

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P & S Docket No. D-10-0058
)
Barnesville Livestock, LLC, and)
Darryl Watson,)
)
Respondents) **Decision and Order**

PROCEDURAL HISTORY

On December 10, 2009, Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], filed a Complaint alleging Barnesville Livestock, LLC [hereinafter Barnesville], and Darryl Watson willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], and the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]. Specifically, the Deputy Administrator alleges Barnesville and Mr. Watson: (1) failed to properly use and maintain Barnesville's custodial account; (2) misused Barnesville's custodial account; (3) issued checks to consignors that were returned unpaid because Barnesville did not have sufficient funds available on the

account upon which the checks were drawn to pay the checks when presented; and (4) failed to remit, when due, the net proceeds from the sale price of livestock sold on a commission basis (Compl. ¶¶ III-V). On December 29, 2009, the Deputy Administrator filed a Corrected Complaint.¹ On January 11, 2010, Barnesville and Mr. Watson filed an Answer to Complaint in which they denied the material allegations of the Complaint. On January 26, 2010, Barnesville and Mr. Watson filed an Answer to Corrected Complaint in which they denied the material allegations of the Corrected Complaint.

On July 28, 2011, the parties filed Joint Stipulation Regarding Admissible Evidence, Facts, and Legal Conclusions [hereinafter the Joint Stipulation] wherein Barnesville and Mr. Watson admitted violating the Packers and Stockyards Act and the Regulations as alleged in the Corrected Complaint, leaving only the issue of the appropriate sanction for Barnesville and Mr. Watson's violations unresolved.

Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] conducted a telephonic hearing on August 2, 2011, with the Deputy Administrator in Washington, DC, and Barnesville and Mr. Watson participating from their attorneys' offices in Zanesville, Ohio. Miles D. Fries and Susan J. Montgomery McDonald of Gottlieb, Johnston, Beam & Dal Ponte, P.L.L., Zanesville, Ohio, represented Barnesville

¹The Corrected Complaint merely added Appendix A which the Deputy Administrator failed to include when the Deputy Administrator filed the original Complaint on December 10, 2009 (Motion for Leave to File a Corrected Complaint filed by the Deputy Administrator on December 29, 2009; Order filed by the then Chief Administrative Law Judge Marc R. Hillson on December 29, 2009).

and Mr. Watson. Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator. The hearing was limited to the issue of the appropriate sanction for Barnesville and Mr. Watson's violations of the Packers and Stockyards Act and the Regulations. Mr. Watson testified on behalf of himself and Barnesville. Raymond Minks, a marketing specialist employed by the Office of Policy and Litigation Support, Packers and Stockyards Program, testified on behalf of the Deputy Administrator.²

The Chief ALJ provided the parties with an opportunity to file post-hearing briefs (Tr. 57-58). On September 20, 2011, the Deputy Administrator filed a post-hearing brief. Barnesville and Mr. Watson did not file a timely post-hearing brief and, after the Chief ALJ issued a Decision and Order, notified the Chief ALJ that they would not be filing a post-hearing brief (Respondent's [sic] Post Hearing Notice to the Court filed October 24, 2011).

On October 13, 2011, the Chief ALJ issued a Decision and Order: (1) concluding Barnesville and Mr. Watson willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.42 and 201.43, as alleged in the Corrected Complaint; (2) ordering Barnesville and Mr. Watson to cease and desist from further violations of 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.42 and 201.43; and (3) suspending Barnesville as a registrant under the Packers and Stockyards Act for a period of 21 days (Chief ALJ's Decision and Order at 7).

²References to the transcript of the hearing are indicated as "Tr." with the page reference.

On November 21, 2011, Barnesville and Mr. Watson appealed to the Judicial Officer. On December 12, 2011, the Deputy Administrator filed Complainant's Response to Appeal Petition. On December 19, 2011, 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 affirm the Chief ALJ's Decision and Order.

