

***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 140(1) 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*.

Brian's Poultry Services Ltd., 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 did not commit the violation and is not liable for payment of the penalty.

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, Ontario, on April 1, 2008.

The Applicant was represented by its solicitor, Mr. Ron E. Folkes.

Evidence for the Applicant was given by Mr. Brian Herman, Ms. Nancy Stauffer and Mr. Casey Scherders.

The Respondent was represented by its solicitor, Mr. Derek Edwards.

Evidence for the Respondent was given by Dr. André Trempe via teleconference with the aid of an interpreter, Ms. Estelle Lavoie.

The Notice of Violation # 0506QC0141 dated January 5th, 2006, alleges that the Applicant on the 4th day of October, 2005, at Woodstock, in the province of Ontario committed a violation namely: "Loaded poultry in a crate to such an extent that caused injury and undue suffering to the poultry by reason of overcrowding" contrary to provision 140(1) of the *Health of Animals Regulations*, which states as follows:

140. (1) No person shall load or cause to be loaded any animal in any railway car, motor vehicle, aircraft, vessel, crate or container if, by so loading, that railway car, motor vehicle, aircraft, vessel, crate or container is crowded to such an extent as to be likely to cause injury or undue suffering to any animal therein.

After confirming that both parties had copies, the following documents were put on the record for the purpose of the hearing:

- Notice of Violation dated January 5th, 2006.
- Letter dated January 18th, 2006, from the Applicant's solicitor requesting a review.
- Letter dated January 25th, 2006, from the Respondent enclosing its report.
- Letter dated March 15th, 2006, from the Applicant's solicitor with an attached brief of documents.

- Letter dated March 30th, 2006, from the Respondent's solicitor in reply to the Applicant's brief.
- Letter dated April 4th, 2006, from the Applicant's solicitor in reply.
- Letter dated April 26th, 2006, from the Applicant's solicitor enclosing bird density information.
- Letter dated March 20th, 2008, from the Applicant's solicitor enclosing further documentation and summary of Applicant's evidence.

Following a brief meeting with counsel, the Applicant's solicitor admitted the facts contained in Tabs 2 and 3 with the exception of the loading times, and the facts contained in Tab 4, Tab 5, Tabs 6 to 9, and Tab 11.

The main thrust of the Respondent's position was that, taking into consideration the weather conditions and the travel distance, the Applicant packed too many birds per crate, causing asphyxiation. The birds located in the center parts of the trailers experienced the most distress due to the lack of ventilation.

The Applicant's position was that the loading density of the crates was not excessive under the circumstances and was within the recommended guidelines. It maintained that any undue suffering was caused by factors beyond the contemplation and control of the Applicant, such as the extended duration of the transportation time of the one load and the waiting time at the slaughter house of the other load.

Load Particulars

On October 4th, 2005, the Applicant loaded 4 loads of chickens in Woodstock, Ontario. The 2 shipments in question were transported by 2 different trucking firms which arrived on the morning of October 5th, 2005, at an abattoir in Drummondville, Quebec. For ease of reference, I will refer to these loads as the Emery load and the Raymond load (drivers' names).

The Raymond load contained 4,532 chickens (80 crates at 8 birds per crate and 556 crates at 7 birds per crate). The average weight per crate was 27.02 kg. The loading time was approximately 2 hours and 15 minutes and the truck left Woodstock at approximately 8:45 p.m. and arrived at Drummondville at approximately 5:45 a.m. the following morning, for a total trip duration of 9 hours.

Slaughter commenced approximately 3 hours later, at which time 453 dead birds were found (10% of load).

The Emery load contained 5,460 chickens (780 crates at 7 birds per crate). The average weight per cage was 26.88 kg. The loading time was approximately 1 hour and 45 minutes and the truck left Woodstock at approximately 8:25 p.m. and arrived at Drummondville at approximately 9:10 a.m. the following morning. The total trip time was 12.5 hours. Slaughter commenced approximately 1 hour after arrival time, at which time 590 dead birds were found (10.8% of load).

