

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0011

In re:

RONNIE LEWIS
doing business as
LAZY L ORDER BUYERS,

Respondent.

DECISION AND ORDER

This matter is before me pursuant to a complaint filed by the United States Department of Agriculture, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administrations (“GIPSA”; “Complainant”) against Ronnie Lewis, d/b/a Lazy L Order Buyers (“Respondent”), alleging violations of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. § 181 et seq. (“the Act”).

I. ISSUES

1. Whether Respondent failed to timely pay sellers for the purchase of livestock in willful violation of the section 312(a) of Act (7 U.S.C. § 213(a));
2. Whether Respondent operated under the Act without adequate surety; and
3. If Respondent willfully violated the Act, whether the sanctions recommended by Complainant should be imposed.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

On October 5, 2011 Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”; “Hearing Clerk”). On November 1, 2011, Respondent filed an Answer with the Hearing Clerk, acting *pro se*. References to the

Answer in this Decision and Order shall be denoted as “RX-1”. By Order issued February 2, 2012, I set deadlines for the parties’ submissions in advance of setting a hearing date.

Complainant timely filed pre-hearing submissions in accordance with my Order, but Respondent did not file any pre-hearing submissions. On February 15, 2012, Complainant filed a motion for Decision by reason of Default. I deferred ruling on that motion and instead held a hearing on June 21, 2012. At the hearing, I admitted to the record Complainant’s documentary evidence identified as CX-1 through CX-21 and heard testimony from Complainant’s witnesses and from Respondent Ronnie Lewis, who represented himself. The transcript of the hearing was filed. Complainant filed written closing argument post-hearing, and Respondent filed documents pursuant to my oral Order at the hearing. Those documents are identified as “RX-2” and hereby admitted to the record.

The record is closed and this matter is ripe for adjudication.

B. Summary of the Facts

In his Answer and at the hearing Respondent Ronnie Lewis admitted that he had made late payments in violation of the Act. RX-1; Tr. at 85-86. Mr. Lewis has been in the livestock business all of his life. Tr. at 87. He began working with his father when Mr. Lewis was in high school. Id. The family business has been in operation since 1969. Tr. at 87-88.

Respondent explained that on September 13, 2010, he learned that funds from his checking account had been stolen when his bank cashed two forged checks written against the account. Tr. at 84; 94; CX-8. When checks Mr. Lewis had written to pay for livestock (identified at CX-11) were presented to his bank, his account had been diminished by the forged checks in the aggregate total of \$87,500.00. Tr. at 85. Mr. Lewis learned about the problem from his bank, and not from sellers who were unable to cash Mr. Lewis’ checks. Tr. at 96-97.

The bank returned the amount of one of the forged checks, \$41,000.00, because the bank was familiar with the name used by the forger on that check. Tr. at 100. A similar theft by forgery under the same name had been perpetrated at a livestock auction in the state of Georgia. Tr. at 100-101. However, the bank refused to return to Mr. Lewis the amount of the other forged check in the amount of \$46,500.00 and he engaged counsel to try to resolve the matter. See, RX-2, letter of November 29, 2010.

During the period between August 23 and October 12, 2010 checks were presented for payment to Mr. Lewis' bank, and were denied. Tr. at 95; CX-11. Some of the checks were rejected because Mr. Lewis' bank advised him to close the compromised account and open a new account for his business needs. Tr. at 85. Mr. Lewis did as he was advised on September 14, 2010, and he was assured by his bank that checks presented on the closed account would be cashed. Tr. at 99. He called people who were holding his checks to warn them of his problem; at the time of the transfer of accounts, sufficient funds were available to cover the checks he had written. Tr. at 99-100. However, an \$80,000.00 check written to Cattleman's drained the account, and could only be partially paid.

Mr. Lewis testified that the matter was further complicated because his original bank, Wachovia, had been taken over by Wells Fargo. Tr. at 85. Another obstacle for Mr. Lewis has been his inability to secure a bond. As a result of non-payment due to the theft, a seller filed a claim against his bond, which was not renewed and has not been replaced, despite Mr. Lewis' efforts. Tr. at 86. Mr. Lewis would like to pay back the outstanding balance of \$38,205.19 owed to livestock sellers, but he cannot operate his business without a bond, and without resolving the matter of the stolen money. Tr. at 86. He believes that the thief has been identified by investigators looking into the Georgia theft. Tr. at 102-104.

