Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Sure Fresh Foods v. Canada (CFIA), 2010 CART 16

Date: 20100824
Docket: RTA-60379;
RT-1513

Between:

Sure Fresh Foods Inc., Applicant

- and -

Canadian Food Inspection Agency, Respondent

Before: Chairperson Donald Buckingham

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(*c*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of a violation of paragraph 143(1)(*d*)of the *Health of Animals Regulations,* alleged by the respondent.

DECISION

[1] Following an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of the penalty in the amount of $2,000.00 to the respondent within 30 days after the day on which this decision is served.

Hearing held in Brampton, Ontario,
May 17, 2010.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that the applicant, Sure Fresh Foods Inc. (Sure Fresh), on January 15, 2009, at Bradford, Ontario, transported or caused to be transported chickens with undue exposure to weather, contrary to paragraph 143(1)(d) of the *Health of Animals Regulations*.

[3] The Tribunal must decide whether the Agency has established all the elements required to support the impugned Notice of Violation in question, particularly:

- if Sure Fresh transported or caused to be transported the chickens in question, and
- if, by not proceeding to process the chickens with due dispatch, Sure Fresh was responsible for their injury or undue suffering caused by continuing exposure to sub-zero temperatures.

Record and procedural history

[4] Notice of Violation #0910ON0200, dated April 21, 2009, alleges that, on the 15th day of January 2009, at Bradford, in the province of Ontario, Sure Fresh "committed a violation, namely: Transport or cause to be transported an animal with undue exposure to weather, contrary to section 143(1)(d) of the *Health of Animals Regulations*, which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*."

[5] The Agency served the above Notice of Violation on Sure Fresh on July 7, 2009. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, this is a serious violation for which the penalty is $2,000.

[6] Paragraph 143(1)(d) of the *Health of Animals Regulations* reads as follows:

> **143.** (1) *No person shall transport or cause to be transported any animal in a railway car, motor vehicle, aircraft, vessel, crate or container if injury or undue suffering is likely to be caused to the animal by reason of*
>
> …
>
> (*d*) *undue exposure to the weather;*
>
> …

[7] In a letter dated July 16, 2009, Sure Fresh requested a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. At that same time, Sure Fresh requested that the review be oral, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations.*

[8] On August 14, 2009, the Agency sent its report (Report) concerning the Notice of Violation to Sure Fresh and to the Tribunal.

[9] In a letter dated August 19, 2009, the Tribunal invited Sure Fresh to file with it any additional submissions in this matter, no later than September 18, 2009.

[10] Sure Fresh filed a package of additional materials with the Tribunal on September 29, 2009.

[11] The Agency provided a written response to Sure Fresh's additional materials on October 7, 2009 as well as providing additional materials to Sure Fresh and the Tribunal on May 10, 2010.

[12] The oral hearing requested by Sure Fresh was held in Brampton, in the province of Ontario, on May 17, 2010, with Sure Fresh represented by its counsel, Mr. Ron Folkes and the Agency represented by its counsel, Ms. Andrea Horton.

Evidence

[13] The evidence before the Tribunal in this case consists of written submissions from both the Agency (specifically, the Notice of Violation, and Agency Report, its response to Sure Fresh's reply and the final additional materials filed on May 10, 2010) and from Sure Fresh (specifically, its request for review and its reply to the Agency Report). As well, both parties presented witnesses who tendered evidence at the hearing on May 17, 2010. The Agency presented Saood Omer and Bruce Mascarenhas while Sure Fresh called Kim O'Brien and Mark Smiderle.

[14] Certain elements of the evidence are not in dispute:

- A load of 8,952 chickens (referred to as load C150) was loaded on a transport truck from a Quebec farm between 7:00 p.m. and 9:30 p.m. on January 14, 2009 and then departed for the Sure Fresh abattoir in Bradford, Ontario.

- The loading and transportation of the chickens took place under harsh conditions, including an outside temperature colder than -20°C, improper loading of the chicken crates and tarping of the load with a ripped tarp by the transporter.

- The load arrived at the Sure Fresh abattoir at 10:11 a.m. on January 15, 2009 with the outside temperature still colder than -20°C. An *ante mortem* (before death) examination was done by Mr. Omer, an Agency inspector and he found the load in poor condition with several of the chickens frozen to death.

- The load remained in the Sure Fresh holding barn between 10:11 a.m. and 3:30 p.m. when it was unloaded and the live chickens were processed by Sure Fresh. The temperature in the holding barn, which had sides but no ends, was approximately the same as the outside ambient temperature.

