

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

RECEIVED

In re:) P. & S. Docket No. D-06-0017
)
Nicholas Meat Packing and)
Eugene A. Nicholas)
) Decision and Order by
Respondents) Reason of Admissions

The Complaint and Notice of Hearing (“Complaint”), filed on April 27, 2006, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) (“the Act”).

Parties and Counsel

The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture (“Complainant” or “GIPSA”). Jonathan D. Gordy, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue, SW, Washington, D.C. 20250-1413, represents the Complainant.

The two Respondents are Respondent Nicholas Meat Packing, also known as Nicholas Meat Packing Co. (“Respondent Nicholas Co.”) and Respondent Eugene A. Nicholas (“Respondent Nicholas”), referred to collectively as “the Respondents.” William L. Knecht, Esq., with the McCormick Law Firm, 835 W. Fourth Street, P.O. Box 577, Williamsport, Pennsylvania 17703, represents the Respondents.

Procedural History

The Complainant filed a “Motion for Decision Without Hearing,” which was accompanied by a proposed “Decision Without Hearing Based on Admissions,” on November 16, 2006. The Respondents did not respond to the Complainant’s Motion. Upon careful

consideration of the Complaint and Answer, I conclude that this case can be decided without further proceeding or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 C.F.R. §§ 1.130-1.151).

The Complaint alleged, among other things, that during the period December 9, 2003 through January 8, 2004, Respondents failed to pay the full purchase price, when due, for livestock that Respondents purchased in interstate commerce from twelve sellers in nineteen transactions. (See Complaint ¶ II.)

The Respondents' Answer, timely filed June 1, 2006, admitted the Complaint ¶ II. and the jurisdictional allegations of the Complaint. (See Answer ¶¶ I, II.) The Respondents' Answer requested that the Complaint be dismissed, and if not, that the Respondents be provided with a hearing on the merits of the Complaint. The Respondents' Answer denied that Respondent Nicholas was the alter ego of Respondent Nicholas Co. as alleged in the Complaint ¶ III. (Answer ¶ III.)

The Respondents' Answer also denied that the Respondents had committed willful violations of the Act:

Denied. It is specifically denied that based upon the facts alleged in paragraph II of this Complaint, that the Respondents willfully violated Sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b. To the contrary, the dates of payments with respect to the respective transactions were within the ordinary course of business dealings and verbal agreements between the Respondents and the various sellers identified in Paragraph II of Plaintiff's Complaint.

By way of further Answer, and in the alternative, it is averred that any delays in payment, if any, that were not in the ordinary course of business, were not as a result of a willful intention to violate the subject Act recited in Paragraph III of Plaintiff's Complaint, but rather would have been due to circumstances beyond Respondents' reasonable control.

By way of further Answer, it is averred that all of the sellers identified in

paragraph II of Plaintiff's Complaint were in fact paid in full and are not now currently owed any money by Respondents.

By way of further Answer, on July 10, 2005, the Respondents' place of business was destroyed by a devastating fire resulting in the Respondents going out of business.

As a result of the fire, the Respondents were required to and in fact did surrender their license to operate under the Packers and Stockyards Act of 1921 and also at the request of the USDA, the Respondents' bond was surrendered and cancelled.

(Answer ¶ III.)

The foregoing reference to Respondents' license is unclear.¹

The Respondents' Answer asserts further, with supporting detail, that "To assess a fine or penalty under the circumstances set forth above would be inequitable, unfair, inappropriate and not warranted since the Respondent, Nicholas Meat Packing Co ceased operations on July 10, 2005 as a result of the fire and has no financial ability or intention to resume business operations and all sellers were paid in full."

The detail in Respondents' Answer includes the assertion that Respondent Nicholas Co. "has absolutely no resources from which to pay any fines or penalties if any should be assessed . . ." and the assertion that Respondent Nicholas "suffered a severe financial loss as a result of the aforesaid fire of July 10, 2005 because of the inadequacy of insurance proceeds and the personal guarantees of business debt which he has had to honor. The assessment of any further fine or penalty arising out of the facts alleged in this Complaint would cause the Respondent, Eugene A. Nicholas, additional significant financial hardship."

Findings of Fact

1. Respondent Nicholas Meat Packing, also known as Nicholas Meat Packing Co., was a corporation incorporated and doing business in the Commonwealth of Pennsylvania, with a mailing address of P.O. Box 95, Loganton, Pennsylvania, and was, at all times material to this

¹ The "license" to which Respondents refer to is unclear, because there is no requirement in the Act that packers be licensed or registered.

Decision:

- a. engaged in the business of purchasing livestock in commerce for the purpose of slaughter and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and
 - b. a packer within the meaning of and subject to the provisions of the Act.
2. Respondent Eugene A. Nicholas is an individual whose business address is P.O. Box 95, Loganton, Pennsylvania, and who was, at all times material to this Decision:
- a. President and owner of 100% of the issued stock of Respondent Nicholas Co., and responsible for the management, direction, and control of Respondent Nicholas; and
 - b. A packer within the meaning of and subject to the provisions of the Act.
3. During the period December 9, 2003 through January 8, 2004, the Respondents failed to pay the full purchase price, when due, for livestock that Respondents purchased in interstate commerce from twelve sellers in nineteen transactions. See Complaint ¶ II.

Conclusions

1. The Secretary of Agriculture has jurisdiction.
2. The Respondents' violations of the Act were "willful" merely in the sense that the Respondents intended to do their actions (such as making livestock purchases) or their inactions (such as failing to pay when due); no evil intent, no intentional wrongdoing is required to violate the Act. *In re Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson*, 59 Agric. Dec. 299 (2000).
3. By reason of Finding of Fact 3, the Respondents willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).
4. The Complainant asks for a \$5,000.00 civil penalty, which would arise from the Respondents' violations 1-1/2 years prior to the Respondents' losses from the devastating fire.

A \$5,000.00 civil penalty is a small amount, compared with what could have been imposed, particularly in light of the Secretary's prior cease and desist order.

Order

1. Respondent Nicholas Co. and Respondent Nicholas, their officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with all their activities subject to the Act, shall cease and desist from failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

2. Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), the Respondents are jointly and severally assessed a **civil penalty** in the amount of Five Thousand dollars, **(\$5,000.00)**. The civil penalty payment instrument shall be made payable to the order of USDA-GIPSA and sent to:

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

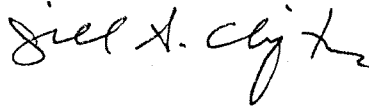
Payment shall be made within 30 days from the date this Order is final and effective (see next paragraph).

Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, 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 by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 29th day of December 2006



Jill S. Clifton
Administrative Law Judge

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