Mr. Lewis was attempting to take over his family business from his mother, and GIPSA notified him that he needed to secure an adequate bond to operate as a dealer. CX-4; Tr. at 109-111. Mr. Lewis was unable to secure the bond and by letter dated December 15, 2010, GIPSA advised the business that it must discontinue all livestock operations for which bonding are required under the Act. CX-9; Tr. at 109.

Nilsa Ramos Taylor works for GIPSA as a resident agent whose duties include conducting regulatory and investigative activities in the livestock and poultry industry in Florida, South Georgia and Alabama. Tr. at 14. In mid-September 2010, she received a telephone call from Tony Yeomans, the president of the Ocala Livestock Market who asked for bonding documents and claim forms relating to Respondent's business. TR. at 15-16. Ms. Taylor conducted an investigation into Mr. Yeoman's allegations that some checks written by Respondent were not cashed because the account had been closed. Tr. at 17; 27. She spoke with Respondent shortly after the phone call from Mr. Yeomans and interviewed Respondent on November 29, 2010. Tr. at 19. Respondent explained that forged checks had been cashed against his account by his bank and that the bank was looking into the problem. Tr. at 20.

Ms. Taylor explained that the failure to make good on the payments by the close of the next business day resulted in Respondent's violation of the Act and regulations. Tr. at 29. Six sellers were not paid timely for transactions that took place from August 23, 2010 to October 12, 2010, although \$80,649.25 of a check written to Cattleman's Auction in the amount of \$85,949.96 cleared the bank. Tr. at 30-36; CX-11; CX-13. In addition, Ocala Livestock Market Inc. filed a claim on Respondent's bond and received \$30,000.00 of the \$39,741.95 owed by Mr. Lewis. Tr. at 29. Ms. Taylor testified that Mr. Lewis provided her with documentation supporting that funds from his bank account had been stolen, but she considered him to be in violation of the Act because he had not paid sellers.

Mr. David Tomkow operates a livestock market and has sold cattle to Mr. Lewis' business, Lazy L Order Buyers, for years. Tr. at 50-51. Mr. Tomkow corroborated the testimony that Mr. Lewis bought livestock in August and September 2010 and did not fully pay for the orders. Tr. at 50-56. Mr. Tomkow testified that Mr. Lewis has not bought cattle at his market after September, 2010. Tr. at 55.

Ms. Taylor testified that records showed that Respondent continued to buy livestock on order for an individual, Terry Bomhak, and received a commission for the purchases. Tr. at 124. Ms. Taylor explained that individuals who buy on order for other registered dealers are required to be bonded and registered. Tr. at 126. Mr. Lewis is not currently registered as a livestock dealer. Tr. at 91. His registration was terminated in December, 2010 because he did not have a bond. Tr. at 109; CX-9.

Respondent made efforts to secure a bond after his bank account was compromised, but was unsuccessful. Tr. at 110. Mr. Lewis testified that he was not aware that he needed to be registered for commission sales of cattle he made on behalf of Mr. Bomhak, who paid for the cattle. Tr. at 111-112; 128. Mr. Lewis contended that he was advised by a GIPSA employee, Ms. Ramos-Taylor, that so long as he was included in Mr. Bomhak's bond, he was covered. Tr. at 112; 131-132. He believed that Mr. Bomhak included him on the bond. Tr. at 132. A copy of a revocable letter of credit and Trust Agreement issued to Terry Bomhak on May 18, 2011 includes Mr. Lewis and extends to May 18, 2013. See, RX-2.