DECISION

Decision Summary

Barnesville and Mr. Watson admit violating the Packers and Stockyards Act and the Regulations as alleged in the Corrected Complaint, leaving only the issue of the appropriate sanction unresolved (Joint Stipulation). Moreover, Barnesville and Mr. Watson appeal only the Chief ALJ's 21-day suspension of Barnesville as a registrant under the Packers and Stockyards Act; they do not appeal the cease and desist provision of the Chief ALJ's Order (Respondents' Appeal Pet. at 1). I have carefully considered the issues raised by Barnesville and Mr. Watson in Respondents' Appeal Petition and conclude the Chief ALJ's 21-day suspension of Barnesville as a registrant under the Packers and Stockyards Act is not error. Therefore, except for minor non-substantive changes, I adopt the Chief ALJ's Findings of Fact, Conclusions of Law, and Order as the final agency decision and order.

Findings of Fact

1. Barnesville is an Ohio limited liability company with a business mailing address in New Concord, Ohio. Barnesville's registered agent for service of process is Darryl L. Watson of Norwich, Ohio.

2. Barnesville operates a livestock auction market in Barnesville, Ohio, and, at all times material to this proceeding, was:

a. Engaged in the business of conducting and operating a posted stockyard subject to the Packers and Stockyards Act;

b. Engaged in the business of a market agency selling consigned livestock in commerce on a commission basis at the stockyard; and

c. Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a market agency buying livestock on commission.

3. Mr. Watson is an individual residing in the State of Ohio. Mr. Watson, at all times material to this proceeding, was:

a. The sole member and owner of Barnesville; and

b. The individual responsible for day-to-day direction, management, and control of Barnesville's business operations.

4. On October 28, 2008, the Packers and Stockyards Program notified Barnesville and Mr. Watson, by certified mail, that Barnesville's operation with a

custodial account shortage is an unfair practice and a violation of the Packers and Stockyards Act.

5. Notwithstanding the notice described in Finding of Fact number 4, Barnesville and Mr. Watson, during the period October 31, 2008, through May 31, 2011, failed to properly use and maintain Barnesville's custodial account, thereby endangering the faithful and prompt accounting of shippers' proceeds and the payment due the owners and consignors of livestock.

6. As of October 31, 2008, Barnesville and Mr. Watson had outstanding checks drawn on Barnesville's custodial account in the amount of \$285,548.03. On that same date, the custodial account had a negative balance of \$58,381.28, with proceeds receivable of \$109,957.85, leaving a custodial account shortage of \$233,971.46.

7. As of December 31, 2008, Barnesville and Mr. Watson had outstanding checks drawn on Barnesville's custodial account in the amount of \$281,043.28. On that same date, the custodial account had a negative balance of \$3,454.86, with proceeds receivable of \$17,749.53, leaving a custodial account shortage of \$266,748.61.

8. As of June 30, 2009, Barnesville and Mr. Watson had outstanding checks drawn on Barnesville's custodial account in the amount of \$165,417.78. On that same date, the custodial account had a negative balance of \$25,268.52, with proceeds receivable of \$19,723.21, leaving a custodial account shortage of \$170,963.09.

9. As of April 29, 2011, Barnesville and Mr. Watson had outstanding checks drawn on Barnesville's custodial account in the amount of \$181,176.11. On that same date, the custodial account had a balance of \$29,672.96, with proceeds receivable of \$15,634.98, leaving a custodial account shortage of \$135,868.17.

10. As of May 31, 2011, Barnesville and Mr. Watson had outstanding checks drawn on Barnesville's custodial account in the amount of \$258,409.34. On that same date, the custodial account had a balance of \$107,890.60, with proceeds receivable of \$19,325.00, leaving a custodial account shortage of \$131,193.74.

11. The shortages in Barnesville's custodial account were due, in part, to Barnesville and Mr. Watson's failure to deposit into the account amounts equal to the proceeds receivable from the sale of consigned livestock within the time prescribed in 9 C.F.R. § 201.42.

12. The shortages in Barnesville's custodial account, during the period October 31, 2008, through May 31, 2011, were also due, in part, to Barnesville and Mr. Watson's misuse of custodial account funds.

13. Barnesville and Mr. Watson, during the period October 6, 2008, through December 26, 2008, permitted \$137 in bank fees to be charged to the custodial account.

14. Barnesville and Mr. Watson, during the period October 3, 2008, through December 30, 2008, transferred \$78,785.71 in custodial funds to Barnesville and Mr. Watson's general account.

