

DEC 20 2012

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	P. & S. Docket No. D-12-0206
)	
Golden West Cattle Co., LLC, and)	
Michael Kastner,)	
)	
Respondents)	Decision and Order

PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 26, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges: (1) on or about June 28, 2010, Golden West Cattle Co., LLC [hereinafter Golden West], under the direction, management, and control

of Michael Kastner, in connection with its operations subject to the Packers and Stockyards Act, issued checks in payment for livestock purchases that were returned unpaid by the bank upon which the checks were drawn because Golden West did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented, in willful violation of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43; and (2) on or about June 21, 2010, and June 28, 2010, Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, purchased livestock and failed to pay the full amount of the purchase price for the livestock within the period required by the Packers and Stockyards Act, in willful violation of 7 U.S.C. §§ 192(a) and 228b and 9 C.F.R. § 201.43.¹

The Hearing Clerk served Golden West and Mr. Kastner with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on March 30, 2012.² Neither Golden West nor Mr. Kastner filed an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Hearing Clerk sent a letter, dated May 16, 2012, to Golden West and Mr. Kastner informing them that an answer to the Complaint had not been filed within the time

¹Compl. ¶¶ II-III.

²United States Postal Service Track & Confirm for label number 7005 1160 0002 7836 3755.

prescribed by the Rules of Practice. Neither Golden West nor Mr. Kastner responded to the Hearing Clerk's May 16, 2012, letter.

On May 18, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Show Cause Order in which he provided the parties 15 days within which to show cause why a default decision should not be entered. On June 4, 2012, the Deputy Administrator filed a response to the Chief ALJ's Show Cause Order in the form of 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]. Neither Golden West nor Mr. Kastner filed a response to the Chief ALJ's Show Cause Order.

The Hearing Clerk served Golden West and Mr. Kastner with the Deputy Administrator's Motion for Default Decision, the Deputy Administrator's Proposed Default Decision, and the Hearing Clerk's service letter on July 10, 2012.³ Neither Golden West nor Mr. Kastner filed objections to the Motion for Default Decision and Proposed Default Decision within 20 days after the Hearing Clerk served them with the Motion for Default Decision and Proposed Default Decision, as required by 7 C.F.R. § 1.139.

On September 25, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Golden West and Mr. Kastner willfully

³Memorandum To The File, dated July 12, 2012, signed by L. Eugene Whitfield, Hearing Clerk.

violated 7 U.S.C. §§ 192(a) and 228b, as alleged in the Complaint; (2) ordering Golden West and Mr. Kastner to cease and desist from violations of the Packers and Stockyards Act; and (3) assessing Golden West and Mr. Kastner a \$10,500 civil penalty.⁴

On November 1, 2012, Golden West and Mr. Kastner filed Petition To Vacate Or In The Alternative Appeal With A Request For Pardon Or Lesser Sanction [hereinafter Appeal Petition]. On November 26, 2012, the Deputy Administrator filed Complainant's Opposition To Respondents' Petition to Vacate or in the Alternative Appeal with a Request for Pardon or Lesser Sanction. On November 30, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

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

DECISION

Statement of the Case

Neither Golden West nor Mr. Kastner filed a timely answer to the Complaint. Pursuant to 7 C.F.R. § 1.136(c), the failure to file a timely answer is deemed, for purposes of the proceeding, an admission of the allegations in the Complaint. Further, pursuant to 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 contained in the Complaint, constitutes a waiver of hearing.

⁴Chief ALJ's Default Decision and Order at 3-4.

Accordingly, the material allegations in the Complaint are adopted as findings of fact, and I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Golden West is a Colorado corporation actively registered to do business within the State of New Jersey.
2. Golden West has a mailing address in Teaneck, New Jersey.
3. Golden West was, at all times material to this proceeding:
 - (a) Engaged in the business of buying livestock in commerce for the purpose of slaughter; and
 - (b) A packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.
4. Mr. Kastner is an individual whose home address is in the State of New Jersey.
5. Mr. Kastner was, at all times material to this proceeding:
 - (a) One hundred percent owner of Golden West;
 - (b) President of Golden West;
 - (c) Responsible for the direction, management, and control of Golden West; and
 - (d) A packer within the meaning of, and subject to the provisions of, the Packers and Stockyards Act.

6. Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, on or about the date and in the transaction described in this Finding of Fact, issued a check in payment for livestock purchases, which check was returned unpaid by the bank upon which the check was drawn because Golden West did not have and maintain sufficient funds on deposit and available in the account upon which the check was drawn to pay the check when presented.

Purchase Date	Seller's Name	No. of Head	Livestock Amount	Due Date	Check Date	Check No.	Check Amount
6/28/2010	Greg Kroupa	48	\$14,673	6/29/2010	7/9/2010	2114	\$14,673

7. Golden West, under the direction, management, and control of Mr. Kastner, in connection with its operations subject to the Packers and Stockyards Act, in the transactions described in this Finding of Fact, purchased livestock and failed to pay the full amount of the purchase price for the livestock within the time period required by the Packers and Stockyards Act.

Seller's Name	Purchase Date	No. of Head	Livestock Amount	Due Date	Payment Instrument No.	Date Paid	Days Late
Jim Bamford	6/21/2010	40	\$16,562.75	6/22/2010	1105	8/24/2010	63
Greg Kroupa	6/28/2010	48	\$14,673	6/29/2010	2114	8/23/2010	55

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Golden West and Mr. Kastner willfully violated 7 U.S.C. §§ 192(a) and 228b.

Golden West and Mr. Kastner's Appeal Petition

Golden West and Mr. Kastner raise seven issues on appeal. First, Golden West and Mr. Kastner contend their Appeal Petition was timely filed (Appeal Pet. ¶¶ 3-10).

The Hearing Clerk served Golden West and Mr. Kastner with the Chief ALJ's Default Decision and Order on October 3, 2012.⁵ The Rules of Practice provide that a party must file an appeal from an administrative law judges' written decision with the Hearing Clerk within 30 days after the Hearing Clerk serves that party with the administrative law judge's decision.⁶ Thus, Golden West and Mr. Kastner were required to file their Appeal Petition with the Hearing Clerk no later than November 2, 2012. Golden West and Mr. Kastner filed their Appeal Petition with the Hearing Clerk on November 1, 2012; therefore, I agree with Golden West and Mr. Kastner that their Appeal Petition was timely filed.

Second, Golden West and Mr. Kastner contend they were not served with the Complaint on March 30, 2012 (Appeal Pet. ¶¶ 2(a)(i); 11-17).

⁵Appeal Pet. ¶ 3.

⁶7 C.F.R. § 1.145(a).

United States Postal Service Track & Confirm for label number 7005 1160 0002 7836 3755 establishes that the Hearing Clerk served Golden West and Mr. Kastner with the Complaint on March 30, 2012. Golden West and Mr. Kastner offer nothing to show this United States Postal Service record, placed in the docket file by the Hearing Clerk, inaccurately states the date of delivery of the Complaint to Golden West and Mr. Kastner. Therefore, I reject Golden West and Mr. Kastner's contention that they were not served with the Complaint on March 30, 2012.

Third, Golden West and Mr. Kastner contend they were never notified of their default (Appeal Pet. ¶ 2(a)(ii)).

The record establishes that the Chief ALJ filed a Default Decision and Order on September 25, 2012, and, contrary to Golden West and Mr. Kastner's contention that they were never notified of their default, Golden West and Mr. Kastner assert they were served with the Chief ALJ's Default Decision and Order on October 3, 2012 (Appeal Pet. ¶ 3). Moreover, Golden West and Mr. Kastner appealed the Chief ALJ's Default Decision and Order by filing their Appeal Petition with the Hearing Clerk on November 1, 2012. In light of Golden West and Mr. Kastner's assertion that the Hearing Clerk served them with the Chief ALJ's Default Decision and Order on October 3, 2012, and Golden West and Mr. Kastner's November 1, 2012, Appeal Petition, I reject Golden West and Mr. Kastner's contention that they were never notified of their default.

Fourth, Golden West and Mr. Kastner contend the Chief ALJ's findings of fact are error (Appeal Pet. ¶¶ 2(a)(iii)-(vii), (b)(i), (iv); 21-24).

The Hearing Clerk served Golden West and Mr. Kastner with the Complaint on March 30, 2012.⁷ Golden West and Mr. Kastner failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint, as required by 7 C.F.R. § 1.136(a). The Rules of Practice provide that the failure to file a timely answer to the Complaint is deemed, for purposes of the proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing.⁸ The Chief ALJ adopted the material allegations of fact alleged in the Complaint as the findings of fact in his Default Decision and Order based upon Golden West and Mr. Kastner's deemed admission of the allegations in the Complaint. Therefore, I reject Golden West and Mr. Kastner's contention that the Chief ALJ's findings of fact are error.

