

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0123

In re: Tyson Farms, Inc.,

Respondent

**Decision and Order**

Appearances: Jonathan D. Gordy, Esquire; Krishna G. Ramaraju, Esquire; Brian P. Sylvester, Esquire; and Ciarra A. Toomey, Esquire; Office of the General Counsel, United States Department of Agriculture, Washington, DC for the Complainant  
L. Bryan Burns, Esquire, Senior Counsel, Tyson Foods, Inc.; Robert W. George, Esquire, Associate General Counsel, Tyson Foods, Inc.; Gordon D. Todd, Esquire; and Brian P. Morrissey, Esquire; Sidley Austin, LLP, Washington, DC for the Respondent

**Preliminary Statement**

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*; hereinafter “Act”) and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 - 1.151; hereinafter “Rules of Practice”). Complainant, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA) initiated this proceeding against Respondent Tyson Farms, Inc. (Tyson) by filing a disciplinary complaint on December 20, 2012.

Copies of the Complaint and the Rules of Practices were served upon Respondent by certified mail. The Complaint alleged that Respondent violated section 410 of the Act and committed an unfair and deceptive practice under section 202 of the Act. (7 U.S.C. § 192, 228b-1).

After seeking and being granted an extension of time in which to answer, Respondent filed its Answer, accompanied by a Petition for Determination of the Secretary's Jurisdiction and Statutory Authority and Memorandum in Support on January 27, 2012.<sup>1</sup> On February 16, 2012, Counsel for Complainant filed a Motion for Hearing and Response to Respondent's Petition. Tyson responded and Complainant replied to the Response.<sup>2</sup> On March 28, 2012, I directed that the parties exchange exhibits, exhibit and witness lists with counsel, to file copies of the exhibit and witness lists with the Hearing Clerk, and to consult with each other and file a status report concerning the expected duration of any hearing on the issues, the preferred location for trial, and a list of mutually agreeable dates.<sup>3</sup> Complainant's exchange was filed with the Hearing Clerk on April 26, 2012. Tyson sought and was granted an extension and filed their exchange on June 25, 2012. Prior to completing its exchange, on May 24, 2012, Tyson filed Motions to Divide the Hearing to Separate Jurisdictional Issues from Merits of the Secretary's Complaint and to Expedite Response to Motion.<sup>4</sup> The Complainant objected to the Motion to Expedite a Response and an Order was entered on June 1, 2012 denying the Motion to Expedite Response and deferring ruling on the Motion to Divide.<sup>5</sup> Complainant responded to the Motion to Divide on June 7, 2012 and on June 19, 2012, in view of the procedural provisions contained in our Rules of Practice precluding Motions to Dismiss even on jurisdictional grounds, I certified the Motion to Divide to the Departmental Judicial Officer.<sup>6</sup>

On July 6, 2012, the Judicial Officer filed his Ruling on [the] Certified Question, concluding that the Secretary of Agriculture has statutory jurisdiction to proceed. Following the

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<sup>1</sup> Docket Entries 3,4, & 5.

<sup>2</sup> Docket Entries 7,9, & 13.

<sup>3</sup> Docket Entry 15.

<sup>4</sup> Docket Entry 22.

<sup>5</sup> Docket Entries 24 & 25.

<sup>6</sup> Section 1.143(b)(1), 7 C.F.R. §1.143(b)(1). Oral argument before the Judicial Officer was requested by the Respondent; however, Complainant objected and the request was denied. Docket Entries 28, 31 & 32.

filing of a joint status report setting forth mutually agreeable dates, the matter was set for oral hearing to commence on December 10, 2012 in the United States Department of Agriculture Court Room, in Washington, DC.<sup>7</sup> Pre hearing briefs were filed by both parties.<sup>8</sup>

During the course of the two day hearing, the Complainant called five witnesses and Respondent called two.<sup>9</sup> Twenty-four Government exhibits and nine Tyson exhibits were admitted.<sup>10</sup> Following the hearing, post hearing briefs were submitted by both sides and the matter is now ripe for disposition.

### **The Positions of the Parties**

In this action, the Complainant alleges that Tyson failed to pay its contract poultry growers in full, in violation of sections 410 and 202 of the Act, because Tyson failed to account for the performance differences of the two different breeds of chickens (Cobb 500 chickens and Cobb 700 chickens) in the payments made to the growers under the tournament settlement system used to compensate the growers. Implicit in the Complainant's position is an assumption that growers with whom the Cobb 700 birds were placed were underpaid because "as a general rule Cobb 500 birds grew faster than the Cobb 700 breed."

Tyson takes the position that no violation of section 410 of the Act occurred as its contract poultry growers were paid in full and on time in accordance with their contract which expressly contemplates the practices at issue in the case. Tyson, moreover, asserts that its practice of including different breeds of birds in the same settlement groups at issue in this action is identical to practices which the Department sought to have prohibited through a proposed

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<sup>7</sup> Docket Entries 35 & 36.

<sup>8</sup> Docket Entries 48 & 50.

<sup>9</sup> References to the transcript of the proceeding will be indicated as Tr. and the page number. An original and corrected transcript appear in the record; however, all references will be to the corrected transcript.