Mr. Lewis believed that he has worked for Mr. Bomhak since August or September, 2011. Tr. at 113. During the period from November, 2010 until he began working with Mr. Bomhak,

Mr. Lewis had done very little work and earned no income. Tr. at 113-114. Income tax returns reflect that Mr. Lewis' income plunged between 2010 and 2011. RX-2.¹

C. Statutory and Regulatory Authority

Livestock buyers are required to make prompt payment for livestock purchases that are governed by the Act. 7 U.S.C. § 228(b). Specifically, livestock buyers must make full payment to the seller's account by the close of the next business day following the purchase and transfer of possession of livestock by paying by check to the seller or authorized representative at the point where the livestock is transferred or by paying through a wire transfer. *Id.* The deadline for making payment in full by the next business day can only be circumvented by express written agreement between the buyer and the seller. *Id.*

Failing to pay for livestock purchases when due, as established by the Act, is considered an unfair and deceptive practice that violates 7 U.S.C. § 192(a). The Act allows for the assessment of civil money penalties in an amount of up to \$11,000 per violation for violations of the Act. 7 U.S.C. § 193(b). The imposition of sanctions in each case should be considered with the purpose of effectuating the remedial purposes of the Act. See, *S.S. Farms Linn County*, 50 Agric. Dec. 476 (1991).

D. Discussion

1. Motion for judgment by default

Pursuant to 7 C.F.R. § 1.136(c), the failure to file an answer within the time frame set forth by 7 C.F.R. § 1.136(a) constitutes an admission of the allegations in the Complaint, and the failure to deny or otherwise respond to an allegation of the Complaint shall be deemed an admission of the allegation. In such instances, the entry of default against a Respondent is appropriate. In addition, pursuant to 7 C.F.R. § 1.139, the failure to file an answer constitutes a

¹ These tax returns have been redacted to protect private information.

waiver of a hearing on the Complaint. If no objection to a motion for entry of proposed decision is filed by Respondent, “the Judge shall issue a decision without further procedure or hearing.”

7 C.F.R. § 1.139.

Having considered all the evidence, I find grounds to deny Complainant’s motion for judgment by default. Respondent filed an answer that Complainant apparently deemed to be timely because Complainant moved for a hearing in the matter on November 9, 2011. Since the motion placed Respondent on notice that a hearing was anticipated in the matter, the grant of a subsequent motion for a default judgment filed months later would impinge upon Respondent’s due process rights. In addition, the Hearing Clerk sent a corrected notice of the Complaint, which was delivered to Respondent on October 11, 2011. Respondent’s answer was docketed by the Hearing Clerk on November 1, 2011. I deem the Answer timely filed as it was received on the 20th day after receipt of the Complaint.

2. Non-payment to livestock sellers

Respondent admits that livestock sellers were not paid, but maintains that his failure to pay was not willful. I find that GIPSA has established that Respondent failed to make timely payments to six sellers during the period from August 23, 2010 to October 12, 2010, as described at CX-11.

3. Operating as a dealer without registration or bonding

I credit Mr. Lewis’ testimony that he did not do any business on his own behalf after October 2010. Mr. Lewis’ income tax returns show a wide disparity of income between 2010 and 2011, which supports his contention. See, RX-1.

The evidence reflects that Mr. Lewis bought livestock on commission through Mr. Bombhak’s business and made purchases in May and June, 2012. CX-21. In compliance with my instructions at the hearing, Respondent submitted post-hearing a copy of a letter of credit from

the Bank of Union El Reno, OK, in the names of Terry Bomhak/Ronnie Lewis, which is dated May 18, 2011 and which was renewed for one year on May 18, 2012. See, RX-1. The letter of credit has a notation that Mr. Lewis was added on May 18, 2012. I cannot deduce from this document alone whether Mr. Bomhak covered Mr. Lewis for transactions that took place before May 18, 2012 or May 18, 2011, as the information is somewhat contradictory. However, it is apparent that Mr. Lewis was included in Mr. Bomhak's surety as of May 18, 2012 at the latest, and accordingly, transactions conducted by Respondent after that date do not represent violations of the Act. I infer from Complainant's closing argument and recommended findings of fact that it has accepted that Mr. Lewis did not violate the Act in 2012.

