AGRICULTURE AND AGRI-FOOD ADMINISTRATIVE MONETARY PENALTIES ACT

DECISION

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

473629 Ontario Inc., carrying on business as Little Rock Farm Trucking, Applicant

-and-

Canadian Food Inspection Agency, Respondent

CHAIRMAN BARTON

Decision

Following an oral hearing and a review of the written submissions of the parties, including the report of the Respondent, the Tribunal, by order, determines 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.

.../2

REASONS

The Applicant requested an oral hearing pursuant to subsection 15(1) of the *Agriculture and Agri-food Administrative Monetary Penalties Regulations*.

The oral hearing was held in Kitchener on November 6, 2006.

The Applicant was represented by its solicitor, Mr. G. Edward Oldfield.

Evidence for the Applicant was given by Mr. Mark Reuber and Mr. Casey Scherders.

The Respondent was represented by its solicitor, Ms. Andrea Horton.

Evidence for the Respondent was given by Mr. Lad Terban, Mr. Santosh Pachai, Dr. Dennis Barran and Dr. Andrew Gomulka.

It was agreed files # 1340 and # 1341 would be heard together.

The solicitors for both parties further agreed that the Notices of Violation be amended to show that the notices were issued to 473629 Ontario Inc., carrying on business as Little Rock Farm Trucking.

The Notice of Violation # 0506ON00752 dated November 25, 2005, alleges that the Applicant, on or about 2:45 hours on the 31st day of August, 2005, at Norval, in the province of Ontario, committed a violation, namely: "did transport or cause to be transported an animal, to wit: 10,568 chickens with undue exposure to the weather", contrary to provision 143(1)(d) of the *Health of Animals Regulations.* Subsection 143(1) states 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
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> (a) inadequate construction of the railway car, motor vehicle, aircraft, vessel, container or any part thereof;
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> (b) insecure fittings, the presence of bolt-heads, angles or other projections;

(c) the fittings or other parts of the railway car, motor vehicle, aircraft, vessel or container being inadequately padded, fenced off or otherwise obstructed;

(d) undue exposure to the weather; or

(e) inadequate ventilation.

Paragraph (d) is a separate violation pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations.*

Prior to the *viva voce* evidence I ascertained whether each party had copies of the following key documents in this file:

1. Notice of Violation dated November 25, 2005.

2. Request for a review by the Applicant dated January 5, 2006.

3. Letter dated January 19, 2006 from the Respondent enclosing its record (case file).

4. Letter dated October 30, 2006 from the Respondent with further evidence.

5. Letter dated October 30, 2006 from the Applicant with further evidence.

6. Letter dated November 2, 2006 from the Applicant with further evidence.

Having confirmed both parties had copies, these documents were entered on the record as evidence for the purpose of the hearing.

The Applicant transported six loads of spent hens from Ohio Fresh Eggs L.L.C., Croton Ohio to Maple Lodge Farms Ltd. in Norval, Ontario . Three of these loads arrived on August 30th, 2005 and three other shipments arrived on August 31st, 2005. It is two out of the latter three shipments that gave rise to these Notices of Violation.

Notice of Violation # 0506ON00742 refers to trailer DEL-19Z and Notice of Violation #0506ON0752 refers to trailer DEL-709 as indicated in the case summary of the Respondent's report.

The number of hens dead on arrival (DOA) was approximately 14% and 10% respectively for these two loads, while the percentage number of DOA's for the loads that arrived on August 30th, 2005, was significantly lower.

At all relevant times, as set out in the Live Load Report at tab 1 of the Respondent's report, the outside temperature ranged from the mid 60s to the low 70s on the Fahrenheit scale, and it was raining. The rain varied in intensity throughout, being very heavy at times. The weather was influenced by the tail end of hurricane Katrina, although there was no evidence to suggest that the conditions were more severe than heavy rainfall.

The sole issue is whether the Applicant transported the chickens where injury or undue suffering was likely to be caused to the chickens by reason of undue exposure to the weather. Although this is initially to be determined at a time just prior to transporting, this assessment could be made at any time during the trip, and remedial steps taken at such time as undue suffering becomes likely. Evidence of the condition of the chickens during transport and on arrival as well as evidence from the ante and post mortem examinations are very relevant in determining the type of injury or undue suffering that occurred during transportation, and therefore whether it could have been anticipated.

The evidence of the Respondent was that the high end of its tolerance for DOA's for spent hens was 4%. Although the evidence further indicated the chickens waited at Maple Lodge Farms on the trucks for some time after arrival prior to slaughter, it is clear most of the deaths were caused during the time of transportation.

