

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-11-0139
)
Vernon Black,)
)
Respondent) **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 on February 18, 2011. 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 pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges, during the period May 26, 2009, through August 11, 2009, Vernon Black engaged in the business of a market agency buying cattle on a commission basis without maintaining an adequate bond or bond equivalent, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29.¹ On March 21, 2011, Mr. Black filed a letter in which he denied the material allegations of the Complaint.

On June 25, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a hearing in Riverton, Wyoming. Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. Mr. Black appeared pro se. The Deputy Administrator called two witnesses and Mr. Black testified on his own behalf.² The Deputy Administrator introduced 24 exhibits identified as CX 1-CX 24.

On August 23, 2012, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding Mr. Black engaged in operations subject to the Packers and Stockyards Act without obtaining and maintaining an adequate bond or bond equivalent, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29; (2) ordering Mr. Black to

¹Compl. ¶¶ II-IV.

²References to the transcript of the June 25, 2012, hearing are indicated as “Tr.” with the page reference.

cease and desist from violations of the Packers and Stockyards Act and the Regulations; and (3) assessing Mr. Black a \$4,000 civil penalty.³

On October 3, 2012, Mr. Black filed Respondent's Appeal Petition to the Judicial Officer Against Decision and Order [hereinafter Appeal Petition]. On October 22, 2012, the Deputy Administrator filed Appeal Response. On October 26, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, the Chief ALJ's Decision and Order as the final Decision and Order.

DECISION

Discussion

The term "market agency" is defined in the Packers and Stockyards Act, as follows:

§ 201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined

When used in this chapter—

....

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services[.]

³Chief ALJ's Decision and Order at 5-6.

7 U.S.C. § 201(c). The Packers and Stockyards Act authorizes the Secretary of Agriculture to require market agencies to obtain bonds to secure their obligations under the Packers and Stockyards Act:

§ 204. Bonds and suspension of registrants

On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency (as defined in this subchapter) . . . under such rules and regulations as he may prescribe, to secure the performance of their obligations[.]

7 U.S.C. § 204. Pursuant to this statutory authority, the Secretary of Agriculture has issued bonding regulations (9 C.F.R. §§ 201.10, .27-.34), which require market agencies to file and maintain bonds:

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

(a) Every market agency . . . shall execute and maintain a reasonable bond on forms approved by the Administrator containing the appropriate condition clauses, as set forth in § 201.31 of the regulations, applicable to the activity or activities in which the person or persons propose to engage, to secure the performance of obligations incurred by such market agency No market agency . . . required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis . . . shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

9 C.F.R. § 201.29(a)-(b).

The failure to obtain and maintain the required bond or bond equivalent is an unfair

and deceptive practice that constitutes a violation of 7 U.S.C. § 213(a).⁴ The evidence establishes that, at least during the period May 26, 2009, through August 11, 2009, Mr. Black bought cattle for a Nebraska-based feedlot operator, Meyers & Sons, and other individuals on a commission basis without obtaining and maintaining the required bond or bond equivalent (CX 2-CX 24). In addition, Mr. Black acknowledged during the hearing that he continues to buy cattle for Meyers & Sons (Tr. 38).

Findings of Fact

1. Mr. Black is an individual residing in the State of Wyoming.
2. Mr. Black was, at all times material to this proceeding:
 - (a) Engaged in the business of buying cattle in commerce on a commission basis; and
 - (b) Not registered with the Secretary of Agriculture.
3. On July 10, 2006, Mr. Black was notified by certified mail that the Packers and Stockyards Program had information indicating he was operating as a market agency without

⁴*United States v. Hulings*, 484 F. Supp. 562, 566-67 (D. Kan. 1980); *In re Mark V. Porter*, 47 Agric. Dec. 656, 667 (1988); *In re Robert F. Johnson*, 47 Agric. Dec. 436, 441-44 (1988); *In re Mart (Bill) White*, 23 Agric. Dec. 1104, 1106 (1964); *In re Floyd Bryan Moore*, 23 Agric. Dec. 312, 314 (1964); *In re Caesar Bros., Inc.*, 22 Agric. Dec. 1248, 1250 (1963); *In re Arden Vietmeier*, 22 Agric. Dec. 529, 531 (1963); *In re C.D. Goff*, 21 Agric. Dec. 1323, 1325 (1962); *In re Ray York*, 20 Agric. Dec. 1112, 1113-14 (1961); *In re Olion Ray Brown*, 20 Agric. Dec. 842, 843-44 (1961); *In re W.O. Steen*, 16 Agric. Dec. 125, 127 (1957); *In re Isom Martin*, 8 Agric. Dec. 1247, 1249 (1949).

being registered with the Secretary of Agriculture and operating as a market agency without having a bond or bond equivalent. The notice also informed Mr. Black that he was required to register with the Secretary of Agriculture and to secure a bond or bond equivalent.

(CX 1.)