The evidence reflects that Mr. Lewis bought livestock on commission for Bomhak on March 8, 2011, April 6, 2011, and April 12, 2011. CX-18-CX-20. The only evidence regarding whether he had surety at this time is Mr. Lewis' credible testimony that he believed that Mr. Bomhak included him on Bomhak's letter of credit from the time he began to work with Bomhak. No other documentary evidence regarding Mr. Bomhak's surety is of record. A copy of Mr. Bomhak's letter of credit or other surety for the period before May, 2011 would have resolved any doubt regarding whether Mr. Lewis was covered in March and April, 2011. It is disappointing that Complainant did not submit such evidence, particularly since GIPSA requires the documentation and presumably has it on file, and since I suggested at the hearing that the documentation would be helpful and held the record open for its receipt.

Mr. Lewis' loss of income, as demonstrated by tax returns that he freely provided, shows that Respondent did not act as a dealer on his behalf without securing a bond. I decline to infer from Mr. Lewis' filings that he was not covered under Mr. Bomhak's letter of credit when he made purchases on commission in March and April, 2011, absent some affirmative evidence supporting that conclusion. I impose no affirmative duty on Mr. Lewis to provide all

documentation from Mr. Bomhak, given the uncertainty of Respondent's access to Bomhak's records and the government's certain access to them. I further decline to shift the burden of proof to Respondent.

However, Mr. Lewis testified that he believed he began to work for Mr. Bomhak in August or September, 2011. Despite finding Mr. Lewis' testimony very credible and according it weight due to his many years as a dealer, his understanding from a GIPSA agent that he needed to be covered by Mr. Bomhak, and his business practice of being similarly covered on his mother's bond in his family business, I must discount his testimony regarding when he began to work for Bomhak. The record clearly establishes that Respondent bought livestock on commission in March and April, 2011, and I conclude from the preponderance of the evidence that Respondent engaged in those transactions without being covered by a financial instrument as surety in violation of 7 U.S.C. § 312(a).

4. Sanctions

Elkin Parker is a Regional Director at GIPSA, whose office is located in Atlanta, Georgia. Tr. at 61-62. Mr. Parker's duties include enforcing the Act in the eastern region of the United States and in Puerto Rico. Tr. at 62. He has worked for GIPSA for over thirty-five years. Tr. at 63. Mr. Parker is familiar with livestock dealers' compliance with the Act, and with the results of GIPSA's enforcement efforts in the territory for which he is responsible. TR. at 65.

Mr. Parker was aware of the circumstances underlying GIPSA's investigation of Respondent's failure to make prompt payment and failure to be bonded. Tr. at 67. He considered these violations serious non-compliance with the Act and believed sanctions were appropriate to promote a deterrent effect by facilitating compliance with the Act. Tr. at 69. Mr. Parker was aware that Mr. Lewis had alleged that forged checks wiped out his bank account, but he

nevertheless believed that Mr. Lewis was responsible for failing to pay in accordance with the law and regulations. Tr. at 80.

Peter Jackson is an auditor with GIPSA's Policy and Litigation Division. Tr. at 136. He reviews investigation files and recommends discipline. Tr. at 138. Mr. Jackson reviewed Respondent's case and concluded that his failure to pay sellers as required was willful. Tr. at 138-139. He recommended that Mr. Lewis be ordered to cease and desist from violating the Act, as well as be ordered to obtain a bond and to be assessed a civil penalty of \$58,000.00. Tr. at 139.

Mr. Jackson explained that the recommended penalty was substantially reduced from the \$11,000.00 per violation that is authorized at law. Tr. at 142. The penalty would not reimburse the outstanding balance Mr. Lewis still owes to sellers, but Mr. Jackson would reconsider his recommendation of the penalty amount if Mr. Lewis could prove that he paid the balances, since the starting point for the penalty was the unpaid amount. Tr. at 142-144.

Mr. Jackson was aware of the forgeries which depleted Mr. Lewis' account, and he considered that when making a penalty assessment. Tr. at 147. However, he continued to assert that the failure to pay when due was a willful violation of the Act. Id.

