

MAR 09 2011

URDA
OALC/CHC

2011-03-09 12:10

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 10-0109

In re: Empire Kosher Poultry, Inc.,

Respondent

Decision and Order

Appearances: Charles E. Spicknell, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Complainant
Jonathan H. Rudd, Esquire, McNeese Wallace & Nurick, LLC, Harrisburg, Pennsylvania for the Respondent

Preliminary Statement

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181, *et seq.*) (Act), instituted by a Complaint filed on February 4, 2010 by Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, United States Department of Agriculture. The Complaint alleges that Empire Kosher Poultry, Inc. (Empire) willfully violated section 410 of the Act (7 U.S.C. §228b-1) by failing to make prompt payments for turkeys that it had purchased, received, and accepted from Koch's Turkey Farm (Koch's).

Empire, after seeking and being granted an extension of time in which to respond to the Complaint, filed its Answer on April 15, 2010. A telephonic prehearing conference was conducted on September 29, 2010 at which time the dates for the filing of witness and exhibit lists and the exchange of exhibits was established and the matter was set for oral hearing on January 4, 2011 in Harrisburg, Pennsylvania.

The oral hearing of this action was held at the scheduled time and place. Eight witnesses were called and testified under oath.¹ At the beginning of the proceeding, the parties stipulated that with the exception of Exhibit CX-4, all of the exhibits were admissible as evidence.² At the conclusion of the hearing the parties were directed to file post hearing briefs. The briefs have been filed and the matter is now ripe for disposition.

The Agency Position

The Agency contends that Empire wrongfully delayed payment to Koch's for turkeys which Empire had purchased, received and accepted without a credit agreement³ in place for 45 days or more while attempting to obtain additional turkeys and an extended payment plan from Koch's.

Empire's Position

Empire takes the position that the Act does not apply to the transactions between Empire and Koch's, but that even if it does, the Act does not prevent Empire from withholding payment where Koch's breached the parties' contract. Empire also asserts that even if the Act was violated, no penalty is warranted as both parties have put the matter behind them and moved on in their business relationship.

The 1987 Poultry Amendments

The Secretary of Agriculture has exercised jurisdiction over shipments of live poultry since 1935. In 1987, the Secretary became concerned that poultry growers were being forced to encounter unreasonable periods of time before receiving payment for birds that they had sold while their bills were coming due. Congress amended the

¹ References to the transcript of the proceedings will be indicated as Tr. with the page reference.

² The Agency had submitted 14 exhibits (CX-1 through CX-14) and Empire had submitted 17 (RX-1 through RX-17). CX-4 was admitted later during the proceedings. Tr. 337-338.

³ 7 U.S.C. §228

Packers and Stockyards Act to establish specific timetables for processors to make payments for live poultry purchases. H.R. Rep. 100-397, reprinted in U.S.C.C.A.N. 855, 857 (the “Poultry Producers Financial Protection Act of 1987”).

Under the 1987 amendments, all poultry sales are deemed to be “cash sales” in which payment is due “before the close of the next business day following the purchase” **unless** there is an **express** extension of credit by the poultry seller or a growing arrangement contract in place. *See*, 7 U.S.C. §228b-1 (Emphasis added).

Evaluation of the Evidence

The transactions between Empire and Koch’s in 2008 were generated as a result of Empire securing a favorable contract with Trader Joe’s for the holiday delivery of 43,200 kosher turkeys. RX-1, Tr. 201, 208. The Trader Joe’s contract had special significance and importance to Empire as it had previously supplied turkeys to Trader Joe’s in prior years, but had been dropped as a supplier in 2002 thereby losing an important and profitable segment of their business.⁴ Tr. 198. With the backdrop of having been dropped previously, the opportunity to re-establish the relationship with Trader Joe’s at an even greater level was a “huge, huge deal” and was of critical importance to Empire.⁵ Tr. 201, 210.

The execution of the contract however represented a significant gamble for Empire as in order to fulfill its contractual requirements of supplying the 43,200 kosher birds to Trader Joe’s Empire needed to acquire a minimum of 54,000 antibiotic free

⁴ According to Jeff Brown, the relationship between Empire and Trader Joe’s had started in the mid to late 1990’s and continued until 2002. By 2002, Trader Joe’s represented approximately 6% of Empire’s sales. Tr. 198-199. By 2008, Trader Joe’s had grown in size and importance adding literally hundreds of stores. Tr.199-200. At the current time, Trader Joe’s is Empire’s largest account, representing approximately 20% of their sales. Tr. 198.

