

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY

Docket No. 11-0062 (P&S-D)



In re:

EASTERN LIVESTOCK COMPANY, LLC¹ and
THOMAS P. GIBSON,

Respondents.

Before:

Administrative Law Judge Janice K. Bullard

Appearances:

Charles Kendall, Esq. for Complainant

Thomas P. Gibson, pro se for Respondent

DECISION AND ORDER ON THE RECORD

I. INTRODUCTION

This matter is before me pursuant to a complaint filed by Complainant United States Department of Agriculture (“USDA”; “Complainant”) against Eastern Livestock Company, LLC, and Thomas P. Gibson (“Respondents”) alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”). The Complaint alleges that Respondent failed to comply with the Act and its implementing regulations, administered by the Packers and Stockyards Program, Grain Inspection Service, Packers and Stockyards Administration (“GIPSA”).

II. ISSUES

1. Whether a hearing is necessary in this matter;

¹ This matter was resolved by the entry of a Consent Decision between Complainant and the corporate Respondent.

2. Whether Respondents failed to timely pay sellers for the purchase of livestock in willful violation of the Act; and
3. If Respondents willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

On November 19, 2010, Complainant filed a complaint against Respondents with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On December 7, 2010, Respondents filed an answer. References to the Answer in this Decision and Order shall be denoted as “RX-1”. On April 6, 2011, I held a telephone conference with representatives for the parties, and was advised that the corporate entity Eastern Livestock Company, LLC (“Eastern”) had filed proceedings in bankruptcy. In addition, I was informed that the Department of Justice was investigating the actions of the Respondents in this matter. Pursuant to a motion filed by Complainant, I placed this matter in abeyance by Order issued July 28, 2011.

On November 1, 2011, Complainant filed a status report, advising that Respondents and others had been indicted, and asking that the stay of action in the instant administrative matter be extended. I granted the request. Thereafter, Counsel for Complainant regularly filed notices of the status of indictment and bankruptcy proceedings. In a status report filed in September, 2013, counsel for Complainant informed me that Respondent Thomas Gibson was expected to begin a prison term related to the investigation and indictment by the Department of Justice.

On November 7, 2014, I directed Complainant’s counsel to file all of the evidence that USDA expected to rely upon in this matter in advance of issuing a Decision and Order on the

record. Eastern and Complainant entered into a consent decision and Order, which I signed on December 17, 2015. No settlement was reached between Complainant and Respondent Gibson, and pursuant to my Order, Complainant's counsel filed a motion for a Decision and Order on the Record, accompanied by supporting evidence.

On February 10, 2015, Respondent Gibson filed a "Notice of Appeal and Request for Reconsideration". I infer that Respondent misconstrued Complainant's pleadings as the issuance of an Order, and I deem his filing to be a response to Complainant's motion. As the response contains some evidentiary allegations, I have marked it as "RX-2" and hereby admit it to the record as both a pleading and evidence. Complainant's exhibits identified as "CX-1" through "CX-42" are also admitted to the record, together with all of Complainant's pleadings and supporting documentation.

The matter is ripe for adjudication and the record is closed.

B. Statutory and Regulatory Authority for On The Record Decisions

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

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

7 C.F.R. § 1.1.39.

In addition, the Judicial Officer for the Secretary of the U.S. Department of Agriculture has recognized that entry of summary judgment is appropriate in cases where there is no material

factual dispute. See, Hope Knaust, an individual; Stan Knaust, an individual; and The Lucky Monkey, a partnership, 2014 WL 4311047, *4 (April 9, 2014); _ Ag. Dec. _.

Respondents' Answer admits many of the allegations, including those that establish jurisdiction for the complaint. The Answer does not specifically address the allegations set forth in the complaint, but merely denies the allegations and raises general defenses. See, RX-1. Respondents' response to Complainant's motion repeats much of what was stated in the Answer, and makes an argument against Complainant's proposed sanction. See, RX-2. Respondents have not raised any issues of material fact in dispute. Accordingly, I find that a Decision on the Record may be entered in this case.

