

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Leslie C. Breiner,)	P & S Docket No. R-94-4
)	
Complainant)	
)	
v.)	
)	
O'Neill Livestock Market, Inc.,)	
Terrance Wanser, Lawrence Wanser,)	
and Gary Nelson Blair)	
)	
Respondents)	Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (Act) and supplemented (7 U.S.C. §181 et seq.). A timely complaint was filed on November 9, 1993, in which complainant seeks reparation against the respondents in the amount of \$8,939.38, in connection with a transaction involving the sale of fifty-four heifer calves.

Each party was served with a copy of the Department's report of investigation. In addition, the respondents were served with a copy of the formal complaint and filed answers thereto in which they denied any liability. As the amount in dispute did not exceed \$10,000.00, the written hearing procedure provided in Rule 13 of the Rules of Practice (9 C.F.R. §202.113) was followed.

In accordance with the Rules of Practice, the parties were given an opportunity to submit further evidence in this matter. None of the parties elected to file additional evidence. In addition, the parties were given an opportunity to submit briefs. The only brief submitted was a

proposed "Findings of Fact, Conclusions and Order" submitted on behalf of respondent Gary Nelson Blair.

Findings of Fact

1. Complainant, Leslie C. Breiner ("Breiner"), is an individual whose mailing address is HC 85, P. O. Box 42, O'Neill, Nebraska 68763. Breiner, at all times material herein, was engaged in business as a farmer and rancher in O'Neill, Nebraska.

2. Respondent, O'Neill Livestock Market Incorporated ("O'Neill Livestock"), is a firm whose mailing address is P. O. Box 395, O'Neill, Nebraska 68763. O'Neill Livestock, at all times material herein, was in the business of conducting and operating a posted stockyard under the Act with a principal place of business in O'Neill, Nebraska. O'Neill Livestock was selling livestock in commerce on a commission basis as a market agency, and was so registered with the Secretary under the Act.

3. Respondent, Terrance C. Wanser ("T. Wanser"), was an individual whose mailing address was P. O. Box 395, O'Neill, Nebraska 68763. At all times material herein, T. Wanser was registered with the Secretary under the Act under the trade name W&W Cattle Co. ("W&W"). W&W was in the business of buying livestock in commerce on a commission basis as a market agency, and buying and selling livestock in commerce for its own account as a dealer. T. Wanser was also the President and one-third owner of O'Neill Livestock.

4. Respondent, Lawrence Wanser ("L. Wanser"), is an individual whose mailing address is P. O. Box 395, O'Neill, Nebraska 68763. At all times material herein, L. Wanser was employed by O'Neill Livestock as an auctioneer.

5. Respondent, Gary Nelson Blair ("Blair"), is an individual whose mailing address is Route 1, Box 216, Allen, Nebraska 68710. At all times material herein, Blair was buying and selling livestock in commerce for his own account as a dealer, and was so registered with the Secretary under the Act.

6. On or about September 27, 1993, Blair contacted Ralph E. Showalter ("Showalter"), Vice President of J&S Livestock, Ltd. ("J&S"), Route 2, Box 86A, Broadway, Virginia 22815. Blair requested a load of heifers be purchased for him and shipped to Nebraska. At Blair's direction the heifers were to be vaccinated against infection. Blair paid J&S the full cost of transporting the heifers from Virginia to O'Neill, Nebraska. Blair's only link with the other respondents in this reparation proceeding was to be that of a livestock consignor.

7. From September 27th through October 1st, 1993, 110 heifers were purchased for Blair by J&S from five Virginia markets.

8. John F. Spangler ("Spangler"), DVM, Harrisonburg, Virginia issued a health inspection certificate for Blair's heifers. In signing the certificate, Spangler certified the heifers were, "not manifesting signs of infectious, contagious, or communicable disease." The certificate also showed the heifers were being transported from Virginia, an area considered free of brucellosis and tuberculosis. In accordance with Blair's instructions, prior to shipment, the heifers were vaccinated with penicillin and a vaccine designed to minimize respiratory infections.

9. On October 1, 1993, J&S shipped the 110 heifers to O'Neill Livestock on Blair's behalf.

10. The heifers arrived at O'Neill Livestock on the morning of October 3, 1993. T. Wanser notified Blair of the heifers' arrival. Blair was told the heifers appeared to be fine.

O'Neill Livestock was provided with copies of Spangler's health certificate, J&S' invoice to Blair, and trucking invoice.