⁵ Failing to fulfill the contract with Trader Joe’s was considered to have the potential of shutting the business down. Tr. 241.

(ABF) hen turkeys. Given the 18 week growing time required to attain the proper size and degree of maturity, at the time the contract was executed, Empire did not possess the capacity to supply the contractually required number of birds. Tr. 207-208. Because the contract specified that only ABF birds would meet contract specifications and because of the limited number of ABF turkey producers, Empire had to compete in the marketplace for the already commenced production of ABF turkeys which would mature and reach the target weight during the performance period. Tr. 206-209. Having a long standing relationship with Koch's over successive generations, Empire contacted Duane Koch as a potential supplier of the needed birds. Tr. 209. Although there was conflicting testimony as to the exact number of turkeys which Koch's would supply, Duane Koch agreed to sell some ABF turkeys to Empire. Tr. 141, 151-152, 175-176, 209-210. Empire claimed that the transaction was a credit sale; however, although emails were exchanged concerning requested terms, the evidence clearly established that no meeting of the minds was reached and credit terms were never agreed upon. Tr. 79, 87, 134-135, 212-213, 254-255, 360, 363.

Koch's commenced delivering ABF hen turkeys to Empire's processing plant on August 6, 2008 and sent Empire an invoice for the initial shipment of four truckloads on August 8, 2008 in the amount of \$114,380.00. Payment was requested to be made within 14 days. Prior to the expiration of the 14 day period, on August 13 and 14, 2008, Koch's sent a second shipment of four truckloads. On this occasion, for reasons which are not entirely clear, there was a large number of what appeared on the inspection reports as "Plant Rejects" from the first two truckloads.⁶ Tr. 144-147, 180-182, 220-221, 228, 256-

⁶Empire claimed that the 1,200 plant rejects were rejected by the USDA inspectors for airsaccualitis; however, there is no entry for airsacculitis on the condemnation form and none of the witnesses testifying

257, 288, 317. The second two trucks were sent back to Koch's where Koch's processed the birds in their own plant without any condemnations. Tr. 143-144. Additional shipments were made on August 20, 2008 which were invoiced to Empire along with the August 13 and 14, 2008 shipments on August 25, 2008. By this time Empire had not made payment within the 14 day period requested in the August 6, 2008 invoice. When Duane Koch called and inquired about when payment would be received, he was informed that if he wanted to get paid, he would have to send more turkeys. Tr. 151. Under the threat of non-payment unless additional birds were shipped to Empire, Koch's sent additional shipments on September 3, 4, and 8, 2008, invoicing those loads on September 10 and 18, 2008. On September 19, 2008 some 42 days after the date of the first invoice and 44 days after the actual delivery, Koch's received a partial payment of only \$50,000.00 payment from Empire.⁷

On September 24, 2008, faced with Empire's continued failure to pay the approximately \$400,000.00 in outstanding invoices for the tens of thousands of turkeys which Empire had purchased, received and accepted and being under mounting financial pressure by his own suppliers after deferring payments for feed, Koch's contacted the hotline maintained by the Grain Inspection, Packers and Stockyards Administration (GIPSA) for assistance. Tr. 23-24, 38-39. Following contact by GIPSA concerning the non-payment of Koch's invoices, Empire initially indicated that the company had been

personally observed the condition of the birds in question. Tr. 288, 317. Neither the Plant Representative nor the inspector signing the Condemnation form appeared as a witness.

