

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-05-0019
)
Hale-Halsell Company,)
)
Respondent)
) Decision and Order

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 16, 2005. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); 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].

Complainant alleges that Hale-Halsell Company [hereinafter Respondent], during the period August 6, 2003, through February 12, 2004, failed to make full payment promptly to 14 sellers of the agreed purchase prices in the total amount of \$412,968.87 for 113 lots of perishable agricultural commodities which Respondent purchased,

received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 23, 2005.¹ Respondent failed to file an answer to the Complaint within 20 days after service, as required by the Rules of Practice.²

On November 29, 2005, in accordance with the Rules of Practice,³ Complainant 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 [hereinafter Proposed Default Decision]. On December 6 and 7, 2005, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter.⁴ Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by the Rules of Practice.⁵

On January 30, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing By Reason of Default [hereinafter Initial

¹United States Postal Service Domestic Return Receipts for Article Number 7004 1160 0001 9223 2237 and Article Number 7004 1160 0001 9223 2244.

²See 7 C.F.R. § 1.136(a).

³See 7 C.F.R. § 1.139.

⁴United States Postal Service Domestic Return Receipts for Article Number 7004 2510 0003 7121 6193 and Article Number 7004 2510 0003 7121 6209.

⁵See 7 C.F.R. § 1.139.

Decision]: (1) finding, during the period August 6, 2003, through February 12, 2004, Respondent purchased, received, and accepted in interstate commerce from 14 sellers, 113 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$412,968.87; (2) concluding Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering publication of the facts and circumstances of Respondent's PACA violations (Initial Decision at 2-3).

On February 15, 2006, Respondent appealed to the Judicial Officer. On March 17, 2006, Complainant filed Complainant's Response to Respondent's Appeal. On March 21, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount

of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF
AGRICULTURE**

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF
PRACTICE) UNDER THE PERISHABLE AGRICULTURAL
COMMODITIES ACT, 1930**

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of

the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Statement of the Case

Respondent failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the State of Oklahoma. Respondent's business address is 9111 E. Pine Street, Tulsa, Oklahoma 74115. Respondent's mailing address is P.O. Box 52898, Tulsa, Oklahoma 74158-2898.

2. At all times material to this proceeding, Respondent was licensed under the provisions of the PACA. License number 19990802 was issued to Respondent on March 31, 1999. Respondent's PACA license terminated on March 31, 2005, when Respondent failed to pay the annual fee, as required by section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. During the period August 6, 2003, through February 12, 2004, Respondent purchased, received, and accepted in interstate commerce, from 14 sellers, 113 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$412,968.87.

Conclusion of Law

Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises one issue in its Appeal of Decision Without Hearing By Reason of Default and Response to Motion for Decision Without Hearing By Reason of Default [hereinafter Appeal Petition]. Respondent denies that it committed willful, repeated, and

flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Respondent's Appeal Pet. at 2).

Respondent's denial of the allegations in the Complaint comes far too late to be considered. Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because it failed to file an answer to the Complaint within 20 days after the Hearing Clerk served it with the Complaint. The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 23, 2005.⁶ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

. . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

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

⁶See note 1.

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 days 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.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon Respondent for the purpose of determining whether Respondent has willfully violated the PACA. Respondent shall have twenty (20) days after receipt of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the PACA (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 3.

Similarly, the Hearing Clerk informed Respondent in the service letter transmitting the Complaint and the Rules of Practice that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

August 16, 2005

Hale-Halsell Company
9111 E. Pine Street
Tulsa, Oklahoma 74115

Hale-Halsell Company
P.O. Box 52898
Tulsa, Oklahoma 74158-2898

Gentlemen:

Subject: In re: Hale-Halsell Company, Respondent -
PACA Docket No. D-05-0019

Enclosed is a copy of a Complaint, which has been filed with this office under the Perishable Agricultural Commodities Act, 1930, as amended.

Also enclosed is a copy of the rules of practice, which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments, which follow, are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent's answer was due no later than September 12, 2005. Respondent's first and only filing in this proceeding is Respondent's Appeal Petition, which Respondent filed February 15, 2006, 5 months 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On November 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On December 6 and 7, 2005, the Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter.⁷ The Hearing Clerk informed Respondent in the service letter transmitting Complainant's Motion for Default

⁷See note 4.

Decision and Complainant's Proposed Default Decision that objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision must be filed within 20 days after service, as follows:

CERTIFIED RECEIPT REQUESTED

November 30, 2005

Hale-Halsell Company
9111 E. Pine Street
Tulsa, Oklahoma 74115

Hale-Halsell Company
P.O. Box 52898
Tulsa, Oklahoma 74158-2898

Gentlemen:

Subject: In re: Hale-Halsell Company, Petitioner [sic] -
PACA Docket No. D-05-0019

Enclosed is a copy of Complainant's Motion for a Decision Without Hearing by Reason of Default; together with a copy of the Decision Without Hearing by Reason of Default which has been received and filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office a response to the Motion.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On January 30, 2006, the ALJ issued an Initial Decision in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default. Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,⁸

⁸See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁹

Respondent's first filing in this proceeding was filed with the Hearing Clerk 5 months 3 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139,

⁹See generally *In re Mary Jean Williams* (Decision as to Mary Jean Williams), 64 Agric. Dec. ____ (Sept. 14, 2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed almost 8 months after the respondent's answer was due and the respondent is deemed, by her failure to file a timely answer, to have admitted violations of the regulations issued under the Animal Welfare Act, as amended); *In re Alliance Airlines*, 64 Agric. Dec. ____ (July 5, 2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed 2 months 6 days after the respondent's answer was due and the respondent is deemed, by its failure to file a timely answer, to have admitted violations of the Plant Protection Act and regulations issued under the Plant Protection Act); *In re Herman Camara*, 62 Agric. Dec. 26 (2003) (holding the default decision was properly issued where the respondent's response to the complaint was filed 11 months 2 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Beef Promotion and Research Order and the Beef Promotion Regulations issued under the Beef Promotion and Research Act of 1985); *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83 (2003) (holding the default decision was properly issued where the respondent's response to the complaint was filed 11 months 16 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Horse Protection Act of 1970, as amended), *aff'd sub nom. Trimble v. United States Dep't of Agric.*, 87 F. App'x 456 (6th Cir. 2003); *In re Wayne W. Coblentz*, 61 Agric. Dec. 330 (2002) (holding the default decision was properly issued where the respondent's response to the complaint was filed 7 months 8 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violations of the Packers and Stockyards Act, 1921, as amended and supplemented), *aff'd*, 89 F. App'x 484 (6th Cir. 2003).

.141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁰

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's PACA violations shall be published. The publication of the facts and circumstances of Respondent's PACA violations shall be effective 60 days after service of this Order on Respondent.

¹⁰*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

RIGHT TO JUDICIAL REVIEW

Respondent 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, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹¹ The date of entry of the Order in this Decision and Order is April 20, 2006.

Done at Washington, DC

April 20, 2006

William G. Jenson
Judicial Officer

¹¹See 28 U.S.C. § 2344.