

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	P. & S. Docket No. D-13-0115
)	
Josephine E. Bonaccurso, Inc.,)	
d/b/a Salem Packing Co., and))	
Samuel Bonaccurso,)	
)	
Respondents)	Decision and Order

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint and Notice of Hearing [hereinafter Complaint] on December 12, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) on June 24, 2003, Salem Packing Company and its then-owner, Anthony Bonaccurso, entered into a consent decision, *In re Josephine E. Bonaccurso, Inc.* (Consent Decision), 62 Agric. Dec. 261 (2003), in which they were ordered to cease and desist

from (a) failing to pay, when due, for livestock purchases, (b) failing to pay the full purchase price of livestock, and (c) failing to maintain an adequate bond; (2) the United States District Court for the District of New Jersey, in *United States v. Josephine E. Bonaccorso, Inc.*, Case No. 1:07-cv-01551-RBK-JS (D.N.J. Oct. 19, 2007), enjoined Salem Packing Company and Samuel Bonaccorso from violating *In re Josephine E. Bonaccorso, Inc.* (Consent Decision), 62 Agric. Dec. 261 (2003); (3) the United States District Court for the District of New Jersey, in *United States v. Josephine E. Bonaccorso, Inc.*, Case No. 1:11-cv-6001-RBK-AMD (D.N.J. Dec. 16, 2011), enjoined Josephine E. Bonaccorso, Inc., and Samuel Bonaccorso [hereinafter Respondents] from purchasing livestock, except to the extent the livestock purchases comply with 7 U.S.C. § 228b(a); (4) on February 28, 2012, Respondents entered into a consent decision, *In re Josephine E. Bonaccorso, Inc.* (Consent Decision and Understanding Regarding Consent Decision), __ Agric. Dec. __ (Feb. 28, 2012), in which Respondents were (a) assessed a \$19,500 civil penalty and (b) ordered to cease and desist from purchasing livestock, unless Respondents paid the full purchase price in United States currency or by wire transfer, and from failing to pay, when due, the full amount of the purchase price of livestock, as required by 7 U.S.C. § 228b(a); (5) during the period from January 23, 2012, through April 20, 2012, Respondents, in 21 transactions with three different livestock sellers, purchased 462 head of livestock for \$561,539.61 and failed to pay, when due, the full purchase price of the livestock; (6) during the period from January 2, 2012, through May 22, 2012, Respondents, in 27 transactions with five different livestock sellers, purchased 381 head of livestock for \$388,247.36 and failed to pay, when due, the full purchase price of the livestock within the time period required by the Packers and Stockyards Act; (7) during the period from April 9, 2012, through June 19, 2012, Respondents, in 14 transactions with four different livestock sellers, purchased 100 head of livestock for \$89,031.79 and paid the

livestock sellers with non-certified checks; and (8) Respondents willfully violated 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43.¹

On January 22, 2013, Respondents filed a Response to Complaint and Notice of Hearing [hereinafter Answer]. Respondents' Answer does not deny the allegations in the Complaint. Instead, Respondents admit they owe money to livestock sellers for livestock purchases, admit they only paid \$5,000 of the \$19,500 civil penalty assessed against them in *In re Josephine E. Bonaccorso, Inc.* (Consent Decision and Understanding Regarding Consent Decision), __ Agric. Dec. __ (Feb. 28, 2012), and assert they plan to sell their real estate, which sale Respondents estimate will result in receipt of sufficient funds to pay the majority of the livestock sellers to whom Respondents owe money for livestock purchases and to pay the outstanding balance of the \$19,500 civil penalty assessed against Respondents.

¹Compl. ¶¶ II-IV at 2-4.

On February 20, 2013, the Deputy Administrator filed a Motion for Decision Without Hearing by Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing by Reason of Default. On March 28, 2013, Respondents filed a Motion to Allow the Filing of an Amended Answer on Behalf of Respondents and Requesting Denial of Default Motion. On April 2, 2013, the Deputy Administrator filed a response in opposition to Respondents' March 28, 2013, motion. On April 4, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] filed an order in which the ALJ: (1) deferred a ruling on the Deputy Administrator's Motion for Default Decision, (2) denied Respondents' request to file an amended answer, and (3) set deadlines for filing lists of exhibits the parties expected to introduce during hearing and lists of witnesses the parties expected call during hearing.

On May 2, 2013, the Deputy Administrator filed a list of witnesses the Deputy Administrator proposed to call during hearing and a list of exhibits the Deputy Administrator proposed to introduce during hearing. On May 13, 2013, the ALJ conducted a telephone conference with counsel for the parties. Counsel for Respondents confirmed the assertion in Respondents' Answer that Respondents anticipated selling real estate to obtain funds to pay livestock sellers to whom Respondents owed money for livestock purchases and the balance of the \$19,500 civil penalty assessed against Respondents in *In re Josephine E. Bonaccorso, Inc.* (Consent Decision and Understanding Regarding Consent Decision), __ Agric. Dec. __ (Feb. 28, 2012). The ALJ ordered Respondents to submit a status report regarding the real estate sale within 60 days following the May 13, 2013, telephone conference. Respondents failed to comply with the ALJ's orders setting deadlines for filing a status report regarding the real estate sale, a list of exhibits Respondents expected to introduce during hearing, and a list of witnesses Respondents expected to call during hearing.

