chief ALJ's finding that the May 17, 2009, May 28, 2009, and July 12, 2009, transactions at issue in this proceeding were sales is supported by the record. The invoices prepared by Mike Lane (CX 8-CX 10), the handwritten summary of the transactions (RX 2), and Mike Lane and Ronald Pollock's testimony all support the Chief ALJ's finding that Mr. Butler purchased cattle from M.R. Pollock & Sons, Inc. Moreover, the Chief ALJ's finding with respect to the May 17, 2009, May 28, 2009, and July 12, 2009, transactions is confirmed by the jury's findings in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11. Therefore, I reject Mr. Butler's assignment of error to the Chief ALJ's finding that the May 17, 2009, May 28, 2009, and July 12, 2009, transactions at issue in this proceeding were sales.

Third, Mr. Butler contends the Chief ALJ's failure to find when and if a bill or demand to pay was ever given or made to Mr. Butler, is error (Resp't's Appeal Pet. at 1 ¶ 2).

As an initial matter, the evidence establishes that M.R. Pollock & Sons, Inc., did demand payment from Mr. Butler (CX 7-CX 11; RX 2; Tr. 57-69, 81-82, 94, 97, 113-14, 151-52). Moreover, demand for payment is not relevant in this administrative disciplinary proceeding. The Packers and Stockyards Act requires that each dealer pay for livestock purchases, as follows:

> **§ 228b. Prompt payment for purchase of livestock**
>
> **(a) Full amount of purchase price required; methods of payment**
>
> Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price[.]

7 U.S.C. § 228b(a). A failure to pay for livestock purchases, when due, is an unfair practice under the Packers and Stockyards Act[19] even if the livestock sellers have acquiesced to late payments.[20] Therefore, even if I were to find that M.R. Pollock & Sons, Inc., never demanded payment from Mr. Butler (which I do not so find), that finding would not change the disposition of this proceeding.

Fourth, Mr. Butler contends the Chief ALJ erroneously based the mitigation of the assessed civil penalty on Mr. Butler's payment of a debt, the amount of which has not been determined in this proceeding (Resp't's Appeal Pet. at 1-2 ¶ 3).

The issue of the Chief ALJ's mitigation of the civil penalty is moot as I reduce the civil penalty assessed by the Chief ALJ from $66,000 to $25,000 and eliminate the Chief ALJ's mitigation provision.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Butler, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

   a. Failing to pay the full purchase price of livestock, when due, as required by 7 U.S.C. § 228b; and

---

[19] 7 U.S.C. §§ 213(a) and 228b(c).

[20] *See* Bott, No. D-11-0438, 71 Agric. Dec. ___, slip op. at 8-9 (U.S.D.A. May 8, 2012) (holding a failure to pay for livestock purchases, when due, is an unfair practice in violation of the Packers and Stockyards Act, even if the livestock sellers fail to complain about late payments); San Jose Valley Veal, Inc., 34 Agric. Dec. 966, 981-82 (U.S.D.A. 1975) (holding the existence of a course of dealing allowing for delayed payment did not excuse the packing company from its delay of payments beyond the close of the next business day and holding the delayed payments to be in violation of the Packers and Stockyards Act); Sebastopol Meat Co., Inc., 28 Agric. Dec. 435, 441 (U.S.D.A. 1969) (rejecting the argument that no violation of the Packers and Stockyards Act occurred as the livestock sellers acquiesced in the late payments by continuing to do business with the livestock purchaser), *aff'd*, 440 F.2d 983 (9th Cir. 1971).

b. Failing to keep records that fully and correctly disclose all transactions in Mr. Butler's business, as required by 7 U.S.C. § 221.

Paragraph 1 of this Order shall become effective on the day after service of this Decision and Order on Mr. Butler.

2. Mr. Butler is suspended as a registrant under the Packers and Stockyards Act for a period of 2 years.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Decision and Order on Mr. Butler.

3. Mr. Butler is assessed a $25,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63179-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Decision and Order on Mr. Butler. Mr. Butler shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0033.

Right to Judicial Review

Mr. Butler has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Butler must seek judicial review within 60 days after entry of the Order in this Decision and Order.[21] The date of entry of the Order in this Decision and Order is January 16, 2013.

—

[21] 28 U.S.C. § 2344.

PACKERS AND STOCKYARDS ACT

In re: RONALD RYAN SHEPARD, JR., A/K/A RONALD RYAN SHEPPARD, JR., A/K/A RON SHEPARD; JEREMY E. PIERCE; AND BROOKFIELD CATTLE CO., LLC.
Docket No. D-12-0357.
Decision and Order.
Filed January 29, 2013.

PS-D – Answer – Rules of Practice – Service.

Krishna G. Ramaraju, Esq. for Complainant.
Timothy Capps, Esq. for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO RONALD RYAN SHEPARD, JR.

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 12, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) Ronald Ryan Shepard, Jr., on or about the dates and in the transactions set forth in Appendix A attached to the Complaint, issued checks in payment for livestock purchases which were returned unpaid by the bank upon which the checks were drawn because Mr. Shepard did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented, in willful violation

of 7 U.S.C. §§ 213(a) and 228b; (2) Mr. Shepard, on or about the dates and in the transactions set forth in Appendices A and B attached to the Complaint, purchased livestock and failed to pay, when due, the full purchase price of the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; (3) Mr. Shepard, on or about the dates and in the transactions set forth in Appendix C attached to the Complaint, purchased livestock and failed to pay for the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; and (4) Mr. Shepard, beginning in April 2011, and on the dates and in the transactions set forth in Appendices A, B, and C attached to the Complaint and in other transactions on other dates, engaged in the business of a dealer buying and selling livestock in commerce without maintaining a bond or bond equivalent, in willful violation of 7 U.S.C. §§ 204 and 213(a) and 9 C.F.R. §§ 201.29-.30.[1]

The Hearing Clerk served Mr. Shepard with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on April 24, 2012.[2] Mr. Shepard failed to file an answer to the Complaint, and on July 6, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which the Chief ALJ provided the parties 15 days within which to show cause why a default decision should not be entered.

On July 17, 2012, the Deputy Administrator filed "Complainant's Response to Show Cause Order; Motion for Adoption of Proposed Default Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Default Decision and Order" [hereinafter Proposed Default Decision]. Mr. Shepard did not file a response to the Chief ALJ's Show Cause Order.

On August 13, 2012, the Hearing Clerk served Mr. Shepard with the Deputy Administrator's Motion for Default Decision and Proposed Default Decision and the Hearing Clerk's service letter.[3] Mr. Shepard failed to file objections to the Deputy Administrator's Motion for Default Decision and Proposed Default Decision.

---

[1] Compl. at 4-6, ¶¶ III-V.

[2] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 1287.

[3] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 1706.

On October 25, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order as to Ronald Ryan Shepard, Jr. [hereinafter the Chief ALJ's Decision]: (1) concluding Mr. Shepard willfully violated 7 U.S.C. §§ 204, 213(a), and 228b and 9 C.F.R. §§ 201.29-.30, as alleged in the Complaint; (2) ordering Mr. Shepard to cease and desist from violations of the Packers and Stockyards Act and the Regulations; (3) prohibiting Mr. Shepard from being registered and engaging in activities for which registration is required under the Packers and Stockyards Act for a period of 10 years; and (4) assessing Mr. Shepard a $582,000 civil penalty.[4]

On December 26, 2012, Mr. Shepard appealed the Chief ALJ's Decision to the Judicial Officer. On January 15, 2013, the Deputy Administrator filed Complainant's Response to Respondent's Appeal of Default Decision and Order. On January 18, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Decision as the final agency decision.

DECISION

Statement of the Case

Mr. Shepard failed to file a timely answer to the Complaint. Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order as to Ronald Ryan Shepard, Jr., pursuant to 7 C.F.R. § 1.139.

Findings of Fact

[4] Chief ALJ's Decision at 4-5.

1. Ronald Ryan Shepard, Jr., also known as Ronald Ryan Sheppard, Jr., and also known as Ron Shephard, is an individual whose home address is in the State of Illinois.

2. At all times material to this proceeding, Mr. Shepard was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce;

(b) Not registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce;

(c) Responsible for the direction, management, and control of buying activities for Brookfield Cattle Co., LLC; and

(d) The alter ego of Brookfield Cattle Co., LLC.

3. On or about April 11, 2011, the Midwestern Regional Office, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration [hereinafter GIPSA], sent Mr. Shepard a Notice of Default by certified mail, which Mr. Shepard received on or about April 13, 2011. The Notice of Default stated GIPSA had information indicating that Mr. Shepard was engaged in the business of buying and selling livestock in commerce. The Notice of Default informed Mr. Shepard that buying and selling livestock in commerce without being properly registered with GIPSA and without filing a bond or bond equivalent are violations of the Packers and Stockyards Act and the Regulations. The Notice of Default warned Mr. Shepard that failure to comply with registration and bonding requirements would result in appropriate corrective action. Relevant provisions, forms, and instructions for registration and bonding were enclosed with the Notice of Default.

4. During the period August 4, 2011, through March 15, 2012, Mr. Shepard issued checks in payment for livestock purchases which were returned unpaid by the bank upon which the checks were drawn because Mr. Shepard did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

5. During the period August 4, 2011, through March 15, 2012, Mr. Shepard purchased livestock and failed to pay, when due, the full purchase price of the livestock.

6. During the period August 6, 2011, through March 22, 2012, Mr. Shepard purchased livestock and failed to pay for the livestock.