Willfulness is defined by the Administrative Procedures Act (5 U.S.C. §558(c)) as an act where "the actor intentionally does a prohibited act irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements." A violation is considered willful "if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts." In re: Hines and Thurn Feedlot, 57 Agric. Dec. at 1414.

It is undisputed that Respondent failed to pay for livestock purchases in violation of the Act. The Secretary has stated that failure to make timely payments to livestock producers (or sellers) results in the same damage regardless of the reasons for the late payments. In re: Great

American Veal Inc., supra. at 211. Moreover, the Secretary has concluded that Respondents who admit to the allegations in a complaint are in willful violation of the Act, even if the violation was the result of circumstances beyond the control of Respondents. In re: Hardin County Stockyards, Inc., 53 Agric. Dec. 654, 656 (1994).

I have found no precedent involving the theft of funds being the reason for non-payment of amounts due to sellers of livestock. Despite the language in the seminal cases cited herein, supra., I find it difficult apply those conclusions in circumstances where unknown agents interfered with a dealer's ability to pay sellers by stealing the dealer's funds. I fully credit the evidence and find that Respondent's bank account held the funds to pay for his purchases until a third party or parties forged checks that his bank, rather foolishly, paid over.

There is no evidence that Respondent was aware of the theft of his funds when he wrote checks to pay for livestock purchases. He closed his account on the advice of his bank, and his remaining funds were disbursed when valid checks were presented for payment. Mr. Lewis informed the sellers of the problem. He used the funds that the bank agreed to return to him to pay the sellers what he could. It is likely that all sellers would have been paid had the bank not refused to reimburse him for one of the forgeries, an issue that he continues to pursue to this date². A claim was made on his bond, and he could not secure a replacement bond, thereby disqualifying him from working in the business that he had worked in all of his life. Respondent did not continue to purchase livestock after the thefts caused him to shortchange sellers. He believed that he met all requirements to buy livestock on commission for a dealer.

² I note the government's argument that Mr. Lewis did not produce proof that he is suing his bank for restitution, and find it has no relevance to burdens of proof or my credibility assessments. Mr. Lewis has suffered severe economic loss as the result of the theft, the ensuing failure to pay, and ultimate inability to conduct his business. His efforts were complicated by a change in bank ownership as well. Mr. Lewis' evidence on this issue, while not complete, is sufficient to verify his testimony that he consulted legal counsel about this issue—the only material reason for its admission.

Respondent suffered severe loss of income and has been unable to pay all of the sellers, though he has made some reimbursements. Respondent could have avoided falling into violation of the Act in these circumstances if he could have foreseen the future and taken measures to stop payment on the forgeries. He also could have kept a reserve of cash large enough to pay creditors, although that should have been covered by the bond that Respondent acquired in the amount set by regulation. Respondent's bond was not large enough to pay all claims, although it met GIPSA requirements. Respondent's livelihood was extinguished when he was unable to find an agency willing to give him a bond after a claim was made. I find that these circumstances do not represent a willful violation of the Act.

In addition, this situation can hardly set standards for deterring other dealers from failing to comply with the Act and regulations. What cautionary tale would sanctions in this case tell: Do not allow thieves to forge checks that your bank is careless enough to cash? The sanctions recommended against Respondent are harsh where the failure to pay was caused by a crime perpetrated against Respondent; where Respondent could not secure a bond to continue to operate his business and generate cash to make sellers whole; and where Respondent did his best to recover the money. In addition, a civil penalty will do nothing to make the sellers whole, and Respondent's debt to the sellers remains unsatisfied.

I note, however, that Mr. Lewis was not the only victim of the theft of his bank account. The sellers who still have not been paid for the sales made to Mr. Lewis were also victims of the crime. Although I accord full credit to Mr. Lewis' efforts to make restitution, there is no evidence that the livestock sales were canceled or that attempts to return the livestock were made. I acknowledge that Mr. Lewis has experienced a financial crisis in the loss of his business, and encourage his efforts to find employment. However, more than \$38,000.00 remains unpaid to sellers. Since the purpose of the Act and regulations is to protect sellers from

the failure of buyers to pay, and since Respondent has not yet made full payment to sellers for transactions that took place two years ago, I find it appropriate to impose a conditional civil penalty. A penalty is also warranted because Mr. Lewis bought livestock in transactions covered by the Act without apparent adequate surety.

