

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-11-0438
)
MICHAEL V. BOTT AND)
TONY BOTT,)
)
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 September 27, 2011. 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 under the Packers and Stockyards Act (9 C.F.R. pt. 201); 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].

The Deputy Administrator alleges, during the period March 2008 through October 2009: (1) Michael V. Bott and Tony Bott purchased livestock and failed to pay, when due, the full purchase price for the livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b; (2) Tony Bott issued 17 checks in purported payment for livestock purchases that were returned unpaid because Michael V. Bott and Tony Bott 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. §§ 213(a) and 228b; and (3) Michael V. Bott and Tony Bott did not maintain trucking or freight invoices and load make-up sheets, as required by 7 U.S.C. § 221.¹

The Hearing Clerk served Michael V. Bott and Tony Bott with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on October 12, 2011.² Michael V. Bott and Tony Bott requested an extension of time within which to file an answer to the Complaint. On November 2, 2011, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] granted Michael V. Bott and Tony Bott's request and extended the time for filing an answer to December 1, 2011.³ Neither Michael V. Bott nor Tony Bott filed a timely answer to the Complaint, and on January 6,

¹Compl. at 3-4 ¶¶ III-V.

²United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7835 8904 and United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7835 8898.

³Chief ALJ's Order Extending Time filed November 2, 2011.

2012, 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 January 23, 2012, the Deputy Administrator filed a Response to Show Cause Order and 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]. The Hearing Clerk served Michael V. Bott and Tony Bott with the Deputy Administrator's Motion for Default Decision and Proposed Default Decision and the Hearing Clerk's service letter.⁴ On February 17, 2012, Michael V. Bott and Tony Bott each filed a response to the Deputy Administrator's Motion for Default Decision and Proposed Default Decision.

On March 9, 2012, the Chief ALJ, in accordance with 7 C.F.R. § 1.139, issued a Default Decision and Order: (1) concluding Michael V. Bott and Tony Bott willfully violated 7 U.S.C. §§ 213(a) and 228b; (2) concluding Michael V. Bott and Tony Bott failed to keep records that fully and correctly disclose all the transactions involved in their business, as required by 7 U.S.C. § 221; (3) ordering Michael V. Bott and Tony Bott to cease and desist from failing to pay, when due, the full purchase price of livestock; (4) ordering Michael V. Bott and Tony Bott to cease and desist from failing to keep records that fully and correctly disclose all transactions involved in their business, as

⁴United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7835 7563 and United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7835 7570.

required by 7 U.S.C. § 221; and (5) assessing Michael V. Bott and Tony Bott, jointly and severally, a \$34,000 civil penalty.⁵

On April 11, 2012, Michael V. Bott and Tony Bott appealed the Chief ALJ's Default Decision and Order to the Judicial Officer. On May 2, 2012, the Deputy Administrator filed Response to letters of appeal. On May 4, 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 agency decision.

DECISION

Statement of the Case

Michael V. Bott and Tony Bott failed to file 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. 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.

⁵Chief ALJ's Default Decision and Order at the third and fourth unnumbered pages.

Findings of Fact

1. Michael V. Bott is an individual whose business address is in Rupert, Idaho.
2. At all times material to this proceeding, Michael V. Bott was:
 - (a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account;
 - (b) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and
 - (c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, a market agency buying on commission, and a market agency providing clearing services.
3. Tony Bott is an individual whose business address is in Rupert, Idaho.
4. At all times material to this proceeding, Tony Bott was:
 - (a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account;
 - (b) Engaged in the business of a market agency, buying livestock in commerce on a commission basis; and
 - (c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.
5. During the period March 2008 through October 2009, Michael V. Bott and Tony Bott, under the name “MB Livestock” and their own names, in connection with

their operations subject to the Packers and Stockyards Act, failed to pay, when due, the full amount of the purchase price for livestock within the time period required by 7 U.S.C. § 228b and 9 C.F.R. § 201.43 in the transactions as identified generally in Attachment A to the Complaint.

6. During the period March 2008 through October 2009, Tony Bott issued 17 checks, on the account of “MB Livestock” and Michael Bott and Doris Bott, in the total amount of \$1,182,982.90 to Cattleman’s Livestock Auction, Inc., d/b/a Treasure Valley Livestock, of Caldwell, Idaho, in purported payment for livestock purchases, that were returned unpaid by the bank upon which they were drawn. These checks were returned because Michael V. Bott and Tony Bott 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.

7. During the period March 2008 through October 2009, Michael V. Bott and Tony Bott did not maintain trucking or freight invoices or load make-up sheets.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Michael V. Bott and Tony Bott willfully violated 7 U.S.C. §§ 213(a) and 228b.

3. Michael V. Bott and Tony Bott failed to keep records that fully and correctly disclose all the transactions involved in their business, as required by 7 U.S.C. § 221, by failing to keep trucking or freight invoices and load make-up sheets.

Michael V. Bott's and Tony Bott's Appeal Petitions

Michael V. Bott and Tony Bott raise five issues in their appeal petitions. First, Michael V. Bott and Tony Bott deny the allegations in the Complaint.

The Hearing Clerk served Michael V. Bott and Tony Bott with the Complaint on October 12, 2011;⁶ therefore, an answer to the Complaint was originally required to be filed with the Hearing Clerk no later than November 1, 2011. Michael V. Bott and Tony Bott requested an extension of time within which to file an answer to the Complaint, which the Chief ALJ granted extending the time for filing an answer to December 1, 2011.⁷ Michael V. Bott and Tony Bott filed their responses to the allegations of the Complaint on February 17, 2012, 2 months 16 days after their answers to the Complaint were due. The failure to file a timely answer to the Complaint is deemed, for the purposes of the proceeding, an admission of the allegations of the Complaint and constitutes a waiver of hearing.⁸ Therefore, Michael V. Bott's and Tony Bott's denials of the allegations of the Complaint both in their responses to the Deputy Administrator's

⁶See note 2.