- In between the time that load C150 arrived at Sure Fresh and the time that the load was processed, another load of chickens (referred to as load C47) was unloaded and processed at Sure Fresh.

- After the unloading and processing of load C150 was completed, the final count of dead chickens on the load was determined to be 2,754 of the original 8,952.

[15] The contested evidence in this matter related to whether the chickens that were not already dead when load C150 arrived at Sure Fresh on January 15, 2009 were caused, or were likely to be caused, injury or undue suffering by reason of undue exposure to the weather from the time of their arrival at 10:11 a.m. until Sure Fresh proceeded to slaughter them, beginning at 3:30 p.m.

[16] The Agency's witnesses, Inspector Omer and Dr. Mascarenhas, both gave evidence which substantiates the claim that the chickens that were still alive on load C150 when it arrived at 10:11 a.m. did incur, or were likely to incur, injury or undue suffering in the time between their arrival at Sure Fresh and more than five hours later when they were processed at the plant.

[17] Mr. Omer testified that he inspected the chickens at 10:15 a.m., just a few minutes after their arrival at Sure Fresh, that many of the chickens were already dead, and that many others were suffering from exposure to extreme cold temperatures. Mr. Omer informed both the Agency Veterinarian-in-charge, Dr. Mascarenhas, and the Sure Fresh Quality Control Manager, Kim O'Brien, that the C150 load was in "terrible condition".

[18] As a result of Mr. Omer's report, Dr. Mascarenhas inspected load C150 *ante mortem* around 10:45 a.m. In his professional opinion, the *ante mortem* inspection revealed that the chickens in load C150 were under severe distress due to cold temperatures. At the completion of his *ante mortem* inspection, Dr. Mascarenhas advised Sure Fresh employees that proceeding to slaughter with load C150 immediately would prevent further distress, even when such action would require interrupting the processing of load C47 which by this time had already commenced. Sure Fresh employees did not heed his advice. At the end of the day of January 15, 2009, after the load had been slaughtered, Dr. Mascarenhas completed a *post mortem* (after death) examination of some of the dead chickens found on load C150 and his conclusions were unequivocal: the dead birds on load C150 had died due to exposure to extreme cold.

[19] Evidence offered by the witnesses of Sure Fresh presented a different rationale for the action of Sure Fresh employees in deciding to proceed with the processing of load C47 before load C150. Both Ms. O'Brien and Mr. Smiderle testified that the decision to hold the load in the holding barn was taken to allow the chickens to warm up, as to process a load that was already suffering from exposure to extreme cold would only increase suffering among surviving chickens. They both stated that, if the chickens were left in the holding barn, the body heat of the chickens would warm the entire load and relieve suffering of the load overall.

Analysis and Applicable Law

[20] This Tribunal's mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). The purpose of the Act is set out in section 3:

3. *The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.*

[21] Section 2 of the Act defines "agri-food Act":

2. *"*agri-food Act*" means the* Canada Agricultural Products Act*, the* Farm Debt Mediation Act*, the* Feeds Act*, the* Fertilizers Act*, the* Health of Animals Act*, the* Meat Inspection Act*, the* Pest Control Products Act*, the* Plant Protection Act *or the* Seeds Act*;*

[22] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

4. (1) *The Minister may make regulations*

(a) *designating as a violation that may be proceeded with in accordance with this Act*

(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act,

[23] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* SOR/2000-187, which designates as a violation, specific provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection Regulations*. These violations are listed in Schedule 1 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* and include a reference to paragraph 143(1)(*d*) of the *Health of Animals Regulations*.

[24] The Act's system of monetary penalties (AMP), as set out by Parliament is, however, very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP system as follows, at paragraphs 27 and 28:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an actus reus *which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him – or herself.*

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[25] The Act creates a liability regime that permits few tolerances, as it allows no defence of due diligence or mistake of fact. Section 18 of the Act states:

> **18.** (1) *A person named in a notice of violation does not have a defence by reason that the person*
>
> *(a) exercised due diligence to prevent the violation; or*
>
> *(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.*
>
> (2) *Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.*

[26] When an AMP provision has been enacted for a particular violation, as is the case for paragraph 143(1)(d) *Health of Animals Regulations*, Sure Fresh has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that the company might raise, including Sure Fresh's belief that it was doing the right thing by leaving the chickens for five hours in the holding barn in the hope that the chickens would warm up.

