

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Jim Beller

P & S Docket No. R-94-7

Complainant

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v.

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Michael Bamrick

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Respondent

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Decision and Order

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 et seq.) A timely complaint was filed on October 6, 1993, in which complainant seeks reparation against the respondent in the amount of \$1,972.26 in connection with a transaction involving a carcass grade/weight sale of 14 heiferettes in which respondent represented the packer as a market agency buying on commission.

Each party was served with a copy of the Department's report of investigation. In addition, the respondent was served with a copy of the formal complaint and filed an answer thereto in which he 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. Complainant filed a sworn opening statement. Respondent filed a sworn response to complainant's sworn opening statement. Complainant filed a sworn reply to respondent's response to his opening statement. In addition, the parties were given an opportunity to submit briefs. Respondent filed a brief.

Findings of Fact

1. Complainant, Jim Beller ("Beller"), is an individual whose mailing address is 4549 Pioneer Lane, Greeley, CO 80634, at all times material herein, was engaged in the business as a farmer feeder at Greeley, CO.

2. Respondent, Michael Bamrick ("Bamrick"), is an individual whose mailing address is 2639 16th Avenue, Greeley, CO 80631. At all times material herein, Bamrick was operating as a market agency buying livestock on commission in interstate commerce and as a dealer buying and selling livestock in interstate commerce. Bamrick was registered and bonded with the Secretary of Agriculture as a livestock dealer and market agency buying livestock on commission in interstate commerce.

3. On September 14, 1993, respondent agreed to purchase 14 heiferettes from complainant at a carcass price of \$113.00/cwt. for choice with a floor price of \$95.00/cwt. for lesser grades. The cattle were purchased for the account of Gibbon Packing, Inc., "Gibbon", Gibbon, NE.

4. The cattle were on feed at Sellmer Feed Lots, Greeley, CO. Complainant Beller was responsible for transportation costs from the feedlot to Gibbon, NE.

5. The 14 heiferettes were loaded at Sellmer Feed Lots, on September 15, 1993. The cattle were received at the packing plant on September 16, 1993 as lot #304 and were killed on September 17, 1993.

6. Lot #304 contained one carcass which weighed 975 lbs. and graded choice. The remaining 13 carcasses graded below choice.

7. Gibbon Packing, Inc. paid complainant \$.95.00/cwt. for the total weight of the entire lot on September 21, 1993.

8. Complainant alleges 12 carcasses graded choice and demands reparation from respondent totaling \$1,972.26. The claim is based on an \$18.00/cwt. price difference between \$113.00/cwt. for choice and the \$95.00/cwt. floor price for carcasses which did not grade choice.

9. The complaint was received within 90 days from the accrual of the cause of action alleged herein.

Conclusions

Complainant and respondent agree that respondent purchased 14 heiferettes for the account of Gibbon at a carcass price of \$113.00/cwt. for choice with a \$95.00/cwt. floor price for cattle which graded below choice.

Complainant Beller alleges respondent Bamrick told him that

12 of the 14 cattle had graded choice during a conversation at a livestock auction. Complainant claims respondent did not say or imply that there would be discounts for heavy carcasses.

Respondent Bamrick acknowledges that he told complainant 12 cattle graded choice. Respondent said this statement was made based on incorrect information received by telephone from an office employee at Gibbon. Respondent admits that he did not specifically mention carcass size and yield grade discounts when he made the second bid. Respondent claimed the carcass size discounts had been discussed when he bid on the same pen of cattle two or three weeks earlier.

The first issue we will address is the grade of the carcasses. Complainant Beller, alleges respondent Bamrick told both him and Allen Sellmer, Sellmer Feed Lots, that 12 carcasses graded choice. Complainant alleges that based on his 35 years experience feeding cattle, 12 carcasses should have graded choice.

Complainant submitted a grade/yield purchase report from Gibbon which shows the carcasses in lot #304 were assigned the following USDA grades: 1 choice , 1 select , 11 utility and 1 breaker. Michael Cummins, Marketing Specialist, Denver, CO obtained sales records from Gibbon to verify the grades. This evidence shows 14 carcasses from lot #304 were sold at the same grades listed on complainant's grade and yield purchase report. We find complainant failed to meet the burden of proof that 12 carcasses graded choice. The record shows one 963 lb. carcass in

lot #304 graded choice.

Complainant Beller alleges he should have been paid \$113.00/cwt. for choice carcasses because carcass weight was not mentioned by respondent. This issue now applies only to the one carcass which graded choice. In his sworn statement, respondent Bamrick claims Gibbon paid Beller \$95.00/cwt. for all 14 carcasses instead of paying the \$113.00/cwt. choice price and deducting a \$30.00/cwt. heavy carcass discount on the one choice carcass.

The evidence shows Gibbon took no discounts for heavy carcasses. Complainant Beller's payment was calculated with all 14 carcasses in lot #304 priced at the \$.95/cwt. floor price for non-choice cattle. We also have in evidence, a sworn statement from Rick Lundt, Director of Cattle Procurement, at Gibbon. Lundt stated they one heavy choice carcass should have been discounted to \$83.00/cwt., but he paid Beller \$95.00/cwt. for the whole lot.

Respondent's position is that the \$95.00/cwt. complainant Beller received for the 963 lb. choice carcass was a higher price than the choice price less a heavy carcass discount. However, the evidence shows no carcass size discounts were deducted from the price of any carcass in complainant's lot #304. The grade/yield purchase report listed carcass weight ranges of 550/900 lbs. and 901 lbs. up. The carcass weight sheet showed nine individual carcasses from lot #304 weighed in excess of 900 lbs. Gibbon followed a course of performance which does not support respondent's contention that heavy carcass discounts were included

in the bid.

In his affidavit, respondent Bamrick established that he bid on the cattle two times. The first bid was made to Sellmer on a pen of 19 cattle, at his feedlot, in late August or early September. The second bid was made to both Sellmer and complainant Beller at a livestock auction on September 14, 1993. Respondent said he stipulated a weight break for heavy carcasses in the first bid and contends he made the bid without knowledge that five heifers had been sold. Respondent stated, "Sellmer told me at this time that they would pass on the bid because there were too many stipulations in the bid." "There was no mention made of the probability of overweight carcasses in this second bid as I had made it clear in the first bid that there would be breaks for overweight carcasses."

We find that respondent Bamrick's first offer to complainant Beller received an unqualified rejection. Therefore, the second bid, which was made approximately two weeks later, was an independent attempt at contract formation. Respondent had a new obligation to fully disclose the terms and conditions as communicated to him by his principal, Gibbon. The importance of disclosing the heavy carcass discounts was increased by complainant's rejection of the first bid based on "too many stipulations."

The evidence does not support respondents position that the prices quoted to complainant were subject to heavy carcass

discounts. We find that complainant Beller should be awarded reparations equal to the \$18.00/cwt. price difference between choice and the floor bid for one 963 lb. choice carcass (963 lbs. X .18 = \$173.34).

In his sworn opening statement, complainant alleges respondent Bamrick misrepresented the transportation cost to Gibbon, NE. Complainant claims he was overcharged for freight on the cattle. Gibbon deducted \$1.21/cwt. freight, respondent had represented the freight would cost \$1.05/cwt. The record contains no evidence on this issue. Complainant made no reparation claim for a freight overcharge.

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 §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.2D 4, 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 Bamrick, shall pay to complainant Beller, as reparation, \$173.34 with interest thereon at the rate of 10 percent per annum from September 21, 1993 until paid.

Copies of this order shall be served upon the parties

Done at Washington, D.C.

WILLIAM G. JENSON

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JUDICIAL OFFICER
Office of the Secretary