4. Notwithstanding the notice described in Finding of Fact number 3, Mr. Black continued to engage in the business of buying cattle in commerce on a commission basis without registering with the Secretary of Agriculture and without obtaining and maintaining an adequate bond. During the period May 26, 2009, through August 11, 2009, Mr. Black bought approximately 358 head of cattle from Riverton Livestock Auction in Riverton, Wyoming, for Meyers & Sons and other individuals and was paid commissions totaling \$1,221.11 (CX 2-CX 22; Tr. 16-18).

5. After the Hearing Clerk served Mr. Black with the Complaint, Mr. Black continued to buy cattle in commerce on a commission basis without registering with the Secretary of Agriculture and without obtaining and maintaining an adequate bond (CX 23-CX 24; Tr. 19-24, 38).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Mr. Black, at all times material to this proceeding, bought cattle in commerce on a commission basis and was a “market agency” as that term is defined in the Packers and Stockyards Act.

3. Mr. Black willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29 by engaging in operations subject to the Packers and Stockyards Act without obtaining and maintaining an adequate bond or bond equivalent.

Mr. Black’s Appeal Petition

Mr. Black raises six issues on appeal. First, Mr. Black asserts the Deputy Administrator violated the Privacy Act of 1974, as amended (5 U.S.C. § 552a) [hereinafter the Privacy Act], when he disclosed records introduced as exhibits in this proceeding without a prior written request by, or the prior written consent of, Mr. Black (Appeal Pet. ¶¶ 1, 9(2)⁵).

This proceeding is a disciplinary administrative proceeding to determine whether Mr. Black has violated the Packers and Stockyards Act and the Regulations; it is not a proceeding to determine whether the Deputy Administrator violated the Privacy Act. Moreover, I do not have jurisdiction to entertain Mr. Black’s Privacy Act claims.⁶ Therefore,

⁵Two paragraphs in Mr. Black’s Appeal Petition are identified as “9.” I identify the first paragraph “9” as “9(1)” and the second paragraph “9” as “9(2).”

⁶See 7 U.S.C. §§ 450c-450g which authorizes the Secretary of Agriculture to delegate regulatory functions to the Judicial Officer and 7 C.F.R. § 2.35 which lists the regulatory functions which the Secretary of Agriculture has delegated to the Judicial Officer.

I decline to address Mr. Black's assertion that the Deputy Administrator violated the Privacy Act.

Second, Mr. Black contends the Chief ALJ's finding that the Packers and Stockyards Program notified Mr. Black of his obligations to register with the Secretary of Agriculture and to secure a bond or bond equivalent, is error (Appeal Pet. ¶ 2).

The Chief ALJ found that, on July 10, 2006, Mr. Black was notified by certified mail that he must register with the Secretary of Agriculture and secure a bond or bond equivalent (Chief ALJ's Decision and Order at 4). The record establishes that the Packers and Stockyards Program sent the letter in question to Mr. Black's proper address and Mr. Black's brother, Jim Black, received the letter on July 10, 2006 (CX 1; Tr. 13-14, 31-32). I infer Mr. Black was notified of the registration and bonding requirements based upon the Packers and Stockyards Program's having directed the letter to the proper address and the receipt of the letter at Mr. Black's address by Mr. Black's brother. Therefore, I reject Mr. Black's contention that the Chief ALJ's finding that Mr. Black was notified of the requirement that he register with the Secretary of Agriculture and the requirement that he secure a bond or bond equivalent, is error.

Moreover, even if I were to find that Mr. Black was not provided actual notice of the Packers and Stockyards Act bonding requirements, that finding would not change the disposition of this proceeding. Neither the Packers and Stockyards Act nor the Regulations

require the Packers and Stockyards Program to provide a market agency with actual notice of the bonding requirements prior to the institution of a disciplinary administrative proceeding against that market agency for a violation of the bonding requirements in 9 C.F.R. pt. 201.

Third, Mr. Black contends the Chief ALJ's finding that Mr. Black operated as a market agency in the transactions at issue, is error (Appeal Pet. ¶¶ 3-5, 9(2)).

A market agency acts as an agent for another person, the principal, for the purpose of buying or selling livestock.⁷ Mr. Black testified he received orders to buy cattle for Meyers & Sons and other individuals, by telephone. When he found cattle of the type and at the price requested by his principals, Mr. Black bought the cattle for his principals. After these transactions, Riverton Livestock Auction issued checks to Mr. Black. (Tr. 35-38; CX 2-CX 22.) Mr. Black referred to the checks issued to him by Riverton Livestock Auction as "gratuity check[s]" (Tr. 37); however, the record establishes that the checks payable to Mr. Black were issued in payment for Mr. Black's services in connection with the purchase of cattle for Mr. Black's principals. Thus, I conclude Mr. Black was paid commissions and Mr. Black bought the cattle in question on a commission basis.⁸ As Mr. Black was acting as

⁷*In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating a person who buys cattle for others is the agent of the purchasers), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

⁸*Keszenheimer v. Reliance Standard Life Ins. Co.*, 402 F.3d 504, 509 (5th Cir. 2005) (stating the word "commission" means a fee paid to an agent or employee for transacting a

a commission buyer, he was a “market agency” as that term is defined in 7 U.S.C. § 201(c).⁹

Therefore, I reject Mr. Black’s contention that the Chief ALJ’s finding that Mr. Black operated as a market agency in the transactions at issue, is error.