7. During the period April 2011 through March 2012, Mr. Shepard engaged in the business of a dealer buying and selling livestock in commerce without maintaining a bond or bond equivalent.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Mr. Shepard was the alter ego of Brookfield Cattle Co., LLC.

3. Mr. Shepard willfully violated 7 U.S.C. §§ 204, 213(a), and 228b and 9 C.F.R. §§ 201.29-.30.

Mr. Shepard's Appeal Petition

Mr. Shepard raises two issues in his Appeal of Default Decision and Order as to Ronald Ryan Shepard [hereinafter Appeal Petition]. First, Mr. Shepard contends he was not served with the Complaint on April 24, 2012. Mr. Shepard asserts he was in Mexico at the time the United States Postal Service delivered the Complaint (Appeal Pet. at 1, 7.)

The Rules of Practice provide that a complaint shall be deemed to be received by a party on the date of delivery of the complaint by certified mail to the last known residence of that party.[5] The record establishes

[5] 7 C.F.R. § 1.147(c)(1). *See also* Harrington, No. 07-0036, 66 Agric. Dec. 1061, 1067-68, 2007 WL 7278316, at *5-6 (U.S.D.A. Aug. 28, 2007) (stating proper service of a complaint is made under the Rules of Practice when the complaint is delivered by certified mail to the respondent's last known address and someone signs for the complaint); Ow Duk Kwon, No. 95-41, 55 Agric. Dec. 78, 93, 1996 WL 367078, at *10 (U.S.D.A. June 6, 1996) (Order Den. Late Appeal) (stating proper service by certified mail is made when a respondent is served with a certified mailing at his or her last known address and someone signs for the document); Kaplinsky, No. 191, 47 Agric. Dec. 613,

that the Hearing Clerk, by certified mail, sent the Complaint to Mr. Shepard's last known residence, where, on April 24, 2012, "Janet Shepard" signed United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 1287, which contained the Complaint. Thus, I reject Mr. Shepard's contention that he was not served with the Complaint on April 24, 2012. Instead, I find Mr. Shepard was served with the Complaint on April 24, 2012, and Mr. Shepard's answer was required by 7 C.F.R. § 1.136(a) to be filed with the Hearing Clerk no later than 20 days after service of the Complaint, namely, May 14, 2012.

Moreover, I find the Hearing Clerk's manner of service meets the requirement of due process of law. To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[6]

As held in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (Ohio Ct. App. 1982):

It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized

---

619, 1998 WL 242933, at *5 (U.S.D.A. Mar. 30, 1988) (stating the excuse, occasionally given in an attempt to justify the failure to file a timely answer, that the person who signed the certified receipt card failed to give the complaint to the respondent in time to file a timely answer has been and will be routinely rejected); Bejarano, No. 292, 46 Agric. Dec. 925, 929, 1987 WL 1153350, at *4 (U.S.D.A. June 22, 1987) (stating a default order is proper where the respondent's sister signed the certified receipt card as to a complaint and forgot to give it to the respondent when she saw him 2 weeks later).

6 *See also* Trimble v. U.S. Dep't of Agric., 87 F. App'x 456, 458 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); Weigner v. City of New York, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated), *cert. denied*, 488 U.S. 1005 (1989); NLRB v. Clark, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co*. (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

I find the Hearing Clerk's mailing the Complaint by certified mail to Mr. Shepard's last known residence (where it was received by "Janet Shepard") was reasonably calculated, under all the circumstances, to apprise Mr. Shepard of the pendency of this proceeding and to afford Mr. Shepard an opportunity to respond to the Complaint.

Second, Mr. Shepard contends the findings of fact in the Chief ALJ's Decision are "materially false" and, because the Chief ALJ's conclusions of law and the Chief ALJ's order are based upon these "materially false" facts, the Chief ALJ's conclusions of law and the Chief ALJ's order, are error (Appeal Pet. at 1-7).

The Rules of Practice provide that an answer to a complaint must be filed within 20 days after service of the complaint.[7] Failure to file an answer within the time provided in 7 C.F.R. § 1.136(a) is deemed an admission of the allegations in the complaint. The record establishes that the Hearing Clerk served Mr. Shepard with the Complaint on April 24, 2012.[8] Mr. Shepard's answer to the Complaint was required to be filed with the Hearing Clerk no later than May 14, 2012. Mr. Shepard's first and only filing was his Appeal Petition filed with the Hearing Clerk on December 26, 2012, 7 months 12 days after his answer was required to be filed; thus, Mr. Shepard is deemed to have admitted the allegations in the Complaint. The Chief ALJ adopted as findings of fact the allegations in the Complaint which Mr. Shepard is deemed to have admitted.[9] Mr. Shepard's contention that the Chief ALJ's findings of fact are "materially false" is tantamount to a denial of the allegations in the Complaint. Mr. Shepard's denial of the allegations in the Complaint, which he has been deemed to have admitted, comes far too late to be considered. Therefore, I reject Mr. Shepard's contention that the Chief

---

[7] 7 C.F.R. § 1.136(a).

[8] *See supra* note 2.

[9] Chief ALJ's Decision at 2.

ALJ's findings of fact are "materially false" and the Chief ALJ's conclusions of law and the Chief ALJ's order, are error.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Shepard, his agents and employees, directly or indirectly through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

(a) Failing to pay and failing to pay, when due, the full purchase price of livestock, as required by 7 U.S.C. § 228b;

(b) Failing to have and maintain sufficient funds on deposit and available in the account upon which checks are drawn to pay the checks when presented;

(c) Buying and selling livestock in commerce without maintaining an adequate bond or bond equivalent; and

(d) Engaging in any business subject to the Packers and Stockyards Act without being registered with the Packers and Stockyards Program.

Paragraph 1 of this Order shall become effective upon service of this Decision and Order as to Ronald Ryan Shepard, Jr., on Mr. Shepard.

2. Mr. Shepard is prohibited from being registered and engaging in any activity for which registration is required under the Packers and Stockyards Act for a period of 10 years. After the expiration of this 10-year time period, Mr. Shepard may submit an application for registration to the Packers and Stockyards Program along with the required bond or bond equivalent.

Paragraph 2 of this Order shall become effective upon service of this Decision and Order as to Ronald Ryan Shepard, Jr., on Mr. Shepard.

3. Mr. Shepard is assessed a $582,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63197-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Decision and Order as to Ronald Ryan Shepard, Jr., on Mr. Shepard. Mr. Shepard shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0357.

Right to Judicial Review

Mr. Shepard has the right to seek judicial review of the Order in this Decision and Order as to Ronald Ryan Shepard, Jr., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Shepard must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Ronald Ryan Shepard, Jr.[10] The date of entry of the Order in this Decision and Order as to Ronald Ryan Shepard, Jr., is January 29, 2013.

___

[10] 28 U.S.C. § 2344.

In re: BRUCE MEDLEY, D/B/A B & M LIVESTOCK.
Docket No. 12-0169.
Decision and Order.
Filed January 30, 2013.

PS-D.

Lisa Jabaily, Esq. for Complainant.
Paul E. Jennings, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.; hereinafter "Act") and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 - 1.151; hereinafter "Rules of Practice"). Complainant, the Deputy Administrator, Grain Inspection, Packers and Stockyards Program, initiated this proceeding against Respondent Bruce Medley, doing business as B & M Livestock, (hereinafter "Respondent") by filing a disciplinary complaint on January 10, 2012.

Copies of the Complaint and the Rules of Practices were served upon Respondent by certified mail. The Complaint alleged that Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act, with the total amount remaining unpaid of $59,610.47[1] as of January 10, 2012, in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

On February 7, 2012, Respondent filed an Answer that admitted the jurisdictional allegations of the Complaint. (*See* Answer ¶¶ I, II). The

[1] The Complainant later updated the alleged unpaid amount to $43,555.66 owed to Peoples Stockyards.

Answer also admitted the purchase of livestock from Peoples Stockyards and Browing's Livestock Market. (Answer ¶ II(a)). However, the Answer did not admit or deny that Respondent continued to owe money for such livestock purchases. The Answer also denied that the failure to make payments to the sellers of the livestock was a willful violation of the Act.

During a conference call with Chief Administrative Law Judge Davenport on October 17, 2012, the parties agreed that there were no material facts in dispute, no hearing was necessary, and that the only issues to be resolved are whether Respondent acted willfully and what sanction would be appropriate. On October 25, 2012, the parties filed a Joint Stipulation Regarding Admissible Documentary Evidence, Facts, and Legal Conclusions. In the Joint Stipulation, the parties stipulated that Complainant's exhibits CX-1 through CX-21, which were pre-marked and exchanged, are admissible evidence and may be submitted into the record of this proceeding by Complainant. The parties also stipulated to the jurisdictional facts in the complaint and to the factual conclusions that Respondent failed to pay, when due, for all twelve livestock purchases stated in the complaint that there remains an unpaid balance to Peoples Stockyards for such livestock purchases. The parties further stipulated to the legal conclusions that Respondent violated sections 312(a) and 409 of the act for failing to pay and failing to pay, when due, the full purchase price for the livestock transactions listed in the Complaint. The parties agreed that the only remaining issues to be addressed are whether Respondent acted willfully and what sanction is appropriate under the Act. On November 15, 2012, Complainant filed a Motion for Decision Without a Hearing, setting forth its position concerning the unresolved issues.