On August 19, 2013, the ALJ issued an order providing Respondents 20 days within which to show cause why the Deputy Administrator's Motion for Default Decision should not be granted. On September 17, 2013, Respondents filed a letter in which they assert they sold real estate and used the proceeds to pay two livestock sellers, New Holland Sales & Stables, Inc., and T. Kenneth Emery, all the money Respondents owed them for livestock purchases. Respondents requested that the ALJ withhold any action on the Deputy Administrator's Motion for Default Decision while the United States Department of Agriculture completed its review of the information Respondents provided concerning Respondents' payments to New Holland Sales & Stables, Inc., and T. Kenneth Emery. On September 25, 2013, the Deputy Administrator filed Notice and Information Concerning Monies Still Owed by Respondents to Their Livestock Creditors in which the Deputy Administrator demonstrated that Respondents still owed livestock sellers \$479,525 of the \$561,539.97 that was due as of the dates of the Complaint and the Deputy Administrator's Motion for Default Decision and requested that the ALJ grant the Deputy Administrator's Motion for Default Decision.

On November 25, 2013, in accordance with 7 C.F.R. § 1.139, the ALJ issued a Decision and Order by Reason of Default [hereinafter Decision and Order]: (1) concluding Respondents willfully violated 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43, by failing to pay the full amount of the purchase price for livestock within the time period required by the Packers and Stockyards Act; (2) concluding Respondents failed to comply with orders issued in *United States v. Josephine E. Bonaccorso, Inc.*, Case No. 1:11-cv-6001-RBK-AMD (D.N.J. Dec. 16, 2011), *United States v. Josephine E. Bonaccorso, Inc.*, Case No. 1:07-cv-01551-RBK-JS (D.N.J. Oct. 19, 2007), *In re Josephine E. Bonaccorso, Inc.* (Consent Decision and Understanding Regarding Consent Decision), ___ Agric. Dec. ___ (Feb. 28, 2012), and *In re Josephine E. Bonaccorso, Inc.*

(Consent Decision), 62 Agric. Dec. 261 (2003), by continuing to fail to pay the full amount of the purchase price of livestock within the time period required by the Packers and Stockyards Act; (3) concluding Respondents failed to comply with the order issued in *In re Josephine E. Bonaccurso, Inc.* (Consent Decision and Understanding Regarding Consent Decision), __ Agric. Dec. __ (Feb. 28, 2012), by making payments for livestock purchases by other than cash, wire transfer, or certified check, and by failing to pay timely the \$19,500 civil penalty assessed against them; (4) ordering Respondents to cease and desist from purchasing livestock, except under the condition that Respondents must deliver to the seller the full amount of the purchase price by payment in United States currency, by certified check, or by wire transfer before the close of the next business day following the purchase of the livestock and the transfer of possession of the livestock; (5) ordering Respondents to cease and desist from failing to pay the full purchase price of livestock before the close of the next business day following each purchase of the livestock, as required by 7 U.S.C. §§ 192(a) and 228b; (6) assessing Respondents, jointly and severally, a \$462,000 civil penalty; and (7) stating Respondents shall continue to be liable for the outstanding balance of the \$19,500 civil penalty assessed against them in *In re Josephine E. Bonaccurso, Inc.* (Consent Decision and Understanding Regarding Consent Decision), __ Agric. Dec. __ (Feb. 28, 2012).²

On December 30, 2013, Respondents appealed the ALJ's Decision and Order to the Judicial Officer. On January 16, 2014, the Deputy Administrator filed Complainant's Response to Respondents' Appeal Petition. On January 22, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

²ALJ's Decision and Order at 12-13.

DECISION

Respondents' Request for Oral Argument

Respondents' request for oral argument,³ which the Judicial Officer may grant, refuse, or limit,⁴ is refused because the two issues raised in Respondents' Appeal Petition are not complex and oral argument would serve no useful purpose.

³See Appeal Pet. at 2.

⁴7 C.F.R. § 1.145(d).

Respondents' Appeal Petition

Respondents raise two issues in their Appeal Petition. First, Respondents contend the ALJ's assessment of a \$462,000 civil penalty without making the findings required to be made when determining the amount of the civil penalty, is error (Appeal Pet. ¶ I at 1-2).

