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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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In re: ) P & S Docket No. 12- 0468  
)  
National Beef Packing Company, )  
LLC, )  
)  
Respondent ) Complaint and Notice of Hearing

There is reason to believe that the Respondent named herein has willfully violated the Packers & Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.) (Act) and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 et seq.) (Regulations), and therefore this complaint and notice of hearing is issued alleging the following:

I.

(a) National Beef Packing Company, LLC (Respondent), is a limited liability company organized and existing under the laws of the State of Delaware. Its business mailing address is P.O. Box 20046, Kansas City, Missouri 64195.

(b) At all times material herein, Respondent was:

- (1) Engaged in the business of buying livestock in commerce for the purposes of slaughter; and
- (2) A packer within the meaning of, and subject to the provisions of, the Act.

## II.

On March 4, 2008, Respondent entered into a Consent Decision in In re National Beef Packing Company, LLC, P&S Docket No. 08-0038. The Consent Decision was signed by Respondent's Vice President of Cattle Procurement and Respondent's attorney. In the Consent Decision, Respondent agreed to cease and desist from failing to disclose, or otherwise make known to livestock sellers, freight charge deductions and data errors that affect the prices that Respondent pays for cattle purchased pursuant to quality-based pricing grids. Respondent was also assessed a civil penalty in the amount Fifty Thousand Dollars (\$50,000.00) payable in accordance with the terms of the Understanding Regarding Consent Decision.

## III.

(a) During the time period of March 31, 2008 through June 27, 2008, Respondent failed to disclose, or make known to livestock sellers, the correct freight charge deductions taken on cattle purchased pursuant to quality-based grids.

(b) During the approximate time periods of May 5, 2008 through May 31, 2008, and June 23, 2008 through July 19, 2008, Respondent failed to disclose, or make known to livestock sellers, data errors that affected the prices that Respondent paid for cattle purchased pursuant to quality-based pricing grids.

(c) Respondent's quality-based grids are pricing formulas that are used to set the prices that are paid to producers who sell cattle to Respondent's plants on a carcass grade and weight basis. Respondent's quality-based grids are not the only valuation mechanism available to producers contracting for the sale of cattle to Respondent's

plants. Respondent also purchases cattle on a liveweight basis and on other carcass weight pricing formulations.

(d) Respondent's quality-based grids are designed to reward producers for high-quality beef cattle. For example, Respondent's grids reward producers for animals whose carcasses obtain the highest U.S. Quality Grade designation of "Prime." Carcasses with the highest degrees of cutability, represented by U.S. Yield Grades 1 or 2, may also receive a price premium. Similarly, carcasses derived from cattle that meet certain phenotypic requirements and that meet the grading or other requirements for certification in a particular marketing program, such as the Certified Angus Beef (CAB) brand program, may also receive a price premium. Conversely, the grids discount carcasses with less desirable grade and yield characteristics that cannot be used in Respondent's branded products.

(e) Many of Respondent's quality-based grids utilize cattle sales price data reported by USDA's Market News (Market News) to establish the base price per hundredweight that will be paid to producers opting to sell cattle to Respondent under contracts that utilize a grid as the pricing mechanism. Premiums or discounts, such as those described in sub-paragraph (d) above, are added to, or subtracted from, the base price depending on the grid specifications and the quality and yield of the carcass. Some of Respondents quality-based grids pay premiums and subtract discounts for each carcass while others only pay premiums or subtract discounts if a lot meets certain threshold values. Many of Respondent's grids utilize Market News reported boxed beef sales price data to calculate Prime and CAB grid premiums. Black Canyon grid premiums incorporate the CAB grid premium in its calculation. By utilizing Market News price

data, Respondent's grids are able to adjust the prices that Respondent pays producers to reflect changing supply and demand conditions in the markets for cattle and beef.

(f) During the time period of March 31, 2008 through June 27, 2008, Respondent deducted a \$.75/cwt freight charge in grid-based pricing calculations. Respondent incorrectly disclosed to livestock sellers in its grid summaries that it was deducting a 7.5 cents/lb (\$7.50/cwt) freight charge in grid-based pricing calculations. The disclosed amount was higher than the amount Respondent actually deducted.

(g) Respondent used incorrect boxed beef sales data for the week ending May 3, 2008. These data were used in a four-week rolling average that determined price premiums for Prime, CAB, and Black Canyon carcasses in Respondent's quality-based pricing grids. Respondent's use of inaccurate Prime, CAB, and Black Canyon premiums resulted in underpayments and overpayments to some producers whose cattle were priced using Respondent's quality-based pricing grids during the time period of May 5, 2008 through May 31, 2008.