It is well-established that failing to make full payment for livestock purchases is a serious violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). *See, e.g.*, *Hines*, No. D-96-0046, 57 Agric Dec. 1408, 1428-29, 1998 WL 1806401 (U.S.D.A. Aug. 24, 1998); *Syracuse Sales Co.*, No. 92-52, 52 Agric. Dec. 1511, 1524, 1993 WL 459887 (U.S.D.A. Nov. 5, 1993); *Palmer*, No. D-89-28, No. D-89-74, 50 Agric. Dec. 1762, 1772-73, 1991 WL 337381 (U.S.D.A. July 18, 1991); *Hennessey*, No. 6717, No. 6851, 48 Agric. Dec. 320, 324, 1989 WL 265397 (U.S.D.A. Feb. 15, 1989); *Garver*, No. 6449, 45 Agric. Dec.

1090, 1094-95, 1986 WL 74928 (U.S.D.A. June 19, 1986), *aff'd sub nom. Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988), *cert. denied* 488 U.S. 820 (1988). Respondent has admitted that all twelve of the livestock purchases listed in the Complaint were not paid when due in accordance with the requirements of the Act, and Respondent has not raised a valid defense to the late payments. Respondent has also admitted that there remains an unpaid balance to Peoples Stockyards for such livestock purchases. Because Respondent has admitted that he has failed to pay, when due, for the livestock he purchased from Peoples Stockyards and Browning's Livestock Market, Respondent's actions are deemed to be unfair and deceptive practices in violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Respondent's actions are also willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) "if a prohibited act is done intentionally, irrespective of evil intent, or done with a careless disregard of statutory requirements." *Marysville Enterprises, Inc.*, No. D-98-0027, 59 Agric. Dec. 299, 309 & n.5, 2000 WL 123137 (U.S.D.A. Jan. 4, 2000). In other words, "a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts." *Hines*, 57 Agric. Dec. at 1414. Here, willfulness is established because of Respondent's decades of experience in the business, his violations of express provisions of the Act, the six-month span during which Respondent committed the violations, the number of Respondent's violative transactions, and the prior notice Respondent received in writing of the violations with opportunity to demonstrate or achieve compliance. *Palmer*, 50 Agric. Dec. at 1780.

The sanction policy of the Department is "to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded . . . as serious, in order to serve as an effective deterrent not only to the Respondents but to other potential violators as well." *Wooton*, No. D-97-0021, 58 Agric. Dec. 944, 980, 1999 WL 1327401 (U.S.D.A. Oct. 29, 1999); *see also Garver*, 846 F.2d at 1100. In this case, Respondent has failed to pay, when due, two different markets on multiple occasions, and he still owes Peoples Stockyards $43,555.66, making these violations both serious and repeated. When livestock sellers, such as Respondent, do not make full payment for their livestock purchases, the sellers are forced to finance

the transaction. *See Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978); *Powell*, No. 6248, 46 Agric. Dec. 49, 53, 1985 WL 62902 (U.S.D.A. Mar. 7, 1985).

Complainant's recommendation that Respondent be ordered to cease and desist from violating the Act and suspended as a registrant under the Act for five years is consistent with the sanctions regularly imposed in other cases involving failure to pay for livestock. *See, e.g.*, *Marysville Enters.*, 59 Agric. Dec. at 321 & n.14, 323; *Hines*, 57 Agric. Dec. at 1429 & n.9.[2] The requested civil penalty is warranted, based on the circumstances this case, *Middlebury Packing Co.*, No. D-92-46, 53 Agric. Dec. 639, 652, 1993 WL 724712 (U.S.D.A. Dec. 16, 1993). *Id.* The order and sanctions requested by Complainant are necessary to deter future violations and to prevent Respondent from continuing to purchase livestock while he is bankrupt and unable to pay for his purchases. *Holmes*, No. D-02-0022, 62 Agric. Dec. 254, 259, 2003 WL 23341034 (U.S.D.A. May 5, 2003).

Findings of Fact

1. Respondent Bruce Medley, doing business as B & M Livestock, is an individual whose mailing address is in the State of Tennessee.

2. Respondent is and, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce as a dealer for his own account;

(b) Engaged in the business of a market agency buying livestock in commerce on a commission basis;

(c) Registered with the Secretary of Agriculture as a livestock dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

---

[2] In determining the sanction, "appropriate weight" is to be given to the sanction "recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose." S.S. Farms Linn Cnty., Inc., No. 89-03, 50 Agric. Dec. 476, 497, 1991 WL 290584 (U.S.D.A. Feb. 8, 1991); *see also* Marysville Enterprises, Inc., No. D-98-0027, 59 Agric. Dec. 299, 318, 2000 WL 123137 (U.S.D.A. Jan. 4, 2000).

3. The amounts alleged not paid when due by Complainant and admitted not paid when due by Respondent are as follows:

Purchase Date	Seller	Purchase Amount
9/7/10	Peoples Stockyards	$6,689.30
10/12/10	Peoples Stockyards	$3,831.20
10/19/10	Peoples Stockyards	$4,759.60
10/26/10	Peoples Stockyards	$5,021.45
11/9/10	Peoples Stockyards	$3,784.60
11/16/10	Peoples Stockyards	$4,768.01
11/23/10	Peoples Stockyards	$8,042.90
11/30/10	Peoples Stockyards	$6,658.60
1/19/11	Browning's Livestock Market	$12,016.45
2/2/11	Browning's Livestock Market	$7,813.62
2/16/11	Browning's Livestock Market	$9,569.06
3/2/11	Browning's Livestock Market	$3,474.63

4. Respondent continues to owe $43,555.66 to Peoples Stockyards for the purchases listed above.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

ORDER

1. Respondent Bruce Medley, doing business as B & M livestock, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from cease and desist from failing to pay and failing to pay, when due, the full amount of the purchase price for livestock in accordance with the Act or in accordance with the terms of a credit agreement that complies

with the requirements of the Act.

2. Respondent is hereby suspended as a registrant under the Act for a period of five (5) years and continuing thereafter until he demonstrates to the Packers and Stockyards Program that he is in full compliance with the Act and the regulations promulgated thereunder, including payment of the civil penalty.

3. Respondent is assessed a civil penalty of $20,000.00. The civil penalty will become due and payable 365 days after the effective date of this Order. At Respondent's option, the civil penalty amount will be offset dollar-for-dollar by restitution payments to Peoples Stockyards. The civil penalty payment and proof of any offsetting restitution payments to Peoples Stockyards should be sent to S. Brett Offutt, Director of Policy and Litigation Division, Packers and Stockyards Program at the following address: 1400 Independence Ave., Washington, DC 20250-3646. Proof of restitution payments may include, but would not be limited to, a statement from the bank holding an account created by Respondent to pay Peoples Stockyards or an affidavit or declaration from Respondent or an administrator tasked with managing payments to Peoples Stockyards. Such statement, affidavit, or declaration should reflect the seller's name (Peoples Stockyards), the payment check numbers, the check amounts, and the dates that each check was cashed. The Packers and Stockyards Program shall have the option of verifying any restitution payments claimed by Respondent and Respondent shall provide and execute any necessary document or release to allow such verification.

4. This Decision and Order shall become final without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

___

In re: TYSON FARMS, INC.
Docket No. 12-0123.
Decision and Order.
Filed March 8, 2013.

PS-D.

Jonathan D. Gordy, Esq.; Krishna G. Ramaraju, Esq.; Brian P. Sylvester, Esq.; and Ciarra A. Toomey, Esq. for Complainant.
L. Bryan Burns, Esq.; Robert W. George, Esq.; Gordon D. Todd, Esq.; and Brian P. Morrissey, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.; hereinafter "Act") and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 - 1.151; hereinafter "Rules of Practice"). Complainant, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA) initiated this proceeding against Respondent Tyson Farms, Inc. (Tyson) by filing a disciplinary complaint on December 20, 2012.

Copies of the Complaint and the Rules of Practices were served upon Respondent by certified mail. The Complaint alleged that Respondent violated section 410 of the Act and committed an unfair and deceptive practice under section 202 of the Act. (7 U.S.C. §§ 192, 228b-1).

After seeking and being granted an extension of time in which to answer, Respondent filed its Answer, accompanied by a Petition for Determination of the Secretary's Jurisdiction and Statutory Authority and Memorandum in Support on January 27, 2012.[1] On February 16, 2012, Counsel for Complainant filed a Motion for Hearing and Response to Respondent's Petition. Tyson responded and Complainant replied to the

[1] Docket Entries 3, 4, & 5.

Response.[2] On March 28, 2012, I directed that the parties exchange exhibits, exhibit and witness lists with counsel, to file copies of the exhibit and witness lists with the Hearing Clerk, and to consult with each other and file a status report concerning the expected duration of any hearing on the issues, the preferred location for trial, and a list of mutually agreeable dates.[3] Complainant's exchange was filed with the Hearing Clerk on April 26, 2012. Tyson sought and was granted an extension and filed their exchange on June 25, 2012. Prior to completing its exchange, on May 24, 2012, Tyson filed Motions to Divide the Hearing to Separate Jurisdictional Issues from Merits of the Secretary's Complaint and to Expedite Response to Motion.[4] The Complainant objected to the Motion to Expedite a Response and an Order was entered on June 1, 2012 denying the Motion to Expedite Response and deferring ruling on the Motion to Divide.[5] Complainant responded to the Motion to Divide on June 7, 2012 and on June 19, 2012, in view of the procedural provisions contained in our Rules of Practice precluding Motions to Dismiss even on jurisdictional grounds, I certified the Motion to Divide to the Departmental Judicial Officer.[6]

On July 6, 2012, the Judicial Officer filed his Ruling on [the] Certified Question, concluding that the Secretary of Agriculture has statutory jurisdiction to proceed. Following the filing of a joint status report setting forth mutually agreeable dates, the matter was set for oral hearing to commence on December 10, 2012 in the United States Department of Agriculture Court Room, in Washington, DC.[7] Pre-hearing briefs were filed by both parties.[8]

During the course of the two day hearing, the Complainant called five witnesses and Respondent called two.[9] Twenty-four Government exhibits

---

[2] Docket Entries 7, 9, & 13.