The Packers and Stockyards Act provides, when determining the amount of the civil penalty to be assessed against a packer for a violation of the Packers and Stockyards Act, the Secretary of Agriculture shall consider: (1) the gravity of the offense, (2) the size of the business involved, and (3) the effect of the civil penalty on the violator's ability to continue in business.⁵ The ALJ did not make findings regarding these factors. However, the Packers and Stockyards Act only requires consideration of these factors; it does not require explicit findings regarding each of these factors. Moreover, I have considered the factors required to be considered by 7 U.S.C. § 193(b) and find the ALJ's assessment of a \$462,000 civil penalty against Respondents justified by the facts in this proceeding. Therefore, I do not find the ALJ's failure to make explicit findings regarding these factors, is error requiring remand of this proceeding to the ALJ.

⁵7 U.S.C. § 193(b).

I found Respondents' willful violations of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43 grave. The Packers and Stockyards Act requires packers to pay the full amount of the purchase price for their livestock purchases before the close of the next business day following the livestock purchases and the transfer of possession of the purchased livestock.⁶ The Packers and Stockyards Act provides that any delay in the payment of the purchase price for livestock is an "unfair practice"⁷ and makes a packer's engaging in or use of any unfair practice, unlawful.⁸

⁶7 U.S.C. § 228b(a).

⁷7 U.S.C. § 228b(c).

⁸7 U.S.C. § 192(a).

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is “to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock.” *Bruhn’s Freezer Meats v. U.S. Dep’t of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971), *cited in Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978). The requirement that a livestock purchaser make timely payment effectively prevents livestock sellers from being forced to finance transactions.⁹ Respondents contravened the timely-payment requirement, and Respondents’ violations directly thwarted one of the primary purposes of the Packers and Stockyards Act.¹⁰ Given the number of Respondents’ violative transactions, the number of livestock sellers involved, the dollar amounts involved, the number of livestock involved, the length of time during which Respondents committed the violations, and Respondents’ failure to comply with previously issued orders to cease and desist from failing to make timely payment for livestock, I find Respondents’ violations extremely grave and I find the \$462,000 civil penalty assessed by the ALJ justified by the facts in this proceeding.

I also considered the size of Respondents’ business. Based upon the number and dollar amount of the violative transactions alleged in the Complaint and admitted to by Respondents, I

⁹*See Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (1998) (stating the requirement that a purchaser make timely payment effectively prevents the seller from being forced to finance the transaction).

¹⁰*See Mahon v. Stowers*, 416 U.S. 100, 111, (1974) (per curiam) (dictum) (stating that regulation requiring prompt payment supports policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for their own purposes); *Bowman v. U.S. Dep’t of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

find Respondents' business to be at least medium-size.

Based upon the record before me, the effect of the assessment of a \$462,000 civil penalty on Respondents' ability to continue in business is difficult to discern. Respondents do not assert that the civil penalty assessed by the ALJ would result in Respondents' inability to continue in business. Instead, Respondents merely contend the ALJ made no findings regarding the effect of the civil penalty on Respondents' ability to continue in business and the ALJ failed to consider the effect of the civil penalty on Respondents' ability to continue in business.¹¹ Even if I were to find that the assessment of a \$462,000 civil penalty against Respondents would effect Respondents' ability to continue in business, in light of the gravity of Respondents' violations and Respondents' repeated violations of previously issued cease and desist orders, I would not alter the civil penalty assessed by the ALJ.

Second, Respondents contend the ALJ's finding that Respondents' violations of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43 were willful, without first affording Respondents a hearing pursuant to 7 C.F.R. § 1.141, is error (Appeal Pet. ¶¶ II at 2).

¹¹Appeal Pet. ¶¶ I(a)-I(b) at 1-2.

The Deputy Administrator alleged in the Complaint that Respondents willfully violated 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43.¹² Respondents did not deny this allegation.¹³ The Rules of Practice provide that a failure to deny or otherwise respond to an allegation of a complaint shall be deemed, for purposes of the proceeding, an admission of the allegation¹⁴ and the admission of the material allegations of fact contained in the complaint shall be deemed a waiver of hearing.¹⁵ Therefore, Respondents are deemed to have admitted that their violations of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43 were willful and are deemed to have waived their opportunity for hearing. Under these circumstances, I reject Respondents' contention that the ALJ's finding, without hearing, that Respondents' violations were willful, is error.

Based upon my review of the record, I affirm the ALJ's November 25, 2013, Decision and Order, and I find no change or modification of the ALJ's November 25, 2013, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision and order as the final order in a proceeding, as follows:

§ 1.145 Appeal to Judicial Officer.

.....
 (i) *Decision of the judicial officer on 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.

7 C.F.R. § 1.145(i).

¹²Compl. ¶ IV at 4.

¹³Answer.

¹⁴7 C.F.R. § 1.136(c).

¹⁵7 C.F.R. § 1.139.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's November 25, 2013, Decision and Order is adopted as the final order in this proceeding.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.¹⁶ The date of entry of the Order in this Decision and Order is March 25, 2014.

Done at Washington, DC

March 25, 2014

William G. Jenson
Judicial Officer

¹⁶28 U.S.C. § 2344.