

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

07-0018  
11/28/06 3:45

In re: ) P.Q. Docket No. 07-0018  
)  
Falcon Air Express, Inc., and )  
Aerpostal Airlines, Inc., )  
)  
Respondent ) Default Decision and Order

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Protection Act of June 20, 2000, as amended (7 U.S.C. §§ 7701 et seq.)(the Act) and the regulation promulgated thereunder (7 C.F.R. §§ 330.111), hereinafter referred to as the regulation, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 et seq.

This proceeding was instituted under the Act by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture on November 8, 2006. The complaint was served by certified mail on the respondent on November 13, 2006. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), the respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of the complaint (7 C.F.R. § 1.136(a)). On November 28, 2006, within the time allotted for the filing of an answer, notice was filed by Frank P. Terzo and Nathan G. Mancuso, Attorneys at Law, that Falcon Air Express, Inc. had filed a voluntary petition under Chapter 11 of the Bankruptcy Code on May 10,

2006 and asserted that the petition operated as an automatic stay of administrative actions against Falcon Air Express, Inc.

Contrary to Falcon Air Express, Inc.'s assertion, however, the petition filed under the Bankruptcy Code does not operate as an automatic stay of this action. "There is an exception to the automatic stay provisions of 11 U.S.C. § 362 that applies to this situation. Under section 362(b)(4), actions and proceedings, such as is the case here, by a government unit to enforce its police or regulatory powers are exempt from the automatic stay provisions." See Pan Am Air Cargo, 50 Agric. Dec. 1706 (1991) and Eastern Airlines, 51 Agric. Dec. 441 (1991).

Accordingly, Complainant was permitted to proceed with this administrative action and Falcon Air Express was required to file an answer. Falcon Air Express, Inc never filed an answer in this matter. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Consequently, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

On July 31, 2007, Complainant filed a Motion for Adoption of Proposed Default Decision, seeking that I impose a civil penalty of \$17,000 against respondent. On November 21, 2007 I issued an Order to Show Cause requesting that Complainant justify the requested civil penalty. Complainant filed a Response to my Order on December 14, 2007. In this Response, Complainant indicated that one of the three violations alleged in the complaint had been resolved

in an earlier administrative settlement and provided substantial justification for the imposition of an \$11,000 civil penalty for the remaining two alleged violations.

#### Findings of Fact

1. Falcon Air Express, Inc., hereinafter referred to as Respondent, is an entity with a mailing address of 9500 NW 41<sup>st</sup> Street, Miami, Florida 333178.
2. On or about December 22, 2002 and January 20, 2004, Respondent failed to provide the appropriate Plant Protection and Quarantine Office serving the ports of arrival with the required advance notification of an intent to arrive at the port, in violation of 7 C.F.R. § 330.111.

#### Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated the Act and the regulation issued under the Act. Therefore, the following Order is issued.

#### Order

The Respondent is hereby assessed a civil penalty of eleven thousand dollars (\$11,000.00). The Respondent shall send a certified check or money order for eleven thousand dollars (\$11,000.00), payable to the Treasurer of the United States, to United States Department of Agriculture, APHIS, Accounts Receivable, P.O. Box 3334, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding, P.Q. Docket No. 07-0018.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

Done at Washington, D.C.  
this 19<sup>th</sup> day of Dccember, 2007

  
**MARC R. HILLSON**  
Chief Administrative Law Judge