

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Hennen v. Canada (CFIA), 2011 CART 003

Date: 20110302
Docket: RTA-60392;
RT-1503

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 paragraph 138(2)(a) 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 did not commit the violation and is not liable for payment of the penalty.

By written submissions only.

REASONS

Alleged incident and issues

[2] The respondent, the Canadian Food Inspection Agency (Agency), alleges that on February 5, 2009 in Proton Station, Ontario, the applicant, Jack Hennen (Hennen), loaded, transported or caused to be loaded or transported a blind horse, that could not be transported without suffering, contrary to paragraph 138(2)(a) of the *Health of Animals Regulations* (Regulations).

[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 a horse that was blind and that its transportation caused it undue suffering.

Record and procedural history

[4] The Notice of Violation #0809ON331801 dated April 9, 2009, alleges that Hennen, on or about 12:41 on the 5th day of February 2009, at Proton Station, in the province of Ontario, "committed a violation, namely: Load, transport or cause to be loaded or transported an animal to wit: a blind horse, that cannot be transported without suffering contrary to section 138(2)(a) 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 serious violation for which the penalty assessed was \$2200.

[6] Section 138 of the Regulations reads as follows:

138. (1) No air carrier or sea carrier shall take on board for exportation out of Canada an animal affected with or suffering from a communicable disease.

(2) *Subject to subsection (3), no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal*

(a) that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey;

(b) that has not been fed and watered within five hours before being loaded, if the expected duration of the animal's confinement is longer than 24 hours from the time of loading; or

(c) if it is probable that the animal will give birth during the journey.

(2.1) For the purpose of paragraph (2)(a), a non-ambulatory animal is an animal that cannot be transported without undue suffering during the expected journey.

(2.2) Despite paragraph (2)(a), a non-ambulatory animal may be transported for veterinary treatment or diagnosis on the advice of a veterinarian.

(3) Paragraph (2)(b) does not apply to a chick of any species if the expected duration of the chick's confinement is less than 72 hours from the time of hatching.

[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, which were accepted by the Tribunal as evidence in the case.

[11] On July 2, 2009, the Tribunal received along with the Agency's additional submissions, a procedural motion from the Agency requesting that the Tribunal:

- (a) reduce the imposed penalty for the allegation violation from \$2200 to \$2000;
and

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- (b) 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) (*Vold*), both cases being applications for judicial review of Tribunal decisions.

[12] On July 6, 2009, the Tribunal granted the Agency's request for a delay in the consideration of this case, 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 supplementary submissions in this case. The Tribunal did not rule at that time on the Agency's other request.

[13] With the rendering of a decision in the *Denfield* matter by the Federal Court of Appeal on February 3, 2010 (2010 FCA 36) and the discontinuance by the parties of the *Vold* matter, the Tribunal, in its letter of April 16, 2010, informed Hennen and the Agency that they had until April 30, 2010 to provide additional submissions in this case. No subsequent submissions were made by either party.

[14] As a preliminary matter and in response to the Agency's July 2, 2009 request to have the amount of the penalty in this case reduced, the Tribunal the orders that the Notice of Violation #0809ON331801 be amended by deleting the penalty amount of "\$2200" and replacing it with the amount of "\$2000".

Evidence

[15] 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 submission) and from Hennen (his request for review and his subsequent submission).

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

- The 29 horses that arrived in Canada on February 5, 2009 were owned by Hennen, loaded into a tractor/trailer owned by Hannah D. Voss Trucking in Minnesota on February 4, 2009 and hauled on February 4 and 5, 2009 to the Canadian slaughter facility at Proton Station, Ontario, known as Establishment 418.

- Upon the arrival of the tractor/trailer at Proton Station, the horses were found to be held in three compartments and were all unloaded into a barn.
- The tractor/trailor carrying the horses was driven by Eric Kotschevar and Jamie Wendlandt

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[17] Agency evidence included several documents from Betty A. Threndyle (Threndyle), an inspector employed by the CFIA, who was on duty at Establishment 418 in Proton Station, Ontario on February 5, 2009, the day that the alleged violation occurred.

[18] Although it is not totally apparent, it appears that the handwritten notes at Tab 1 of the Agency Report are those of Threndyle and are dated February 5, 2009 at 12:41. Included in those handwritten notes is the following entry “#2866 – Blind (Bay) on front compartment led off by plant employee”.