[3] Docket Entry 15.

[4] Docket Entry 22.

[5] Docket Entries 24 & 25.

[6] Section 1.143(b)(1), 7 C.F.R. §1.143(b)(1). Oral argument before the Judicial Officer was requested by the Respondent; however, Complainant objected and the request was denied. Docket Entries 28, 31 & 32.

[7] Docket Entries 35 & 36.

[8] Docket Entries 48 & 50.

[9] References to the transcript of the proceeding will be indicated as Tr. and the page number. An original and corrected transcript appear in the record; however, all references will be to the corrected transcript.

and nine Tyson exhibits were admitted.[10] Following the hearing, post-hearing briefs were submitted by both sides and the matter is now ripe for disposition.

The Positions of the Parties

In this action, the Complainant alleges that Tyson failed to pay its contract poultry growers in full, in violation of sections 410 and 202 of the Act, because Tyson failed to account for the performance differences of the two different breeds of chickens (Cobb 500 chickens and Cobb 700 chickens) in the payments made to the growers under the tournament settlement system used to compensate the growers. Implicit in the Complainant's position is an assumption that growers with whom the Cobb 700 birds were placed were underpaid because "as a general rule Cobb 500 birds grew faster than the Cobb 700 breed."

Tyson takes the position that no violation of section 410 of the Act occurred as its contract poultry growers were paid in full and on time in accordance with their contract which expressly contemplates the practices at issue in the case. Tyson, moreover, asserts that its practice of including different breeds of birds in the same settlement groups at issue in this action is identical to practices which the Department sought to have prohibited through a proposed rulemaking. That proposed rule was never implemented as Congress prohibited the expenditure of any federal funds to implement that policy. Tyson accordingly argues that the Department was stripped of any authority to prosecute this matter and its actions in doing so in this action are *ultra vires*. *See* Consolidated and Further Continuing Appropriations Act of 2012 (Agric. App. Act) § 721, P.L. 112-55, 125 Stat. 552, 583 (Nov. 18, 2011).

Background

This disciplinary proceeding involves a single poultry production complex (the complex) operated by Tyson located in Oglethorpe, Georgia. Tyson processes broiler chickens at the complex for sale to various consumers, with the breast filets going almost exclusively to Wendy's, and other parts going to Applebee's, Hooters and other

---

[10] Complainant's exhibits are indicated by number with the prefix CX; Respondent's are indicated by the number and the prefix RX.

restaurant chains. Tr. 260-262. Although the processing, sale, and distribution of its chicken products is handled by Tyson, it contracts with independent growers to raise newborn chicks which Tyson purchases from a variety of entities to be raised by the growers for the 44-48 day maturing process until the birds reach the weight desired by Tyson's customers. Tr. 72-73, 84, 293-294.

As is common throughout the poultry industry, growers are compensated for their services through tournament style competitions. Tr. 39, 70. The tournament competition rules and compensation formula are spelled out in detail in uniform broiler production contracts which Tyson enters into with each contract grower. CX-3, 4; RX-1, 2. Productivity is measured under the contract by calculating Tyson's cost of placing the flock with the grower (chick cost, feed, medicines, and other expenses) and dividing that cost by the weight of the mature birds delivered to Tyson. Tyson then ranks the productivity of each flock to the average of all flocks settled that week, with flocks outperforming the average receiving an upward adjustment and those that underperform receiving a downward adjustment, capped by a minimum amount. *Id.*

Although the Complainant asserts that Tyson's contracts have an implied term requiring payment other than what was received by the growers, examination of the terms of Tyson's contracts forces a conclusion to the contrary. The contracts expressly authorize Tyson to provide their growers with any "type" of bird breed.[11] CX-3, 4; RX-1, 2. Under the contract's terms, Tyson determined the amount, type, frequency, and time of delivery to and pick-up from the Producer of chickens. RX-1, 2. An express disclaimer of the "quality, merchantability, or fitness for purpose of" provides further amplification of Tyson's discretion over breed type and any related characteristics. RX-1, 2. Moreover, the contracts contain explicit language expressly rejecting any unwritten terms. *Id.* Tyson provides a significant amount of information concerning best practices for raising the chicks; however, it is up to the individual grower as to whether that information and guidance is followed. Tr. 299-302.

Prior to the fall of 2009, Tyson had placed a single breed, the Cobb

[11] "Company will determine the amount, *type*, frequency, and time of delivery to and pick-up from Producer of chickens…." Para 2A of cited exhibits (emphasis added).

500, with its growers to be processed at the Georgia complex. Tr. 262-263. Believing it would be advantageous for the company to shift to a breed of bird with a larger percentage of breast meat that might better meet the needs of its primary consumer, in September of that year Tyson decided to shift its production from the Cobb 500 to the Cobb 700. Tr. 263-264. Due to the requirements to both acquire sufficient numbers of Cobb 700 chicks to make the conversion and to avoid the costs inherent with the immediate retirement of the Cobb 500 hens prior to their normal replacement date, it was not economically or operationally feasible to make the conversion at one time, but rather the transition was phased in over time as the flocks of Cobb 500 hens producing the chicks were retired. Tr. 271-272, 418, 419. As the Cobb 500 hens were retired and replaced with Cobb 700 hens, the percentage of Cobb 700 chicks placed with the growers increased. Tr. 109, 271, 287- 288, 429, 432, 456-457. Throughout the period that both breeds were placed with growers, Tyson placed birds of both breeds with growers on a random basis. Id. Chicks were hatched together in the same machines on the same days and hatched at the same rate. Tr. 281. As the new chicks were born, Tyson delivered them to growers in the order they were hatched. Accordingly, no grower stood any greater chance of receiving one breed over the other, and over time, it appears that all growers received flocks of both. Tr. 432-433.

Tyson's expectations of the Cobb 700 breed were not achieved as mid way through the transition process, Tyson reluctantly concluded that the Cobb 700 breast filets—although as large as expected—were not as desirable as anticipated. Tr. 264. The complex's largest customer's specifications required a smaller breast than was being produced with the Cobb 700 breed, requiring Tyson to substantially trim the filets, resulting in both waste and additional costs not previously encountered. Tr. 264. The transition process was accordingly reversed with a shift back to the Cobb 500 breed and the target weight of delivered birds was reduced from 6 pounds down to 5.5 pounds. Tr. 186, 294. In all, although the Department's investigation focused on a 46 week period, the complex processed a varied mix of Cobb 500 and 700 birds for a total of 74 weeks, from September 19, 2009 to February 26, 2011.[12] Tr. 186.

[12] The Complainant's investigation examined 542 flocks produced by 115 growers during the 46 week period of September 26, 2009 through August 7, 2010. Compl. ¶ II(b).

Acting upon a hot line complaint from an anonymous grower in June of 2010 who felt that he was being financially harmed by the introduction of the Cobb 700 into flocks that he was raising, an investigation into Tyson's operation at the Georgia complex was initiated and assigned to Resident Agent Nilsa Ramos Taylor. Tr. 101-105. As part of the investigation Taylor and Meghan Flynn, a student economist with the Eastern Regional Office visited Tyson's Oglethorpe complex from August 16 through August 19, 2010 to review records, interview employees and gather information. Tr. 107-111, 131-142. Upon completion of the on-site portion of the investigation, Ms. Flynn took copies of most of the documents they had collected back to the Atlanta Office for her analysis. Tr. 111.

Evaluation of the Evidence

The underpinning of the Department's case against Tyson is based upon assumptions and conclusions drawn from the analysis of the data collected by Taylor and Flynn. According to her testimony, Flynn analyzed each transaction, reviewing electronic flock data and written information on the flocks, reconciling any discrepancies with the help of Tyson's bookkeeper and written data that was available. Tr. 134-142, 145-150. Organizing the data into files (CX-14-15, 18-19), her preliminary analysis indicated to her that the Cobb 700 breed had an average weight that was approximately a half a pound less than the Cobb 500 breed at the time of settlement.[13] Tr. 158.

Flynn's analysis was then reviewed by Gary McBryde, Ph.D., the Director of the Business and Economic Analysis Division in the Packers and Stockyards Program. Tr. 194, 200-222. Using Flynn's data, McBryde applied ordinary averages and graphic analysis of the pure Cobb 500 and Cobb 700 flocks and concluded that the difference in relative performance of the two breeds resulted in a difference of less than $.04 per bird in the payments made to growers. McBryde then went on to calculate a projected deficiency of $834,707 in the payment to

[13] Data from Cobb-Vantress in their Broiler Management Guides however reflects that the two breeds have virtually identical weights at harvest age. CX-21, 27, Tr. 88, 179. On cross examination, Ms. Flynn admitted that had she been aware of that information, it might have caused her to question her conclusions. Tr. 180.

growers raising the Cobb 700 chicks. CX-16. Using regression analysis, McBryde concluded that growers with a high concentration of Cobb 700 birds should have been compensated an additional $1,540 per flock had Tyson placed a uniform ratio of Cobb 500 and 700 with the growers or, alternatively all Cobb 700 birds in each grower's settlement group flocks. Tr. 200-222.