⁷See note 3.

⁸7 C.F.R. §§ 1.136(c), .139, .141(a).

Motion for Default Decision and Proposed Default Decision and in their appeal petitions come far too late to be considered.

Second, Michael V. Bott and Tony Bott assert none of the livestock sellers from whom they purchased livestock has complained about late payment. Tony Bott asserts the only person who “seems to have a problem with [his] practices is the [Packers and Stockyards Program] agent.” (Tony Bott’s Appeal Pet. at 1.)

The Packers and Stockyards Act requires that each market agency and each dealer promptly pay for livestock purchases, as follows:

§ 228b. Prompt payment for purchase of livestock

(a) Full amount of purchase price required; methods of payment

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price[.]

7 U.S.C. § 228b(a). A failure to pay for livestock purchases, when due, is an unfair practice under the Packers and Stockyards Act⁹ even if the livestock sellers have acquiesced to late payments.¹⁰ Therefore, even if I were to find that none of the livestock

⁹See 7 U.S.C. § 213(a).

¹⁰See *In re San Jose Valley Veal, Inc.*, 34 Agric. Dec. 966, 981-82 (1975) (holding the existence of a course of dealing allowing for delayed payment did not excuse the packing company from delaying its payments beyond the close of the next business day and holding the delayed payments to be in violation of the Packers and Stockyards Act); *In re Sebastopol Meat Co., Inc.*, 28 Agric. Dec. 435, 441 (1969) (rejecting the argument that no violation of the Packers and Stockyards Act occurred as the livestock sellers

(continued...)

sellers from whom Michael V. Bott and Tony Bott purchased livestock has complained about late payment, that finding would not change the disposition of this proceeding.

Third, Michael V. Bott asserts the Packers and Stockyards Program will not tell him the number of days he must own cattle before they become feeder cattle, rather than dealer cattle.

Michael V. Bott fails to explain the relevance of the Packers and Stockyards Program's purported failure to inform him of the number of days he must own cattle before they become feeder cattle, and I find Michael V. Bott's assertion regarding the Packers and Stockyard Program's lack of communication on the subject of feeder cattle irrelevant to this proceeding. Michael V. Bott is deemed, by his failure to file a timely answer to the Complaint, to have admitted the allegations of the Complaint,¹¹ including the allegation that, at all times material to the Complaint, he "[e]ngaged in the business of a dealer."¹²

Fourth, Michael V. Bott and Tony Bott assert the Packers and Stockyards Program does not enforce the Packers and Stockyards Act against everyone.

¹⁰(...continued)
acquiesced in the late payments by continuing to do business with the livestock purchaser), *aff'd*, 440 F.2d 983 (9th Cir. 1971).

¹¹7 C.F.R. § 1.136(c).

¹²Compl. at 1 ¶ I(b)(1).

Michael V. Bott and Tony Bott's assertion that the Packers and Stockyards Program does not enforce the Packers and Stockyards Act against everyone is not relevant to this proceeding.¹³ The Packers and Stockyards Act does not need to be enforced everywhere to be enforced somewhere and agency officials have broad discretion in deciding against whom to institute administrative disciplinary proceedings for violations of the Packers and Stockyards Act. The decision of whether and when an agency exercises its enforcement powers is left to agency discretion, except to the extent determined by Congress.¹⁴

Fifth, Tony Bott asserts the "MB Livestock" account no longer exists.

Tony Bott fails to explain the relevance of the closure of the "MB Livestock" account, and I find Tony Bott's assertion regarding the closure of the "MB Livestock" account irrelevant to this proceeding. Tony Bott is deemed, by his failure to file a timely

¹³*In re Sam Mazzola* (Ruling Denying Mr. Mazzola's Motion to Reopen), 68 Agric. Dec. 1066, 1068-69 (2009) (finding that a respondent's assertions that the agency failed to enforce the Animal Welfare Act against others who had violated the Animal Welfare Act had no relevance in the proceeding concerning violations committed by the respondent).

¹⁴*See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869); *Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001); *Massachusetts Pub. Interest Research Group v. U.S. Nuclear Regulatory Comm'n*, 852 F.2d 9, 14-19 (1st Cir. 1988); *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949, 952-53 (3d Cir. 1987).

answer to the Complaint, to have admitted the allegations of the Complaint,¹⁵ including the allegation that he issued 17 checks “on the account of ‘MB Livestock’ and Michael Bott and Doris Bott, in the total amount of \$1,182,982.90 to Cattleman’s Livestock Auction, Inc. d.b.a. Treasure Valley Livestock, of Caldwell, ID . . . in purported payment for livestock purchases, that were returned unpaid by the bank upon which they were drawn.”¹⁶

For the foregoing reasons, the following Order is issued.

ORDER

1. Michael V. Bott and Tony Bott, their agents and employees, directly or indirectly through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

- (a) failing to pay, when due, the full purchase price of livestock; and
- (b) failing to keep records that fully disclose all transactions involved in their business, including trucking or freight invoices and load make-up sheets.

2. Michael V. Bott and Tony Bott are assessed, jointly and severally, a \$34,000 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:

¹⁵See note 11.

¹⁶Compl. at 3 ¶ III(b).

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63197-0335

Payment of the civil penalty shall be sent to, and received by, USDA-GIPSA within 60 days after service of this Order on Michael V. Bott and Tony Bott. Michael V. Bott and Tony Bott shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-11-0438.

Done at Washington, DC

May 8, 2012

William G. Jenson
Judicial Officer