

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Johnny J. Jeffrey,)	P & S Docket No. R-94-5
)	
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 October 28, 1993, in which complainant sought reparation against the respondents in the amount of \$1,409.00, in connection with a transaction involving the sale of twelve 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, Johnny J. Jeffrey ("Jeffrey"), is an individual whose mailing address is 309 South Harrison, O'Neill, Nebraska 68763. Jeffrey, at all times material herein, was employed as a hospital maintenance engineer and, on a part-time basis, engaged in business as a 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. Blair directed Showalter to have the heifers 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 by J&S from five Virginia markets for Blair.

8. John F. Spangler ("Spangler"), DVM, Harrisonburg, Virginia issued a health inspection certificate for the 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 the risk of respiratory infections.

9. On October 1, 1993, J&S shipped all 110 heifers to O'Neill Livestock.

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 the 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. Jeffrey had a high bid of \$92.00 per hundredweight on the group of sixty-six heifers. Jeffrey only took twelve of them. A competing buyer, Leslie C. Breiner ("Breiner") accepted the remaining fifty-four heifers at Jeffrey's bid price of \$92.00 per hundredweight. Jeffrey paid O'Neill Livestock for the heifers and accepted delivery that same evening.

13. On October 5, 1993, two of the Jeffrey heifers died. These heifers died of pneumonia. On November 9, 1993, another heifer died.

14. Jeffrey is seeking reparation for the cost of the three dead heifers (\$1,035.00), veterinarian service fees (\$252.45) incurred in treating all the heifers that were sick, medications (\$130.71), medicated feed (\$185.75), and \$150.00 for his time in caring for the heifers.

15. Jeffrey's claims for all amounts listed above were received within ninety days from the accrual of the cause of action alleged herein.

Conclusions

The complainant stated that he is a part-time rancher. He buys twelve to fifteen feeder calves in the fall of the year to feed until the following spring. On October 4, 1993, Jeffrey attended a sale at O'Neill Livestock to purchase feeder calves. Jeffrey states that he had decided

to purchase heifer calves that fall. A group of sixty-six heifers were offered for sale. Jeffrey was interested in this group of calves due to their weight and what he judged would be their price range. Jeffrey stated that T. Wanser announced the heifers had been consigned by George Beeson of eastern Nebraska. This information persuaded Jeffrey 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 Jeffrey for death losses and the other claimed expenses.

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 heifer's arrival, describing 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 agreed that to their knowledge Blair never saw the heifers. After purchasing their heifers, Jeffrey and Breiner called Blair to discuss the problems they were having. Jeffrey and Breiner both remembered Blair stating he never saw the heifers.

As evidence the heifers were healthy when shipped, all the respondents point to the health inspection performed by Spangler. They also mention that O'Neill Livestock's veterinarian, Dr.

Owen, DVM ("Owen"), cleared the heifers for sale. Blair states that he made a good faith effort to protect the heifers from sickness. He says this was demonstrated by his requesting the heifers be vaccinated prior to shipment.

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.

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. An Eastern Nebraska rancher named Beeson was known to be in the process of dispersing his herd. According to Jeffrey, L. Wanser simply expressed the opinion that the heifers were nice looking, healthy cattle. Unlike Jeffrey, Breiner stated that L. Wanser announced "Beeson" as the consignor of the group of sixty-six heifers. Breiner said he understood the heifers to have come straight to O'Neill Livestock from Beeson's ranch. T. Wanser stated this group of heifers was from Eastern Nebraska and were "weaned and bunk broke", Breiner said.

In his statement, T. Wanser stated that he announced Blair as the consignor of the group of sixty-six heifers. On October 3rd the trucker gave O'Neill Livestock the J&S invoice to give to Blair. T. Wanser was at O'Neill Livestock at the time. Yet, during the sale, when asked of the heifer's origin, T. Wanser said that he did not know what their origin was. In his declaration, L. Wanser agreed with what T. Wanser said his response was.

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 read; 120 Ang. & Ballie hfrc 400-450 G. Beeson. L. Wanser acknowledged 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 anything at O'Neill Livestock. T. Wanser said he 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. Neither T. Wanser nor L. Wanser dispute that 120 calves advertised in the papers were Blair's heifers.

Jeffrey 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 Jeffrey for the sale of the twelve heifers showed the heifers were Blair's. The purchase invoice issued to Jeffrey, however, showed the seller only by number. For the sale of October 4, 1993, O'Neill Livestock assigned seller number "4" to Blair. Jeffrey 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. Jeffrey states that Glen Anderson, the Nebraska brand inspector at O'Neill Livestock, told Jeffrey the consignor of the heifers was Blair. This was made known to Jeffrey while he was still at the market on the afternoon of October 4th.

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 the freight. 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. O'Neill Livestock personnel would have known how much Blair paid for the heifers, and exactly where the heifers came from. The trucker had given O'Neill Livestock 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 maintained the commissions were deducted in accordance with O'Neill Livestock's tariff and that the market's bookkeepers took care of all other deductions. Selling commissions of \$605.00, earned in the course of providing 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 weighs strongest in favor of the complainant. We believe the heifers were misrepresented as to their ownership and origin.

In their defense, the respondents point to 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, however, are conducted to determine if the cattle may be carrying any contagious diseases. The inspections do not assure the overall health of the cattle.