Weather

In accordance with the weather records set out in Tabs 6 to 9 of the Respondent's report (and admitted by the solicitor for the Applicant), the temperatures ranged from 20 °C at the time of loading to 17 °C during travel to the abattoir, to 18°C at the time of arrival at the abattoir. The relative humidity was high and peaked at around 4:00 a.m. in Montreal on the morning of October 5th, 2005.

Load Densities

Section 5.2.12 of the *Recommended Code of Practice for the Care and Handling of Farm Animals*, located at Tab 14 of the Respondent's report recommends the maximum live weight loading densities for chickens in crates in cold weather to be 63 kg/m². It also provides that this is the recommended density for winter conditions and should be reduced during summer months by 15 to 20%.

Although October is neither officially a winter or a summer month, the Respondent considered the temperatures on October 4th and 5th to be unusually high and argued that the recommended loading densities should have been reduced to reflect summer months' temperatures.

The Applicant's evidence is that crate densities are not normally reduced in summer conditions until the temperatures reach into the high 20s and that loading densities for the times in question were normal in the circumstances. The other 2 loads from the same farm on the same day were packed with similar densities and did not experience unusually high levels of deaths at time of slaughter.

Mr. Casey's calculations at Tab 3 of the Applicant's brief of documents equates the recommended loading density to be 30.738 kg per crate. The Respondent calculated the weight per crate in the Raymond load to be 27.02 kg and in the Emery load to be 26.88 kg as indicated in its report at Tabs 12 and 13.

The evidence disclosed that the crates in the Raymond load holding 8 birds per crate were loaded on the rear end of the trailer where no problems were found.

Accordingly, for comparison purposes, I will only refer to the densities of 7 birds per crate. Using the actual dimensions of the crates as measured by Mr. Casey (the Respondent admits that it did not measure the crates) and the average weight of the birds set out in Tabs 12 and 13 of the Respondent's report, I calculate that the density of the crates on the Emery load was 12.5% below the recommended maximum, and the crate density on the Raymond load was 12.1% below the recommended maximum.

According to the evidence of Ms. Nancy Stauffer, loading proceeded normally and there were no problems with the condition of the birds when they left the producer's premises. Further, when Dr. Trempe examined the Emery load at around 9:15 in the morning, and the Raymond load at around 6:30 on the morning of October 5th, 2005, he observed nothing abnormal, and the birds that he could see at the outer edges of the load appeared to be in good condition.

Delays

Although the Respondent submitted hearsay evidence in its report that an ideal loading time should not exceed 1.75 hours, I am satisfied from the evidence of Ms. Stauffer that the loading times for the Emery load of 1 hour and 45 minutes and for the Raymond load of 2 hours and 15 minutes were not excessive in the circumstances.

The Applicant points out that the trip duration for the Emery load from the producer to the abattoir took 12 hours and 40 minutes, while the Raymond load took 9 hours, a difference of 3 hours and 40 minutes.

There is no evidence to indicate the reasons for this difference. The drivers' log books were not put in evidence. However, the Respondent acknowledges that if a load is stopped, there is a heat buildup in the trailer which would cause problems.

The Applicant further alleges that the Emery load stood for 1 hour and 20 minutes and the Raymond load for 3 hours and 15 minutes outside the abattoir prior to the time of slaughter.

Dr. Trempe testified that he first became aware of the problem with the Raymond load at 9:00 a.m. and the Emery load at 10:30 a.m., the times of occurrence set out in his Inspector's Non Compliance report at Tabs 12 and 13 of the Respondent's record. This would indicate that slaughter was under way by these times, although the actual times of commencement of slaughter cannot be determined.

Although Dr. Trempe did testify these wait times were not unusual, in the case of the Raymond trailer, it was sitting outside the premises (rather than inside where it would have been protected from the sun and with cooling misters) for a considerable period prior to slaughter, during which time heat build up in the trailer would have occurred.