Fifth, Golden West and Mr. Kastner contend their violations of the Packers and Stockyards Act were not "unfair practices" because the livestock sellers, Mr. Kroupa and Mr. Bamford, expressly agreed to payment for the livestock in question in a manner other than required by 7 U.S.C. § 228b(a) (Appeal Pet. ¶¶ 2(a)(viii)-(ix), (b)(ii)-(iii); 25-31).

⁷See note 2.

⁸7 C.F.R. §§ 1.136(c), .139, .141(a).

Golden West and Mr. Kastner correctly point out that the prompt payment provisions in 7 U.S.C. § 228b(a) may be modified by the parties to the purchase and sale of livestock, as follows:

§ 228b. Prompt payment for purchase of livestock

.....
(b) Waiver of prompt payment by written agreement; disclosure requirements

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

7 U.S.C. § 228b(b). However, Golden West and Mr. Kastner have not offered any evidence of their express written agreements with Messrs. Kroupa and Bamford. Instead, Golden West and Mr. Kastner failed to file a timely response to the Complaint and are deemed to have admitted that they failed to make prompt payment for the purchase of livestock. As a matter of law, a packer's delay in payment for livestock is an unfair practice:

§ 228b. Prompt payment for purchase of livestock

.....
(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or

otherwise for the purpose of or resulting in extending the normal period of payment for such livestock 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.

7 U.S.C. § 228b(c). Therefore, I reject Golden West and Mr. Kastner’s contention that their failure to make full payment promptly for livestock, in willful violation of 7 U.S.C. § 228b(a), is not an “unfair practice,” as that term is used in the Packers and Stockyards Act.

Sixth, Golden West and Mr. Kastner contend the civil penalty assessed by the Chief ALJ is not warranted in law and is without justification in fact (Appeal Pet. ¶¶ 2(c)(i)-(vi); 41-51).

The Chief ALJ assessed Golden West and Mr. Kastner, jointly and severally, a \$10,500 civil penalty.⁹ The maximum civil penalty that the Secretary of Agriculture may assess for each of Golden West and Mr. Kastner’s violations of the Packers and Stockyards Act is \$11,000.¹⁰ The Chief ALJ could have assessed Golden West and Mr. Kastner a civil penalty of \$33,000 each. Therefore, I reject Golden West and

⁹Chief ALJ’s Default Decision and Order at 4.

¹⁰The Packers and Stockyards Act provides that the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 192(a) is \$10,000 (7 U.S.C. § 193(b)). However, the maximum civil penalty that the Secretary of Agriculture may assess for each violation of 7 U.S.C. § 192(a) has been modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), and various implementing regulations issued by the Secretary of Agriculture. When Golden West and Mr. Kastner violated the Packers and Stockyards Act, the maximum civil penalty for each violation of 7 U.S.C. § 192(a) was \$11,000 (7 C.F.R. § 3.91(b)(6)(i)).

Mr. Kastner's contention that the \$10,500 civil penalty assessed by the Chief ALJ is not warranted in law.

Moreover, the civil penalty assessed by the Chief ALJ is justified in fact. When determining the amount of the civil penalty, the Secretary of Agriculture must consider three factors: (1) the gravity of the offense; (2) the size of the business involved; and (3) the effect of the civil penalty on the person's ability to continue in business (7 U.S.C. § 193(b)).

Golden West and Mr. Kastner, in two transactions, purchased 88 head of livestock for \$31,235.75 from two livestock sellers and failed to pay, when due, the full purchase price of the livestock. These two transactions occurred within a week of each other; namely, on June 21, 2010, and June 28, 2010. Golden West and Mr. Kastner's payment to Mr. Bamford was 63 days late and their payment to Mr. Kroupa was 55 days late. After considering the number of violative transactions, the number of livestock sellers involved, the number of livestock involved, the total amount of the transactions, the period of time during which the violative transactions commenced, and the length of time that Golden West and Mr. Kastner delayed payment, I find Golden West and Mr. Kastner's violations of the Packers and Stockyards Act sufficiently grave to support the Chief ALJ's assessment of a \$10,500 civil penalty against Golden West and Mr. Kastner.

