

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P. & S. Docket No. D-12-0123
)
Tyson Farms, Inc.,)
)
Respondents) **Ruling on Certified Question**

The Chief Administrative Law Judge's Certified Question

On June 19, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] certified the following question to me: Does the Secretary of Agriculture have statutory jurisdiction to proceed with this action against Tyson Farms, Inc. [hereinafter Tyson]? (Chief ALJ's Certification of Motion to the Judicial Officer [hereinafter the Chief ALJ's Certified Question] at 2.)¹

¹The Chief ALJ certified the question in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] which authorize administrative law judges to certify any question to the Judicial Officer, as follows:

§ 1.143 Motions and requests.

....
(e) *Certification to the judicial officer.* The submission or

certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R. § 1.143(e).

Discussion

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181-229b) [hereinafter the Packers and Stockyards Act], and the Rules of Practice by filing a Complaint on December 20, 2011. The Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1 and has committed an unfair practice and deceptive practice under 7 U.S.C. § 192.²

The Chief ALJ requests that I address three independent reasons advanced by Tyson as the basis for Tyson's contention that the Secretary of Agriculture lacks statutory authority to proceed with this action.

1. Tyson contends that the Complaint seeks to sanction Tyson for engaging in conduct—the ranking of flocks of birds with different breeds in the same “tournament”—that the Secretary proposed to regulate in a recent proposed rule (amending 9 C.F.R. Part 201) which Congress has prohibited any funds from being used to “implement.” Consolidated and Further Continuing Appropriations Act of 2012 (the “Agriculture Appropriations Bill”), Publ. L. 112-55, 125 Stat. 552 (Nov. 18, 2011). If Congress's prohibition does extend to the instant administrative proceeding, Tyson argues that the Secretary's action would violate Article I, Sections 8 and 9 of the U.S. Constitution, the

²Compl. ¶¶ II-III.

Purpose Statute, 31 U.S.C. § 1301, the Antideficiency Act, 31 U.S.C. § 1341, and the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.*

Chief ALJ's Certified Question at 1-2.

The Consolidated and Further Continuing Appropriations Act, 2012, Pub. L.

No. 112-55, § 721, 125 Stat. 552 (2011), provides:

SEC. 721. None of the funds made available by this or any other Act may be used to write, prepare, or publish a final rule or an interim final rule in furtherance of, or otherwise to implement, "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (75 Fed. Reg. 35338 (June 22, 2010)) unless the combined annual cost to the economy of such rules do not exceed \$100,000,000: *Provided*, That no funds be made available by this or any other Act to publish a final or interim final rule in furtherance of, or otherwise implement, proposed sections 201.2(l), 201.2(t), 201.2(u), 201.3(c), 201.210, 201.211, 201.213, or 201.214 of "Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act" (75 Fed. Reg. 35338 (June 22, 2010)): *Provided further*, That such rules must be published in the Federal Register no later than December 9, 2011: *Provided further*, That none of the funds made available by this or any other Act may be used to implement such rules until 60 days from the publication date of such rules, and only unless such rules are otherwise in compliance with this section.

The Complaint does not refer to any proposed rule and the Deputy Administrator does not allege a violation of any proposed rule. Instead, the Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1 and has committed an unfair practice and deceptive practice under 7 U.S.C. § 192.³ Therefore, I conclude Congress's

³Compl. ¶¶ II-III.

prohibition in the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552 (2011), does not extend to the Complaint filed by the Deputy Administrator.

2. Tyson next contends that Congress has not authorized the Secretary of Agriculture to initiate administrative proceedings to adjudicate allegations of unfair and deceptive practices committed by **live poultry dealers** such as Tyson, citing *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1456 (8th Cir. 1995) and *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005).

Chief ALJ's Certified Question at 2 (emphasis in original).

The Deputy Administrator alleges Tyson underpaid poultry growers in violation of 7 U.S.C. § 228b-1. An underpayment of a poultry grower in violation of 7 U.S.C. § 228b-1(a) is considered an “unfair practice” in violation of the Packers and Stockyards Act, as follows:

§ 228b-1. Final date for making payment to cash seller or poultry grower

....

(b) Delay or attempt to delay collection of funds as “unfair practice”

Any delay or attempt to delay, by a live poultry dealer which is a party to any such transaction, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for poultry obtained by poultry growing arrangement or purchased in a cash sale, shall be considered an “unfair practice” in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term “unfair practice” as used in this chapter.