15. Barnesville and Mr. Watson, on October 31, 2008, deposited proceeds in the amount of \$5,723.52 from the sale of livestock sold on a commission basis into an account other than Barnesville's custodial account.

16. Barnesville and Mr. Watson, during the period September 13, 2008, through August 15, 2009, sold livestock on a commission basis and in purported payment of the net proceeds of those sales issued at least 350 NSF checks to consignors that were returned by the bank upon which the checks were drawn because Barnesville and Mr. Watson failed to maintain a sufficient balance in Barnesville's custodial account for the checks to be honored when presented for payment and, in so doing, failed to remit, when due, the net proceeds due from the sale price of such livestock on a commission basis.

17. Barnesville and Mr. Watson have fully cooperated with the Grain Inspection, Packers and Stockyards Administration's investigation of issues concerning the custodial account for shippers' proceeds at Barnesville.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Barnesville was, at all times material to Barnesville and Mr. Watson's violations of the Packers and Stockyards Act and the Regulations, a market agency selling consigned livestock within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.

3. Mr. Watson is the alter ego of Barnesville.

4. Barnesville and Mr. Watson willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. § 201.42 by failing to maintain and properly use Barnesville's custodial account for shippers' proceeds at the auction market.

5. Barnesville and Mr. Watson willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. § 201.43 by issuing NSF checks and by failing to timely remit the net proceeds due from the sale of livestock to the consignors

Barnesville and Mr. Watson's Appeal Petition

Barnesville and Mr. Watson appeal only the Chief ALJ's 21-day suspension of Barnesville as a registrant under the Packers and Stockyards Act. Barnesville and Mr. Watson raise three issues with respect to the Chief ALJ's 21-day suspension. First, Barnesville and Mr. Watson assert their acts were isolated and thus not an unfair practice under 7 U.S.C. § 213(a) (Respondents' Appeal Pet. at 1).

The Packers and Stockyards Act makes it unlawful for any market agency to engage in or use any unfair practice, as follows:

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

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

7 U.S.C. § 213(a).

Barnesville and Mr. Watson: (1) failed to properly use and maintain Barnesville's custodial account during the period October 31, 2008, through May 31, 2011, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.42; and (2) issued at least 350 NSF checks to consignors during the period September 13, 2008, through August 15, 2009, and, in so doing, failed to remit, when due, the net proceeds from the sale price of livestock on a commission basis, in willful violation of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.43. Accordingly, I find no factual basis for Barnesville and Mr. Watson's contention that their violations over a period of 2 years 8 months 18 days were "isolated" violations of the Packers and Stockyards Act and the Regulations.

Moreover, even if I were to find Barnesville and Mr. Watson's acts "isolated" (which I do not so find), that finding would not preclude my concluding that they engaged in an unfair practice under 7 U.S.C. § 213(a). The issue has previously arisen as to whether a single transaction or incident may be the subject of a disciplinary or reparation proceeding under the Packers and Stockyards Act. This issue has arisen because of the use of the word "practice" in the Packers and Stockyards Act, *e.g.*, "[i]t shall be unlawful . . . to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device[.]" 7 U.S.C. § 213(a). Although the word "practice" usually has the connotation of repeated or customary action, it does not always have that connotation.³ In addition,

³*Webster's Third New International Dictionary Unabridged* 1780 (1981).

the Packers and Stockyards Act refers to a “practice or device,” and the word “device” does not have the usual connotation of repeated or customary action.⁴

The Judicial Officer has long held that a single incident or transaction in violation of the Packers and Stockyards Act is a sufficient basis for a proceeding under the Packers and Stockyards Act.⁵ The Judicial Officer’s position is based upon legislative history of the Packers and Stockyards Act which indicates congressional concern with practices in the industry.⁶ It is my view, therefore, that Congress used the term “practice” in the Packers and Stockyards Act with respect to industry practices rather than to a continuous course of conduct by a particular individual.

In view of the language of the statute, the legislative history, and the long-held position of the Judicial Officer, I conclude a single transaction or incident is sufficient to support a disciplinary proceeding for an unfair, unjustly discriminatory, or deceptive practice under 7 U.S.C. § 213(a). Therefore, even if I were to conclude that Barnesville

⁴*Webster’s Third New International Dictionary Unabridged* 618 (1981).

