

***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)(c) 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*.

**David Maxwell, Applicant**

**-and-**

**Canadian Food Inspection Agency, Respondent**

**CHAIRMAN BARTON**

**Decision**

**Following an oral hearing and a review of all oral and written submissions, 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.**

## 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 London, Ontario, on February 19<sup>th</sup>, 2008.

The Applicant gave his own evidence.

The Respondent was represented by its co-solicitors, Ms. Kathryn Lipic and Ms. Cheryl Braun.

Evidence for the Respondent was given by Dr. Peter Kotzeff, Mr. Ken Schaus and Ms. Jackie Robson.

The Notice of Violation #0506ON00942 dated November 10<sup>th</sup>, 2006 alleges that the Applicant, on the 5<sup>th</sup> day of November, 2005, on or about 17:00 hours, at Elmwood, in the province of Ontario, committed a violation, namely: “did transport an animal, to wit: 96 cattle, that were inadequately fenced off such that injuries were caused” contrary to provision 143(1)(c) 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

- (a) inadequate construction of the railway car, motor vehicle, aircraft, vessel, container or any part thereof;
- (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.

Provision 143(1)(c) of the *Health of Animals Regulations* is a separate violation pursuant to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

After having confirmed that both parties had copies, the following documents were put on the record as evidence for the purpose of the hearing:

- Notice of Violation ##0506ON00942 dated November 10<sup>th</sup>, 2006;
- Letter from the Applicant dated December 29<sup>th</sup>, 2006, requesting a review;
- Letter dated January 15<sup>th</sup>, 2007, from the Respondent enclosing its report (blue binder);
- Additional submissions from the Applicant dated March 22<sup>nd</sup>, 2007 (black binder);
- Letter from Respondent's solicitor dated April 11<sup>th</sup>, 2007, with reply documentation.

At the outset, I wish to point out the Respondent's acknowledgment that the Applicant had no intention of causing harm to the animals. The Applicant was a victim of circumstance, in the wrong place at the wrong time.

At all material times, the Applicant was a driver for O'Rourke Transport Inc. On Thursday, November 3<sup>rd</sup>, 2005, the Applicant, with assistance, loaded 96 head of cattle on a trailer at Almeda, Saskatchewan, for delivery to an undisclosed location in Ontario. The trailer was a double deck cattle trailer with six compartments. Eight animals were loaded in each of the top and bottom front compartments, 26 loaded in each of the top and bottom center compartments, 12 in the top rear compartment (dog house) and the remaining 16 in the bottom rear compartment.

The cattle were ultimately delivered to Schaus Land and Cattle, Elmwood, Ontario, on November 5<sup>th</sup>, 2005.

On arrival at Elmwood, 15 dead cattle were found in the bottom of the rear compartment and one was found to be disabled (which was later euthanized). Three of the original 12 animals were still in the dog house while the other 9 had fallen down or had just jumped from the dog house to the bottom rear compartment during the trip.

I accept the evidence of Dr. Peter Kotzeff that the animals died between 36 and 45 hours prior to arrival at Elmwood and that the cause of deaths was attributable to the animals either falling or jumping from the dog house to the bottom rear compartment of the trailer while en route.

#### **Gate on dog house compartment**

The dog house had a swing gate with a spring loaded latch near the top and a bolt latch near the bottom of one end. When closed, the gate prevented animals in the doghouse from falling to the bottom compartment.

The gate had to have been in the open position in order for this tragedy to have occurred.

The Applicant testified that he was absolutely certain that the gate was closed and locked when he loaded the cattle, and that it was likely accidentally opened by the cattle and movement of the truck during the trip.

On the other hand, Mr. Ken Schaus testified that when he observed the trailer on arrival at Elmwood, the swing gate was in its open and locked position against the side wall of the trailer with the bottom latch bolted. Dr. Kotzeff and Jackie Robson had similar observations.

There is also some heresy evidence in the written material to indicate that the latch on the upper part of the dog house gate had recently been replaced with a new style latch that contained a safety pin.

### **Continuing obligation**

As mentioned by counsel for the Respondent, the obligation on the Applicant as the driver to have adequate fencing on the trailer to prevent injury or undue suffering is a continuing obligation throughout the transportation process, from the time of loading until the time of offloading.

Whether the gate was left open at the time of loading, was not adequately secured at the time of loading, was accidentally opened by the cattle and truck movements during transportation, was opened due to a faulty locking mechanism or for any other reason, the inescapable fact remains that it was open at some time during the transportation, and that this lead to the deaths of the animals.

### **Intention of Applicant**

The Applicant did not intend any harm to these animals and testified he did the best he could have done in the given circumstances.

The circumstances were that he had been driving for less than one year prior to this incident, had no prior training in hauling cattle (had only hauled one load of cattle before), had no money or other means with him during the trip to consider other courses of action in emergency situations, and stated that his boss, Mr. Brian O'Rourke, consistently pressured him throughout the trip to keep driving east to avoid a 48-hour deadline after which the cattle would have had to have been fed and watered.

The Applicant's inexperience and pressure from his boss perhaps prevented him from closer inspection of the load along the way, and particularly in Driftwood, where the Applicant first noticed 2 dead animals.

Notwithstanding, the Respondent has established, on a balance of probabilities, that injury or undue suffering was caused to the animals during their transportation by the Applicant, by reason of inadequate fencing in the cattle trailer. Unfortunately for the Applicant, his lack of training and other pressures on him during the trip are not defences to the violation.

The Tribunal wishes to point out to the Applicant that this is not a criminal or a federal offence but a monetary violation, and that he has the right to apply after 5 years to have the notation of this violation removed from the Minister's records in accordance with subsection 23(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, which states as follows:

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 7<sup>th</sup> day of March, 2008.

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Thomas S. Barton, Q.C., Chairman