[19] In her Inspector’s Non-Compliance Report (Tab 2), dated February 5, 2009, Threndyle reports under the section entitled “Remarks Section” that: “No horses were found to be down on the trailer. ... USEA Tag #2866 – Bay horse was blind in both eyes. The Owner Shipper Certificate VS Form 10-13 was clearly marked with a check mark that Horses loaded for Fitness to Travel to a Slaughter facility are not blind in both eyes.” Threndyle also indicates that the 29 horses that came on the Hennen load were partitioned into three compartments—4 in the front, 20 in the centre and 5 in the rear compartment. In this part of her report, Threndyle does not mention in which compartment the Bay horse Tag #2866 was located.

[20] As well, at Tab 2 of the Agency Report, there is a United States Department of Agriculture (USDA) document VS17-140 entitled “United States Origin Health Certificate” issued February 2, 2009 which records in typed form the identification of the horses shipped by Hennen to Proton Station. Beside the typed entry “2866 G Bay” is a handwritten notation of “Blind”. Exactly who wrote that notation is not immediately clear from that document, but a letter from Dr. Brenda Stewart (Stewart), Veterinarian-in-Charge at Establishment 418, dated March 26, 2009 (Tab 3), indicates that she made those handwritten notations.

[21] Also, at Tab 2 of the Agency Report, there is an undated USDA document 10-13 entitled “Owner/Shipper Certificate - Fitness to Travel to a Slaughter Facility” with a signature which appears to be that of Hennen. Beside entry number 11 are handwritten notes as follows: “[USEA 28]66 X [indicating the horse is Bay in colour] X [indicating it is the QT Breed], X [indicating for sex: Geld] Eye’s clear can see will step up a [under the section entitled “Remarks” including existing conditions]”. At least some of the handwritten notations were made by Threndyle, according to the evidence of Stewart dated March 26, 2009, a document which is referred to below.

[22] As well, at Tab 2 of the Agency Report, there is an Agency document 5201 entitled "Animal Transportation Inspection Report" dated February 5, 2009 and bearing a signature that appears to be that of Threndyle. The document pertains to the arrival of the Hennen load at Establishment 418 and contains, among other items, the handwritten notation as follows: "4 - Back compartment 20 center 5 - front Blind #2866 Bay G".

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[23] Also, at Tab 2 of the Agency Report, there is an Agency document 4206 entitled "Health of Animals Act - Notice - Requirement to Quarantine and/or License to Transport Animals or Things" dated February 5, 2009 and bearing the name of an Agency inspector Dr. Meidrym Hebda. The document pertains to the Hennen load in transit and at its arrival at Establishment 418. It contains several handwritten notes, the authorship of which is not clear, including the following handwritten notation: "2866 Blind".

[24] Tab 3 of the Agency Report is a letter dated March 26, 2009 from Stewart regarding the events of February 5, 2009 involving the Hennen load of horses. Stewart states that she was the Agency Veterinarian-in-Charge at Establishment 418 on February 5, 2009 when the Hennen load arrived at 12:41 that day. She notes the following: "USEA2866- Bay QH was found to be blind in both eyes. This horse was not segregated on the trailer. The VS10-13 indicated 'eyes clear, can see, will step up.' This horse was hesitant coming off the trailer, was placed in a separate pen for later examination and was confirmed to be blind in both eyes."

[25] Additional submissions were received from the Agency on July 2, 2009. They included:

- (a) Statement by CFIA Investigations Specialist Guy Desroches, dated June 25, 2009. This statement relates to the identity and corporate status of Hennen and is not in dispute.
- (b) LexisNexis Business Report for Hennen Johnathon. This statement relates to the identity and corporate status of Hennen and is not in dispute.
- (c) "Transporting Blind Horses", a statement by CFIA Investigation Specialist Roger Weber; This statement explores experiences of the writer with respect to transporting blind horses.
- (d) *Humane Handling Guidelines for Horses: Standards for the Care of Unfit Animals*, Alberta Equine Welfare Group, dated June 2008; This document sets out guidelines for "Alberta's Equine Industry Promoting Horse Well-Being".