⁵*See, e.g., In re Ozark County Cattle Co.* (Decision as to National Order Buying Co. and Thomas D. Runyan), 49 Agric. 336, 354-55 (1990); *In re Danny Cobb*, 48 Agric. Dec. 234, 272-73 (1989), *aff’d*, 889 F.2d 724 (6th Cir. 1989), *reprinted in* 51 Agric. Dec. 640 (1992); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 287 n.10 (1988), *aff’d per curiam*, 865 F.2d 262 (Table), 1988 WL 133292 (6th Cir. 1988); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 563-64 (1977), *aff’d sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Hass-Davis Packing Co.*, 29 Agric. Dec. 1249, 1251-52 (1970).

⁶H.R. Rep. No. 85-1048 at 1 (1957) *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213; 61 Cong. Rec. 1800-01, 1887, 2615-16 (1921).

and Mr. Watson's violations of the Packers and Stockyards Act and the Regulations were isolated, I would reject their contention that their acts could not be an unfair practice under 7 U.S.C. § 213(a).

Second, Barnesville and Mr. Watson assert a 21-day suspension would impact the local economy and put Barnesville out of business (Respondents' Appeal Pet. at 1).

Collateral effects of a sanction on a violator's business and the local economy in which the violator operates are generally given no weight in determining the sanction to be imposed for violations of the Packers and Stockyards Act since the national interest of having fair conditions in the livestock industry must prevail over a violator's interests and the interests of the violator's community.⁷ Accordingly, I reject Barnesville and

⁷See *In re Marysville Enterprises, Inc.*, 59 Agric. Dec. 299, 328 (2000); *In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1430 (1998); *In re Sam Odom*, 48 Agric. Dec. 519, 540-41 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 206 (1989), *aff'd*, 891 F.2d 281 (3d Cir. 1989) (unpublished); *In re Edward Tiemann*, 47 Agric. Dec. 1573, 1593 (1988); *In re Paul Rodman* (Order Denying Pet. for Recons.), 47 Agric. Dec. 1400, 1415 (1988); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1104 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 445 (1984), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1365 (1982). *But see Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 804 (8th Cir. 2010) (stating the effect of a proposed sanction on a registrant is crucially important); *In re Todd Syverson* (Order Denying Pet. to Reconsider on Remand), ___ Agric. Dec. ___, slip op. at 4-5 (Dec. 22, 2010) (stating, with respect to proceedings that could be appealed to the United States Court of Appeals for the Eighth Circuit, my policy of giving no weight to the effect of a suspension of registration under the Packers and Stockyards Act on the likelihood of a violator's bankruptcy and on the likelihood that a violator will be deprived of his or her livelihood is modified to comport with *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793 (2010)).

Mr. Watson's contention that the 21-day suspension of Barnesville as a registrant under the Packers and Stockyards Act is inappropriate because of the impact the suspension might have on the local economy and on Barnesville's ability to continue in business.

Third, Barnesville and Mr. Watson contend their full and open cooperation with the Grain Inspection, Packers and Stockyards Administration's investigation and their admission of wrongdoing are significant (Respondents' Appeal Pet. at 1).

The Chief ALJ specifically considered Barnesville and Mr. Watson's admissions of wrongdoing and cooperation with the Grain Inspection, Packers and Stockyards Administration's investigation when determining the appropriate period of Barnesville's suspension as a registrant under the Packers and Stockyards Act (Chief ALJ's Decision and Order at 3). Therefore, I reject Barnesville and Mr. Watson's contention that the Chief ALJ erroneously failed to find their admissions and cooperation significant.

For the foregoing reasons, the following Order is issued.

ORDER

1. Barnesville and Mr. Watson, their agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from further violations of 7 U.S.C. § 213(a) and 9 C.F.R. § 201.42 and § 201.43.

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

2. Barnesville is suspended as a registrant under the Packers and Stockyards Act for a period of 21 days.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Decision and Order on Barnesville and Mr. Watson.

Done at Washington, DC

January 23, 2012

William G. Jenson
Judicial Officer