11. Blair never saw the 110 heifers. Blair relied on the expertise of J&S to purchase the heifers and O'Neill Livestock to sell them.

12. On October 4, 1993, T. Wanser sorted the 110 heifers by size into two groups: one group of sixty-six heifers averaging 396 pounds each, and one group of forty-four heifers averaging 469 pounds. All 110 heifers were sold at O'Neill Livestock's sale of October 4, 1993. A competing buyer, Johnny J. Jeffrey ("Jeffrey"), had the high bid on the group of sixty-six heifers. Jeffrey only wanted twelve of them. Breiner accepted the remaining fifty-four heifers at Jeffrey's bid price of \$92.00 per hundredweight. Breiner paid O'Neill Livestock for his heifers and accepted their delivery that same evening.

13. From October 5, 1993, to about November 5, 1993, twenty-two of the Breiner heifers died. The heifers died of pasteurella hemolytica and pneumonia.

14. Breiner is seeking reparation for the cost of the twenty-two dead heifers (\$8,110.96) and veterinarian service fees (\$828.42) incurred in treating all the heifers that were sick.

15. The complaint was received within ninety days from the accrual of the cause of action alleged herein.

Conclusions

The complainant stated that he is a full-time farmer and rancher. As part of his ranching operation, he buys feeder calves in the fall of the year to feed until the following spring. On October 4, 1993, Breiner attended a sale at O'Neill Livestock to purchase feeder calves. Breiner wanted calves that were straight from the farm, local in origin, and of a type that would work well

in his ranching operation. A group of sixty-six heifers were offered for sale. Breiner stated that L. Wanser announced the heifers as having been consigned by "Beeson". Breiner says he knew of a "Beeson" from Eastern Nebraska who was dispersing his herd. During the sale T. Wanser stated the heifers were from Eastern Nebraska, Breiner remembered. This information, and the price at which they were available, convinced Breiner to purchase a portion of the group of heifers.

Respondents T. Wanser and L. Wanser denied misrepresenting any aspects of the ownership or origin of the heifers. They contend Blair was announced as the seller, with the origin of the heifers specified as unknown. They also disavow any obligation to Breiner for death losses and veterinary fees.

Respondent Blair stated that he expected the heifers to be sold in his name. He further stated he did not attend the October 4th sale and is without knowledge of what representations were made during the sale.

Blair stated that he never saw any of the 110 heifers. The heifers were purchased from J&S by Blair over the phone. J&S arranged the transportation of the heifers from Virginia to O'Neill Livestock on Blair's behalf. By phone, T. Wanser told Blair of the arrival of the heifers and described their condition to Blair as, "O.K.". Blair mailed a check to J&S in payment for the heifers and the full cost of freight to Nebraska. In their statements, T. Wanser and L. Wanser supported Blair's position, agreeing the heifers were sold sight unseen by Blair. After purchasing their heifers, Breiner and Jeffrey called Blair to discuss the problems they were having. Breiner and Jeffrey both remember Blair stating he never saw the heifers.

As evidence the heifers were healthy when shipped and sold, all the respondents point to the health inspections performed by Spangler, and by O'Neill Livestock's veterinarian, Dr. Owen ("Owen"). Blair points to the vaccination of the heifers prior to shipment as proof of a good faith effort to protect the heifers from sickness.

No mention was made of the heifers being sold "subject". It is therefore believed their sale was on an "as is" basis. The death losses and veterinarian costs realized by the complainant would be his responsibility unless information, material to his making a purchase decision, was withheld from him or misrepresented by the seller. Therefore, the most critical issue in dispute concerns representations made during the sale of October 4, 1993, about the ownership and origin of the heifers.

Breiner stated that L. Wanser announced "Beeson" as the consignor of the group of sixty-six heifers. An Eastern Nebraska rancher named Beeson was known to be in the process of dispersing his herd. Breiner stated he understood the heifers to have come straight from Beeson's ranch. T. Wanser stated this group of heifers was from Eastern Nebraska and were "weaned and bunk broke", Breiner said. Jeffrey remembered T. Wanser referring to a George Beeson of Eastern Nebraska as the consignor, and stating that the heifers had been injected with a long-lasting penicillin. L. Wanser simply expressed the opinion that the heifers were nice looking, healthy cattle, according to Jeffrey.

In his statement, T. Wanser stated that he announced Blair as the consignor of the group of sixty-six heifers. T. Wanser was at O'Neill Livestock on October 3rd when the trucker gave O'Neill Livestock the J&S invoice to give to Blair. But in his statement, when asked of the

heifer's origin during the sale, he said that he did not know what their origin was. In his sworn statement, L. Wanser reiterated T. Wanser's response.