(h) Some livestock sellers delivering cattle to Respondent's plants in Dodge City, Kansas, and Liberal, Kansas received approximately \$1,588.52 less for some of their lots of cattle during the period of May 5, 2008 through May 31, 2008 than they would have received if Respondent had not included the undisclosed data error, described in subparagraph (g) above, in Respondent's grid-based pricing calculations. Packers and Stockyards (P&S) Program investigators discussed the results with Respondent and Respondent made additional payments to the affected sellers.

(i) Respondent incorrectly calculated the threshold values that it used in some of its quality-based pricing grids during the time period of June 23, 2008 through July 19,

2008. The threshold values were used to calculate a rolling four-week average that was used in Respondent's quality-based pricing grids. Respondent's use of inaccurate threshold values resulted in underpayments and overpayments to some producers whose cattle were priced using Respondent's quality-based pricing grids during the time period of June 23, 2008 through July 19, 2008.

(j) Some livestock sellers delivering cattle to Respondent's plants in Dodge City, Kansas, and Liberal, Kansas received approximately \$5,418.97 less for some of their lots of cattle during the period of June 23, 2008 through July 19, 2008 than they would have received if Respondent had not included the undisclosed data error, described in subparagraph (i) above, in Respondent's grid-based pricing calculations. P&S Program investigators discussed the results with Respondent and Respondent made additional payments to the affected sellers.

(k) In a sworn affidavit signed by Douglas Mascher, the Vice President of Business Analysis for Respondent, on March 4, 2009, Mr. Mascher admitted that "we made an unintentional mistake in determining the premiums for Prime, Certified Angus Beef, and Black Canyon Premium Reserve Beef for some of National Beef's grids for the weeks ending May 10, May 17, May 24 and May 31." Mr. Mascher further admitted in the affidavit that "[i]t appears that there were small differences in some of the threshold percentages for the weeks ending June 28 to July 19." A copy of the affidavit is attached hereto and incorporated by reference as Exhibit A.

#### IV.

On February 3, 2010, the Western Regional Office of the P&S Program sent Respondent a Notice of Violation Letter, which was served on March 3, 2010, informing

Respondent that it had failed to ensure the accurate weighing of carcasses in violation of section 202(a) of the Act (7 U.S.C. § 192(a)) and section 201.71(a) of the Regulations (9 C.F.R. § 201.71(a)).<sup>1</sup> Specifically, Respondent was notified that a test of its dynamic monorail scale at its Liberal, Kansas plant found that 3 of the 20 individual test loads, 15%, were in error, which exceeds the 10% allowance established by the National Institute of Standards and Technology (NIST) Handbook 44 in section 2.20, subsection T.N.3.8. Respondent was further informed that the three test loads that were in error exceeded “two times the tolerance,” and that the cumulative error on the test loads exceeded the allowable tolerance of  $\pm 0.2\%$  as established by NIST Handbook 44. Respondent was informed that it must correct its business practices and that failure to do so could result in the filing of an administrative complaint.

V.

(a) Respondent failed to maintain and operate an accurate scale for the purpose of determining livestock carcass weights at Respondent’s slaughter facility in Liberal, Kansas.

(b) On August 11, 2010, P&S Program investigators conducted a dynamic monorail scale test on the dynamic monorail scale at Respondent’s Liberal plant. The scale was identified as having serial number 1442544 (Scale No. 1442544) and was used to determine hot carcass weights. Carcass hot weights are used by Respondent to calculate the payments that are due to cattle sellers who sell cattle to the Liberal plant on a carcass weight or carcass grade and weight basis. Scale No. 1442544 failed to meet

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<sup>1</sup> The Date of Violation noted on the Notice of Violation Letter was incorrectly stated as November 11, 2009. The actual Date of Violation was November 16, 2009.

applicable accuracy tolerances for dynamic monorail scales established by NIST Handbook 44.

(c) The General Code, Scales Code, and Weights Code of the 2009 edition of the NIST Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices," is incorporated by section 201.71 of the Regulations (9 C.F.R. § 201.71). Subsection T.N.3.8 of section 2.20 in the NIST Handbook 44 entitled "Dynamic Monorail Weighing System," states, *inter alia*, that "[o]n a dynamic test of twenty or more individual test loads, 10% of the individual test loads may be in error, each not to exceed two times the tolerance. The error on the total of the individual test loads shall not exceed  $\pm 0.2\%$ ."

(d) The August 11, 2010 scale test conducted on Scale No. 1442544 found that 6 of the 20 individual test loads, 30%, were in error and that the cumulative error of the test loads was -0.32%. The 6 loads in error had values ranging from -1.60 to -3.70. On August 11, 2010, Respondent purchased 1,250 head of livestock totaling approximately 1,113,582 pounds and valued at approximately \$1,514,272.13 on a hot weight basis despite the fact that Scale No. 1442544 failed to meet the applicable NIST accuracy tolerances. The use of an inaccurate scale may have resulted in overpayments to some cattle sellers whose cattle were weighed on August 11, 2010.

