

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-03-0014
)
Hunts Point Tomato Co., Inc.,)
)
Respondent) **Order Denying Petition to Reconsider**

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 March 31, 2003. 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 Hunts Point Tomato Co., Inc. [hereinafter Respondent], during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 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-IV). On August 7, 2003, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On August 10, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On October 15, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on November 17, 2004, Respondent filed Respondent's Proposed Findings of Fact and Law. On December 6, 2004, Complainant filed Complainant's Reply Brief.

On April 21, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]:

- (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and
- (2) ordering the publication of the facts and circumstances of Respondent's violations (Initial Decision at 7-8, 12).

On October 7, 2005, Respondent appealed to the Judicial Officer. On October 17, 2005, Complainant filed Complainant's response to Respondent's appeal petition. On October 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On November 2, 2005, I issued a Decision and Order: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.¹

On December 12, 2005, Respondent filed a Petition to Reconsider *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ____ (Nov. 2, 2005). On January 3, 2006, Complainant filed Complainant's Response to Petition to Reconsider. On January 5, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider. Based upon a careful consideration of the record, I deny Respondent's Petition to Reconsider.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

¹*In re Hunts Point Tomato Co.*, 64 Agric. Dec. ____, slip op. at 6, 25 (Nov. 2, 2005).

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

§ 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.

. . . .

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499h(a), (e), 499p.

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).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises five issues in Respondent’s Petition to Reconsider. First, Respondent contends the finding that Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is not supported by the evidence (Respondent’s Pet. to Reconsider at 2).

Complainant conducted an investigation of Respondent after Complainant received at least 10 complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist employed by the United States Department of Agriculture, and Timothy Swainhart, an

assistant regional director for the Perishable Agricultural Commodities Branch, United States Department of Agriculture, went to Respondent's place of business on July 24, 2002. Wayne Shelby and Timothy Swainhart met with Lenny Guerra, Respondent's office manager, who identified and provided for copying Respondent's accounts payable files. (Tr. 23-24, 27-28, 31-35.)

The accounts payable files, which Respondent provided to Complainant, indicate that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (CX 3-CX 35; Tr. 37-49). At an exit conference on August 7, 2002, Respondent's president, sole director, and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than \$1,000,000 for produce purchased and received, some of which was not in interstate or foreign commerce (Tr. 46).

Respondent did not rebut the evidence introduced by Complainant to prove that Respondent violated the prompt payment provision of the PACA. Therefore, I reject Respondent's contention that the finding that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not supported by the evidence. Instead, I find Complainant proved by a preponderance of the evidence² that, during the period September 2001

²Complainant, as the proponent of an order, has the burden of proof in this
(continued...)

²(...continued)

proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec.

(continued...)

through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Second, Respondent contends the Judicial Officer's conclusion that the Chief ALJ was not required to find the exact amount Respondent failed to pay its produce sellers in accordance with the prompt payment provision of the PACA, is error (Respondent's Pet. to Reconsider at 3).

The Chief ALJ found, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 produce sellers of the agreed purchase prices in a total amount "over \$795,000" for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (Initial Decision at 7-8). Since this finding alone is sufficient to conclude that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and \$795,000 is more than a de minimis amount of money, I reject Respondent's contention that my conclusion

²(...continued)

1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

that the Chief ALJ was not required to find the exact amount Respondent failed to pay its produce sellers in accordance with the PACA, is error.³

Third, Respondent asserts the sanction in this proceeding involves severe employment restrictions. Respondent contends, in order to justify severe employment restrictions, Complainant must prove the amount of money Respondent failed to pay produce sellers in accordance with the PACA is not de minimis and a person responsibly connected with Respondent caused Respondent's failure to comply with the PACA. (Respondent's Pet. to Reconsider at 3.)

