

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: *1230890 Ontario Limited v Canadian Food Inspection Agency*, 2024 CART 06

Docket: CART-2023-FNOV-022

BETWEEN:

1230890 ONTARIO LIMITED

APPLICANT

- AND -

CANADIAN FOOD INSPECTION AGENCY

RESPONDENT

BEFORE: Emily Crocco, Member

**WITH: Mr. William Warner, for the Applicant
Ms. Deniz Samadi, for the Respondent
Mr. Chris Araujo, for the Respondent**

DECISION DATE: April 4, 2024

VIRTUAL HEARING DATE: March 27 and 28, 2024

1. INTRODUCTION

[1] The Applicant has requested that the Canada Agricultural Review Tribunal (the Tribunal) review the Notice of Violation (Notice) #2122ON0096 that the Respondent issued against it and which imposed a financial penalty of \$10,000.00.

[2] For the reasons below, the Notice is cancelled.

2. ISSUE

[3] On August 20, 2021, the Applicant confined 167 market hogs at three farms in Warwick Township and Kerwood, Ontario, and transported them to Breslau, Ontario.

[4] The first issue before me is whether by doing so the Applicant breached subsection 148(1) of the [*Health of Animals Regulations*](#) (*HA Regulations*) by transporting the hogs in a container that was overcrowded.

[5] Most relevant to my determination in this file, in determining overcrowding, paragraph 148(2)(b) of the *HA Regulations* states that overcrowding occurs when, due to the number of animals in the container, “the animal is likely to develop a pathological condition such as hyperthermia”.

[6] Subsection 138.3(1) of the *HA Regulations* states that in assessing and monitoring risk factors related to transport, “any risk factors that could reasonably be viewed as having an impact” on the animal’s ability to withstand transportation must be considered, and that these include “the foreseeable weather conditions during transport” (s. 138.3(1)(i)).

[7] Given the foregoing, the elements of the violation in this file are:

1. The person who is named in the Notice committed the violation;
2. That person transported an animal in a container; and
3. The container was overcrowded because, due to the number of animals in the container, the animals were likely to develop a pathological condition like hyperthermia.

[8] The Applicant does not dispute, and I agree with the Respondent, that the first two elements of the violation are set out. The question is whether the Respondent has established the final element.

[9] If the violation is established, the second issue for my determination is whether the penalty amount was properly calculated.

3. EVIDENCE AND ANALYSIS

I. Calculating the Size of the Trailer, Its Compartments, and Loading Capacity

[10] The parties agreed that the average live weight of the pigs was 127.9 kg (or 282 lbs) and that the minimum area required for a pig that size is about 4.85 square feet.

[11] I reject some of the Respondent's calculations of the size of the trailer compartments.

[12] In one area of a diagram, the Respondent's inspectors recorded that the total length of compartment E was 24 feet, and they used this number in its calculations. However, elsewhere on the same diagram, the Respondent indicated that compartment E's length would total 25.75 feet (or 25 feet 9 inches). Given the Respondent's burden of proof in these matters and the specificity of how the larger number was calculated, I adopt the larger number as most likely representing the length of compartment E.

[13] The Respondent's inspectors also recorded that the trailer was 8 feet wide. However, I am satisfied, given the photograph provided by the Applicant's representative William Warner, and Mr. Warner's steadfast testimony on the issue, that the width of the trailer was 8.25 feet (or 8 feet 3 inches).

[14] With the revised dimensions of the compartments, I determine that in ideal circumstances, the trailer could accommodate 223 pigs of the size in question.

II. Reduced Load Based on The Weather Conditions

[15] The Respondent provided weather reports demonstrating that the temperature at loading in Warwick was 26°C, and at loading in two locations in Kerwood were 27°C and 28°C. Upon arrival in Breslau (near Kitchener), the temperature was 27°C. These figures exclude the humidex.

[16] During the hearing, the parties disagreed not only on how to calculate the temperatures but on what the impact of these temperatures should be on the Applicant's responsibilities to reduce the loading density that day.

[17] The Respondent argued that pursuant to the recommendations made by the National Farm Animal Care Council's (NFACC's) archived "Transportation Code", the Applicant should have reduced its load by 25%. The Transportation Code states that a 25% reduction applies in "hot humid weather". Although the Transportation Code states that death rate in transit begins to rise when the temperatures exceed 16°C, the Transportation Code does not define "hot humid weather".

[18] The Applicant argued that he was required to follow the “Density Recommendations” by Ontario Pork. Ontario Pork’s document cites the Transportation Code as a reference but provides more nuanced guidance. Ontario Pork recommends reducing a load by 25% when the temperature is from 29°C through 32°C (what they call “hot and humid”). However, if the temperature is from 24°C to 28°C (“hot”), Ontario Pork recommends a reduction by only 15%.

[19] Although neither of these documents are binding, I find, given that the incident occurred in Ontario and the specificity of the density calculations in Ontario Pork’s document, that Ontario Pork’s “Density Recommendations” are more helpful to me in this file than the Transportation Code.

[20] That said, Ontario Pork’s “Density Recommendations” do not specify whether their temperatures include the humidex. The only mention of humidity is under the heading “hot and humid” where the temperature is 29°C through 32°C. To the extent of this ambiguity, and given the Respondent’s burden of proof, I interpret these temperatures in favour of the Applicant (that is, that they exclude humidity).

[21] Recalling the language of “foreseeable weather conditions during transport” from part 138.3(1)(i) of the *HA Regulations*, I also find that the Respondent failed to demonstrate that it was foreseeable that the weather would exceed 28°C.