It is also clear that the cause of death of most of the chickens was due to their being exposed to rain during the trip. The Live Load Reports set out at tab 1 of the Respondent's case file shows rain throughout the journey. Further, the weather information submitted by the solicitor for the Applicant confirms the high humidity and very heavy rainfall for August 30th, with moderate winds throughout the duration of the transportation.

The necropsy reports set out at tab 5 of the Respondent's reports and the evidence of Dr. Barran in file # 1340 and Dr. Gomulka in file # 1341 in this regard confirms that the spent hens had no signs of disease or other health problems, and that most birds in the samples suffered from cyanosis.

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Dr. Barran also testified that the normal temperature of the birds is 107° Fahrenheit. Spent hens have less feather protection and less ability to deflect water from their skin. When wet, the bird tries to maintain an even temperature throughout. This causes the birds to try to respire more quickly and they turn blue from lack of oxygen. This takes considerable time and in his view causes the birds considerable suffering.

Dr. Gomulka testified that the cyanosis is primarily due to the stress caused by the lack of oxygen. When wet, the birds get cold and try to balance their temperature. The birds are forced to produce more heat and require more oxygen to balance the loss of heat. This gradual process causes death over a period of several hours.

In the context of the *Health of Animal's Act and Regulations,* the term "undue" has been defined by the Federal Court of Appeal as meaning "unwarranted" or "unjustified". I conclude from all the evidence that the birds were unduly exposed to the rain, which caused them undue suffering.

The Respondent's solicitor pointed out that "due diligence" is not a defence by reason of subsection 18(1) of the *Agriculture and Agri-Food Monetary Penalties Act*.

The solicitor for the Applicant agreed, but argued that due diligence is built into the term of "undue" in subsection 143(1) of the *Health of Animals Regulations* in that due diligence is part of the decision to truck or not to truck, having regard to the weather conditions at the time.

He produced evidence to indicate that the Applicant has never had to refuse a load due to weather conditions, and that rainfall was never an issue. He further indicated that the two drivers were experienced and well trained. With this background, the Applicant's solicitor considers the truckers' decisions to transport were based on the unlikelihood of injury or undue suffering due to the weather conditions.

As disclosed in the evidence, transportation of chickens, and especially spent hens, requires considerable training as weather conditions vary considerably over the course of a trip. The spent hens are very vulnerable to weather and should be monitored often. Tarping is, in the words of the Applicant's solicitor an "art", and not a "science".

I agree there is a delicate balance between keeping the chickens warm on the one hand, and on the other hand not allowing the chickens to overheat and suffocate. This requires adjustment of the tarps throughout, especially in rainy conditions.

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Various guidelines were introduced at the hearing to indicate that, once loaded, the truck should proceed immediately on its trip without waiting. Further, the load should be inspected shortly after loading (½ hour or 1 hour into the trip) and then subsequently the driver should stop and inspect the load every 3 to 4 hours thereafter (every 2 hours on shorter trips). The likelihood of injury or undue suffering should, then, be monitored closely throughout the trip, especially in conditions of inclement weather.

Although the drivers did stop once before the border, evidence discloses that, having regard to the heavy rainfall, the drivers did not inspect the loads often enough. In my view, the extent of the training, the experience of the drivers, and the adherence to the numerous guidelines are all issues of due diligence, and are not defences to these violations.

Whatever the drivers based their decisions on to go ahead with the transportation of these chickens in these conditions, the fact remains the chickens unduly suffered during the trip and that suffering was caused by undue exposure to the rain. The number of DOA's is evidence that undue suffering should have been predictable at the outset, or at least on periodic inspections of the loads had this been done more frequently.

Although these cases may have been a spike as, in the Applicant's evidence indicated all drivers at one time or another experience, the fact remains there was no other reasonable explanation for the DOA's except for undue exposure to the weather.

Subsection 20(2) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* holds an employer liable for a violation committed by an employee acting in the scope of his employment, whether or not a violation has been issued against the employee.

In this case, the Respondent has established, on a balance of probabilities, that the driver committed a violation, and hence the Applicant is deemed to have committed the violation.

As an observation, despite the extensive training and experience of both drivers, it is interesting to note the different manner in which each driver tarped his load. As can be

observed by tab 1 of the Respondent's report, in file # 1340 the passenger's side tarp was not used throughout the trip while the top tarp and driver's side tarp were used throughout. There was no tarping change during the trip.

On the other hand, the driver in file # 1341 did not use the driver's side tarp throughout the trip, but did use the passenger's side tarp from the border onward.

Dated at Ottawa this 5th day of December 2006.

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Thomas S. Barton, Q.C., Chairman