I disagree with Respondent's assertion that I imposed employment restrictions in this proceeding. Based on my conclusion that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), I ordered the publication of the facts and circumstances of Respondent's violations. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ___, slip op. at 25 (Nov. 2, 2005). Moreover, Complainant proved by a preponderance of the evidence⁴ that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable

³I also note, while the Chief ALJ did not find the exact amount Respondent failed to pay its produce sellers in accordance with the prompt payment provision of the PACA, I found Respondent failed to make full payment to 33 sellers of the agreed purchase prices in the total amount of exactly \$795,878.80. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ___, slip op. at 7, 11, 13, 22-23 (Nov. 2, 2005).

⁴See note 2.

agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce. I find \$795,878.80 is not a de minimis amount of money. Finally, PACA does not require that a responsibly connected⁵ person cause the PACA licensee to violate the PACA. Section 16 of the PACA (7 U.S.C. § 499p) explicitly provides that a PACA licensee is liable for the acts or omissions of any agent, officer, or other person acting for, or employed by, the PACA licensee.

Fourth, Respondent asserts it cannot be found to have violated the prompt payment provision of the PACA because Respondent's creditors and the United States District Court for the Southern District of New York determined the timing and the amount of Respondent's payment for produce (Respondent's Pet. to Reconsider at 3).

On May 31, 2002, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust. On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2).

⁵The term "responsibly connected" is defined in 7 U.S.C. § 499a(b)(9).

On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies. The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure:

(1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

While Judge Lawrence M. McKenna enjoined Respondent from disbursing any of its PACA trust assets other than through the actions of the court-appointed escrow agent operating the PACA trust, the injunction is not a defense to Respondent's failures to comply with the prompt payment provision of the PACA. Since the PACA trust action arose directly from Respondent's failures to pay its produce sellers in the first place, to allow the PACA trust action as a defense to Respondent's failures to comply with the prompt payment provision of the PACA would be counter to the clear purposes of the PACA.

Fifth, Respondent asserts it offered to make full payment to its produce sellers to resolve this proceeding. Respondent further asserts Complainant's failure to accept Respondent's settlement offer "defied common sense" and "is 'arbitrary and capricious.'" Respondent also asserts, by affirming Complainant's failure to accept Respondent's settlement offer, the Judicial Officer "failed to breathe life into a rule that is as rigid as a

corpse” and “decided that he and the case law surrounding the Rules of Practice are powerless to prevent ‘arbitrary and capricious’ behavior.” (Respondent’s Pet. to Reconsider at 4.)

Voluntary settlements are highly favored in proceedings under the Rules of Practice.⁶ However, the Rules of Practice do not require a party to accept a settlement offer made by another party, as Respondent suggests. Complainant had complete discretion to accept or reject Respondent’s settlement offer. Respondent’s assertion that Complainant’s failure to accept Respondent’s settlement offer defied common sense and is arbitrary and capricious, is without merit.

Moreover, the Judicial Officer has no authority under the Rules of Practice to direct a party to accept another party’s settlement offer. Therefore, even if I were to find that Complainant’s failure to accept Respondent’s settlement offer defied common sense and was arbitrary and capricious (which I do not so find), I would have no authority to require Complainant to accept Respondent’s settlement offer.

For the foregoing reasons and the reasons set forth in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ____ (Nov. 2, 2005), Respondent’s Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to

⁶*In re Gwain Wilson*, 64 Agric. Dec. ____, slip op. at 3 (Oct. 3, 2005) (Remand Order as to John R. LeGate, Sr.); *In re Gwain Wilson*, 64 Agric. Dec. ____, slip op. at 3 (Sept. 27, 2005) (Remand Order as to William Russell Hyneman).

grant or deny a timely-filed petition to reconsider. Respondent's Petition to Reconsider was timely filed and automatically stayed *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ____ (Nov. 2, 2005). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ____ (Nov. 2, 2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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 violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider 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 Order Denying Petition to Reconsider.⁷ The date of entry of the Order in this Order Denying Petition to Reconsider is January 9, 2006.

Done at Washington, DC

January 9, 2006

William G. Jenson
Judicial Officer

⁷See 28 U.S.C. § 2344.