[22] The Respondent did not provide any weather *forecasts* in support of their allegations. They could have done so. The internet is rife with archived weather forecasts.

[23] Instead, the Respondent provided me with after-the-fact weather reports; that is, reports that were created to demonstrate what the actual weather was. These were less helpful to me because they do not tell me as much about what weather the Applicant could have foreseen prior to loading and transportation.

[24] What these weather reports do tell me, however, is that at the time of loading at the first stop in Warwick, where it was 26°C, it was already 29°C in Breslau (the trailer’s destination). At first glance, this suggests that the Applicant could have foreseen a 29°C temperature during transportation (which would put the reduction into the 25% zone).

[25] However, the Respondent did not demonstrate to me that the trailer was ever in Breslau at a time when the temperature was 29°C. Instead, by the time the trailer arrived in Breslau at 6:16 p.m. and throughout unloading until 8:00 p.m., the weather ranged from a high of 27°C to a low of 21°C. This impacts how I consider the data about the temperature in Breslau when the Applicant was loading the trailer in Warwick. Was it likely that it would be as hot late in the day when the trailer arrived in Breslau, as it was in the early afternoon? No. And the actual temperature in Breslau confirms that it had cooled by the time the trailer arrived.

[26] Given the temperatures during loading and at unloading, and based on Ontario Pork’s guidelines, I am satisfied that the Applicant should have reduced the load in question by 15%.

III. The Trailer Was Not Overcrowded

[27] As previously noted, the total number of pigs with a live weight of 127.9 kg each that the trailer could accommodate in ideal circumstances was 223.

[28] Before August 20, 2021, the Applicant planned to transport only 180 pigs. Ultimately, it further reduced its load to 167 pigs. At the hearing, the Respondent argued that the Applicant was required to reduce its load by 25% off what it had planned to transport, rather than its potential maximum (i.e., from 180 pigs, rather than 223).

[29] In my view, that argument is illogical. What if the Applicant had only planned to load just 4 pigs in the same trailer, with several compartments empty and each pig in its own compartment. Would the *HA Regulations* automatically require the Applicant to reduce its load? Of course not. Moreover, pursuant to the Respondent's Interpretive Guidance document relating to the *HA Regulations*, the assessment begins by considering "the space available to animals" in ideal circumstances and reducing the number from there.

[30] Given this, the 167 pigs that the Applicant loaded and transported represents a reduction of 25.11% (off the potential maximum load of 223 pigs).

[31] For ease of reference, in the below chart, I demonstrate what an unreduced load could have contained, how many pigs were actually loaded, and what a reduced load by either 15% or 25% would have contained.

Compartment	Length	Width	Area (sq. ft)	Number of Hogs in ideal circumstances, rounded down (previous #)	Max # of Hogs with a 25% decrease	Max # of Hogs with a 15% decrease	Actual Number of Hogs Loaded	Actual Reduction %
A	9.9	8.25	81.68	16 (16.84)	12	13	11	31.25%
B	16	8.25	132	27 (27.22)	20	22	18	33.34%
C	14.3	8.25	117.9	24 (24.33)	18	20	19	20.83%
D	11.33	8.25	93.47	19 (19.27)	14	16	7	63%
E	25.75	8.25	212.4	43 (43.80)	32	36	35	19%
F	14.3	8.25	117.9	24 (24.33)	18	20	21	12.5%
G	11.33	8.25	93.47	19 (19.27)	14	16	14	26.32%
H	16	8.25	132	27 (27.22)	20	22	21	22.22%

I	14.3	8.25	117.9 o	24 (24.33)	18	20	21	12.5%
Totals				223	166	185	167	25.11%

[32] Depending on the compartments, the reductions in the trailer ranged from 12.5% to 63%.

[33] With a 15% decrease warranted, only compartments F and I are potentially overcrowded, because the number of pigs in these compartments was reduced by only 12.5%.

[34] However, I do not have persuasive evidence that any pig in either compartments F or I were likely to develop a pathological condition like hyperthermia due to the number of the animals in their compartments.

[35] On the contrary, the dead and non-ambulatory (and ultimately euthanized) pigs came from compartments (B, E, and H) that I have determined were loaded within appropriate densities.

[36] Similarly, the necropsy was done on a pig that was euthanized from a compartment that was not overcrowded.

[37] Further, the photographs taken by the Respondent's inspector, which were blurry, were of dead and euthanized pigs from these same, not overcrowded, compartments. I received no photographs of any pigs from compartments F or I.

[38] Given the above, I do not have evidence to demonstrate that the pigs in compartments F or I faced a risk to their welfare due to overcrowding because of the foreseeable temperatures that day.

[39] Inspector Amanda Murphy testified that the regulations in question are "outcome based". She stated, repeatedly, that the Respondent will not pursue enforcement if an otherwise overcrowded trailer does not show any negative outcomes (like hyperthermia). Inspector Murphy's testimony is consistent with section 15.2 of the Respondent's Interpretive Guidance document.

[40] Inspector Murphy testified that although each compartment is analyzed, the assessment is done on "the whole trailer load".

[41] This being the case, I note again that using the revised trailer dimensions, the Applicant reduced the "whole trailer load" by 25.11%, which exceeded Ontario Pork's (and even the NFACC's) recommendations and takes overcrowding out of the equation.

4. CONCLUSION

[42] The Notice and its penalty are cancelled.

Dated at Ottawa, Ontario, on this 4th day of April 2024.

(Original Signed)

Emily Crocco
Member and Chairperson
Canada Agricultural Review Tribunal