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. Infections can develop when cattle experience shipping related stress under adverse conditions. Blair was concerned about this possibility and was willing to pay for preventative treatment. At Blair's request, J&S injected the heifers with vaccines designed to prevent respiratory ailments and pneumonia.

T. Wanser stated that Blair's heifers sold for \$10.00 per hundredweight less than other heifers at the sale. Presumably Jeffrey purchased the twelve 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 contained copies of the purchase invoices for the 110 heifers issued to J&S from five Virginia markets. 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 sold in four groups. Four different buyers purchased the heifers. Jeffrey and Breiner each 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 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.

Jeffrey accepted the twelve heifers on the evening of October 4, 1993, and transported them to his ranch. Jeffrey had already been informed of Blair's identity as seller. To Jeffrey's knowledge, however, this would not have precluded the possibility that Blair brought the heifers to O'Neill Livestock directly from the Beeson ranch. It was on Saturday October 9, 1993, that Jeffrey met with T. Wanser and learned the heifers had come from out of state.

Jeffrey had been concerned about the ownership and origin of the twelve heifers at the time of purchase. Jeffrey says he understood, based on representations made during the sale, that the heifers were straight off the Beeson ranch in Eastern Nebraska. Kirk Shules, DVM ("Shules") and Amy Baker, DVM ("Baker"), both from the same clinic as Owen, examined the heifers on October 5th and 6th respectively. Their veterinarian's statement of account mentioned one calf exhibiting evidence of severe respiratory distress and having a temperature of 102 degrees. The statement of account also noted that two calves died on October 5th from pneumonia. These observations would indicate shipping fever as the cause of death. 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 Jeffrey. Furthermore, the misrepresentations were material and were relevant to the losses claimed by Jeffrey.

Jeffrey paid an average of \$345.76 per head for the twelve heifers. Therefore, the death of two heifers on October 5th resulted in a loss of \$691.52. Incidental damages were also incurred in the process of providing medical care necessary to minimize death losses. Jeffrey's claim included supporting documentation for \$252.45 in veterinary bills, \$130.71 for medications, and \$185.75 for medicated feed. The amounts claimed for all incidental damages were substantiated

by supporting documentation and a sworn statement provided by Jeffrey. There was an error made by Jeffrey in adding the medicated feed bills together. The correct amount was \$184.75. These losses and damages therefore total to \$1,259.43.

In his declaration Jeffrey stated a third heifer died on November 9, 1993. He provided a delivery receipt issued by P.M. Dead Stock Removal. This delivery receipt was dated November 10, 1993, and showed one angus heifer was received from Jeffrey. Jeffrey's declaration was received by the Omaha regional office of the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), U.S.D.A. on November 27, 1993. This was within ninety days of the cause of action on Jeffrey's complaint. Jeffrey's claim will be amended by \$345.76 to include his loss on this heifer.

From October 4th through the 19th Jeffrey claims 15 hours of his own time was spent caring for the sick heifers. Jeffrey's reparation claim included \$150.00 for his time. Jeffrey provided a handwritten itemization by date of hours spent caring for the heifers. This itemization was not verified by oath or affirmation.

The substantive value of Jeffrey's labor is inextricably linked to the value added to, or the degree to which losses were averted on, the calves. As a self-employed rancher, Jeffrey is the beneficiary of his own labor. Granting any amount in compensation for his time could be likened to requiring the respondents to pay Jeffrey a salary to work for himself. Even if compensation for his time was deemed appropriate, Jeffrey provides no information to confirm the reasonableness of a \$10.00 per hour rate. Jeffrey's claim for 15 hours of his own labor will not be allowed.

Intermixed with the supporting documents provided by Jeffrey was an invoice dated October 26, 1993, from the Atkinson Veterinary Clinic P.C., Atkinson, NE. This invoice billed

Jeffrey for 10 sulfa span boluses at a cost of \$15.20. According to the invoice, the boluses were purchased or administered on October 12th. The invoice notes the boluses were for Jeffrey's cow herd. Jeffrey makes no mention of the invoice in his reparation claim. In his declaration Jeffrey states Shules and Baker from the O'Neill Veterinary Clinic P.C. administered all veterinary care to the heifers. No mention is made of the Atkinson clinic. Jeffrey also stated in his declaration that sulfur boluses were administered to all twelve heifers on October 5th. On his itemization of time spent caring for the calves, Jeffrey included two hours on October 10th and another two hours on October 11th administering sulfa pills and LA 200 to the calves. Jeffrey mentions five calves were treated with boluses on each of those days. We are otherwise left to assume the \$15.20 amount was to be included in Jeffrey's claim. Based on the dates presented, it is difficult to assume the Atkinson invoice relates to boluses administered to the sick heifers. We will not make any assumptions and will disregard the invoice entirely.

Redress may be sought 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 GIPSA, T. Wanser is now deceased. Jeffrey's complaint against T. Wanser must therefore be 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 it's share of profit on Blair's heifers. O'Neill Livestock is responsible to Jeffrey 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, Johnny J. Jeffrey, as reparation, \$1,605.19 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 1997

WILLIAM G. JENSON

JUDICIAL OFFICER
Office of the Secretary