

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0033

In re: Douglas Butler,

Respondent

**Decision and Order**

Appearances: Jonathan Gordy, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant

Peter F. Langrock, Esquire, Langrock, Sperry & Wool, LLP, Middlebury, Vermont, for the Respondent

**Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint filed on October 19, 2011 by Alan R. Christian, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that Douglas Butler, herein referred to as Respondent, willfully violated the Act.

The Complaint alleges that between May 16, 2009 and the end of the summer of 2009, on six occasions Respondent, a dealer registered with the Secretary, purchased a total of 116 head of cattle from M.R. Pollock & Sons (Pollock) and failed to pay the

purchase price of \$105,800.00 for the livestock when due.<sup>1</sup> The Complaint also alleges that Respondent failed to maintain records of the transactions that took place between Pollock and himself in that there are no invoices or records or inventory of the cattle purchased.

The Respondent filed his Answer on November 18, 2011, admitting the jurisdictional allegations, but denying the remaining allegations, asserting that he had not purchased the cattle, but rather had instead entered into a joint venture with Pollock, agreeing to care for the livestock for the milk that they produced and splitting half of the profits from their intended sale to third parties.

The matter was heard in Burlington, Vermont on June 5 and 6, 2012. Four witnesses testified for the Complainant and the Respondent and his son testified for the Respondent.<sup>2</sup> Fifteen exhibits were admitted into evidence, twelve from the Complainant (CX-1-12) and three from the Respondent (RX-1-3).

### **Discussion**

The Packers and Stockyards Act, enacted on August 15, 1921,<sup>3</sup> is a product of the same era that produced § 3 of the Interstate Commerce Act of 1887<sup>4</sup> (prohibiting undue preferences), the Sherman Anti-Trust Act in 1890,<sup>5</sup> § 2 of the Clayton Act in 1914<sup>6</sup> (prohibiting specified discriminatory pricing), and § 5 of the Federal Trade Act in 1914<sup>7</sup> (prohibiting unfair methods of competition in commerce). In 1917, President Wilson had

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<sup>1</sup> Complainant since conceded that 9 head of cattle were returned to Pollock and that the total amount due for the remaining cattle was \$92,750.00. n. 1, page 2, Complainant's Post-Hearing Brief, Docket Entry No. 24 ; RX-2.

<sup>2</sup> References to the transcript of the proceeds will be indicated as Tr. and the page number.

<sup>3</sup> Aug. 15, 1921, c.64, Title I, § 1, 42 Stat. 159.

<sup>4</sup> Interstate Commerce Act, ch. 104, 24 Stat. 380 (1887), 49 U.S.C. § 10701(c)(1), 10741, 10742.

<sup>5</sup> 15 U.S.C. §§ 1-7.

<sup>6</sup> 15 U.S.C. §13

<sup>7</sup> 15 U.S.C. §45

directed the Federal Trade Commission (FTC) to investigate the food industry to determine the truth or falsity of allegations made earlier that year in Congressional hearings “that the course of trade in important food products is not free, but is restricted and controlled by artificial and illegal means.”<sup>8</sup> The strongly worded FTC Report concluded there was “conclusive evidence” that “monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest” existed.<sup>9</sup> When enacted, the House Report described it as “a most comprehensive measure and extends further than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.”<sup>10</sup>

The purpose of the Act was expressed in connection with a 1958 amendment as being:

[T]o 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.<sup>11</sup>

Included in the Act’s major provisions are prohibitions against unfair, unjustly discriminatory, or deceptive practices,<sup>12</sup> record keeping requirements,<sup>13</sup> and stringent requirements for the payment of livestock purchased by a packer, market agency or dealing purchasing livestock.<sup>14</sup>

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<sup>8</sup> FTC, Report of the Federal Trade Commission on the Meat Packing Industry, 392 (1919).

<sup>9</sup> *Id.*

<sup>10</sup> HR Rep No 77, 67<sup>th</sup> Cong, 1<sup>st</sup> Sess 2 (1921).

<sup>11</sup> HR Rep No 1048, 85<sup>th</sup> Cong, 1<sup>st</sup> Sess 1(1957).