⁷ The \$50,000.00 payment was less than half of the amount due for the initial shipment and Koch's at that point had a receivable of over \$420,000.00 which was unpaid, nearly \$185,000 of which was over 30 days from the Invoice date which because of waiting for the receipt of the weight slips customarily was prepared several days after the actual delivery. CX-8, 157-158, 160.

experiencing cash flow problems and that payment to Koch's would be forthcoming.⁸ Tr. 24. Thereafter Empire sent Koch's an extended payment plan and installment payments to Koch's were commenced by Empire. CX-6. Koch's agreed to the deferred payments, but final and complete payment of the amounts owed by Empire to Koch's was not completed until November 3, 2008.⁹

Given the vague terms and informal and relaxed nature of the negotiation for the supply of birds that was "the biggest thing on the company's board by far," in absence of a written agreement, it is difficult to see how Empire could have legally compelled Koch's to deliver any specific number of turkeys, particularly after Empire failed to remit in a timely manner for Koch's initial shipment to it. Tr. 196, 201, 210, 240-241, 244. It is manifestly clear from the testimony that no express credit agreement was agreed prior to any of the shipments to Empire. Tr. 135, 212-213. While Jeff Brown's testimony established that Empire clearly eschewed cash sales and in its usual arrangements assiduously avoided complying with Section 410 requirements,¹⁰ Empire's failure to agree on credit terms in advance of delivery by Koch's effectively eliminated the possibility of the transaction being considered a credit sale and left as the only option a cash sale under the Act.¹¹ Viewing the chronology of events, it is difficult to view Empire's conduct as anything other than a particularly pernicious "unfair practice"

⁸ The cash flow problems testified to by John Rollins (Tr. 24-25) were minimized by Jeff Brown in his testimony; however, he did testify concerning the need to pay other suppliers of turkeys being processed for the Trader Joe's contract during the same time he was withholding payment to Koch's. Tr. 240-241.

⁹ Empire's check was dated October 30, 2008; Koch's did not receive it until November 3, 2008. CX-8, Tr.138-139, 155.

¹⁰ Jeff Brown provided a confident gasconade in response to a question asking whether he had planned on paying Koch's the next day after he picked up the birds: "A. Absolutely not, that never, that doesn't happen." When asked if he had ever been involved in a cash sale with another processor, he also answered: "A. Never., whether buying or selling." Tr. 213

¹¹ For the purpose of this section, a cash sale means a sale in which the seller does not expressly extend credit to the buyer. 7 U.S.C. §228b-1(c)

contrary to the purpose and intent of the Act.¹² Given both the inordinate delay in payment and the threats of withholding further payments to Koch's unless and until Empire could satisfy its own contractual obligations which Empire failed to adequately protect and bind in advance by appropriate and enforceable supply agreements. Given the importance of the Trader Joe's contract to Empire, its dilatory and cavalier treatment of its obligations to the single largest supplier that was enabling their performance under the contract with Trader Joe's at the same time selectively paying other suppliers of turkeys cannot be excused. Only after coming under scrutiny by GIPSA did Empire commence making payments to Koch's in an extended and protracted basis.

As I consider the transactions before me to be a live poultry dealer's purchases of live poultry in a cash sale I reject the position that the Act does not apply to the transaction between Empire and Koch's. Similarly, as the vague, relaxed and informal agreement between the parties failed to create a contract capable of being breached, I will find Empire's withholding of payment was without justification and in violation of the Act. I will also reject Empire's suggestion because Empire and Koch's are still doing business together that no sanction is called for under the circumstances.

On the basis of the entire record including the testimony provided during the oral hearing and the exhibits entered into evidence, having considered the arguments of counsel, the following Findings of Fact, Conclusions of Law and Order will be entered.

¹² 7 U.S.C. §228b-1(b) provides "Any delay or attempt to delay...the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry...shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

Findings of Fact

1. Empire Koshher Poultry, Inc. is a Delaware corporation which operates a kosher chicken and turkey processing plant. Its principal place of business is in Mifflintown, Pennsylvania. CX-1.
2. Empire is a kosher poultry processor, processing chicken and turkey products, both raw and further processed, selling cold cuts of meat, whole birds as well as cooked and fried products to distributors for delivery to supermarkets and delicatessens around the country. Tr. 189-190.
3. Empire is a live poultry dealer operating in interstate commerce subject to the Packers and Stockyards Act.
4. In approximately May or June of 2008, Empire executed a contract to provide 43,200 ABF kosher hen turkeys to Trader Joe's for the 2008 end of year holiday season. Tr. 208. At time of executing the contract, Empire lacked capacity to fulfill the terms of the contract with their existing growing arrangements and was forced to compete in the marketplace for the already commenced production of ABF turkeys which would mature and reach the target weight during the performance period. Tr. 206. Empire contacted Duane Koch as a potential supplier of the needed birds. Although there is conflicting testimony as to the exact number of turkeys which Koch's would supply, Duane Koch agreed to sell some ABF turkeys to Empire.¹³ Tr. 141, 151-152, 175-176, 209-210.
5. The arrangement between Empire and Koch's was vague, relaxed, informal and was never reduced to writing. There was no express agreement in place concerning credit terms. Tr. 79, 87, 134-135, 196, 213, 254-255, 360, 363.