(e) On August 12, 2010, the P&S Program investigators retested Respondent's Scale No. 1442544 at the Liberal plant and once again, the dynamic monorail scale failed to meet the applicable NIST accuracy tolerances.

(f) The August 12, 2010 scale test conducted on Scale No. 1442544 found that 4 of the 20 individual test loads, 20%, were in error and that the cumulative error of

the test loads was -0.14%. The 4 loads in error had values ranging from -2.00 to 1.70. On August 12, 2010, Respondent purchased 1,562 head of livestock totaling approximately 1,222,025 pounds and valued at approximately \$1,774,939.71 on a hot weight basis despite the fact that Scale No. 1442544 failed to meet the applicable NIST accuracy tolerances. The use of an inaccurate scale may have resulted in both overpayments and underpayments to some cattle sellers whose cattle were weighed on August 12, 2010.

(g) On August 18, 2010, the P&S Program investigators retested Respondent's Scale No. 1442544, and it passed the dynamic monorail scale test.

#### VI.

By reason of the facts alleged in paragraphs II and III herein, Respondent has willfully violated section 202(a) of the Act, (7 U.S.C. § 192(a)), and section 201.99 of the Regulations (9 C.F.R. § 201.99).

By reason of the facts alleged in paragraph IV and V herein, Respondent has willfully violated section 202(a) of the Act (7 U.S.C. § 192(a), and section 201.71 of the Regulations (9 C.F.R. § 201.71).

WHEREFORE, it is hereby ordered that for the purpose of determining whether Respondent has, in fact, willfully violated the Act and the Regulations, this Complaint and Notice of Hearing shall be served upon Respondent. Respondent shall have twenty (20) days after receipt of this Complaint and Notice of Hearing in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250, in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 et seq.)

(Rules of Practice). Allegations not answered shall be deemed admitted for the purpose of this proceeding. Failure to file an answer shall constitute an admission of all the material allegations of this Complaint and Notice of Hearing unless the parties have agreed to a consent decision pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138). Respondent is hereby notified that unless hearing is waived, either expressly or by failure to answer and request a hearing, a hearing will be held in accordance with the Rules of Practice, at a time and place to be designated later. At the hearing, Respondent will have the right to appear and show cause why an appropriate order should not be issued in accordance with the provisions of the Act requiring that Respondent cease and desist from violating the Act and the Regulations with respect to matters alleged herein and assessing such civil penalties as are authorized by the Act and warranted under the circumstances.

Done at Washington, D.C.

this 11 day of June, 2012



Alan R. Christian  
Deputy Administrator  
Packers and Stockyards Program

Leah C. Battaglioli  
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## EXHIBIT A

Declaration under penalty of perjury for use in any proceeding or action under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 et seq.).

I, Douglas J. Mascher, hereby declare under penalty of perjury as follows:

I am the V.P. of Business Analysis for National Beef Packing Co., LLC.

In our PSP audit conducted late in 2008 and early 2009, there were 2 errors noted:

1) It appears that we made an unintentional mistake in determining the premiums for Prime, Certified Angus Beef, and Black Canyon Premium Reserve Beef for some of National Beef's grids for the weeks ending May 10, May 17, May 24 and May 31. It appears that it was a single mistake, but because premiums used in our grids are four-week averages, it affected four-week's worth of payments. A check had been implemented to catch this type of error but it appears that procedures were not followed. A clerical person responsible for checking the premiums against an independent calculation apparently failed to notice the value discrepancy. Since the apparent error was discovered, this procedure has been reviewed with all personnel involved.

I have been told by Weylin Lucius of P&S that any affect it had on payments for cattle was small and not to our benefit. If this information is correct, we paid more for cattle than we would have paid otherwise. I have requested details from the Packers and Stockyards Administration but have been told that they could not share this information which shows impact by lot.

2) It appears that there were small differences in some of threshold percentages for the weeks ending June 28 to July 19. It was unintentional as well. We have been unable to determine how this happened. We did not know about it before the PSP audit. It also appears to be a one-time mistake, but the thresholds are also four-week averages.

Effective August 4, 2008, all NBP slaughter plants have been converted to a new cattle procurement system. As a result of extensive testing, we have a great deal of confidence in this system and feel that errors of this nature are unlikely in the new system. As a safeguard, we also pull lot data weekly and calculate thresholds in an Excel spreadsheet. The Excel

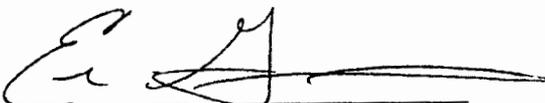
thresholds are then compared to the system generated thresholds to ensure their accuracy before grid cattle are paid for.

I give this statement freely and voluntarily, without threats or promises having been made, knowing that it may be used in administering the Packers and Stockyards Act, 1921, as amended, and the regulations thereunder.

As provided in 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 4<sup>th</sup> day of  
March, 2009.

  
(Signed)

  
(Witness)