

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	P. & S. Docket No. D-06-0015
)	
American Family Farms, Inc., and)	
Tim Dietzler,)	
)	Decision and Order as to only
Respondents)	American Family Farms, Inc.,
)	by Reason of Default

The Complaint and Notice of Hearing (“Complaint”) filed on March 8, 2006, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.) (“Act”).

PARTIES AND COUNSEL

The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture (“Complainant”).

Andrew Y. Stanton, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250, represents the Complainant.

The two Respondents are Respondent American Family Farms, Inc. (hereinafter sometimes referred to as the “Corporate Respondent”), and Respondent Tim Dietzler. This Decision and Order concerns only the Corporate Respondent; only the Corporate Respondent is in default.

PROCEDURAL HISTORY

The Complaint that was initially sent to the Corporate Respondent by certified mail was returned to the Hearing Clerk, with the Post Office label indicating “RETURN TO SENDER” “MOVED, LEFT NO ADDRESS.” On March 28, 2006, the Hearing Clerk sent the Complaint to the Corporate Respondent by certified mail to the address of the Corporate Respondent’s registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., c/o Tibeck, Inc., 102 S. Main Street, Elkader, Iowa 52043, but the Complaint was again returned to the Hearing Clerk, with the Post Office label indicating “RETURN TO SENDER” “MOVED, LEFT NO ADDRESS.”

On March 30, 2006, a copy of Hearing Clerk’s letter acknowledging receipt of the answer of Respondent Tim Dietzler was mailed to American Family Farms, Inc., c/o Tibeck, Inc., 102 S. Main Street, Elkader, Iowa 52043, but the envelope was returned to the Hearing Clerk with a Post Office label indicating that Tibeck was located at P.O. Box 331, Elkader, Iowa 52043-0331, and that the time for forwarding had expired. After receiving this information about Tibeck’s location, the Hearing Clerk, on April 11, 2006, sent the Complaint to the Corporate Respondent by certified mail to the address of the Corporate Respondent’s registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include “c/o Tibeck, Inc.”). The Complaint was returned to the Hearing Clerk, with the Post Office label indicating “RETURN TO SENDER” “REFUSED.” On April 28, 2006, the Hearing Clerk sent the Complaint to the Corporate Respondent by ordinary mail to the address of the Corporate Respondent’s registered agent,

Tibeck, Inc., as follows: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include “c/o Tibeck, Inc.”).

Section 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.147(c)(1)) (hereinafter, “Rules of Practice”), states as follows, with regard to the service of complaints:

Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1)

Since the Hearing Clerk’s attempt to serve the Complaint on the Corporate Respondent by certified mail on April 11, 2006, at the address of its registered agent, was returned marked “RETURN TO SENDER” “REFUSED,” the April 28, 2006, remailing of the Complaint by ordinary mail to the same address satisfied the requirements for service set forth in section 1.147(c)(1) of the Rules of Practice. The Corporate Respondent’s answer was due within 20 days after service, according to section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Corporate Respondent has failed to file an answer, so the Corporate Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Further, the Hearing Clerk sent the Complainant's Motion for Decision together with the Complainant's proposed Decision ("Motion for Decision"), to the Corporate Respondent by certified mail on August 7, 2006, to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc."). The Motion for Decision was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "REFUSED." On August 22, 2006, the Hearing Clerk sent the Motion for Decision to the Corporate Respondent by ordinary mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc.).

Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint (7 C.F.R. §1.136(c)). Failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material facts alleged in the Complaint, which are admitted by the Corporate Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order as to American Family Farms, Inc., therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). *See* 7 C.F.R. §1.130 et seq.

FINDINGS OF FACT

1. Respondent American Family Farms, Inc., is a corporation whose business mailing address is that of its registered agent, Tibeck, Inc., P.O. Box 331, Elkader, Iowa 52043-0331.
2. Respondent American Family Farms, Inc., was, at all times material herein:

- (a) Engaged in the business of buying livestock in commerce for purposes of slaughter;
- (b) Manufacturing or preparing meat and meat food products for sale and shipment in commerce; and
- (c) A packer within the meaning of and subject to the Act.

3. Respondent American Family Farms, Inc., in connection with its operations subject to the Act, purchased livestock for slaughter and failed to pay the full amount of the purchase price for livestock within the time period required by the Act, with \$765,445.72 remaining unpaid.

4. Respondent American Family Farms, Inc. was insolvent as of August 15, 2003, as its current liabilities then exceeded its current assets in the amount of \$1,141,203.36.

CONCLUSIONS

1. The Secretary of Agriculture has jurisdiction.
2. By reason of Finding of Fact 3 herein, Respondent American Family Farms, Inc. has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).
3. By reason of Finding of Fact 4 herein, Respondent American Family Farms, Inc.'s financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

ORDER

1. Respondent American Family Farms, Inc., its officers, directors, agents, employees, successors and assigns, individually or through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

- a. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act; and

b. Purchasing livestock in commerce while insolvent, i.e., while current liabilities exceed current assets, unless Respondent American Family Farms, Inc. pays the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer.

2. Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), Respondent American Family Farms, Inc., is assessed a **civil penalty** in the amount of Fifty Thousand Dollars (**\$50,000.00**).

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, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties. The address for the Corporate Respondent is **American Family Farms, Inc., c/o Tibeck, Inc., P.O. Box 331, Elkader, Iowa 52043-0331**. The remaining Respondent shall also be served, even though this Decision and Order does not decide the case as to him: **Mr. Tim Dietzler, National Fish Hatchery, HC37 Box 8, Willow Beach, AZ 86445**.

Done at Washington, D.C.
this 31st day of October 2006

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Ave SW
Washington DC 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

....

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition,

and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145