¹³ Koch's ultimately provided approximately 43,000 ABF hen turkeys. CX-9 through 14.

6. On August 6, 2008, Koch's delivered four truckloads containing 8,910 live turkeys weighing 163,400 pounds with a value of \$114,380.00 to Empire's processing plant. CX-9.

7. Empire failed to pay for the turkeys it received from Koch's within the time period required for payment in a cash sale as set forth in Section 410 of the Act. On August 8, 2008, Koch's invoiced Empire for the August 6, 2008 shipment requesting payment within 14 days.¹⁴ CX-9. Empire also failed to make payment within the requested 14 day period, and ultimately made only a single partial payment of \$50,000.00 which Koch's deposited on September 19, 2008 prior to the date that Empire was contacted by GIPSA.¹⁵ CX-8.

8. On August 13 and 14, 2008, Koch's sent a second four truckloads of 7,168 live turkeys to Empire's processing plant. CX-11. One truck containing 1,736 turkeys weighing 30,300 pounds of turkeys was unloaded and processed. *Id.* at 3. A second truck containing 1,848 turkeys weighing 32,840 was also unloaded; however, only 84 birds were processed. *Id.* at 4. Of the 1,820 birds in the lot, 4 were dead on arrival, 31 were condemned for Septicaemia and Toxemia, and another 1,200 were Plant rejects.¹⁶ The other two truckloads were not processed, but were sent back to Koch's. Tr. CX-11 at 5, 6.

9. Empire failed to pay for the turkeys it received from Koch's on August 13 and 14, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act.

¹⁴ Invoice No. 130111, CX-9.

¹⁵ This single payment represented less than half of the total amount due for the first shipment which had been purchased, received and accepted by Empire and was the only payment made by Empire to Koch's until after Empire was contacted by GIPSA.

¹⁶ The exact reason for the Plant rejects is unclear from the evidence. Empire claimed that the rejections were made by USDA Inspectors for *Airsacculitis*; however, the space on the form for that specific entry was left blank. Tr. 257. Neither the Authorized Plant Official nor the Inspector testified.

10. Koch processed the loads returned to it by Empire at their own processing plant without any birds being condemned. Tr. 143-144.
11. On August 20, 2008, Koch's delivered another four truckloads containing 8,902 turkeys weighing 140,120 pounds with a value of \$98,084.00 to Empire's processing plant. CX-10; RX-3.
12. Empire failed to pay for the turkeys it received from Koch's on August 20, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act.
13. On August 25, 2008, Koch's invoiced Empire for the August 13 and 14, 2008 shipments in the amount of \$30,840.00¹⁷ and for the August 20, 2008 shipment in the amount of \$98,084.00.¹⁸ Payment of both invoices was again requested within 14 days. CX-10, 11.
14. Empire failed to make payment of the August 25, 2008 invoice within the 14 day period requested by Koch's and, without justification, threatened Koch's by telling Duane Koch to send more turkeys if Koch's wanted to get paid.¹⁹ Tr. 151.
15. On September 3 and 4, 2008, Koch's delivered five truckloads containing 8,708 ABF hen turkeys weighing 140,900 pounds with a value of \$98,630.00 to Empire's processing plant. CX-12.
16. On September 4, 2008, Koch's delivered four truckloads containing 5,586 ABF hen turkeys weighing 97,200 pounds with a value of \$68,040.00 to Empire's processing plant. CX-13.

¹⁷ Invoice No. 130201, CX-11.

¹⁸ Invoice No. 130200, CX-10.

¹⁹ At this point in time, the unpaid invoices amounted to over \$243,000.00.

17. Empire failed to pay for the turkeys it received from Koch's on September 3 and 4, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act.