- (e) Excerpt from *Effect of Transport on Meat Quality and Animal Welfare of Cattle, Pigs, Sheep, Horses, Deer and Poultry*, by Gary C. Smith et al., dated December 2004. This document explores basic horse behaviour during their transport.
- (f) "Basic Horse Behaviour", provided, according to the Agency, by CFIA Veterinarian-in-Charge Dr. Brenda Stewart. This document, however, on its face has no authorship specifically attached to it and explores basic horse behaviour.
- (g) [Agency] Respondent's Submissions, dated July 2, 2009. This document provides arguments by the Agency, supported by references to various pieces of evidence, for the Tribunal's consideration in rendering its decision.

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[26] The Tribunal has reviewed and considered all of the additional submissions of the Agency as set out in the previous paragraph. The Tribunal notes, however, that much of the material relates either to argument or to opinion evidence about the nature of horses and their handling during transport. The Tribunal, in its decision in the matter, has been mindful of this fact in determining the appropriate weight to be attributed to all such evidence.

[27] Hennen's evidence is presented in his Request for Review and his additional submission received by the Tribunal on June 24, 2009. In his Request for Review he states: "In the case 0809ON331801 138(2)(A) I never shipped a totally blind horse. I did send a bay Geld that was nearly blind, he could see close up, would step up in a trailer and would not run in a wall or a person. He was still being riden and running out with 50 horses in Jamestown, North Dakota for the past years on Al Meyers ranch. We even listed on health can see close up not totally blind he would blink when a hand was waved within 1 foot of his eye's." Again, in his submission of June 24, 2009, Hennen states: "The issue of the 'Blind' horse it was marked on the healths, 'could see' this horse came off a ranch in Jamestown N.D. Al Meyer. he was running out in a lot with 30-40 hed. he was still rode by his grandchildren. he (the horse) could see up to 10 feet away stepped up in a trailer never run in anything. What better place for him but for some benefit meat."

Analysis and Applicable Law

[28] 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.

[29] 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;.

[30] 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*

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

[31] 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* (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 138(2)(a) of the *Health of Animals Regulations*.

[32] Paragraph 138(2)(a) 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.

[33] To assist in the humane transport of animals, paragraph 138(2)(a) of the Regulations requires that “no person shall load or cause to be loaded on any railway car, motor vehicle, aircraft or vessel and no one shall transport or cause to be transported an animal ... that by reason of infirmity, illness, injury, fatigue or any other cause cannot be transported without undue suffering during the expected journey.”

[34] For there to be a violation of paragraph 138(2)(a), the Agency must establish the following elements, as set out by the Federal Court of Appeal in paragraph 41 of its decision in *Doyon v Canada (AG)*, 2009 FCA 152:

1. that the animal in question was loaded (or was caused to be loaded) or transported (or caused to be transported);
2. that the animal in question was loaded onto or transported on a railway car, motor vehicle, aircraft or vessel;
3. that the cargo loaded or transported was an animal;
4. that the animal could not be transported without undue suffering;
5. that the animal suffered unduly during the expected journey;
6. that the animal could not be transported without undue suffering by reason of infirmity, illness, injury, fatigue or any other cause; and
7. that there was a causal link between the transportation, the undue suffering and the animal's infirmity, illness, injury or fatigue, or any other cause.

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[35] As to proving elements 1, 2 and 3, the Tribunal is satisfied, according to the Agency's evidence, which was uncontested by Hennen, that a Bay horse #2866 was loaded and transported or caused to be loaded and transported by Hennen from its location in Minnesota on February 4, 2009 arriving at Proton Station, Ontario in a tractor/trailer on February 5, 2009.

[36] As to proving elements 4, 5, 6 and 7, the Tribunal is not satisfied that the Agency has, on the balance of probabilities, adduced sufficient evidence to prove each element.

[37] Particularly with respect to element 5, the Agency has not produced sufficient, if any, evidence that the Bay horse #2866 that is the subject of this review suffered at all, let alone "suffered unduly" during the expected journey. Clearly there is conflicting evidence from the Agency witnesses and Hennen as to the visual capacity of the Bay horse #2866. Dr. Stewart simply states in her notes that the horse is blind without giving any explanation as to any tests or assessments she used to support her conclusion. Hennen, on the other hand, admits that the horse had limited visual capacity, but he also points out that the horse could see close-up and was able to be loaded into the tractor/trailer without incident. There is no evidence to suggest that the horse was involved in any untoward incident during its transportation from Minnesota to Ontario. Moreover, while the Agency has provided evidence that the horse was led off the truck trailer at its destination, there is no evidence that the horse had suffered or was suffering. There is no evidence that the horse had been injured, no blood, no broken

bones or abrasions and no ambulatory concerns whatsoever are noted by any of the Agency witnesses who observed the horse at Proton Station. Evidence from the Agency witness Threndyle indicated that “No horses were found to be down in the trailer.”

