

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Mikkelson Beef, Inc.)	P & S Docket No. R-94-10
Complainant)	-
)	
v.)	
)	
Oklahoma National Stockyards Company and George Hall)	
)	
)	
Respondents)	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 complaint was filed on December 30, 1993, in which complainant sought reparation against Oklahoma National Stockyards Company and George Hall as President in the amount of \$2,644.12 in connection the death of six cows which were held at the stockyard after purchase and fed feed supplied by the stockyard. Five cows died at respondents' stockyard out of a pen of 24 cows which were purchased on October 19, 1993. The sixth cow died on October 30, 1993 at complainant's packing plant after the animal was removed from respondents' stockyard.

The Grain Inspection, Packers and Stockyards Administration, "GIPSA", Fort Worth Regional Office, conducted an investigation pursuant to Rule 4 of the Rules of Practice (9 C.F.R. § 202.104).

The findings were included in the investigation report and became part of the evidence in this proceeding.

During the investigation, it was determined that George Hall's actions in this matter were within the scope of his employment as President of Oklahoma National Stockyards Company. George Hall was made a party to the reparation and was served individually with a copy of the Department's report of investigation. The Oklahoma National Stockyards Company and George Hall (hereafter respondents) were served with copies of the formal complaint. Respondents filed a joint answer thereto, which denied all allegations. 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, both parties were given an opportunity to submit further evidence. Complainant filed two affidavits. Respondents filed eight affidavits in response to complainant's additional evidence. Complainant filed an additional affidavit in response to the additional evidence. Respondents filed an affidavit in response to complainant's affidavit. Both parties were given an opportunity to submit briefs. Respondents filed a brief.

Findings of Fact

1. Complainant, Mikkelson Beef, Inc., ("Mikkelson"), is a corporation whose mailing address is P.O. Box 25911, Oklahoma

City, OK 73125. At all times material herein, the corporation was engaged in business as a meat packer buying cattle for slaughter in interstate commerce.

2. Respondent, Oklahoma National Stockyards Company is a corporation whose business mailing address is 107 Livestock Exchange Building, Oklahoma City, OK, 73108. At all times material here-in, respondent was operating as a stockyard as defined in Section 301(a) of the Packers & Stockyards Act. Oklahoma National Stockyards Company was engaged in the business of providing stockyard services in connection with the receiving, marketing, feeding, watering, holding, delivery, shipment, weighing or handling of livestock in commerce.

3. Respondent, George Hall is an individual whose business mailing address is 107 Livestock Exchange Building, Oklahoma City, OK, 73108. At all times material herein, George Hall was an agent for and President of Oklahoma National Stockyard Company. George Hall conducted business on behalf of his employer as an agent and acted within the scope of his employment.

4. Sparks Commission Co. purchased 24 cows for the account of complainant at respondents' stockyard on October 19, 1993. The cows were held at the stockyard for several days in pens assigned to Sparks. The cows were fed by Sparks' employees with feed and water provided by respondents.

5. Five head died before the cows were removed from respondents' stockyard. The record is unclear concerning the

exact dates when the cows died. A hand written note included with the complaint listed October 21, 1993 through October 23, 1993 as the dates the cows died. Complainant's typewritten letter to respondents shows one cow died on October 22, 1993 and four more died on October 23, 1993. Respondents identify Friday, October 22, 1993, as the date complainant was notified the first cow died. We accept that complainant was notified the first cow died on October 22, 1993. Four more cows died on or before October 23, 1993.

6. A sixth cow died on October 30, 1993 after complainant removed it from respondents' stockyard.

7. Complainant seeks reparation totaling \$2,644.12 representing the purchase cost of the six cows.

8. The complaint was received in the Grain Inspection Packers & Stockyards, Fort Worth Regional Office on December 30, 1993. This was within ninety days from the accrual of the cause of action alleged herein.

Conclusions

Complainant claims six cows died as a result of feed supplied by respondents and further alleges the feed was not a suitable ration because mature cows can't digest it. Five of the dead cows had been purchased at respondents' stockyard by Sparks Commission Co. and died while being held in Sparks' pens. The complaint alleges a sixth cow died after it was removed from the stockyard.

In deciding this matter, consideration must be limited to the five cows which were part of the 24 head purchased on October 19, 1993. The sixth cow, which died on October 30, 1993, was identified on the reparation claim as tag #1304 totaling \$378.58. The record contains an autopsy report and letter from Dr. Leo Voshkul, D.V.M. which identifies bloating, as the cause of death. No invoice or documentation was placed in evidence to support the purchase date or cost of the cow that would place it in the same purchase lot as the other five cows. Since complainants in reparation proceedings have the burden of proving their claim by preponderance of evidence, this portion of the claim must be denied.

Complainant states Sparks was instructed to feed and water the cows to maintain their body composition. Complainant alleges the cows died because they were unable to digest feed Sparks was required to feed them under stockyard rules. Complainant alleges the only feed offered by respondents was formulated for yearling cattle and can kill older cows.

Respondents agree that five cows died at their stockyard. Respondents admit they delivered feed ordered by Sparks Commission Co. to pens occupied by complainant's cattle, but the actual feeding of the cattle was the responsibility of Sparks or complainant. Respondents deny that the feed delivered to Sparks was a formula which cows could not digest. Respondents contend the feed was not the problem. Respondents suggest that more

aggressive, "boss cows," died as a result of Sparks failure to properly manage their feed intake. Respondents allege complainant made a poor management decision by holding the cows at the stockyard for several days after purchase.

A copy of the Tariff No. 15 for Oklahoma National Stockyards Company is included in the record. Complainant directs attention to Item 9, Rule 4 as evidence that Sparks had no choice but to feed the feed delivered by respondents. The rule states:

"No person, firm or corporation shall bring into or use within or upon these yards, any feed or bedding, except such as is obtained from the Oklahoma National Stockyards Company at the charge fixed in Item No. 2."

Complainant answered respondents' poor management allegations with an assertion that the tariff restriction places a responsibility upon respondents to provide a feed which does not have the potential to kill mature cows within three days of purchase.

Respondents cite Rules 3 and 7 under Item 9 of their tariff to support their position that they had no responsibility for the care and management of the livestock. Item 9, Rule 3 states:

"Unless otherwise directed in writing by the owner before delivery of the livestock, this company deems the person, firm or corporation, to whom or in whose care the livestock is consigned or weighed, to be agent for the owner for all purposes."

Item 9, Rule 7 states:

"This company will not be responsible for loss or damage to any livestock not in its exclusive control and custody, nor to or by any vicious or unmanageable animals. Notices of all claims for shortages, injuries, mixing, weighing, or other damages must be given within a reasonable time after the alleged cause for claim arises."

Respondents state there was no evidence whatsoever that there was anything wrong with the feed they delivered to Sparks and that complainant is improperly attempting to shift responsibility for improper management of his cattle to respondents. We agree that the feed respondents provided was not toxic, but the evidence is persuasive that the feed was not appropriate for mature cows because it has the potential to cause bloat. Respondents point to Sparks's failure to manage the feed intake, but ignore their management contribution as sole supplier offering one feed.

In his affidavit, respondent Hall states that complainant's statement that the pelleted feed is not designed for cows unless a roughage is supplied is wholly inaccurate. We disagree with Hall's statement. The evidence is persuasive that the feed is not appropriate for mature cows unless roughage is also fed.

Persuasive testimony is found in two affidavits from Donald Gill, Professor of Animal Science and Extension Livestock Specialist at Oklahoma State University. In the first affidavit, Gill stated he checked the composition of the Stock Yard's feed and found it was designed to help fill shipped stocker cattle and calves over a short period of time. Gill warned of four cautions which must be observed when feeding this feed or any other pelleted ration. First, it should not be fed for more than 72 hours without some form of additional roughage such as long hay because of bloat potential. Second, the cattle should have free access to water before and after feeding. Third, older animals

should not be allowed to eat more than 2% of their body weight in less than 24 hours. Fourth, cows which have been off feed for long periods of time may have the ability to overeat any palatable pelleted feed and encounter rumen impaction or bloat. He offered a solution that feed intake for one animal cannot exceed 8 pounds of feed in an eight hour period.

In his second affidavit, Gill described the cautions stated in his first affidavit as common sense directives for feeding pellets of any kind. Gill asserts that cattlemen with minimal experience and certainly owners of commission firms and order buying firms would know to take these precautions.

The official Veterinarian for respondents, Dr. L. D. Barker, D.V.M., stated in his affidavit that complainant's decision to leave his cows on feed at the stockyard was a management mistake. He stated that upon learning of complainant's problems with his cows, he recommended immediately moving the cows off the stockyard where they could be fed hay.

Dr. Barker performed necropsies on two of the cows. He felt the cows had gorged on the feed and drank water and died from the resulting pressure and expansion. Dr. Barker expressed his opinion that the feed was designed to be a filling and holding ration for yearling cattle and was not designed to be fed for long periods, especially to older cows. He added that older cows have been held successfully when their feed intake was limited.

Respondents' brief raises the question of whether reasonable

service was provided as the primary issue in this case. Section 307 of the Packers and Stockyards Act requires that:

"It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to furnishing stockyard services."

To evaluate "reasonable service" we ask the question: Would a person knowledgeable in the care and feeding of mature cows avoid feeding the feed respondents offer? The record contains seven affidavits from cow buyers and commission firm operators concerning the feed offered by respondents. Four cow buyers, Charles Smith, Lewis Hull, Doug Klaasen and Emmett Marcum, stated they have experienced cow death losses which they attributed to the feed provided by respondents. Three commission firm owners or agents stated they find nothing wrong with the feed, but warn that feed intake must be managed. We conclude from this evidence, that all four cow buyers would avoid feeding mature cows the feed offered by respondents. We further conclude that the commission firms would not select respondents' feed for mature cows.

Black's Law Dictionary defines "reasonable" as:

"just; proper. Ordinary or usual. Fit and appropriate to the end in view."

The evidence is convincing that the feed was not proper, ordinary, usual, fit or appropriate for mature cows.

In his affidavits, Dr. Gill recommends four management cautions or "common sense" directives which should be observed when feeding the pelleted feed supplied by respondents. The first

caution involved not feeding the pelleted feed for more than 72 hours without some form of additional roughage. Two of the other cautions involved controlling the feed intake of each cow in a manner which would impose an unreasonable expectation on the firms responsible for feeding cows. Respondents expected Sparks to control feed intake by limit feeding and sorting off more aggressive "boss cows." This would have required sorting the cows into numerous pens in order to limit feed them in small groups.

Respondent Hall's letter to complainant, which he adopted as part of his affidavit, demonstrates his knowledge of the stressful conditions the cows experience in shipment and their varying physical conditions when they arrive at the stockyard.

The evidence is convincing that the feed has the potential to cause bloat in mature cows. The evidence would indicate that respondents may have failed to provide a "reasonable stockyard service" as required by (7 U.S.C. 208(a)) by offering only one feed which was not appropriate for mature cows. However, respondent's liability for the animals at issue rests on its proximity to the damage caused complainant. In other words, was respondents action in requiring the one type of feed the direct cause of the death of the cattle - or was there an intervening event or omission that resulted in the death? Did the feed respondents delivered to Sparks caused the death of complainant's cows? Respondents and Sparks each contributed to the management of complainant's cows. Respondents provided the feed. Sparks

controlled the quantity of feed fed, frequency of the feeding and observation of the cows. The evidence is persuasive that the feed supplied by respondents placed an added management requirement on Sparks to limit each cow's feed intake.

Complainant's statement that Sparks was instructed to feed and water the cows to maintain their body composition provides no evidence of the care and management Sparks practiced in caring for complainant's cows. Respondents allege that Sparks failed to properly manage the cows' feed intake. We find the record contains no evidence concerning the degree of management Sparks practiced in caring for the cows. The record includes no evidence or statements from any representative of Sparks concerning how the cows were fed and managed. Also, no record showing the quantity of feed Sparks charged to complainant or how frequently it was fed, was submitted into evidence.

Absent this evidence, no conclusion can be reached concerning the proximate cause or the substantial factors which caused the death of the cows. Complainant has not satisfied the burden of proof necessary to prove respondents' feed caused the five cows to die and has failed to meet the burden of proof by preponderance of evidence necessary in reparation cases.

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.

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

The complaint against respondents is hereby dismissed.
Copies of this order shall be served upon the parties

Done at Washington, D.C.

JAN 20 1998

WILLIAM G. JENSON

JUDICIAL OFFICER

Office of the Secretary