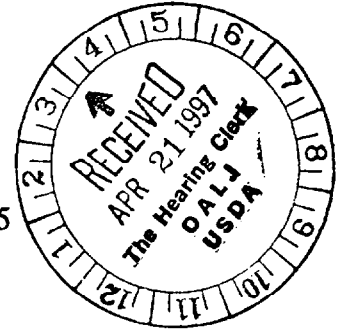


UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE



In re:) P. & S. Docket No. D-96-25
Raymond Perkins d/b/a)
Seneca Packing Co.,)
)
Respondent)
)

DECISION AND ORDER UPON ADMISSION
BY FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.), herein referred to as the Act, instituted by a complaint and notice of hearing filed by the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and notice of hearing and the Rules of Practice (7 C.F.R. § 1.130 et seq.) governing proceedings under the Act were served upon respondent by certified mail.

Respondent failed to file an answer within the time prescribed in the Rules of Practice. However on April 9, 1997, respondent filed a letter in response to complainant's Motion for Adoption of Proposed Decision. Respondent did not explain his failure to file an answer within the prescribed time period, and did not attempt to deny the principal allegations of the complaint. Under the Rules of Practice respondent's failure to file a timely answer constitutes an admission of the complaint's allegations that respondent purchased livestock for slaughter without a required bond after receiving notification on July 13, 1994, that he was required to obtain an adequate bond or its equivalent, and that there remains unpaid a total of \$95,833.30 for livestock purchases made between

February 28, 1995, and April 4, 1995. (7 C.F.R. § 1.136(c)). Respondent instead asserted: (1) that he did not wilfully violate the Act; (2) that he was trying without success to obtain a bond while operating; (3) that P & S in Indianapolis (complainant) knew he was slaughtering cattle without a bond; (4) that Merlin Garver (the unpaid livestock seller) knew he was not bonded; (5) that he restarted operations on March 31, 1996, with an approved bond; and (6) that he ceased his resumed operations on July 31, 1996, and is now without funds and unemployed.

Findings of Fact

1. Respondent Raymond Perkins, doing business as Seneca Packing Co., is an individual whose business address is Box 127, Republic, Ohio 44867.

2. Respondent is, and at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Respondent was notified by certified mail, received July 13, 1994, that he was required to obtain a \$100,000.00 surety bond or bond equivalent to secure the performance of his livestock buyer operations under the Act before commencing the purchase of livestock in commerce for purposes of slaughter. Notwithstanding such notice, respondent commenced and continued to engage in the business of a packer without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

4. Respondent's average annual purchases of livestock for purposes of slaughter have exceeded \$500,000.00.

5. Respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased from Merlin L. Garver, Inc., a dealer located in West Salem, Ohio, livestock on a dressed weight basis that had moved in commerce through posted stockyards in Ohio, Pennsylvania and West Virginia. Respondent failed to pay, when due, the full purchase price of the livestock.

6. There remains unpaid a total of \$95,833.30 for these livestock purchases.

Conclusions

Respondent has admitted allegations of purchasing livestock for slaughter as a packer without required bond coverage, failing to pay, and failing to pay when due, for substantial purchases of livestock by his failure to file a timely answer. A failure to file a timely answer constitutes an admission of the material allegations in the complaint. *See, 7 C.F.R. § 1.136(c); In re Jeremy Byrd, d/b/a T Byrd Cattle Company, 55 Agric. Dec. 443, 450 (1996).* Respondent shall not now be permitted to contest the complaint after failing to file a timely answer without showing good cause for this failure. Respondents are required to deny or explain any allegation of the complaint and set forth any defense in a timely answer to enable the Department to handle its large caseload in an expeditious and economical manner; to provide some closure to the process; and to ensure that all parties are treated fairly under recognized rules that are uniformly applied.

Respondent has not asserted that the facts alleged in the complaint are untrue. Rather, respondent has asserted that there are other facts that should be considered in mitigation. Although respondent has failed to show why he did not assert the existence of such mitigating circumstances in a timely filed answer, we will briefly address respondent's points and show why their establishment would be unavailing.

It is well-settled that operating without a bond is a serious violation, and efforts to secure a bond do not mitigate the violation. *See, In re Danny Cobb and Crockett Livestock Sales Company, Inc.*, 48 Agric. Dec. 234, 269 (1989), aff'd, 889 F.2d 724 (6th Cir. 1990). Respondent's failure to pay for his livestock purchases constitutes a serious violation of Sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b), and the fact that these were unexpected financial difficulties would not normally warrant the withholding or lessening of sanctions. *See, In re Richard N. Garver*, 45 Agric. Dec. 1090, 1094-1095 (1986), aff'd, 846 F.2d 1029 (6th Cir.), cert. denied 488 U.S. 820 (1988); *In re Rotches Pork Packers, Inc., et al*, 46 Agric. Dec. 573, 584 (1987).

Respondent has violated express bonding and payment provisions of the Act and the regulations, and his conduct was willful. A violation is willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), if a person carelessly disregards regulatory requirements. *See, Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-188 (1973); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 112 S.Ct. 178 (1991); *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983).

The \$10,500.00 civil penalty sought by complainant is an appropriate deterrent for the violations that are the subject of this proceeding. Complainant routinely requests a civil penalty equal to about ten percent of the unpaid livestock purchase amount from a packer, unless there is reason to believe that the assessment of such a penalty would adversely affect the interests of unpaid livestock sellers. The total civil penalty sought derives from this calculation and an additional amount, related to the amount of bond deficiency in the case, that is also sought as a standard deterrent. When a packer is no longer operating, the Secretary may assess an appropriate civil penalty without considering the effect of the penalty on the person's ability to continue in business

as would otherwise be required under Section 203(b) of the Act (7 U.S.C. § 193 (b)) when a proposed civil penalty is contested by a respondent who has filed a timely answer.

Respondent has asserted in his response to the pending motion that he is “financially broke and unemployed” (Respondent’s letter). Respondent was advised by complainant’s counsel that a substantial civil penalty was being sought when he was sent a proposed consent decision following service of the complaint. Respondent elected to ignore the proceeding until complainant filed its motion for a default decision and his present claim of financial distress in reduction of the civil penalty proposed by complainant comes too late.

By reason of the facts found in Findings of Fact 3 and 4 above, respondent wilfully violated section 202(a) of the Act (7 U.S.C. § 192 (a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 192(a), 228b).

Order

Respondent Raymond Perkins, his agents and employees, directly or through any corporate or other device, in connection with his operations as a packer, shall cease and desist from:

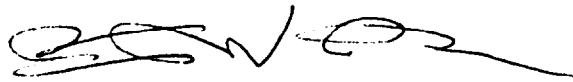
1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is assessed a civil penalty in the amount of Ten Thousand Five Hundred Dollars (\$10,500.00).

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 21st day of April,

A handwritten signature in black ink, appearing to read 'V. Palmer', written over a horizontal line.

Victor W. Palmer
Chief Administrative Law Judge