<sup>12</sup> 7 U.S.C. § 201

<sup>13</sup> 7 U.S.C. § 213

<sup>14</sup> 7 U.S.C. § 228b

The evidence of record establishes that in late August of 2010, Ronald Pollock contacted the Packers and Stockyard Program officials and complained that Respondent had not paid him for cattle purchases that had been negotiated on Pollock's behalf by Mike Lane, an individual who worked with Pollock. Tr. 20-21. Jamie Ziem, a Packers and Stockyards Program Resident Agent proceeded to investigate the matter, collecting copies of the sales invoices from Pollock; taking statements from Mike Lane (CX-3), Ronald Pollock (CX-4), Milton Pollock (CX-5) and Respondent (CX-6); and reviewing Respondent's records. Tr. 21-37. At the hearing, 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 by the parties as reflected in the testimony adduced at trial is in sharp conflict, with Complainant's witnesses testifying that the transactions were all sales and the Respondent testifying that in each case a form of joint venture was established whereby he would take care of the cattle, retain any milk that was produced, and that when the cattle were sold to third parties that he would get half of the proceeds.

Mike Lane, the individual who negotiated dairy cattle transactions on Pollock's behalf,<sup>15</sup> testified that on May 6, 2009, he, Ronald Pollock, Milton Pollock (Ron's brother), and Respondent took 39 Holstein cows, also described in the testimony as the Cooper herd from Maine to Butler's farm in Vermont.<sup>16</sup> Tr. 55-56, 126. The herd was considered to be in excellent shape and Respondent was on hand at the time of the

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<sup>15</sup> Lane indicated that he "trucks" cattle for a living and that he also works with Ron Pollock in buying cows to sell to other people. Tr. 52. Pollock confirmed that he and Lane started "dealing" in [dairy] cows together. Tr. 123.

<sup>16</sup> Respondent subsequently returned nine of the cattle to Lane. Tr. 66-67. At \$1,450 per head, the cost of the remaining cattle would be \$43,500.00.

transfer to inspect the animals before they were delivered to his farm.<sup>17</sup> Tr. 56-57, 125. Lane testified that the negotiated sale price was \$1,450.00 per head and an invoice reflecting the sale was prepared and given to Respondent. Tr. 56-57, 126, 127, 139, CX-3, 7. At the time of the sale, Respondent told both Lane and Pollock that he had a buyer for the cattle and that he would pay for them when they were sold. Tr. 56, 135. On May 17, 2009, Lane delivered another 33 head of cattle from the Lovewell farm to Butler. Tr. 58-60. Butler again told Lane that he had a buyer for the cattle and that payment would be forthcoming once they were resold. *Id.* An invoice was again prepared reflecting a purchase amount of \$22,300.00 and given to Respondent. Tr. 59-60, 113, CX-8.

The third transaction occurred on or about May 28, 2009 when Lane delivered six cattle (5 bred Holsteins and a bull) to Respondent's farm. Tr. 60-61. The invoice prepared and delivered to Respondent reflected the six animals and a purchase price of \$6,950.00. CX-9. On July 12, 2009, Lane met Butler at Santa Claus Village in New Hampshire where eight cattle were unloaded from Lane's trailer onto Respondent's. Tr. 62-63. Respondent had told Lane that he needed some cheaper animals for a neighbor who was going to buy them. Tr. 62-63. An invoice reflecting a sales price of \$5,600.00 was prepared and given to Respondent. CX-10. On or about July 22, 2009, Lane delivered a breeding age bull to Respondent. Tr. 64. An invoice reflecting a purchase price of \$750.00 was given to Respondent. CX-11.

The final transaction negotiated by Lane occurred in July or August of 2009. Tr. 66. Those cattle were delivered to Respondent by Milton Pollock. Tr. 132. An invoice reflecting the purchase price of \$13,650 was prepared. CX-12.

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<sup>17</sup> Butler took only a portion of the cattle in the herd as there were a number that he did not take. Those animals were sold to another farmer in Maine. Tr. 56.

Although the evidence very clearly reflected that Respondent had disposed of a number of the cattle that had been sold to him without remitting any portion of their purchase price to Pollock (Tr. 69, 133, 146, 155), Respondent maintained in his testimony that he and Pollock had made a deal as partners.<sup>18</sup> Tr. 210. As part of the deal, Respondent indicated that Pollock provided the cattle and Respondent furnished the feed and labor. Tr. 210. He also testified that rather than just the nine animals being taken back from the Cooper herd that Lane had indicated, all but two or three had been retrieved and resold by Pollock. Tr. 203.

Respondent's testimony was strongly disputed by Pollock. Throughout his testimony, he indicated that all of the transactions were sales and that he still expected to be paid. Tr. 121-168.