[38] While the evidence is conflicting as to the extent of the Bay horse #2866’s ability to see, one must be mindful in this case that paragraph 138(2)(a) does not makes it a violation to transport a blind, or visually-impaired horse. Nor could it be argued from the evidence adduced that the horse in question was non-ambulatory, such that other legal considerations as set out in subsection 138(2.1) might arise. The horse was clearly ambulatory as it was loaded without assistance and, while it was led off the trailer by a plant employee, no evidence exists to support a conclusion that the horse was non-ambulatory. Rather, given guidance from the Federal Court of Appeal in *Doyon* cited above, a violation of paragraph 138(2)(a) is grounded in there actually being suffering, not just a potential for suffering. The Tribunal concludes, as a finding of fact in this case, that there is insufficient evidence that the Bay horse #2866 suffered before or during any part of its transportation from Minnesota to Ontario on February 4 and 5, 2009. Nor is there sufficient, if any, evidence that at its unloading at Proton Station, the horse was suffering at all, let alone unduly suffering. This finding of fact by the Tribunal is sufficient to conclude that the Agency has failed to prove each and every element necessary for a finding of liability under paragraph 138(2)(a).

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[39] While the Tribunal’s primary finding is that the violation cannot be sustained because the Agency has failed to prove that the Bay horse #2866 did not “suffer unduly during the expected journey”, it has also failed to convince the Tribunal that elements 4, 6 and 7 set out in *Doyon* have been proved on the balance of probabilities. With respect to element 4, while the Agency led evidence concerning the dangers of transporting a blind horse and the procedures and guidelines that producer associations and academics have recommended for the transportation of a blind horse, there is insufficient evidence that this Bay horse #2866 was totally blind, or even if it was, that it “could not be transported without undue suffering”. The Agency produced several documents as evidence attesting to the general conditions that prevail and general precautions that should be observed to reduce risks when horses which are blind are transported (ie. the evidence of Agency witness Roger Weber in his statement “Transporting Blind Horses”, the evidence of Agency witness Dr. Stewart in her statement “Basic Horse Behaviour”, evidence adduced by the Agency in the academic article by Gary Smith et al. “Effect of Transport on Meat Quality and Animal Welfare of Cattle, Pigs, Sheep, Horses, Deer, and Poultry”, and evidence adduced by the Agency in the Alberta Equine Welfare Group producer publication “Humane Handling Guidelines for Horses”). However, the

mere presentation of such evidence to the Tribunal is not sufficient to meet the threshold of proving that this Bay horse #2866 could not be transported without undue suffering.

[40] Given that the Tribunal holds that the Agency has been unable to adduce sufficient evidence to prove, on the balance of probabilities, elements 4 and 5, it follows that elements 6 and 7 of the *Doyon* test cannot be made out as well. There can be no causal link where the Tribunal finds, as a fact, that there was no suffering by the horse during the expected journey.

[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, there is no proof of any undue suffering and thus the violation cannot be upheld. Even where a guideline provides instruction and advice to producers and transporters as to how to move fragile animals (as is the case the Tribunal observes from the Alberta Equine Welfare Group producer publication "Humane Handling Guidelines for Horses" wherein it advises that "blind horses should be haltered, handled individually and transported with special provisions: with a familiar pen mate or with a compatible horse in the rear compartment), the Tribunal is bound by the specific wording of paragraph 138(2)(a) of the Regulations and its interpretation by the Federal Court of Appeal.

[42] 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.

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[43] 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.*

[44] Moreover, in *Doyon*, the Federal Court of Appeal cautions this Tribunal and advises it to be "*circumspect in managing and analyzing the evidence and in analyzing the essential elements of the violation*" in an alleged AMP violation 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.

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

[46] It is with respect to the fourth and fifth elements of the *Doyon* test, that the Tribunal finds the Agency has failed to prove its case on the balance of probabilities. The Tribunal therefore finds that the Agency has not made all of the essential elements of the case, and as a result the Tribunal holds that Mr. Hennen did not commit the alleged violation and is not liable for payment of the monetary penalty.

Dated at Ottawa, this 2nd day of March, 2011.

Dr. Donald Buckingham, Chairperson