The reparation report contains a copy of a notepad belonging to L. Wanser bearing names of consignors and a listing of what they were consigning to the October 4th sale. One entry shows "120 Ang. & Ballie hfrc 400-450 G. Beeson". L. Wanser acknowledges placing advertisements in two local papers but said he could not recall why Beeson's name would have been listed as a consignor. L. Wanser said that he did not believe Beeson consigned anything to the October 4th sale. T. Wanser agreed, and added that to his knowledge, Beeson had never sold any livestock at O'Neill Livestock. T. Wanser assumed the publication of Beeson's name in the advertisements was a matter of both papers independently misprinting the same consignor's name in exactly the same manner. T. Wanser and L. Wanser do not dispute that 120 calves advertised in the papers were Blair's heifers.

Breiner saw the advertisements after the sale. He did not rely on the advertisements in purchasing the heifers.

In their answer to the reparation report, T. Wanser and L. Wanser state that the 110 heifers were consigned and brand cleared into the sale under Blair's name. The documentation given to Blair and Breiner for the sale of the fifty-four heifers showed the heifers were Blair's. The purchase invoice issued to Breiner, however, showed the seller only by number. For the sale of October 4, 1993, O'Neill Livestock assigned seller number "4" to Blair. Breiner could not have known the true identity of the consignor, unless he had inquired of O'Neill Livestock, or been told by someone connected with the sale. After getting the heifers home the night of the 4th,

Breiner learned of the correct identity of the consignor from Jeffrey. Jeffrey had been told by the local brand inspector that Blair was the actual consignor of the heifers.

The O'Neill Livestock account of sale issued to Blair showed total deductions of \$2,140.00 taken from the gross proceeds. Of this amount, \$895.00 was shown as a deduction for costs involved in trucking the 110 heifers to O'Neill Livestock. Blair, however, paid J&S directly for the full cost of freight to O'Neill Livestock. Blair states that he believes the \$895.00 deduction was made by O'Neill Livestock as it's share of Blair's profit on the heifers. The \$895.00 amount was almost exactly half of Blair's profit on the heifers. O'Neill Livestock personnel would have known how much Blair paid for the heifers, and exactly where the heifers came from, because O'Neill Livestock was given the J&S invoice billing Blair for the heifers. T. Wanser disclaimed any knowledge of why the \$895.00 deduction was made from Blair's proceeds. He maintains the commissions were deducted in accordance with O'Neill Livestock's tariff and that the market's bookkeepers take care of all other deductions. Selling commissions of \$605.00, earned in the course of providing the normal selling services, were deducted separately from the \$895.00 amount.

Announcing the heifers as being of local origin, and straight off the ranch where produced, would have raised the bidding, and enhanced the value of the heifers. If O'Neill Livestock was to retain half of Blair's profit on the heifers, misstating the ownership and origin of the heifers would have benefited O'Neill Livestock as well as Blair. Blair did not view the heifers when they arrived from Virginia. He also did not observe their sale. Blair depended on the Wansers to watch over and protect his interest in the heifers.

The evidence above weighs strongest in favor of the complainant's arguments. We believe the heifers were misrepresented as to their ownership and origin.

In their defense, the respondents note the health inspection work that was done on the heifers in Virginia and Nebraska. They say that Spangler and Owen found the heifers to be healthy before and after shipment from Virginia. Such inspections are conducted to determine if the cattle may be carrying any contagious diseases. The inspections do not assure the overall health of the cattle.

Blair highlights his request for the vaccination of the heifers by J&S. In the fall of the year when the days tend to be warm and the nights cool, cattle being transported a long distance run a danger of developing shipping fever. Concerned about this possibility, Blair was willing to pay for preventative treatment. At Blair's request, the heifers were injected with vaccines designed to prevent respiratory ailments and pneumonia which can develop when cattle experience stress while being shipped long distances.

