

**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 subsection 138(4) 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 Mytz, 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 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 Edmonton on September 11, 2003.

The Applicant made his own submissions.

The Respondent was represented by its solicitor, Mr. Marc Deveau.

The Notice of Violation dated January 21, 2003, alleges that the Applicant, on or about 0600 hours on the 7th day of August, 2002, at Blue River, in the province of British Columbia, committed a violation namely: "Continue to transport an animal that is unfit for transport" contrary to subsection 138(4) of the *Health of Animals Regulations* which states:

138(4) No railway company or motor carrier shall continue to transport an animal that is injured or becomes ill or otherwise unfit for transport during a journey beyond the nearest suitable place at which it can receive proper care and attention.

It is undisputed that the Applicant was a motor carrier, transporting livestock from Rimbey Alberta, to Abbotsford British Columbia. In the early morning of August 7th, 2002, the Applicant checked the load at Kamloops to find one cow dead. Upon instructions from his employer, the Applicant continued to Abbotsford and a post mortem of the dead cow was subsequently conducted on August 14th, 2002. Although the cause of death was not specified, the injuries were consistent with trauma, and the cow was diagnosed as having a very severe and chronic extensive mastitis involving all four quarters.

The first main issue in this application is whether the animal was injured or became ill or otherwise unfit for transport during the journey. If so, the second issue is the location of the nearest suitable place at which the cow could receive proper care and attention after that determination was made.

On the first issue, although the Applicant admits telling the Respondent the load was "a little down on condition" or "under condition", he indicated this comment referred generally to thirteen cows in the back part of the load that were segregated from the rest.

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The Applicant testified he was not particularly familiar with the transportation of

holsteins. When asked what he meant by “problem cow” in his Notice of Application, the Applicant responded he was referring to the cow lying down when it should have been standing.

The Applicant checked the load on four occasions. The first two times, one cow was down in the rear compartment and the Applicant managed to get the cow standing and continued the journey. The third time he checked the load (at Blue River), he was unable to get the cow to stand and made the cow comfortable and again continued the journey. On checking the load the fourth time at Kamloops, he found this cow dead. After the cow died, he stated he realized there must have been something wrong with the animal, but did not detect it beforehand.

The Respondent testified that, on arrival at the destination, in addition to the dead cow, three animals were exhausted and breathing heavily. After a rest, they rose and were subsequently unloaded without incident. The Respondent further provided evidence of the post mortem examination showing the cow had very severe and chronic extensive mastitis. The Respondent acknowledged it would be unreasonable to assume that the Applicant would have known the cow had mastitis, and that only a veterinarian would be qualified to diagnose this illness.

The Respondent also stated one of the symptoms of mastitis is that cows become lazy, which is consistent with the Applicant’s evidence that he thought the cow was lying down because it was lazy. Or like the three other cows that were lying down it may simply have been exhausted but subsequently revived.

This is not sufficient evidence from which to conclude the cow was unfit to transport at that point.

Accordingly, on the first issue, the Tribunal finds the Applicant could not have known the cow was injured, became ill or otherwise unfit for transport until he discovered the cow was dead.

It is unnecessary to decide the second issue.

The Respondent has failed to establish, on a balance of probabilities, that the Applicant committed the violation.

Dated at Ottawa this 18th day of September, 2003.

Thomas S. Barton, Q.C., Chairman