C. Statutory and Regulatory Authority Related to Allegations

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

Livestock dealers, market agencies and packers operating subject to the Act are required to obtain reasonable bonds to secure their obligations to livestock sellers. 7 U.S.C. § 704. The Secretary has issued regulations requiring parties subject to the bond requirements to file bonds or bond equivalents with the Packers and Stockyards Program, Grain Inspection, Packers and

Stockyards Administration (“GIPSA”), in an amount set forth by 9 C.F.R. § 201.30. See, 9 C.F.R. § 201.29. The Act allows for the assessment of civil money penalties in an amount of up to \$11,000 per violation for violations of the Act. 7 U.S.C. § 213(b).

The Act allows for the assessment of civil money penalties in an amount of up to \$11,000.00 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. See, S.S. Farms Linn County, 1991 WL 290584 (February 8, 1991); 50 Agric. Dec. 476 (1991). One of the primary purposes of the Act is to assure fair trade practices and safeguard farmers and ranchers from being paid less than the fair market value of their livestock. Bruhn’s Freezer Meats v. United States Dep’t of Agric., 438 F. 2d 1332, 1337 (8th Circ. 1971).

D. Discussion

1. JURISDICTION.

Respondents were registered with USDA as livestock dealers. In their Answer, signed by Respondent Gibson, Respondents admit the allegations contained in Paragraph I(a), I(b), and I(c) of the Complaint. Those allegations state:

(a) Eastern Livestock Company LLC (hereinafter “Respondent LLC”) is a limited liability company with an operational and mailing address of 135 West Market Street, New Albany, Indiana 47150.

(b) Respondent LLC, at all times material herein, was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for its own account and of a market agency providing clearing services; and

(2) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for its own account and as a market agency providing clearing services.

(c) Thomas P. Gibson (hereinafter "Individual Respondent"), at all times material herein was:

- (1) The 65% owner of Respondent LLC;
- (2) The President of Respondent LLC; and
- (3) Responsible for the day to day direction, management and control of

Respondent LLC.

In his filing of February 10, 2015, Respondent Gibson again adopted the facts set forth at ¶ (c)(1) – (3), supra. Complainant's exhibits CX-01 through CX-11 also demonstrate that Respondent is subject to the Act and prevailing regulations and establishes jurisdiction.

2. RESPONDENTS FAILED TO MAKE TIMELY PAYMENTS UNDER THE ACT

The record is undisputed that Respondents failed to make timely payments within the mandates of the Act. Respondent Gibson admits as much in his pleading dated February 10, 2015. RX-2. Respondent Gibson held envelopes containing payment checks that were not deposited in the mail when payment was due. CX-12 through CX-14. Between January, 2009 and January, 2010, Respondents failed to timely pay for livestock purchases in at least 45 transactions. CX-12. Copies of livestock purchases recorded at CX-12 for Cullman Stockyard, Inc., and Okeechobee Livestock Market, Inc. demonstrate that transactions were not paid for properly. See, CX-13. Records from USPS reflect that Respondents made payments well after the time required by the Act. Investigator Amy Blechinger's report describing an OIG memorandum also contains admissions of the mailing delay scheme by Eastern official Steve McDonald. CX-14.

The evidence further supports finding that Respondents willfully failed to pay the full price for livestock transactions, in addition to delaying payment. CX-15 through CX-28. CX-17

represents a schedule of checks that Eastern issued in payment for livestock, which the bank returned unpaid. CX-18 consists of copies of checks which were not honored, and were submitted by livestock sellers with their bond claims.