[27] Given Parliament's clear statement on the issue, the Tribunal accepts that such statements by Sure Fresh would not be permitted defences under section 18.

[28] However, the Federal Court of Appeal, in *Doyon*, also points out that the Act imposes an important burden on the Agency. At paragraph 20, the Court states:

> *[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation, and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.*

[29] Section 19 of the Act reads as follows:

> **19.** *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

[30] The strictness of the AMP regime reasonably must apply to both the applicant and the Agency. Consequently, the Agency must prove all the elements of the violation, on a balance of probabilities.

[31] For there to be a violation of paragraph 143(1)(*d*), the Agency must establish the following elements:

1. that the animal in question was transported (or caused to be transported);

2. that the animal in question was transported on a railway car, motor vehicle, aircraft, vessel, crate or container;

3. that the cargo loaded or transported was an animal;

4. that the animal transported incurred injury or undue suffering likely to be caused by undue exposure to the weather; and

5. that there was a causal link between the transportation, the injury or undue suffering and the undue exposure to the weather.

[32] Put another way, the Tribunal must decide whether the Agency has established that Sure Fresh transported or caused to be transported the chickens in question (elements 1, 2, and 3) and, if so, whether the Agency has also established that, by not proceeding to process the chickens with due dispatch, Sure Fresh caused or was likely to cause injury or undue suffering to the chickens by continuing their exposure to sub-zero temperatures (elements 4 and 5).

[33] In some cases that have come before the Tribunal where a violation of s. 143(1)(*d*) of the Health of Animals Regulations has been alleged, the applicant has been the transporter of the animals (*Glenview Livestock v. Canadian Food Inspection Agency* RTA 60162 (2005)). In such cases, the burden on the Agency to prove that the applicant "transported" the animals in question is easily met. Here however, the applicant is not a transporter in the conventional sense but rather the slaughtering plant which processes the chickens once they are offloaded from the transport truck that brought them to the plant. In *Volailles Grenville Inc. v. Canadian Food Inspection Agency* RTA 60277 (2007), which shares some similar facts with the present case, the Tribunal was tasked with determining whether a slaughter house could "transport or cause to be transported chickens" while they were being held at the slaughter house awaiting slaughter. Tribunal member Lamed found that the applicant slaughter house in that case "had no control or influence over the manner in which the birds were caged, loaded into the truck or transported. The Applicant had no control over the actions of the transporter" (para 19) and as a result, dismissed the Notice of Violation against the slaughter house. In the present case, a similar assessment must be made by the Tribunal. The Tribunal must determine if Sure Fresh had sufficient control or influence over load C150 to have transported or cause to be transported the chickens in question?

[34] The Tribunal finds that there is sufficient evidence to determine that Sure Fresh did have sufficient control and influence to "transport or cause to be transported" the chickens on load C150, even though it did so only at the end of the voyage of the chickens. The *Health of Animals Act* and *Regulations* provide rules for the humane transport of animals. To this end, the rules that provide for the safe "transport" of an animal must encompass the activities involving the movement of animals which will, unless special circumstances exist, include the loading, moving in the transporting vehicle, and unloading of an animal. With such an expansive definition of "transport or cause to be transported" a number of parties -- producers, transporters and even auction marts and slaughter houses -- can conceivably "transport or cause the transport of an animal".

[35] In the recent Federal Court of Appeal case of *Canada (Attorney General) v. Denfield Livestock Sales Limited* 2010 FCA 36, the Court commented on the meaning of the words "move, or cause the movement of an animal" in the context of section 176 of the *Health of Animals Regulations*. While not the section in question in this case, the Court's discussion of the meaning of words that are similar to the ones found in paragraph 143(1)(*d*) are instructive. The Court in *Denfield* held that an auction mart exercised sufficient power and control over the movement of an animal so as to cause the movement of an animal for the purposes of section 176 (paras. 18, 29, and 31). The same logic can be applied in this case where Sure Fresh, by the decision of its employees not to proceed directly with the slaughter of load C150, exercised sufficient power and control over load C150 to cause the transport of, or more correctly, to continue the transport of the chickens on load C150 for an additional five hours.

[36] Moreover, counsel for Sure Fresh was willing to concede, and did concede in his closing argument, that the decision by Sure Fresh not to proceed immediately with the processing of load C150 put the company in the position of having control over the load and, therefore, for the purposes of the definitions found in the *Health of Animals Regulations* to cause the load to be transported. As such, elements 1, 2, and 3 have been made out by the Agency.

[37] As to elements 4 and 5, the Agency's evidence is convincing and suffices to prove each element, on a balance of probabilities. The Tribunal recognizes that contradictory evidence was presented by the two parties on the impact of the additional five-hour delay in processing load C150. The Agency's witnesses, Mr. Omer and Dr. Mascarenhas, both observed *ante mortem,* that the load was in serious distress with many dead chickens already onboard. When the chickens arrived at the Sure Fresh plant, they had been en route already for more than 12 hours in extreme cold temperatures. The professional opinion of Dr. Mascarenhas, which he delivered to Sure Fresh employees before 11 a.m. on the day the load arrived, was that the load should be processed as soon as possible. In his professional opinion, there was no benefit in waiting. He provided no suggestion that the load would warm up if left to sit in a holding barn with an ambient temperature colder than -20°C. There was no evidence presented during the hearing that the ambient temperature inside load C150 actually increased or decreased during the five-hour delay in processing. The Tribunal accepts the professional opinion of Dr. Mascarenhas, that the chickens would have suffered less, or would likely have suffered less, if they had proceeded directly to processing, over that of Sure Fresh witnesses who maintained, without any evidence to support their claim, that the chickens would be less stressed and would warm up waiting more than five hours in a holding barn on a frigid day in January.

[38] The test set out in paragraph 143(1)(*d*) of the *Health of Animals Regulations* requires that injury or undue suffering to the animals need only be "likely" to be caused by undue exposure to weather. The Tribunal accepts that that test, on the balance of probabilities, has been met in this case. Given the extreme cold and the long trip already endured by the chickens, holding the chickens an additional five hours did cause, or did likely cause, any surviving chickens injury or undue suffering.

[39] Morever, industry practices, as set out in “Recommended code of practice for the care and handling of farm animals – Chickens, Turkeys and Breeders from Hatchery to Processing Plant (Code)” produced by the Canadian Agri-Food Research Council, which were presented as evidence by the Agency, recommends the immediate processing of stressed loads, of which load C150 was surely one. The Code sets out the following guideline: “Stressed loads must, if at all possible, take precedence in the slaughter schedule. Flocks observed to be in distress during the transport or while awaiting slaughter at the abattoir should be slaughtered on a priority basis. Generally, it is accepted practice to schedule slaughter based on crate time” (p. 35).

[40] In this case, load C150 should have preceded load C47, as the former was a stressed load and had a longer crate time. While the above guideline by itself does not prove, on a balance of probabilities, that load C150 suffered unduly during its extra five-hour wait, it does discredit the evidence of Sure Fresh employees that the load would “warm up” if left to sit in the holding barn. No mention of a cold weather “warming-up” practice exists in the guidelines referred to above.

[41] In *Canada (Attorney General) v. Porcherie des Cèdres Inc.,* 2005 FCA 59, the Federal Court of Appeal indicates that undue suffering is unwarranted, unjustified or undeserved suffering (paragraph 26). In *Doyon*, the Federal Court of Appeal indicates that undue suffering can be imposed even on healthy animals if they are exposed to risks during transportation (paragraph 34). In this case, the chickens were likely to incur injury or undue suffering because, on top of their long, cold journey to the abattoir, an additional five hours of waiting time in the extreme cold was added to time before their slaughter due to a decision of Sure Fresh employees.

[42] The Tribunal is satisfied that the evidence demonstrates that there is a clear causal link between the transportation and the undue suffering and undue exposure to the weather of the chickens. Consequently, the Tribunal concludes that the Agency has, on a balance of probabilities, proven all the essential elements of the violation. The Tribunal, by order, determines that Sure Fresh committed the violation and orders it to pay the respondent a monetary penalty of $2,000 within 30 days after this decision is served.

[43] However, the Tribunal wishes to inform Sure Fresh that this violation is not a criminal offence. After five years, Sure Fresh will be entitled to apply to the Minister to have the violation removed from its record, in accordance with section 23 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act:*

> **23.** (1) *Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from*
>
> (*a*) *where the notice of violation contained a warning, the date the notice was served, or*
>
> (*b*) *in any other case, the payment of any debt referred to in subsection 15(1),*
>
> *unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.*

Dated at Ottawa, this 24th day of August, 2010.

_____

Dr. Donald Buckingham, Chairperson