Contrary to operational feasibility and the actual facts of Tyson's transition, McBryde's analysis assumed that Tyson could have and should have placed an equal ratio of 59% Cobb 700 birds and 41% Cobb 500 birds with each grower each week. Tr. 214. Due to the fact that his model was based upon a flock-by-flock basis rather than a bird-by-bird basis, the impact of the smaller flocks was exaggerated thereby further skewing the data. Tr. 471-475. Most significantly however, the analysis completely failed to account for grower skill and effectiveness, a factor obviously indicated by the fact that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups. Tr. 459-471, CX-15.

As the evidence indicates the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups, the selection of the breed mix was expressly addressed in the contracts entered into between Tyson and its growers, and Tyson paid its contract poultry growers in full and on time in accordance with the terms of those contracts,[14] I will conclude that the Cobb 700 were not disadvantaged and there is no violation of section 410. It accordingly will be unnecessary for me to address whether the Department's prosecution of this action was *ultra vires*.

Statement of Facts

1. Respondent Tyson Farms, Inc., a subsidiary of Tyson Foods, Inc., is a corporation organized under the laws of and registered in the state of North Carolina, with offices in Raleigh, North Carolina.

---

[14] Complainant's position that Tyson's contracts contain an "implied term" that would require Tyson to pay growers something other than what they received is clearly contrary to the terms of the contract.

2. Tyson operates a poultry production complex (the complex) located in Oglethorpe, Georgia where Tyson processes broiler chickens for sale to various consumers, primarily Wendy's, with other parts going to Applebee's, Hooters and other restaurant chains. Tr. 260-262.

3. Although the processing, sale, and distribution of the chicken products is handled by Tyson, it contracts with independent growers to raise newborn chicks which Tyson purchases from a variety of entities to be raised by the growers for the 44-48 day maturing process until the birds reach the weight desired by Tyson's customers. Tr. 72-73, 84, 293-294.

4. The contract growers are compensated for their services through tournament style competitions. Tr. 39, 70. The competition rules and compensation formula are spelled out in detail in uniform broiler production contracts which Tyson enters into with each contract grower. CX-3, 4; RX-1, 2.

5. Ranking in the tournament system is determined by the grower's productivity under the contract relative to that of other growers in the same settlement by calculating Tyson's cost of placing the flock with the grower (chick cost, feed, medicines, and other expenses) and dividing that cost by the weight of the mature birds delivered to Tyson. Tyson then ranks the productivity of each flock in relation to the average of all flocks settled that week, with flocks outperforming the average receiving an upward adjustment and those that underperform receiving a downward adjustment, capped by a minimum amount. *Id.*

6. Prior to the fall of 2009, Tyson had placed a single breed of chicken, the Cobb 500, with its growers to be processed at the Georgia complex. Tr. 262-263.

7. In September of 2009 Tyson decided to shift its production from the Cobb 500 to the Cobb 700. Tr. 263-264. In making the change, Tyson believed that the Cobb 700 bird's characteristics of having a larger breast would better suit its primary customer.

8. While both breeds possess low feed conversion rates, i.e. produces more meat using less feed than other broiler breeds, the Cobb 500 and

Cobb 700 birds have different characteristics, with industry literature suggesting that the Cobb 700 grows more slowly than the Cobb 500, but produces a larger percentage of breast meat.[15] Tr. 45, 263, CX-21, 27.

9. For both economic and operational reasons the transition from the Cobb 500 bird to the Cobb 700 bird was phased in over time due to the requirements to both acquire sufficient numbers of Cobb 700 chicks to make the conversion and to avoid disruption of the retirement cycle and the additional costs inherent with retirement of the Cobb 500 hens prior to their normal replacement date. Tr. 271-272, 418, 419.

10. As each cycle of Cobb 500 hens was replaced with Cobb 700 hens, the percentage of Cobb 700 chicks placed with the growers increased and Tyson's Georgia complex processed a varied mix of Cobb 500 and 700 birds for a total of 74 weeks, from September 19, 2009 to February 26, 2011. Tr. 186.

11. Throughout the transition period during which mixed flocks of birds were processed, placement of the chicks was done on a random basis and no pattern of placement discrimination against any individual grower was established.

12. Although industry literature concerning the characteristics of the two breeds of bird indicates that the Cobb 700 bird typically grows more slowly than the Cobb 500, the evidence of record clearly establishes that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups. CX-15, Complainant's Post Hr'g Br. at 9.

13. Complainant's statistical analysis was flawed in that it failed to account for differences in grower expertise.

---

[15] The evidence of record however suggests that the most significant drivers of flock performance are growing practices and the skill and expertise of individual growers. Tr. 75-77. Management of such factors such as temperature, feed, ventilation and litter management are critical to the success of the operation. Tr. 76-83, 206, 299-310. Failure to manage flocks in accordance with the best practices can and will lead to less successful flocks regardless of the breed. *Id.*

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Tyson, at all times pertinent to the Complaint was:

   a. Engaged in the business of obtaining live poultry by purchase or under poultry growing arrangements for the purpose of slaughter,

   b. Shipping processed poultry products in commerce, and

   c. Operating as a live poultry dealer subject to the provisions of the Act.

3. Tyson's contracts with its growers authorize Tyson to provide their growers with any "type" of bird breed.[16] CX-3, 4; RX-1, 2. Its terms allow Tyson to determine the amount, type, frequency, and time of delivery to and pick-up from the Producer of chickens. CX-3,4; RX-1, 2. An express disclaimer of the "quality, merchantability, or fitness for purpose of" provides further amplification of Tyson's discretion over breed type and any related characteristics. CX-3, 4: RX-1, 2.

4. Tyson's contracts contain an integration clause with explicit language expressly rejecting imposition of any implied or unwritten terms. *Id.*

5. The evidence of record establishes that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups; accordingly, placement of the Cobb 700 birds did not result in those growers being disadvantaged.

6. Tyson's contract poultry growers were paid in full and on time in accordance with their contract.

7. No violation of section 410 of the Act by Tyson was established.

---

[16] "Company will determine the amount, *type*, frequency, and time of delivery to and pick-up from Producer of chickens…." Para 2A of cited exhibits (emphasis added).

ORDER

1. No violation of the Act having been established, the relief sought in the Complaint is DENIED.

2. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties.

In re: PERKINS LIVESTOCK, LLC AND ROBB TAYLOR.
Docket No. 13-0134.
Decision and Order.
Filed April 24, 2013.

PS-D.

Leah C. Battaglioli, Esq. for Complainant.
Respondents, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) (Act) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statues (7 C.F.R. §§ 1.130-1.151) (Rules of Practice). Complainant, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), initiated this proceeding against Perkins Livestock, LLC (Respondent Perkins)

and Robb Taylor (jointly, Respondents) by filing a disciplinary complaint on December 26, 2012.

Copies of the Complaint and the Rules of Practice were served upon Respondents by certified mail. The Complaint alleged that Respondent Perkins, under the direction, management, and control of Respondent Robb Taylor, failed to properly maintain its custodial account for shippers' proceeds (custodial account) by operating with custodial account shortages in violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations issued under the Act (9 C.F.R. § 201.42) (Regulations).

By letter dated January 29, 2013, the Hearing Clerk's Office informed Respondents that as of the date of the letter, an Answer had not been filed within the time allotted by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). On February 1, 2013, Amanda Hickman, Office Manager for Respondent Perkins, sent a multi-page fax to the Hearing Clerk's Office. The fax included an Answer to the Complaint entitled Response to P&S Docket No. 13-0134. In the Answer, Respondents admitted the allegations in the Complaint.

In response to Respondents' Answer, Complainant moved for a Decision Without Hearing By Reason of Admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). After considering the record, Complainant's motion will be granted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Discussion

Respondents filed an Answer admitting the allegations in the Complaint including admission that as of May 26, 2011 and October 6, 2011, Respondents had custodial account shortages in the amounts of $97,999.98 and $74,913.03, respectively. In their defense, Respondents claim that (1) the shortages were caused by the failure of others to pay Respondents and (2) no one went unpaid during the time periods of the shortages.

While the fact that the custodial account shortages may have been largely attributable to the failure of a buyer to pay for livestock purchases, that fact does not excuse Respondents' violation of the Act and the Regulations. "When the market agency chooses to sell to a type of buyer who might pose a greater than normal risk of not paying, it is the market agency who must bear the risk of non-payment." *Cobb*, No. 6587, 48 Agric. Dec. 234, 255, 1989 WL 265394 (U.S.D.A. Feb. 13, 1989), *aff'd sub nom. Cobb v. Yeutter* 889 F.2d 724 (6th Cir. 1989). If the proceeds receivable from livestock sales cannot be collected and deposited into a market's custodial account by the close of the seventh day after the sale, then the market must make up the shortfall and reimburse the custodial account. *See* 9 C.F.R. § 201.42(c). By failing to timely reimburse the custodial account, Respondents impermissibly shifted the risk of non-payment to the livestock consignors. *See Cobb*, 889 F.2d at 730. The fact that a buyer may have failed to pay the market for purchases is no defense to this regulatory requirement. *See Simmons*, No. D-05-0018, 66 Agric. Dec. 731, 2007 WL 5971724 (U.S.D.A. Apr. 18, 2007) (rejecting similar buyer nonpayment defense).

Similarly, Respondents' second defense, "[t]he argument that there is no evidence of any particular shipper not being paid, is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir. 1957), *cert. denied*, 354 U.S. 939 (1957); *see also Wooton*, No. D-97-0021, 58 Agric. Dec. 944, 975, 1999 WL 1327401 (U.S.D.A. Oct. 29, 1999); *George Cnty. Stockyard, Inc.*, 45 Agric. Dec. 2342, 2349 (U.S.D.A. 1986). "The fact that Respondents caused no harm to consignors by issuing insufficient funds checks does not relieve Respondents from the responsibility for maintaining and operating their custodial account in strict conformity with the Act and the Regulations." *Wooton*, 58 Agric. Dec. at 976.