Fourth, Mr. Black contends he has no obligation to obtain and maintain a bond because the auction market at which he bought cattle, Riverton Livestock Auction, is bonded and Mr. Black’s principal, Myers & Sons, pays Riverton Livestock Auction directly (Appeal Pet. ¶ 6).

piece of business or performing a service); *Estes v. Meridian One Corporation*, 77 F. Supp.2d 722, 726 n.7 (E.D. Va. 1999) (stating the common definition of the word “commission” is a fee or percentage allowed to a salesman or agent for his services), *aff’d*, 6 F. App’x 142 (4th Cir. 2001); *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating the word “commission” means a fee paid to an agent or employee for transacting a piece of business or performing a service), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

⁹*In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 216 (1980) (stating, under the Packers and Stockyards Act, a person who is engaged in buying or selling livestock for others is either a market agency or a dealer - a market agency if he charges a commission; a dealer if he does not), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980).

The Regulations require every market agency to execute and maintain a reasonable bond and prohibit market agencies from conducting operations subject to the Packers and Stockyards Act unless there is on file and in effect a bond complying with 9 C.F.R. pt. 201.¹⁰ I find no exception from the bonding requirements for a market agency that buys cattle at a livestock auction company that is bonded and no exception for a market agency whose principal pays the livestock auction company directly. Therefore, I reject Mr. Black's contention that he has no obligation to obtain and maintain a bond because Riverton Livestock Auction is bonded and Myers & Sons pays Riverton Livestock Auction directly.

Fifth, Mr. Black contends he has no obligation to obtain and maintain a bond because he does not take title to or possession of the cattle he buys for Meyers & Sons and others at Riverton Livestock Auction (Appeal Pet. ¶¶ 7-9(1)).

Mr. Black's failure to take title to or possession of the cattle which he buys for others at Riverton Livestock Auction is not relevant to Mr. Black's obligation to obtain and maintain a bond. Mr. Black is required to obtain and maintain a bond because he operates as a "market agency" which term is defined as any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.¹¹

¹⁰9 C.F.R. § 201.29(a).

¹¹7 U.S.C. § 201(c).

Nothing in the definition of the term “market agency” indicates that a person must take title to or possession of the livestock bought or sold on a commission basis in order to meet the definition of market agency.¹² Therefore, I reject Mr. Black’s contention that he has no obligation to obtain and maintain a bond because he does not take title to or possession of the cattle he buys for Meyers & Sons and others at Riverton Livestock Auction.

Sixth, Mr. Black contends the Chief ALJ’s order that Mr. Black cease and desist from violations of the Packers and Stockyards Act and the Regulations was premature (Appeal Pet. ¶ 10).

The Secretary of Agriculture is authorized to order any market agency to cease and desist from violations of 7 U.S.C. § 213(a), as follows:

§ 213. Prevention of unfair, discriminatory, or deceptive practices

....

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

¹²I note that, generally, a market agency does not take title to livestock, but merely facilitates transactions between buyer and seller. *See Syverson v. U.S. Dep’t of Agric.*, 601 F.3d 793, 801-02 (8th Cir. 2010) (discussing the issue of title in the context of market agency transactions).

7 U.S.C. § 213(b). The Hearing Clerk served Mr. Black with notice of his alleged violations of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.29 on March 2, 2011,¹³ and the Chief ALJ conducted a hearing on June 25, 2012.¹⁴ After the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order on August 23, 2012, which included the cease and desist order which Mr. Black contends was premature.¹⁵ As the Chief ALJ issued the cease and desist order subsequent to notice and hearing in this proceeding, I reject Mr. Black's contention that the Chief ALJ prematurely issued the cease and desist order.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Black, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required without obtaining, filing, and maintaining an adequate bond as required by the Packers and Stockyards Act and the Regulations.

¹³United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9851 5888.

¹⁴Tr. 1-68.

¹⁵Chief ALJ's Decision and Order at 5-6.

Paragraph 1 of this Order shall become effective on the day after service of this Decision and Order on Mr. Black.

2. Mr. Black is prohibited from and shall cease and desist from engaging in any capacity for which bonding is required under the Packers and Stockyards Act without first becoming properly registered with the Secretary of Agriculture.

Paragraph 2 of this Order shall become effective on the day after service of this Decision and Order on Mr. Black.

3. Mr. Black is assessed a \$4,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Mr. Black. Mr. Black shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-11-0139.

RIGHT TO JUDICIAL REVIEW

Mr. Black has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §
_ 2341-2350. Mr. Black must seek judicial review 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 December 31, 2012.

Done at Washington, DC

December 31, 2012

William G. Jenson
Judicial Officer

¹⁶28 U.S.C. § 2344.