T. Wanser stated that Blair's heifers sold for \$10.00 per hundredweight less than other heifers at the sale. Presumably Breiner purchased the fifty-four heifers at a lower price due to their obvious poor condition. T. Wanser, however, provides no information about the selling prices of other heifers at O'Neill Livestock. The reparation report does include copies of the purchase invoices issued to J&S from five Virginia markets for the 110 heifers purchased for Blair. These invoices show J&S was able to acquire the heifers in Virginia at per hundredweight prices ranging from \$60.00 to \$80.00. J&S rebilled these heifers to Blair at prices ranging from \$73.21 to \$77.69, FOB J&S. The 110 heifers were sorted prior to sale into two groups. During the sale each of these groups were again divided in two. Four different buyers were involved in

purchasing Blair's heifers. Breiner and Jeffrey paid \$92.00 per hundredweight for the sixty-six heifers. The other two buyers; Ken Van Every ("Van Every") and Bruce Waldo ("Waldo"), paid \$83.50 and \$91.50 respectively for their portions of the remaining forty-four heifers. Van Every was the only one of the four buyers who purchased heifers consigned by someone other than Blair. Van Every purchased one heifer consigned by a "Malhendorf" at a price of \$81.00.

Breiner accepted the fifty-four heifers on the evening of October 4, 1993, and transported them to his ranch. Later that same evening Jeffrey called Breiner and told him the heifers had been consigned by Blair rather than Beeson. To Breiner's knowledge, this would not have precluded the possibility that Blair brought the heifers to O'Neill Livestock straight from the Beeson ranch. It was on Wednesday, October 6, 1993, that Breiner contacted T. Wanser and learned the heifers had come from the East coast. T. Wanser also told Breiner that O'Neill Livestock would not help him with his losses.

Breiner had been concerned about the ownership and origin of the fifty-four heifers at the time of purchase. Breiner says he was of the understanding, based on representations made during the sale, that the heifers were straight off the Beeson ranch in Eastern Nebraska. When Breiner's heifers began to die he had one posted. It was found to have *pasteurella hemolytica* and pneumonia: indicative of shipping fever. The death losses were related to the long distance the heifers traveled to O'Neill Livestock.

Based on the evidence presented, it is our finding that the respondents, other than Blair, misrepresented the ownership and origin of the heifers purchased by Breiner. Furthermore, the misrepresentations were material and were relevant to the losses claimed by Breiner. Breiner paid an average price per head of \$368.68 for all fifty-four heifers. The loss incurred as a result of the

death of twenty-two heifers came to \$8,110.96. Incidental damages of \$828.42 were also incurred in the process of providing medical care necessary to minimize death losses. Breiner's claim of \$8,939.38 is right and proper.

Redress may be sought, however, from only one of the four respondents. The report is devoid of any evidence that L. Wanser could properly be named as a defendant in this matter. He was neither a stockyard owner, market agency, or dealer. L. Wanser's involvement was limited to his sphere of duties as an employee of O'Neill Livestock. The complaint against L. Wanser is dismissed for this reason. According to the Omaha regional office of the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, U.S.D.A., T. Wanser is now deceased. Breiner's complaint against T. Wanser is thereby dismissed. Blair provided uncontested testimony that he played no part in instigating or orchestrating any misrepresentations made. He also exercised due diligence by having the heifers vaccinated prior to shipment so that they might remain healthy. The death losses may have been even higher otherwise. For these reasons the complaint against Blair is dismissed. We find that O'Neill Livestock gave out misleading information to increase its split of profit on Blair's heifers. O'Neill Livestock is responsible to Breiner for his losses.

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to the delegated authority, 7 C.F.R. §2.35, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C. 1982 Ed., App. pg. 1068. It constitutes "an order for payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. §210(f), which provides for enforcement of such an order by court action begun by complainant.

It is requested that, if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such action, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250-1400. On a petition to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. §202.117).

On a complainant's right to judicial review of such an order, see 5 U.S.C. §702-3 and United States v. I.C.C., 337 U.S. 426 (1949). On a respondent's right to judicial review of such an order, see Maly Livestock Commission v. Hardin et al., 446 F.2d4, 30 Agric. 1063 (8th Cir. 1971); and Fort Scott Sale Co., Inc. v. Hardy, 570 F. Supp 1144, 42 Agric. 1079 (D. Kan. 1983).

Order

Within 30 days from the date of this order, respondent O'Neill Livestock Market, Incorporated, shall pay to complainant, Leslie C. Breiner, as reparation, \$8,939.38 with interest thereon at the rate of 10 percent per annum from October 4, 1993, until paid.

The complaint is hereby dismissed as to respondents Terrance C. Wanser, Lawrence Wanser, and Gary Nelson Blair.

Copies of this order shall be served upon the parties.

Done at Washington, D.C.

JUN 23 1987

WILLIAM G. JENSON

JUDICIAL OFFICER
Office of the Secretary