Respondents' operation subject to the Act with custodial account shortages is a willful violation of the Act and the Regulations. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) "if a prohibited act is done intentionally, irrespective of evil intent, or done with a careless disregard of statutory requirements." *Marysville Enterprises., Inc.*, No. 98-0027, 59 Agric. Dec. 299, 309 &

n.5, 2000 WL 123137 (U.S.D.A. Jan. 4, 2000). Operating with custodial account shortages, is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42). *Porter*, No. 6538, 47 Agric. Dec. 656, 672, 1988 WL 247536 (U.S.D.A. Apr. 28, 1988); *Blackfoot Livestock Comm'n Co*., No. 6107, 45 Agric. Dec. 590, 604, 1986 WL 74695 (U.S.D.A. Mar. 7, 1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *Powell*, No. 5876, 41 Agric. Dec. 1354, 1361, 1982 WL 37335 (U.S.D.A. July 7, 1982). Respondents admitted that they operated with custodial account shortages on more than one occasion. This admission alone is sufficient to demonstrate that Respondents' violation of the Act and the Regulations was willful.

The Fourth and Tenth Circuits require a more stringent standard of willfulness requiring that there must be "such gross neglect of a known duty as to be the equivalent" of an intentional misdeed. *Capital Produce Co. v. U.S. Dep't of Agric.*, 930 F.2d 1077, 1079-80 (4th Cir. 1991); *Capitol Packing Co. v. U.S. Dep't of Agric.*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even applying the more stringent standard, Respondents' violation of the Act and the Regulations was willful. Respondents admitted that they received a Notice of Violation (NOV) letter from GIPSA in November 2008 notifying them that Respondent Perkins had custodial account shortages in June, August, and September of 2008 and that operating with a custodial account shortage was a violation of sections 307 and 312(a) and the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42). Respondents also admitted that they entered a Civil Penalty Stipulation Agreement with GIPSA in September 2010 to resolve, among other things, additional findings of custodial account shortages in November 2009 and January 2010. Based on these admissions, Respondents were familiar with the requirements of the Act and Regulations regarding custodial accounts and had a history of operating with custodial account shortages and therefore, Respondents knew or should have known that they were operating with custodial account shortages in May and October of 2011.

It is the policy of the Department to impose sanctions for violations of any of the regulatory programs administered by the Department that are serious and repeated in order to serve as an effective deterrent not only to the named respondents, but to future violators as well. *See Wooton*, 58 Agric. Dec. at 980. The Act authorizes the Secretary to suspend a

registrant under the Act "for a reasonable specified period." *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 805 (8th Cir. 2010) (quoting 7 U.S.C. § 204). In determining the length of the suspension, it is the Secretary's policy to: "(1) to examine the nature of the violations in relation to the remedial purposes of the PSA, (2) to consider all relevant circumstances, and (3) to give appropriate weight to the recommendations of the administrators of the PSA." *Id.* at 804 (citing *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (U.S.D.A. 1991), *aff'd sub nom., Hickey v. U.S. Dep't of Agric.*, 991 F.2d 803 (9th Cir. 1993)). Applying these guidelines to the circumstances of this case, Complainant's requested sanction of a cease and desist Order, an Order suspending Respondent Perkins for a period of 21 days and thereafter until Respondents demonstrate that the custodial account shortages have been corrected, and an Order prohibiting Respondent Taylor from registering under the Act during the time period of Respondent Perkins' suspension is warranted and entirely appropriate.

Although it was Respondents' "duty and obligation under the Act and regulations to see to it that there were funds in the custodial account at all times in an amount sufficient to cover all outstanding obligations," Respondents operated with custodial account shortages on May 26, 2011 and again on October 6, 2011 in violation of these requirements. *Lufkin Livestock Exch., Inc.*, 27 Agric. Dec. 596, 606-07 (U.S.D.A. 1968). Operating with custodial account shortages is a serious violation of the Act and the Regulations. *See*, *e.g.*, *Cobb*, No. 6587, 48 Agric. Dec. 234, 255, 1989 WL 265394 (U.S.D.A. Feb. 13, 1989), *aff'd*, 889 F.2d 724 (6th Cir. 1989)); *George Cnty. Stockyard*, 45 Agric. Dec. at 2351. Suspending Respondent Perkins is consistent with the sanction that has been imposed in past cases involving custodial account violations. *See*, *e.g.*, *Barnesville Livestock, LLC*, No. 10-0058, 71 Agric. Dec. 518, 527, 2012 WL 441415, at *6 (U.S.D.A. Jan. 22, 2012); *Fowler Livestock Auction, Inc.*, No. D-92-21, 52 Agric. Dec. 558, 571-72, 1993 WL 124886 (U.S.D.A. Feb. 26, 1993); *Finger Lakes Livestock Exch*., *Inc*., No. 6793, 48 Agric. Dec. 390, 407-08, 1989 WL 265405 (U.S.D.A. Mar. 14, 1989); *Powell*, 41 Agric. Dec. at 1366; *Miller*, 33 Agric. Dec. 53, 87-88 (U.S.D.A. 1974).

Respondents claim in their Answer that it would be a hardship to shut their business down or to even fine them. Nevertheless, the Judicial Officer has

long held that collateral effects of a sanction on a violator and on a violator's community, customers, employees, and creditors are given no weight in determining the sanction to be imposed for violations of the Packers and Stockyards Act since the national interest of having fair conditions in the livestock industry must prevail over a violator's interests and the interests of the violator's community, customers, employees, and creditors.

Syverson, *supra* at *2 (decision on reconsideration) (footnote omitted), *aff'd,* 666 F.3d 1137 (8th Cir. 2012); *see also Barnesville*, 2012 WL 441415, *6; *Marysville*, 59 Agric. Dec. at 328. Accordingly, this argument is rejected.

An Order prohibiting Respondent Taylor from registering under the Act during the time period of Respondent Perkins' suspension is also warranted and appropriate. The Secretary "routinely issues orders applicable to the owners and officers of corporations when the evidence shows that these individuals were responsible for the corporate violations, including orders prohibiting the registration . . . of the responsible owners and officers." *Chatham Area Auction Coop., Inc.*, No. D-88-88, 49 Agric. Dec. 1043, 1076, 1990 WL 321403 (U.S.D.A. Sept. 28, 1990). In addition, "the corporate device cannot immunize individual [respondents] from liability" once they are found to be market agencies, dealers, or packers under the Act. *See Fillippo v. S. Bonaccurso & Sons, Inc*., 466 F. Supp. 1008, 1018 (E.D. Pa. 1978). By Respondent Taylor's own admissions, he is liable for the violations of the Act and the Regulations because he was both the sole member and owner exerting direction, management, and control over Respondent Perkins and a market agency under the Act.

A s the Respondents' Answer presents no *bona fide* dispute as to the material facts, no hearing is required in this matter and the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Perkins Livestock, LLC is a limited liability company organized under the laws of the State of Oklahoma with a mailing address in Perkins, Oklahoma.

2. Respondent Perkins, under the direction, management, and control of Respondent Robb Taylor, is, and at all times material to the Complaint was:

(a) Engaged in the business of conducting and operating Perkins Livestock, LLC, a stockyard posted under and subject to the provisions of the Act;

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. Robb Taylor is an individual with a mailing address in Perkins, Oklahoma.

4. Respondent Robb Taylor is, and at all times material to the Complaint was:

(a) Sole member of Respondent Perkins;

(b) Owner of 100% of Respondent Perkins;

(c) Registered agent of Respondent Perkins; and

(d) Responsible for the direction, management, and control of Respondent Perkins.

5. Respondent Robb Taylor is, and at all times material to the Complaint was:

(a) Engaged in the business of conducting and operating Perkins Livestock, LLC, a stockyard posted under and subject to the provisions of the Act; and

(b) Engaged in the business of a market agency selling livestock in commerce on a commission basis.

6. On November 25, 2008, GIPSA sent an NOV via certified mail to Respondents. The NOV was delivered on or about December 1, 2008. The NOV informed Respondents, among other things, that Respondent Perkins had a shortage in its custodial account of $7,195.17, $34,350.06, and $37,736.86 as of June 30, 2008, August 29, 2008, and September 30, 2008, respectively. The NOV informed Respondents that the shortage was caused, in part, by Respondents' failure to timely reimburse the custodial account for unpaid buyer payments. The NOV further informed Respondents that operating with a custodial account shortage is a violation of sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42), and that failure to comply with the Act and the Regulations would result in appropriate disciplinary action.

7. On September 13, 2010, Respondents and GIPSA entered into a Civil Penalty Stipulation Agreement (Agreement) to resolve, among other things, additional findings that Respondents had custodial account shortages on November 15, 2009, and January 24, 2010. The Agreement assessed a civil penalty against Respondents in the amount of $5,750.00.

8. Respondent Perkins, under the direction, management, and control of Respondent Robb Taylor, failed to properly use and maintain its custodial account.

9. As of May 26, 2011, Respondents had outstanding checks drawn on their custodial account in the amount of $186,785.27, and had, to offset such checks, a bank balance in the custodial account of $33,352.79, current proceeds receivable in the amount of $55,432.50, with no deposits in transit, resulting in a custodial account shortage in the amount of $97,999.98.

10. As of October 6, 2011, Respondents had outstanding checks drawn on their custodial account in the amount of $444,858.44, and had, to offset such checks, a bank balance in the custodial account of $63,491.89, deposits in transit of $36,703.12, and current proceeds receivable in the amount of $269,750.40, resulting in a custodial account shortage in the amount of $74,913.03.

11. The custodial account shortages were due, in part, to Respondents' failure to reimburse the custodial account for Respondent Robb Taylor's purchases and for livestock purchases made by buyers who had not paid by the close of the seventh business day following the sale of the livestock.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondents willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the Regulations (9 C.F.R. § 201.42) by operating with custodial account shortages.

ORDER

1. Respondent Perkins and Respondent Robb Taylor, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from failing to properly maintain their custodial account in strict conformity with the Act and section 201.42 of the Regulations (9 C.F.R. § 201.42).

2. Respondent Perkins is suspended as a registrant under the Act for a period of twenty-one (21) days and thereafter until Respondents demonstrate to the satisfaction of the Packers and Stockyards Program that their custodial account shortages have been corrected. After the expiration of the initial twenty-one (21) day suspension period, and provided that Respondents have demonstrated that their custodial account shortages have been corrected, upon application to the Packers and Stockyards Program, a supplemental order may be issued terminating the suspension. Respondent Robb Taylor is prohibited from

registering under the Act during the time period of Respondent Perkins' suspension in accordance with section 201.11 of the Regulations (9 C.F.R. § 201.11).

3. The provisions of this Order shall become effective on the sixth day after service of this Decision and Order on Respondents.

4. This Decision and Order shall become final without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

MISCELLANEOUS ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

PACKERS AND STOCKYARDS ACT

MARSHALL M. CHERNIN.
Docket No. 13-0117.
Miscellaneous Order.
Filed January 11, 2013.

In re: DOUGLAS BUTLER.
Docket No. D-12-0033.
Miscellaneous Order.
Filed January 15, 2013.

PS-D – Reopen hearing.

Jonathan D. Gordy, Esq. for Complainant.
Peter F. Langrock, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER GRANTING IN PART PETITION TO REOPEN

On November 26, 2012, Douglas Butler filed Respondent's Petition to Reopen requesting remand of this proceeding to Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] for a new hearing in light of the jury's November 1, 2012, findings in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11 (Resp't's Pet. to Reopen at 2 ¶ 12). Mr. Butler attached the jury verdict form entered in *Pollock v. Butler* to Respondent's Petition to Reopen, which form contains the jury findings.

On December 17, 2012, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed Complainant's Response to Petition to Reopen. The Deputy Administrator opposes Mr. Butler's request to remand this proceeding to the Chief ALJ for a new hearing.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151), which are applicable to the instant proceeding, set forth the requirements for a petition to reopen, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Mr. Butler filed Respondent's Petition to Reopen prior to the issuance of the decision of the Judicial Officer. Respondent's Petition to Reopen identifies the nature and purpose of the evidence to be adduced. Moreover, the evidence to be adduced is not merely cumulative and could not have been adduced at the hearing as the jury in *Pollock v. Butler* did not return a verdict until November 1, 2012, after the June 5th and 6th, 2012, hearing conducted by the Chief ALJ in the instant proceeding.

Under these circumstances, I reopen this proceeding and receive in evidence the November 1, 2012, jury verdict form entered in *Pollock v. Butler*. However, the jury verdict form entered in *Pollock v. Butler*

contains the jury's findings that are relevant to the instant proceeding; therefore, I decline to remand the proceeding to the Chief ALJ for a new hearing.

For the foregoing reasons, the following Order is issued.

ORDER

Respondent's Petition to Reopen filed November 26, 2012, is granted in part. The proceeding is reopened and the jury verdict form entered in *Pollock v. Butler*, Vermont Superior Court, Addison Civil Division, Docket No. 236-10-11, is received in evidence.

___

GARY FULTON.
Docket No. 12-0542.
Miscellaneous Order.
Filed January 23, 2013.

In re: TODD SYVERSON, D/B/A SYVERSON LIVESTOCK BROKERS.
Docket No. D-05-0005.
Miscellaneous Order.
Filed April 23, 2013.

PS-D – Suspension order.

Charles Spicknall, Esq. for Complainant.
E. Lawrence Oldfield, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER GRANTING MOTION TO MODIFY SUSPENSION ORDER TO PERMIT TODD SYVERSON'S SALARIED EMPLOYMENT

Discussion

In *Syverson*, No. D-05-0005, 69 Agric. Dec. 1500, 2010 WL 10078382 (U.S.D.A. Nov. 16, 2010) (Decision on Remand), I suspended

Todd Syverson as a registrant under the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. §§ 181-229b), for a period of 16 months. The suspension order, which became effective on June 1, 2012, allowed for modification "to permit the salaried employment of Mr. Syverson by another registrant or packer after the expiration of 8 months of the suspension term." *Syverson*, No. D-05-0005, 71 Agric. Dec. ___, slip op. at 3 (U.S.D.A. May 21, 2012) (Order Lifting Stay Order). On March 25, 2013, after the initial 8 months of the suspension period had passed, Mr. Syverson applied to Packers and Stockyards Program to work as a salaried employee of Minneola Farms, LLC, Zumbrota, Minnesota. Packers and Stockyards Program concluded an investigation of the proposed employment arrangement on April 8, 2013, and, on April 15, 2013, moved for modification of the suspension order to permit Mr. Syverson's salaried employment by Minneola Farms, LLC. On April 23, 2013, the Hearing Clerk transmitted Packers and Stockyard Program's Motion to Modify Suspension Order to Permit Respondent's Salaried Employment [hereinafter Motion to Modify Suspension Order] to the Office of the Judicial Officer for consideration and a ruling.

Packers and Stockyards Program's April 15, 2013, Motion to Modify Suspension Order is granted and the following Order is issued:

ORDER

The suspension provision in *Syverson*, No. D-05-0005, 71 Agric. Dec. ___, 2012 WL 1909338 (U.S.D.A. May 21, 2012) (Order Lifting Stay Order), is modified to permit the salaried employment of Mr. Syverson by Minneola Farms, LLC, Zumbrota, Minnesota, with the Order in *Syverson*, No. D-05-0005, 71 Agric. Dec. ___, 2012 WL 1909338 (U.S.D.A. May 21, 2012) (Order Lifting Stay Order), remaining in effect in all other respects. This Order Granting Motion to Modify Suspension Order to Permit Todd Syverson's Salaried Employment shall become effective upon filing with the Office of the Hearing Clerk.

___

In re: PIEDMONT LIVESTOCK, INC. AND JOSEPH RAY JONES.
Docket No. 13-0087.
Miscellaneous Order.

Filed April 29, 2013.

PS – Appeal, untimely.

Thomas N. Bolick, Esq. for Complainant.
Joseph R. Jones for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyard Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 19, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges, during the period October 10, 2011, through November 21, 2011, Piedmont Livestock, Inc., and Joseph Ray Jones, in 16 transactions, purchased 342 cattle from 10 different sellers for a total purchase price of $255,077.31 and failed to pay, when due, the full amount of the purchase price, in willful violation of 7 U.S.C. §§ 213(a) and 228b and 9 C.F.R. § 201.43.[1]

The Hearing Clerk served Piedmont Livestock, Inc., and Mr. Jones with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on November 26, 2012.[2] Neither Piedmont Livestock, Inc., nor Mr. Jones filed an answer to the Complaint, and on December 20, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter

[1] Compl. at second unnumbered page, ¶¶ II-III.
[2] United States Postal Service Domestic Return Receipts for article numbers 7005 1160 0002 7836 2307, 7005 1160 0002 7836 3540, and 7005 1160 0002 7836 3557.

the Chief ALJ] issued a Show Cause Order in which the Chief ALJ provided the parties 15 days within which to show cause why a default decision should not be entered.

On January 4, 2013, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of a Motion for Decision Without Hearing by Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing by Reason of Default. Neither Piedmont Livestock, Inc., nor Mr. Jones filed a response to the Chief ALJ's Show Cause Order.

On January 9, 2013, the Hearing Clerk served Piedmont Livestock, Inc., and Mr. Jones with the Deputy Administrator's Motion for Default Decision and the Hearing Clerk's service letter.[3] Neither Piedmont Livestock, Inc., nor Mr. Jones filed objections to the Deputy Administrator's Motion for Default Decision.

On March 7, 2013, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order [hereinafter Decision]: (1) concluding Piedmont Livestock, Inc., and Mr. Jones willfully violated 7 U.S.C. §§ 213(a) and 228b and 9 C.F.R. § 201.43, as alleged in the Complaint; (2) ordering Piedmont Livestock, Inc., and Mr. Jones to cease and desist from failing to pay the full amount of the purchase price for livestock before the close of the next business day following each purchase of livestock, as required by 7 U.S.C. §§ 213(a) and 228b; and (3) assessing Piedmont Livestock, Inc., and Mr. Jones a $14,000 civil penalty.[4] On March 11, 2013, the Hearing Clerk served Piedmont Livestock, Inc., with the Chief ALJ's Decision and the Hearing Clerk's service letter,[5] and on March 13, 2013, the Hearing Clerk served Mr. Jones with the Chief ALJ's Decision and the Hearing Clerk's service letter.[6]

---

[3] United States Postal Service Domestic Return Receipts for article numbers 7005 1160 0002 7836 3212, 7005 1160 0002 7836 3229, and 7005 1160 0002 7836 3236.

[4] Chief ALJ's Decision at 3.

[5] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7837 4584.

[6] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7837 4577.