Exhibits

During the hearing , I put the following exhibits on the record:

- Applicant's exhibit #1 being a report by Mr. Casey Scherders;
- Respondent's exhibit #1 being the case of *Canada (Canadian Food Inspection Agency) v. Porcherie des Cèdres Inc.*, 2005 FCA 59;
- Respondent's exhibit #2 being the case of *Fermes G. Godbout et Fils Inc. v. Canada*, 2006 FCA 408;
- Respondent's exhibit #3 being the case of *Samson v. Canada (Canadian Food Inspection Agency)* , 2005 FCA 235;

Summary

The sole question is whether the Applicant's actions in loading 7 or 8 chickens per crate crowded the birds to such an extent as to be likely to cause injury or undue suffering to them.

Counsel for the Respondent quite properly pointed out that good faith and due diligence were not defences. Also, following customary practices is not a defence as it is equivalent to due diligence, as found in the *Godbout* case.

Counsel for the Applicant indicated he was not arguing the reasonableness of the Applicant's actions or that they were carried out in good faith or in accordance with customary practice, but simply that the act of the Applicant, in loading 7 or 8 birds per crate, did not create crowding in the crates so as to be likely to cause injury or undue suffering to them. His three witnesses, with extensive hands-on experience in the loading and transportation of chickens, all testified to this conclusion.

The fact, however, that at the time of slaughter, a large number of dead birds were found on the loads means that the birds must have been caused injury or undue suffering at some point. There is no evidence to establish the times of death, and all conditions appeared to be normal from the time of leaving the producer's premises to the time slaughtering began. In this case, it is clear that the birds in the centre of the loads suffered from suffocation. The question then becomes what was the likely cause of the suffering.

The *Recommended Code of Practice for the Care of Handling of Farm Animals* set out at Tab 14 of the Respondent's report was developed as a guideline that "recognizes the basic principle that humane treatment of animals is the prime consideration in animal transportation and that animals which are treated well and protected from stress arrive at their destination in far better condition".

In this case, I find as a matter of fact that the weather on October 4th and 5th, 2005, did not equate to weather normally experienced in winter or in summer months, and accordingly the guideline for recommended maximum live weight loading densities for crates of 63 kg/m² is useful, but not determinative in the circumstances. In fact, as earlier indicated, the density of the cages loaded at 7 birds per crate in the Emery load was 12.5% below the guideline and in the Raymond trailer was 12.1% below the guideline. This appears to be a reasonable adherence to the guideline.

The birds loaded at 8 per crate in the Raymond load were located at the rear of the trailer where no problems occurred. As indicated in the evidence, the birds on either end of the trailer are better ventilated than the birds in the centre of the load, both while in transit and when the trucks are stopped, and accordingly, are less likely to be prone to suffocation.

The other two loads of chickens transported from the same producer on the same day did not experience the same problems. Counsel for the Applicant pointed out that the only significant difference in the four loads was the duration of the Emery trip, which was more than 3 hours longer than the Raymond trip, and the fact the Raymond trailer sat outside the abattoir premises for approximately 3 hours. In both situations heat build up in the trailers would have occurred, causing suffocation. This would explain the likely cause of the considerably higher dead count in those 2 loads.

Based on all the facts, I find that the Respondent has not established, on a balance of probabilities, that the densities of chickens loaded by the Applicant were likely to cause injury or undue suffering to them.

In an earlier decision, the Tribunal found that the transporter of the Raymond load committed a violation of provision 140(2) of the *Health of Animals Regulations*. This decision did not result from an oral hearing but was based on written submissions. The transporter did not question or deny any of the evidence submitted by the Respondent but contested the violation solely on the basis that the catching and loading of the birds was not its responsibility.

I also note the Respondent provided evidence in that case that the size of the cages was 45 square meters, as opposed to the actual measurements in this case done by Mr. Herman showing the cages to measure 48.8 square meters. This discrepancy then had the effect of reducing the recommended density in the *Garceau* case.

In any event, that decision was based on the uncontested facts before it.

Dated at Ottawa this 23rd day of April, 2008.

Thomas S. Barton, Q.C., Chairman