<sup>10</sup> Complainant's exhibits are indicated by number with the prefix CX; Respondent's are indicated by the number and the prefix RX.

rulemaking. That proposed rule was never implemented as Congress prohibited the expenditure of any federal funds to implement that policy. Tyson accordingly argues that the Department was stripped of any authority to prosecute this matter and its actions in doing so in this action are *ultra vires*. See, Consolidated and Further Continuing Appropriations Act of 2012 (Agric. App. Act) § 721, P.L. 112-55, 125 Stat. 552, 583 (Nov. 18, 2011).

### **Background**

This disciplinary proceeding involves a single poultry production complex (the complex) operated by Tyson located in Oglethorpe, Georgia. Tyson processes broiler chickens at the complex for sale to various consumers, with the breast filets going almost exclusively to Wendy's, and other parts going to Applebee's, Hooters and other restaurant chains. Tr. 260-262. Although the processing, sale, and distribution of its chicken products is handled by Tyson, it contracts with independent growers to raise newborn chicks which Tyson purchases from a variety of entities to be raised by the growers for the 44-48 day maturing process until the birds reach the weight desired by Tyson's customers. Tr. 72-73, 84, 293-294.

As is common throughout the poultry industry, growers are compensated for their services through tournament style competitions. Tr. 39, 70. The tournament competition rules and compensation formula are spelled out in detail in uniform broiler production contracts which Tyson enters into with each contract grower. CX-3, 4; RX-1, 2. Productivity is measured under the contract by calculating Tyson's cost of placing the flock with the grower (chick cost, feed, medicines, and other expenses) and dividing that cost by the weight of the mature birds delivered to Tyson. Tyson then ranks the productivity of each flock to the average of all flocks settled that week, with flocks outperforming the average receiving an upward adjustment and those that underperform receiving a downward adjustment, capped by a minimum amount. *Id.*

Although the Complainant asserts that Tyson's contracts have an implied term requiring payment other than what was received by the growers, examination of the terms of Tyson's contracts forces a conclusion to the contrary. The contracts expressly authorize Tyson to provide their growers with any "type" of bird breed.<sup>11</sup> CX-3, 4; RX-1, 2. Under the contract's terms, Tyson determined the amount, *type*, frequency, and time of delivery to and pick-up from the Producer of chickens. RX-1, 2. An express disclaimer of the "quality, merchantability, or fitness for purpose of" provides further amplification of Tyson's discretion over breed type and any related characteristics. RX-1, 2. Moreover, the contracts contain explicit language expressly rejecting any unwritten terms. *Id.* Tyson provides a significant amount of information concerning best practices for raising the chicks; however, it is up to the individual grower as to whether that information and guidance is followed. Tr. 299-302.

Prior to the fall of 2009, Tyson had placed a single breed, the Cobb 500, with its growers to be processed at the Georgia complex. Tr. 262-263. Believing it would be advantageous for the company to shift to a breed of bird with a larger percentage of breast meat that might better meet the needs of its primary consumer, in September of that year Tyson decided to shift its production from the Cobb 500 to the Cobb 700. Tr. 263-264. Due to the requirements to both acquire sufficient numbers of Cobb 700 chicks to make the conversion and to avoid the costs inherent with the immediate retirement of the Cobb 500 hens prior to their normal replacement date, it was not economically or operationally feasible to make the conversion at one time, but rather the transition was phased in over time as the flocks of Cobb 500 hens producing the chicks were retired. Tr. 271-272, 418, 419. As the Cobb 500 hens were retired and replaced with Cobb 700 hens, the percentage of Cobb 700 chicks placed with the growers increased. Tr. 109, 271,

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<sup>11</sup> "Company will determine the amount, *type*, frequency, and time of delivery to and pick-up from Producer of chickens...." Para 2A of cited exhibits. (emphasis added)

287- 288, 429, 432, 456-457. Throughout the period that both breeds were placed with growers, Tyson placed birds of both breeds with growers on a random basis. *Id.* Chicks were hatched together in the same machines on the same days and hatched at the same rate. Tr. 281. As the new chicks were born, Tyson delivered them to growers in the order they were hatched. Accordingly, no grower stood any greater chance of receiving one breed over the other, and over time, it appears that all growers received flocks of both. Tr. 432-433.

Tyson's expectations of the Cobb 700 breed were not achieved as mid way through the transition process, Tyson reluctantly concluded that the Cobb 700 breast filets- although as large as expected- were not as desirable as anticipated. Tr. 264. The complex's largest customer's specifications required a smaller breast than was being produced with the Cobb 700 breed, requiring Tyson to substantially trim the filets, resulting in both waste and additional costs not previously encountered. Tr. 264. The transition process was accordingly reversed with a shift back to the Cobb 500 breed and the target weight of delivered birds was reduced from 6 pounds down to 5.5 pounds. Tr. 186, 294. In all, although the Department's investigation focused on a 46 week period, the complex processed a varied mix of Cobb 500 and 700 birds for a total of 74 weeks, from September 19, 2009 to February 26, 2011.<sup>12</sup> Tr. 186.

Acting upon a hot line complaint from an anonymous grower in June of 2010 who felt that he was being financially harmed by the introduction of the Cobb 700 into flocks that he was raising, an investigation into Tyson's operation at the Georgia complex was initiated and assigned to Resident Agent Nilsa Ramos Taylor. Tr. 101-105. As part of the investigation Taylor and Meghan Flynn, a student economist with the Eastern Regional Office visited Tyson's Oglethorpe complex from August 16 through August 19, 2010 to review records, interview

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<sup>12</sup> The Complainant's investigation examined 542 flocks produced by 115 growers during the 46 week period of September 26, 2009 through August 7, 2010. