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Department of
Agriculture

Office of
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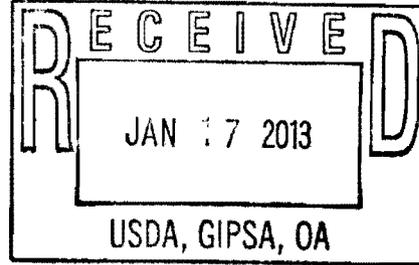
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CERTIFIED RECEIPT REQUESTED

January 16, 2013

Peter F. Langrock, Esq.
LANGROCK SPERRY & WOOL, LLP
P.O. Drawer 351
111 S. Pleasant Street
Middlebury, VT 05753



Dear Mr. Langrock:

Subject: Douglas Butler, Respondent
Docket No. D-12-0033

Enclosed is a date-stamped copy of the Decision and Order issued by the Judicial Officer on the Secretary's behalf in the above-captioned proceeding.

Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute.

Prior to filing an appeal, you may file a petition for reconsideration of the Judicial Officer's Decision and Order within 10 days of service of this decision. An original and 3 copies of the petition for reconsideration must be filed with this office.

Sincerely,

L. Eugene Whitfield
Hearing Clerk

Enclosure

cc: Jonathan Gordy, OGC – with enclosure
S. Brett Offutt, GIPSA – with enclosure.

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LANGROCK, SPERRY AND WOOL, LLP
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MIDDLEBURY, VT 05753



UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-12-0033
)
Douglas Butler,)
)
Respondent) **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.

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

¹Compl. ¶¶ II-IV.

²References to the transcript of the June 5th and 6th, 2012, hearing are indicated as “Tr.” with the page reference.

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.

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

³*In re Douglas Butler* (Order Granting in Part Pet. to Reopen), ___ Agric. Dec. ___ (Jan. 15, 2013).

⁴Chief ALJ's Decision and Order at 8-9.

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:

⁵See note 3.

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 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

⁶7 U.S.C. § 213(a).

⁷7 U.S.C. § 221.

⁸7 U.S.C. § 228b.

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 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).

⁹Mr. 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.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *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

¹⁰The 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)).

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, 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

¹¹See *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); *In re Robert Morales Cattle Co.*, __ Agric. Dec. __, slip op. at 19 (Mar. 6, 2012) (same); *In re Richard L. Reece* (Order Denying Pet. to Reconsider),

(continued...)

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. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be

¹¹(...continued)

___ Agric. Dec. ___, slip op. at 7 (Nov. 4, 2011) (same); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (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).

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.

¹⁴*In re Todd Syverson* (Decision on Remand), 69 Agric. Dec. 1500, 1508-09 (2010), *aff'd*, 666 F.3d 1137 (8th Cir. 2012).

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

(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.

¹⁵7 U.S.C. § 201(d).

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:

§ 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

¹⁶7 C.F.R. § 1.145(d).

¹⁷Compl. ¶¶ II, IV(b).

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).

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

¹⁸See also, *In re Edward Tiemann*, 47 Agric. Dec. 1573, 1588 (1988) (stating it is well-settled that failure to pay, in whole or in part, is an unfair and deceptive practice); *In re Farmers & Ranchers Livestock Auction, Inc.*, 44 Agric. Dec. 1973, 1986-87 (1985) (stating the failure to pay, when due, the full purchase price of livestock constitutes an unfair and deceptive practice); *In re Adolf Sklar*, 31 Agric. Dec. 872, 882 (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).

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 (Respondent'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 Act¹⁹ 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 (Respondent's Appeal Pet. at 1-2 ¶ 3).

¹⁹7 U.S.C. §§ 213(a) and 228b(c).

²⁰See *In re Michael V. Bott*, ___ Agric. Dec. ___, slip op. at 8-9 (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); *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 981-82 (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); *In re Sebastopol Meat Co., Inc.*, 28 Agric. Dec. 435, 441 (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).

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

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.

Done at Washington, DC

January 16, 2013



William G. Jenson
Judicial Officer

²¹28 U.S.C. § 2344.

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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-12-0033
)
Douglas Butler,)
) **Order Granting in Part**
) **Petition to Reopen**
Respondent)

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 (Respondent'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.

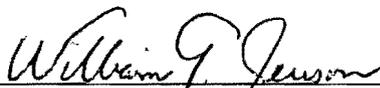
For the foregoing reasons, the following Order is issued.

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.

Done at Washington, DC

January 15, 2013



William G. Jenson
Judicial Officer

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