18. On September 8, 2008, Koch's delivered three truckloads containing 5,502 ABF hen turkeys weighing 101,660 pounds with a value of \$71,162.00 to Empire's processing plant. CX-14.

19. As with all prior loads, Empire failed to pay for the turkeys it received from Koch's on September 8, 2008 within the time period required for payment in a cash sale as set forth in Section 410 of the Act and Invoices for the September 3 and 4 shipments were sent on September 10, 2008 and the September 8, 2008 shipment was invoiced on September 18, 2008.²⁰ Again, payment was still not made within the requested 14 day remittance period.

20. Despite Empire's continued failure to timely remit payment for the turkeys purchased, received and accepted by Empire, Koch's continued to pay its growers in a timely fashion, but was forced to delay payments to its feed suppliers and was faced with the prospect of not being able to make payroll disbursements. Tr. 131-132, 134.

21. On September 24, 2008, faced with Empire's continued failure to pay the approximately \$400,000.00 in outstanding invoices for the tens of thousands of turkeys which Empire had received and accepted and being under mounting financial pressure by his own suppliers after deferring payments for feed, Koch's contacted the hotline maintained by the Grain Inspection, Packers and Stockyards Administration (GIPSA) for assistance. Tr. 23-24, 38-39.

²⁰ Invoice Nos. 130290, 130291 and 130346, CX 12, 13, and 14.

22. Following contact by GIPSA concerning the non-payment of Koch's invoices, Empire initially indicated that the company had been experiencing cash flow problems and that payment to Koch's would be forthcoming. Tr. 24.

23. On September 26, 2008, Empire sent Koch's a proposed extended payment plan which was accepted and installment payments to Koch's were commenced by Empire. CX-6, Tr. 138-139.

24. Faced with a desperate need for funds, Koch's agreed to the deferred payments, but final and complete payment of the amounts owed by Empire was not received by Koch's until November 3, 2008. Tr. 138-139, 155, 166.

25. After receiving final payment from Empire, Koch's indicated its satisfaction with the resolution of their dispute, their business relationship with Empire has continued, and Duane Koch expressed his desire not to harm Empire in any way. Tr. 155, 165-167.

26. Empire had previously received a "Notice of Violation" which specified the payment requirements of Section 410. CX-4.

26. Empire is a large operating concern, earning in excess of \$5,000,000.00 in 2009 and the recommended sanction is unlikely to have any impact upon Empire's continued ability to do business. CX-3, Tr. 332-333, 335, 351, 359.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. GIPSA has a valid interest in preventing poultry processors from ignoring the cash sale payment deadline, deferring poultry debts to alleviate cash flow problems, or to extract concessions from sellers under threats or coercion. Once having sought and

received GIPSA assistance in obtaining payment from Empire, Koch's is without standing to withdraw its report of Empire's conduct in violation of the Act.

2. Despite there being no advance expectation by Koch's that payment would be by the end of the next business day, no express agreement as to payment terms existed at the time of the transactions. Accordingly, the transactions between Koch's and Empire were cash sales under the Act requiring payment within the time established by Section 410. 7 U.S.C. §228b-1.

3. Koch's ultimate acceptance of deferred credit payment terms after complaint to and intervention by GIPSA does not alter the nature of the cash sale transactions when they were negotiated and the poultry purchased, received and accepted.

4. Empire's failure to pay for poultry purchased, received and accepted within the time period required for payment in a cash sale as set forth in Section 410 of the Act was without justification and constitutes an unfair practice in willful violation of the Act.

Order

1. Empire Kosher Poultry, Inc., its agents and employees, directly or through any corporate or other device, in connection with the corporation's activities subject to the Act, shall cease and desist from failing to pay for poultry purchases within the time period required by Section 410 of the Act. 7 U.S.C. §228b-1.

2. Empire is assessed a civil penalty of eighteen thousand dollars (\$18,000.00) pursuant to Section 411(b) of the Act. 7 U.S.C. §228b-2(b). The payment shall be made out to the "U.S. Department of Agriculture" and sent to:

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

The Docket No. 10-0109 shall be noted on the payment instrument.

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

March 8, 2011



Peter M. Davenport
Chief Administrative Law Judge

Copies to: Charles E. Spicknall, Esquire
Jonathan H. Rudd, Esquire

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue SW
Room 1031, South Building
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776