The only indication of the size of Golden West and Mr. Kastner's business and the effect of assessment of a \$10,500 civil penalty on Golden West and Mr. Kastner's ability to continue in business are assertions contained in Golden West and Mr. Kastner's Appeal Petition. Golden West and Mr. Kastner assert Golden West is a small business and Mr. Kastner is now unemployed (Appeal Pet. ¶ 50). Golden West and Mr. Kastner further assert they have exited the industry and will not be returning to the industry in the future (Appeal Pet. ¶ 2(c)(v)). Therefore, for the purpose of determining the amount of the civil penalty in this proceeding, I find the size of Golden West and Mr. Kastner's business is small and the amount of the civil penalty has no effect on Golden West and Mr. Kastner's ability to continue in business as Golden West and Mr. Kastner are no longer packers and will not become packers in the future.

After consideration of the gravity of Golden West and Mr. Kastner's violations of the Packers and Stockyards Act, the size of Golden West and Mr. Kastner's business, and the effect of assessment of a \$10,500 civil penalty on Golden West and Mr. Kastner's ability to continue in business, I find the Chief ALJ's assessment of a \$10,500 civil penalty against Golden West and Mr. Kastner, jointly and severally, justified in fact.

Seventh, Golden West and Mr. Kastner contend a finding of actual or likely harm to competition is a necessary prerequisite to the conclusion that a violation of the Packers and Stockyards Act has occurred, and the Chief ALJ failed to find that actual or likely

harm to competition resulted from Golden West and Mr. Kastner's actions or inaction (Appeal Pet. ¶¶ 35-40).

The purposes of the Packers and Stockyards Act are varied; however, one of the primary purposes of the Packers and Stockyards Act is to assure proper handling and transmission of a livestock seller's funds, including prompt payment.¹¹ The requirement that a livestock purchaser make timely payment effectively prevents sellers from being forced to finance transactions.¹² Golden West and Mr. Kastner contravened the timely payment requirement and their violations directly thwart one of the primary purposes of the Packers and Stockyards Act.¹³ I do not find that the Chief ALJ's failure to find actual or likely harm to competition resulting from Golden West and Mr. Kastner's actions or inaction, error.

¹¹*Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966).

¹²*Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating timely payment in a livestock purchase prevents the seller from being forced, in effect, to finance the transaction); *In re Robert Morales Cattle Co.*, ___ Agric. Dec. ___, slip op. at 19 (Mar. 6, 2012) (same); *In re Richard L. Reece* (Order Denying Pet. to Reconsider), ___ Agric. Dec. ___, slip op. at 7 (Nov. 4, 2011) (same); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1429 (1998) (same).

¹³*See Mahon v. Stowers*, 416 U.S. 100, 111 (1974) (per curiam) (dictum) (stating regulations requiring prompt payment support the policy to ensure that packers do not take unnecessary advantage of cattle sellers by holding funds for the packers' own purposes); *Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 85 (5th Cir. 1966) (stating one of the purposes of the Packers and Stockyards Act is to ensure prompt payment).

Golden West and Mr. Kastner's Request for Oral Argument

Golden West and Mr. Kastner's request for oral argument, which the Judicial Officer may grant, refuse, or limit,¹⁴ is refused because the issues are not complex and oral argument would serve no useful purpose.

For the foregoing reasons, the following Order is issued.

ORDER

1. Golden West and Mr. Kastner, their agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:
 - a. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which the checks are drawn to pay the checks when presented; and
 - b. Failing to pay, when due, the full purchase price of livestock.
2. Golden West and Mr. Kastner are assessed, jointly and severally, a \$10,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA—GIPSA
P.O. Box 790335
St. Louis, MO 63197-9000

¹⁴7 C.F.R. § 1.145(d).

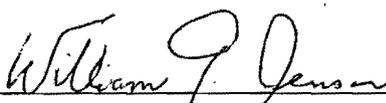
Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Golden West and Mr. Kastner. Golden West and Mr. Kastner shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-12-0206.

RIGHT TO JUDICIAL REVIEW

Golden West and Mr. Kastner have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Golden West and Mr. Kastner must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁵ The date of entry of the Order in this Decision and Order is December 18, 2012.

Done at Washington, DC

December 18, 2012



William G. Jenson
Judicial Officer

¹⁵28 U.S.C. § 2344.

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