Having heard the testimony from both parties, I find Respondent's testimony that the 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 animals purchased were subsequently either resold or otherwise disposed of without there being any remittance to Pollock. Tr. 69, 133, 146, 155. Even had there been such an agreement as Respondent has suggested, Respondent has in essence admitted flagitious conduct on his part in that he has not settled up with Pollock. Tr. 210.

In this action Complainant has sought a cease and desist order, a five year suspension and a civil penalty of \$66,000.00. The United States Department of Agriculture's sanction policy provides that Administrative Law Judges and the Judicial

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<sup>18</sup> Respondent admitted that he had not been able to settle up with them (Pollock and Lane). Tr. 210.

Officer must give appropriate weight to sanction recommendations of administrative officials, 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. supra.*

Like the Judicial Officer, I do not consider such recommendations controlling, and in appropriate circumstances, the sanction imposed may be considerably different, either less or more than that requested.<sup>19</sup> In the action before me here, the Agency has recommended that a civil penalty of \$66,000.00 be imposed. While I will impose a civil penalty in that amount, given the purpose of the Act that sellers of livestock be paid for the animals that were sold, rather than diminish the potential for payment to made to the seller, I will suspend a significant portion of the penalty provided the Respondent can provide evidence that his debt to Pollock has been satisfied within six months of the date of this Decision and Order.

On the basis of the entire record, the following Findings of Fact, Conclusions of Law and Order will be entered.

### **Findings of Fact**

1. Respondent Douglas Butler is an individual who resides in the Middlebury, Vermont who operates a dairy and cattle farm and is also a cattle dealer. Tr. 196.

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<sup>19</sup> In re Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77,89 (2009); In re Alliance Airlines, 64 Agric. Dec. 1595, 1608 (2005); In re Mary Jean Williams, (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); In re George A. Heimos Produce Co., 62 Agric. Dec. 763, 787 (2003), appeal dismissed, No. 03-4008 (8<sup>th</sup> Cir. Aug 31, 2004); In re Excel Corp., 62 Agric. Dec. 196, 234 (2003), enforced as modified, 397 F. 3d 1285 (10<sup>th</sup> Cir. 2005); In re Steven Bourk (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

2. Respondent, at all times material herein, was:
  - (a) Engaged in business as a dealer, buying and selling livestock in commerce 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. Between May 16, 2009 and the end of July of 2009, on six occasions Respondent purchased 107 head of cattle from M.R. Pollock & Sons and failed to pay the purchase price of \$92,750.00 for the livestock, when due. CX-7through 12, RX-2.
4. Respondent also failed to maintain adequate records of the transactions that took place between M.R. Pollock & Sons and himself in that there are no invoices or records or inventory of the cattle purchased.
5. As of the date of the issuance of this Decision, Respondent still continues to owe Pollock for the cattle purchased from him.

#### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated Sections 312(a), 401 and 409 of the Act, 7 U.S.C. §213(a), 221, and 228(b).

#### **Order**

1. Respondent, his agents and employees, directly or through any corporate or other device, in connection with activities subject to the Act, shall cease and desist from:
  - a. Failing to pay the full purchase of livestock as required by section 409 of the Act, 7 U.S.C. §228b;

b. Failing to maintain records that fully and correctly disclose all transactions in his business, as required by section 401 of the Act, 7 U.S.C. §221.

2. Respondent is suspended as a registrant under the Act for a period of five years, and thereafter for such time until he:

a. Provides evidence that the debt for the livestock purchases in this action has been satisfied.

b. Acquires, files and maintains an adequate bond as required by the Act and the Regulations thereunder.

3. Respondent is assessed a civil penalty of \$66,000.00; however, \$36,000.00 of that amount will be suspended on condition that Respondent provides satisfactory evidence that his debt to Pollock has been satisfied within six months of the date of this Decision and Order. Failing production of such evidence within the allotted time, the full amount of the penalty shall then be due and owing.

Payment shall be made to: US Department of Agriculture  
USDA-GIPSA  
P.O. Box 790335  
St. Louis, Missouri 63179-0335

Respondent is further directed to note the Docket Number of this action on the payment instrument.

4. This Decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R § 1.145).

Copies of this Decision shall be served upon the parties.

August 31, 2012

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**Peter M. Davenport**  
Chief Administrative Law Judge

Copies to: Jonathan Gordy, Esquire  
Peter F. Langrock, Esquire

Hearing Clerk's Office  
U.S. Department of Agriculture  
1400 Independence Avenue SW  
Room 1031, South Building  
Washington, D.C. 20250-9203  
202-720-4443  
Fax: 202-720-9776