3. RESPONDENTS OPERATED WITHOUT ADEQUATE BONDING

According to GIPSA's bond claim analysis, approximately 375 livestock sellers, trucking companies and others filed claims totaling \$37,036,348 against Eastern's bond. CX-19. Of that total, approximately \$29,414,316 represented timely claims for amounts owed in connection with livestock transactions covered by the bond. The Kentucky Attorney General's Office (KY AG) collected court-ordered restitution from two former officials associated with Eastern, including one of the Respondent's sons, Grant Gibson, as part of a criminal plea agreement. CX-20. In 2012, the KY AG distributed restitution payments totaling approximately \$821,291 to 174 persons who filed bond claims against Eastern, nearly two years after the transactions that triggered Respondents' obligations under the Act and regulations were completed.

The bond trustee adjudicated disputed bond claims, reached a settlement agreement on the largest claim against Eastern's \$875,000 bond, and submitted a list of approved claims with pro-rata distribution amounts to the bankruptcy court for review and authorization to begin distribution of the proceeds. CX-21. After obtaining the court's authorization, in 2014, the bond trustee distributed bond proceeds of approximately \$745,673 on a pro-rata basis to 146 bond claimants, nearly four years after Respondents obligations arose..

The evidence establishes that claimants filed apparently valid claims totaling approximately \$27,847,221, which does not include rejected claims, or any livestock transaction that did not result in a claim on Respondents' bond. The amount also reflects the trustee's reduction of claims through settlement and litigation in the related bankruptcy cases. CX-22

through CX-28. It is clear that Respondents did not hold an adequate bond under the Act and regulations. CX-29 through CX-35.

The record demonstrates that Respondent Gibson was personally involved in purchasing livestock on behalf of Eastern, and signed at least one check issued by Eastern in purported payment for livestock. CX-27. He was also personally involved in reselling livestock on behalf of Eastern. CX-33 through CX-35.

Respondents operated subject to the Act without adequate bonding despite being advised by GIPSA by letter of May 5, 2010, that the volume of business reported by Eastern indicated that Respondents' bond must increase from \$875,000 to \$1,150,000. CX-29. On or about June 10, 2010, GIPSA sent Respondent Gibson, as President of Eastern, a Notice of Default Registration/Bonding, via certified mail, which informed Respondent Gibson that Eastern was operating without the required bond, and advised that continuing to engage in business without adequate bond could subject him and Eastern to disciplinary action. CX-30. The notice stated that the disciplinary action could include an order to cease and desist from the unlawful conduct, civil penalties of up to \$11,000.00 per violation, or suspension of Eastern's registration. The certified mail return receipt was signed on June 17, 2010, by Scott Gibson, one of Respondent Thomas Gibson's sons. CX-30. Eastern continued to operate subject to the Act without having filed the required bond increase. CX-33 through CX-35.

The Secretary has found that "...once a licensee has been adequately warned, if he subsequently violated the Act the agency may proceed to suspend his license without any further warning, notice or opportunity to demonstrate informally that he did not violate the Act". In re: Jeff Palmer, 50 Agric. Dec. 1762 at 1782 (1991).

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

I further find that Respondent Thomas P. Gibson willfully violated the Act by continuing to operate under the Act after failing to increase bonds despite notice from GIPSA to do so.

I accord substantial weight to Ms. Blechinger's recommended sanctions (CX-42), considering the number of years and transactions involved in Respondents' violations of the Act, their flagrant refusal to increase their bond, and the widespread harm to the industry that resulted from their actions. GIPSA's notice to Respondents failed to serve as a suitable deterrent to Respondents' practice of delaying or refusing to make payments. I agree with GIPSA's assessment of penalties, and find that a cease and desist Order and a suspension of ten years from registering to operate under the Act is appropriate.

I have considered Respondent Gibson's argument that a prohibition from registration under the Act for a period of ten years would effectively prevent him from operating in the future. Mr. Gibson suggested that a five year prohibition on him personally would be appropriate, noting that at no time did he use the corporate entity as an "alter ego" and did not attempt to hide assets or otherwise seek to defraud creditors. Mr. Gibson also observed that the Bankruptcy Court sold his assets at an extremely low price, while the sales administrator collected high fees that would have better been used to satisfy claims.