On April 18, 2013, Piedmont Livestock, Inc., and Mr. Jones appealed the Chief ALJ's Decision to the Judicial Officer. On April 24, 2013, the Deputy Administrator filed Complainant's Response to Respondents' Appeal of Default Decision and Order. On April 26, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[7] The Hearing Clerk served Piedmont Livestock, Inc., with the Chief ALJ's Decision on March 11, 2013, and served Mr. Jones with the Chief ALJ's Decision on March 13, 2013;[8] therefore, Piedmont Livestock, Inc., was required to file its appeal petition with the Hearing Clerk no later than April 10, 2013, and Mr. Jones was required to file his appeal petition with the Hearing Clerk no later than April 12, 2013. Instead, Piedmont Livestock, Inc., and Mr. Jones filed their appeal petition with the Hearing Clerk on April 18, 2013. Therefore, I find Piedmont Livestock, Inc., and Mr. Jones' appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[9] The Chief ALJ's Decision became final 35 days after the

---

[7] 7 C.F.R. § 1.145(a).

[8] *See supra* notes 5 and 6.

[9] *See, e.g.*, Custom Cuts, Inc. Nos. D-12-0443, D-12-0444, 72 Agric. Dec. ___, 2013 WL 8213598 (U.S.D.A. Feb. 20, 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed 1 month 27 days after the chief administrative law judge's decision became final); Self, No. D-12-0167, 71 Agric. Dec. ___, 2012 WL 10767600 (U.S.D.A. Sept. 24, 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, No. 08-0153, 69 Agric. Dec. 631, 2010 WL 10079822 (U.S.D.A. Feb. 5, 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 week after the administrative law judge's decision became final); Noble, No. 09-0033, 68 Agric. Dec. 1060, 2009 WL 8382895 (U.S.D.A. Dec. 17, 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Edwards, No. D-06-0020, 66 Agric. Dec. 1362, 2007 WL 7277763 (U.S.D.A. Oct. 30, 2007) (Order Den. Late Appeal)

Hearing Clerk served Piedmont Livestock, Inc., and Mr. Jones with the Chief ALJ's Decision.[10] Thus, the Chief ALJ's Decision became final as to Piedmont Livestock, Inc., on April 15, 2013, and final as to Mr. Jones on April 17, 2013. Piedmont Livestock, Inc., and Mr. Jones filed their appeal petition on April 18, 2013. Therefore, I have no jurisdiction to hear Piedmont Livestock, Inc., and Mr. Jones' appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Piedmont Livestock, Inc., and Mr. Jones' filing an appeal petition after the Chief ALJ's Decision became final.

Accordingly, Piedmont Livestock, Inc., and Mr. Jones' appeal petition must be denied. For the foregoing reasons, the following Order is issued.

ORDER

(dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); Tung Wan Co., No. D-06-0019, 66 Agric. Dec. 939, 2007 WL 1378158 (U.S.D.A. Apr. 25, 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray, No. 01-D022, 64 Agric. Dec. 1699, 2005 WL 2994262 (U.S.D.A. Oct. 17, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); Mokos, No. 03-0003, 64 Agric. Dec. 1647, 2005 WL 2251945 (U.S.D.A. Sept. 6, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); Blackstock, No. 02-0007, 63 Agric. Dec. 818, 2004 WL 1842435 (U.S.D.A. July 13, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); Gilbert, No. 04-0001, 63 Agric. Dec. 807, 2004 WL 2823368 (U.S.D.A. Nov. 30, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Nunez, No. 03-0002, 63 Agric. Dec. 766, 2004 WL 2031430 (U.S.D.A. Sept. 8, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[10] *See* 7 C.F.R. § 1.139; Chief ALJ's Decision at 3.

1. Piedmont Livestock, Inc., and Joseph Ray Jones' appeal petition, filed April 18, 2013, is denied.

2. The Chief ALJ's Decision, filed March 7, 2013, is the final decision in this proceeding.

___

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

PACKERS AND STOCKYARDS ACT

RICARDO JURADO.
Docket No. 12-0597.
Default Decision and Order.
Filed January 30, 2013.

PIEDMONT LIVESTOCK, INC. AND JOSEPH RAY JONES.
Docket No. 13-0087.
Default Decision and Order.
Filed March 7, 2013.

JAMES EMANUEL MOWERY.
Docket No. 13-0007.
Default Decision and Order.
Filed March 20, 2013.

DAVID BYRD, D/B/A DB CATTLE CO., D/B/A AD BYRD CATTLE.
Docket No. 12-0550.
Default Decision and Order.
Filed March 21, 2013.

MARK KASMIERSKY.
Docket No. 12-0600.
Default Decision and Order.
Filed March 21, 2013.

ABE CUESTA, A/K/A ABRAM CUESTA, D/B/A QUALITY CATTLE.
Docket No. 12-0533.
Default Decision and Order.
Filed May 8, 2013.

CAMBRIDGE VALLEY LIVESTOCK MARKET, INC.
Docket No. 13-0162.
Default Decision and Order.
Filed May 15, 2013.

TONY E. LYON, D/B/A LYON FARMS.
Docket No. 13-0121.
Default Decision and Order.
Filed May 30, 2013.

___

CONSENT DECISIONS

PACKERS AND STOCKYARDS ACT

Wilson Horse & Mule Sale, Inc.
Docket No. 12-0535.
Filed January 2, 2013.

Daryl Bowman and Daryl Bowman Livestock, Inc.
Docket No. 12-0374.
Filed January 9, 2013.

Nathan Lewis.
Docket No. 12-0534.
Filed January 9, 2013.

Clint Sicking, D/B/A Flying C Cattle Company.
Docket No. 13-0086.
Filed January 11, 2013.

Anderson Livestock Auction Co. and Jerry Anderson.
Docket No. 12-0516.
Filed January 18, 2013.

Billy Tackett.
Docket No. 12-0616.
Filed January 24, 2013.

Robin Olson, D/B/A American Cattle Services.
Docket No. 13-0124.
Filed January 24, 2013.

Well Bred Farms, Inc.
Docket No. 13-0110.
Filed January 25, 2013.

JLA, LLC, D/B/A Marshall Livestock Auction, Carey Jones, and Martha Jones.
Docket Nos. 12-0188, 12-1089, 12-0243.
Filed February 1, 2013.

Gary Thompson.
Docket No. D-12-0028.
Filed February 11, 2013.

Monte Clark.
Docket No. 13-0060.
Filed February 11, 2013.

Randy R. Wientjes, D/B/A Brookport Cattle Company.
Docket No. 13-0156.
Filed February 14, 2013.

Central Beef Industries, LLC.
Docket No. 13-0117.
Filed February 20, 2013.

Wing & Sing Poultry Market, Inc., D/B/A New Wing and Sing and Poultry, Inc., and D/B/A Wing and Sing Poultry; Island Farm Meat Corp., D/B/A Al-Noor Live Chicken Market, D/B/A Alnoor Halal Live Poultry Market, D/B/A Al-Noor Live Poultry, D/B/A Al-Noor Halal Poultry, Inc., and D/B/A Al-Noor Halal Meat Chicken and Fish Market; and Mohammed Yasser Aldeen, A/K/A Mohammed Bader, A/K/A Mohammad Badereldeen, A/K/A Mohammed Eldeen, and A/K/A Yesser M. Eldeen.
Docket No. 13-0141.
Filed February 21, 2013.

New Wilmington Livestock Auction, Inc. and Thomas R. Skelton.
Docket No. D-12-0241.
Filed February 28, 2013.

Daniel R. Froman, D/B/A R&K Real Estate, Inc.
Docket No. 12-0539.
Filed March 7, 2013.

CONSENT DECISIONS

Thomas Kinderknecht, Barbara Kinderknecht, and Quinter Livestock, Inc.
Docket No. D-12-0250.
Filed March 26, 2013.

Benjamin W. Dunlap, A/K/A Ben Dunlap, D/B/A Ben Dunlap Livestock, D/B/A Dunlap Cattle and Farms, and D/B/A Phat Buzzard Cattle Co.
Docket No. 13-0136.
Filed March 27, 2013.

Martin D. Yoder, D/B/A Martin D. Yoder Livestock, Ltd.
Docket No. 12-0584.
Filed March 28, 2013.

John Michael Loy, D/B/A Loy's Sale Barn.
Docket No. 13-0166.
Filed March 29, 2013.

T&M Cattle, Inc. and Travis Witt.
Docket No. 13-0064.
Filed April 3, 2013.

Pilgrim's Pride Corporation.
Docket No. 12-0386.
Filed April 9, 2013.

Milan Livestock Auction, Inc., also D/B/A Brookfield Sales Co., Wendell Fleshman, and Linda Fleshman.
Docket No. 12-0404.
Filed April 11, 2013.

Atlantic Veal and Lamb, LLC, D/B/A Atlantic Veal and Lamb, Inc., and Philip Peerless.
Docket No. 13-0119.
Filed April 12, 2013.

Keith Robertson, Charlene Robertson, and Farmington Livestock, LLC.
Docket No. 13-0170.
Filed April 22, 2013.

TW Cattle Co., LLC and Thomas J. Witt.
Docket No. 13-0147.
Filed May 10, 2013.

Don Harris Buying Station, Inc., Don Harris, and Nancy Harris.
Docket No. 13-0183.
Filed May 13, 2013.

John C. Howard.
Docket No. 13-0191.
Filed May 16, 2013.

Jimmy Springer.
Docket No. 13-0058.
Filed June 4, 2013.

Farmer Grown Poultry, LLC.
Docket No. 13-0066.
Filed June 17, 2013.

M&L Farms, LLC; Jamil Jallaq, A/K/A Sam Jallaq; and Majdi Jallaq, A/K/A Mike Jallaq.
Docket No. 13-0188.
Filed June 21, 2013.

___