7 U.S.C. § 228b-1(b). Thus, a violation of the payment requirements in 7 U.S.C. § 228b-1(a) is also a prohibited “unfair practice” under 7 U.S.C. § 192. Pursuant to 7 U.S.C. § 228b-2, the Secretary of Agriculture may institute an administrative adjudicatory proceeding against a live poultry dealer for an alleged violation of the payment requirements in 7 U.S.C. § 228b-1, which violation is also an unfair practice prohibited by 7 U.S.C. § 192.⁴ Therefore, I conclude the Packers and Stockyards Act authorizes the Secretary of Agriculture to institute this administrative adjudicatory proceeding against Tyson for alleged underpayment of poultry growers in violation of 7 U.S.C. § 228b-1 and an alleged unfair practice under 7 U.S.C. § 192.⁵

⁴The cases cited by Tyson in support of the position that the Secretary of Agriculture has no authority to initiate administrative proceedings to adjudicate allegations of an unfair practice committed by live poultry dealers are inapposite as they do not relate to proceedings instituted under 7 U.S.C. § 228b-2. (See *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005) (stating the Secretary of Agriculture has no authority under 7 U.S.C. § 193(a) to adjudicate alleged violations of 7 U.S.C. § 192 by live poultry dealers), *cert. denied*, 546 U.S. 1034 (2005); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1457 (8th Cir. 1995) (stating, under the plain language of the Packers and Stockyards Act, the administrative complaint procedure under 7 U.S.C. § 210 is not available for claims against a live poultry dealer; however, the Secretary of Agriculture is authorized to enforce administratively the prompt payment provision of the Packers and Stockyards Act (7 U.S.C. § 228b-1), which provision is not at issue in this case).

⁵The Deputy Administrator also alleges Tyson has committed a “deceptive practice” under 7 U.S.C. § 192 (Compl. ¶ III). I find the Deputy Administrator’s allegation that Tyson committed a “deceptive practice” under 7 U.S.C. § 192 puzzling because 7 U.S.C. § 228b-1(b) does not provide that a violation of 7 U.S.C. § 228b-1(a) shall be considered a “deceptive practice” under the Packers and Stockyards Act; instead, 7 U.S.C. § 228b-1(b)

provides only that a violation of 7 U.S.C. § 228b-1(a) shall be considered an “unfair practice” under the Packers and Stockyards Act.

3. Last, Tyson argues that even were the Secretary vested with jurisdiction to bring an action pursuant to § 202 of the Packers and Stockyards Act (Act), 7 U.S.C. § 192, the Complaint in this action is fatally deficient in that it fails to plead an essential allegation that Tyson's conduct resulted in injury or a likelihood of injury to competition.

Chief ALJ's Certified Question at 2.

The Deputy Administrator alleges Tyson violated 7 U.S.C. § 228b-1(a). The Packers and Stockyards Act contains no requirement that injury to competition or likelihood of injury to competition must be shown in order to prove a violation of 7 U.S.C. § 228b-1(a); however, 7 U.S.C. § 228b-1(b) specifically provides that a violation of 7 U.S.C. § 228b-1(a) shall be considered an "unfair practice" under the Packers and Stockyards Act. Thus, a violation of 7 U.S.C. § 228b-1(a) is a prohibited "unfair practice" under 7 U.S.C. § 192 without regard to whether injury to competition or likelihood of injury to competition is shown.

Response to the Chief Administrative Law Judge's Certified Question

The Secretary of Agriculture has statutory jurisdiction to proceed with this action against Tyson.⁶

Done at Washington, DC

July 6, 2012

William G. Jenson
Judicial Officer

⁶The Rules of Practice are applicable to administrative adjudicatory proceedings under the Packers and Stockyards Act (9 C.F.R. § 202.200). However, except for Packers and Stockyards Act adjudicatory proceedings conducted under 7 U.S.C. §§ 193, 204, 213, and 221 (7 C.F.R. § 1.131(a)), the complaint instituting the proceeding must provide that the Rules of Practice are applicable to the proceeding and the Assistant Secretary for Administration must concur with the complaint (7 C.F.R. § 1.131(b)(6)). The Complaint filed in this proceeding specifically provides that the Rules of Practice are applicable to this proceeding instituted under 7 U.S.C. § 228b-2 (Compl. at fourth unnumbered page); however, I am unable to locate the Assistant Secretary for Administration's concurrence with the Complaint. Therefore, while the Secretary of Agriculture has statutory jurisdiction to proceed with this action against Tyson under 7 U.S.C. § 228b-2, the Chief ALJ may want to ensure that the Rules of Practice have been properly made applicable to the instant proceeding.