I find that Mr. Gibson did in fact use the corporate entity as an alter ego, and I reject his argument for leniency on those grounds. I accord weight to Mr. Gibson's arguments regarding victims whose claims remain unsatisfied. However, it was Respondent's actions that made victims of his customers, and I am persuaded that a ten year suspension carries the appropriate deterrent effect in a case of such wide spread harm. I also note that Complainant has not recommended the imposition of civil money penalties, which recognizes that Respondent's assets should offset claims, so far as they are able.

E. Findings of Fact

1. Eastern Livestock Company LLC (Respondent Eastern) is a limited liability company with a physical address and mailing address of 135 West Market Street, New Albany, Indiana 47150.

2. Respondent LLC, at all times material herein, was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account and of a market agency providing clearing services; and

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

(c) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for its own account and as a market agency providing clearing services.

3. Thomas P. Gibson (Respondent Gibson), at all times material herein was:

(a) The President of Respondent Eastern;

(b) The 65% owner of Respondent Eastern; and

(c) The sole director of Corporate Respondent.

4. Respondent Eastern, under the direction, management, and control of Respondent Gibson, issued checks in purported payment for cattle purchases which were returned as dishonored by the bank against which they were drawn, in a total amount of \$11,636,008.79.
5. As of November 8, 2010, Respondent Eastern's records reflected a balance of accounts payable, for which no payment had been tendered, of \$3,698,253.00.
6. Respondents failed to pay for livestock purchases in the amount of at least \$15,334,261.79.
7. As of November 5, 2010, according to Respondent Eastern's records, Respondent Eastern had issued checks which were dishonored by the bank against which they were drawn in the total amount of \$81,035,249.56.
8. Respondent Eastern, under the direction, management, and control of Respondent Gibson, during the period August 31, 2009 through January 22, 2010, failed to make prompt payment to four (4) sellers, in regard to 21 transactions, for 2,424 head of cattle in a total amount of \$1,121,888.88 when Respondent Eastern failed to deposit checks therefor in the United States mail within the time limits specified in the Act.
9. Respondent Eastern was notified by certified mail, received June 17, 2010, that it was necessary to increase its surety bond to \$1,150,000.00 to secure its livestock operations under the Act before continuing in such operations. Notwithstanding such notice, Respondent Eastern continued to engage in the business of a dealer buying and selling livestock on its own account and as a market agency providing clearing services without maintaining an adequate bond or its equivalent.
10. By reason of the facts in Finding of Fact 3 above, Respondent Eastern is the alter ego of Respondent Gibson.

F. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. A hearing in this matter is not necessary, as there are no material facts in dispute.
3. By failing to pay for livestock purchases, failing to timely pay for livestock purchases, and by issuing checks in purported payment for livestock purchases without sufficient funds on deposit to pay those checks, Respondent Thomas B. Gibson willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).
4. By engaging in the business of a dealer buying and selling livestock on its own account and as a market agency providing clearing services without maintaining an adequate bond or its equivalent, despite notice, Respondent Thomas P. Gibson willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. § 201.29, 201.30).
5. Sanctions are appropriate to deter Respondent and others from willfully failing to make prompt payments, pursuant to 7 U.S.C. §193(b).

ORDER

Respondent Thomas P. Gibson, his agents and employees, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock;
3. Issuing checks in payment for livestock purchases without sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

4. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with 7 U.S.C. § 204, Respondent Thomas P. Gibson is prohibited from registration under the Packers and Stockyards Act for a period of ten (10) years.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

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

Hearing Clerk is advised to use the following address to serve Respondent Thomas P. Gibson:

Thomas P. Gibson
Fed ID# 13726-033
P.O. Box 33 FPC
Terre Haute, IN 47808

So ORDERED this 20th day of February, 2015, in Washington, D.C.


Janice K. Bullard
Administrative Law Judge