Accordingly, I hereby impose a civil penalty of \$38,000.00, which shall be suspended on condition that Respondent provides proof that he has paid in full, within one year of the date this Decision becomes final, all outstanding balances due to sellers who were not fully and promptly paid for the transactions underlying the instant cause of action³. I also adopt the agency's recommendation of issuing a cease and desist Order, as well as ordering Respondent to obtain an adequate bond or bond equivalent in order to operate subject to the Act.

E. Findings of Fact

1. At all times material herein, Respondent was engaged in the business of buying livestock in commerce on a commission basis.
2. Respondent bought livestock at auction on six occasions between the period from August 23, 2010 and October 12, 2010 and failed to make full payment to the buyers by the end of the next business day.
3. On November 16, 2010, GIPSA notified Respondent that Lazy L Order Buyers could not engage in transactions covered by the Act because its bond had been terminated.
4. Respondent was unaware that his bank had paid out two forged checks in the total amount of \$87,500.00 on September 13, 2010.
5. On the advice of his bank, Respondent closed his account, and subsequent sellers' demands for payment were refused.

³ I am optimistic that Respondent's employment as a livestock buyer on commission shall improve his financial condition and allow him to make restitution.

6. One seller made a claim against Respondent's bond and was partially paid the amount due from the sale.
7. Respondent's bank restored the sum of one of the forged checks, \$41,000.00, from which Respondent made payments and partial payments to the sellers.
8. Respondent continues to pursue restitution from his bank for the other check, which has been complicated by a law enforcement investigation and the sale of the bank to another entity.
9. Sellers remain unpaid for the transactions in the aggregate of slightly more than \$38,000.00.
10. Respondent ceased operating as a dealer under his own business name when he could not get a bond or other financial surety.
11. Sometime in 2011, Respondent began to buy livestock on commission on behalf of dealer Terry Bomhak.
12. Respondent was included in Bomhak's letter of credit as of not later than May 18, 2012.
13. Respondent bought livestock for Bomhak on three occasions in March and April 2012 without apparent surety.
14. Respondent bought livestock for Bomhak later in 2012, after he had been added to the letter of credit covering Bomhak's actions covered by the Act.

F. Conclusions of Law

1. Respondent Ronnie Lewis willfully violated 7 U.S.C. § 213(a) and 9 C.F.R. §§ 201.29, 201.30, by engaging in operations subject to the Act without maintaining an adequate bond or bond equivalent.
2. Respondent Ronnie Lewis, doing business as Lazy L Order Buyers operated in violation of the Act and its implementing regulations by failing to pay the full amount of the

purchase price for livestock within the time period required by the Act during the period from August 23, 2010 to October 12, 2010 in violation of 7 U.S.C. §213(a).

3. Respondent's failure to pay was caused by the theft of his funds through forged checks cashed against his bank account, and his failure to pay was not willful.
4. Although Respondent did not willfully fail to pay sellers, balances remain on the account of some of the sellers, and therefore sanctions are appropriate to encourage others to make restitution and to operate with proper surety.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from: (1) engaging in business in any capacity for which bonding is required without filing and maintaining an adequate bond or its equivalent as required by the Act and prevailing regulations; and (2) failing to pay the full amount of the purchase price for livestock within the time period required by the Act and regulations.

Further, Respondent is ordered to obtain an adequate bond or bond equivalent if Respondent wishes to operate subject to the provisions of the Act.

Pursuant to 7 U.S.C. § 213(b), Respondent is assessed a civil penalty in the amount of thirty-eight thousand dollars (\$38,000.00), except that the penalty shall be suspended on condition that Respondent has satisfied the outstanding debts owed to sellers by not later than one year from the date this Decision becomes final.

Respondent's payment, if due, 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. Respondent shall include on the payment instrument a reference to this case, Docket No. 12-0033.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 11th day of October, 2012 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge