

Canada Agricultural  
Review Tribunal



Commission de révision  
agricole du Canada

Citation: Hennen v. Canada (CFIA), 2010 CART 031

Date: 20101202  
Docket: RTA-60389;  
RT-1500

**Between:**

**Jack Hennen, 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 the facts of a violation of subsection 142(b) of the *Health of Animals Regulations*, alleged by the respondent.

## **DECISION**

**[1] Following a review of all 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 \$500.00 to the respondent within thirty (30) days after the day on which this decision is served.**

By written submissions only.

## REASONS

### **Alleged incident and issues**

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that on January 15, 2009 in Proton Station, Ontario, the applicant, Jack Hennen (Hennen) transported or caused to be transported animals to wit: horses, without adequate drainage or absorption of urine contrary to subsection 142(b) of the *Health of Animals Regulations* (Regulations). The events that gave rise to the alleged violation in this case are the same ones that were examined by this Tribunal in its decision of *David Voss v. CFIA* (CART decision #A60357 dated 17 July 2009).

[3] The Tribunal must decide whether:

- the Agency has established all of the elements required to support the impugned Notice of Violation; and
- the Agency has established, more specifically and among other things, that Hennen caused the transportation of the horses in a vehicle that did not have adequate absorption of urine as prescribed.

### **Record and procedural history**

[4] The Notice of Violation #0809ON330801 dated April 9, 2009, alleges that Hennen on or about 16:00 on the 15<sup>th</sup> day of January 2009, at Proton Station, in the province of Ontario, "committed a violation, namely: Transport or cause to be transported animals to wit: horses, without adequate drainage or absorption of urine contrary to section 142(b) 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] Service by the Agency of the above Notice of Violation on Hennen was deemed to have occurred on April 19, 2009. Under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, Hennen's alleged infraction is a minor violation for which the penalty assessed is \$500.

[6] Subsection 142(b) of the Regulations reads as follows:

**142.** *No person shall transport or cause to be transported animals in a railway car, motor vehicle, aircraft or vessel unless*

...

*(b) provision is made for the drainage or absorption of urine from all decks or levels.*

[7] In a letter received by the Tribunal on April 28, 2009, Hennen requested a review by the Tribunal of the facts of the violation, as provided under paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*.

[8] On April 29, 2009, Hennen informed the Tribunal that he wished to proceed with a review by way of written submissions alone. The Tribunal has, therefore, conducted its review on the basis of all written submissions presented to the Tribunal by Hennen and the Agency.

[9] On May 27, 2009, the Agency sent Hennen and the Tribunal its report (Report) concerning the Notice of Violation.

[10] In a letter dated June 2, 2009, the Tribunal informed Hennen that if he wished to file any additional submissions in the case, he must do so no later than July 2, 2009. On June 24, 2009, the Tribunal did receive additional written submissions from Hennen which the Tribunal provided to the Agency. On July 2, 2009, the Agency also provided to the Tribunal, and to Hennen, additional written submissions.

[11] On June 19, 2009, the Tribunal received a procedural motion (which was dated June 18, 2009) from the Agency wherein the Agency requested that the Tribunal delay its consideration of this case until after the Federal Court of Appeal had completed its consideration of *Attorney General of Canada (CFIA) v. Denfield Livestock Sales Ltd.* (2010 FCA 36) (*Denfield*) and *Attorney General of Canada (CFIA) v. Vold, Jones and Vold Auction Co. Ltd.* (FCA File No. A-586-08), both cases being applications for judicial review of Tribunal decisions. On June 25, 2009, the Tribunal granted the Agency's request informing the parties that once the Federal Court of Appeal had disposed of the two cases, the Agency and Hennen would be granted two additional weeks to make additional supplementary submissions in this case.

[12] On April 12, 2010, with the Federal Court of Appeal having disposed of the two above-mentioned cases, the Agency submitted to the Tribunal and to Hennen its final submissions in the present matter. By its letter of April 16, 2010, the Tribunal informed Hennen that he had until April 30, 2010 to provide additional submissions. No subsequent submissions were made by either party.

**Evidence**

[13] The evidence before the Tribunal in this case consists of written submissions from both the Agency (the Notice of Violation, the Agency's Report and its subsequent submissions) and from Hennen (his request for review and his subsequent submission).

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

- 30 horses owned by Hennen were loaded into a tractor/trailer owned by HD Voss Trucking in Minnesota on January 14, 2009 and hauled on January 14 and 15, 2009 to the Canadian slaughter facility at Proton Station, Ontario known as Establishment 418.
- Upon the arrival of the tractor/trailer at Proton Station all but one of the horses, which was found to be dead, disembarked from the trailer into the slaughter facility.
- The tractor/trailer carrying the horses was driven by Mr. Michael Hornick and Mr. Michael Kotschevar, who had taken turns driving in order to drive straight through from Minnesota to Ontario.

[15] Agency evidence included the following submissions from Dr. Brenda Stewart, a veterinarian employed by the CFIA who was on duty at Establishment 418 in Proton Station, Ontario on January 15, 2009, the day that the alleged violation occurred: Handwritten Notes (Tab 1 of the Agency's Report), an Inspector's Non-Compliance Report (Tab 2 of the Agency's Report), and photos taken on January 15, 2009 (Tab 5 of the Agency's Report).

[16] The handwritten notes of Dr. Brenda Stewart at Tab 1 are titled: "January 15/09 - Hennen Load" and contain the following entries on page one: "5 + 1 DOA back compart Chestnut mare Rt. lateral. Bloated. Stiff. No bedding! Lots of shit!"

[17] In her Inspector's Non-Compliance Report (Tab 2) dated January 15, 2009, Dr. Stewart reports that: "When the trailer was backed up to the loading dock we unloaded 5 horses from the rear compartment. This compartment floor was covered in wet, soupy manure, with no evidence of sawdust, straw or any bedding material whatsoever. There was a lot of exposed areas of the metal floor. A chestnut mare was lying dead in right lateral recumbency with her head partially propped up against the partition door. She was quite stiff and had started to bloat. There was some evidence of blood on the door. I asked the driver if he had placed bedding in the trailer prior to loading and he said they had put sawdust. I told him I didn't think that was true based on the evidence in the trailer. We moved the dead horse over to the side of the compartment in order to open part of the partition door and allow the next compartment of horses off to access the compartment the stuck horse was in. This compartment was also

full of wet, soupy fecal material.” Further evidence of Dr. Stewart was that this load of horses was the first for both drivers.

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[18] Dr. Stewart’s evidence includes 7 photos that she took on January 15, 2009, of the tractor/trailer and horses at Tab 5 of the Report. Photos 2, 5, 6 and 7 reveal the state of the trailer’s floor with respect to manure and provisions that had been made for the absorption of urine from the horses. Photo 2 gives a rear view of the trailer and shows mounds of manure that had accumulated against the back door of the trailer. Photo 5 provides a clear view of the head and front quarter of the dead horse and bare floor areas of the trailer around it. Photo 6 provides a rear view of the rear and hind quarter of the dead horse and the bare patches of floor around it. Finally, photo 7 provides a view of the empty trailer compartment with alternating patches of bare floor and soupy manure clearly in view. These photos substantiate, to the satisfaction of the Tribunal, that Dr. Stewart’s assertions that the compartment floor was in some places covered in wet, soupy manure while in others there was no evidence of sawdust, straw or any bedding material whatsoever. Exposed areas of metal floor were clearly evident.

[19] In his written submissions, Hennen asserts that “I-we-have hauled over 100 loads of horses to Canada thru your ports in North Dakota to a Canadian plant in Newdorf over the past 2 yrs. Never had we had any more sawdust in any trailer than we had in January on the First load to Proton Station. No one ever questioned this before so it set a presidant (sic). And we were never notified we needed this especially after a 900 mile haul in 10 below weather it would Freeze if there was any urine left in a horse. ... I try my Best to keep up with all the changes in rules etc. ...”

### **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* (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 violations several 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 subsection 142(b) of the *Health of Animals Regulations*.

[24] Subsection 142(b) is a portion of Part XII of the Regulations entitled "Transportation of Animals". The provisions included in this section guide producers and transporters in the humane transportation of animals which are destined for human consumption. When these provisions are violated, the provisions in Part XII enable the Agency to take enforcement action against violators.

[25] To assist in the humane transport of animals, it is important to note that subsection 142(b) of Regulations requires that "provision is made for the drainage or absorption of urine from all decks or levels". It does not read "adequate provision" or "adequate drainage" or "adequate absorption of urine". Nor does the paragraph specifically mention what exact provisions, if any, must to be made for the drainage or absorption of fecal matter other than urine.

[26] There is no direct evidence from Hennen or from the drivers of the tractor/trailer carrying the horses on January 14 and 15, 2009 that the drivers (Hornick and Kotschevar) made any provision for the drainage or absorption of urine. There is indirect evidence from Hennen that implies there may have been some sawdust in the trailer that delivered the horses to Proton Station and that when he ships horses he is in the habit of providing sawdust for the absorption of urine. There is also indirect evidence from the notes of Dr. Stewart that the driver Hornick

replied to Dr. Stewart when questioned that they (the drivers) had put sawdust in the trailer prior to loading the horses.

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[27] From the Agency, there is clear and convincing direct evidence from Dr. Stewart, both from her notes and from her photos, that on January 15, 2009 in the trailer that carried Hennen's horse there was insufficient, or a complete lack of any, provision for the drainage or absorption of urine from all decks or levels. The direct evidence submitted by Dr. Stewart is that she saw no evidence of sawdust, straw or any bedding material whatsoever. The Tribunal accepts her evidence supported by the photos that she took over that of the drivers who said to Dr. Stewart that they provided sawdust in the trailer before loading the horses.

[28] However, should the evidence of Dr. Stewart be considered insufficient to support the outcome of this decision, it is the Tribunal's finding that if the drivers distributed any sawdust on the trailer floor for the transportation of the horses from Minnesota to Ontario, it was in amounts too small to meet the threshold envisaged by subsection 142(b) of the Regulations. The subsection employs the word "provision" which in the Canadian Oxford Dictionary is defined as: "1(a) the act or an instance of providing, (b) something provided, (c) preparation that is made to meet future needs or eventualities."

[29] Subsection 142(b) of the Regulations contributes to safeguarding animal health by setting standards for animal safety and protection from sickness and injury while travelling. In this context, the protection offered to animals afforded by subsection 142(b) is that provision must be made such that animals will not be exposed to unnecessary risks of falling and injuring themselves and from sickness or injury that might occur from contact with urine or urine solutions mixed with fecal matter accumulating on vehicle floors. In this regard, the third definition cited in paragraph 28 above best captures the requirement set down for transporters of livestock. The sawdust or any other bedding material provided by haulers for the transportation of animals must be sufficient in quantity to meet the future needs or eventualities of the haul. As conditions change, so will the absolute quantity of sawdust or other bedding. On a long haul more bedding may be required than on a shorter haul.

[30] It is the Agency which bears the burden of proof for proving all the elements of the alleged violation. Based on the evidence presented, the Agency must prove, on the balance of probabilities, each of the elements that is required for the violation to be sustained. The evidence presented by the Agency demonstrates that Hennen caused the shipping of horses to Proton Station from Minnesota on January 14 and 15, 2009. The reasoning in the recent Federal Court of Appeal decision in *Denfield* continues to support the interpretation that Hennen's participation in the process of transportation of the horses is sufficient to meet the threshold of having "caused the transportation" of the horses. The evidence demonstrates that

the trailer did not have any, or at least very least adequate, provision for drainage or absorption of urine from all decks or levels of the trailer.

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[31] Hennen cannot rely on a defence that it was not him but his agents that failed to meet the obligations of the Regulations. Neither he, nor his agents, HD Voss Trucking or its drivers, made adequate provision for the drainage or absorption of urine from all decks or levels of the trailer in which the horses were transported. This Tribunal is bound by subsection 20(2) of the Act which reads as follows:

*20. (2) A person is liable for a violation that is committed by any employee or agent of the person acting in the course of the employee's employment or the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.*

[32] Finally, the Act's system of monetary penalties (AMP), as set out by Parliament is very strict in its application. 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.*

[33] When an AMP provision has been enacted for a particular violation, as is the case for subsection 142(b) of the Regulations, Hennen has little room to mount a defence. The Tribunal finds that Hennen's statements such as "Never had we had any more sawdust in any trailer than we had in January on the First load to Proton Station. No one ever questioned this before so it set a presidant (sic). And we were never notified we needed this especially after a 900 mile haul in 10 below weather it would Freeze if there was any urine left in a horse. ... I try my Best to keep up with all the changes in rules etc. ...", will not, in and of themselves, be



permitted defences under section 18, and would not have the effect of exonerating an applicant. In the present case, section 18 of the Act will exclude practically any excuse that Hennen might raise. Given Parliament's clear statement on the issue, the Tribunal accepts that such statements by Hennen are not permitted defences under section 18.

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[34] The Tribunal finds that the Agency has met the evidentiary burden of proving, on the balance of probabilities, all the necessary elements of the alleged violation of subsection 142(b) of the Regulations. In light of the evidence and the applicable law, the Tribunal finds that Hennen committed the violation and is liable for payment of the penalty in the amount of \$500.00 to the Agency within 30 days after the day on which this decision is served.

[35] The Tribunal wishes to inform Mr. Hennen that this violation is not a criminal offence. After five years, he will be entitled to apply to the Minister to have the violation removed from its records, 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 2<sup>nd</sup> day of December, 2010.

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Dr. Donald Buckingham, Chairperson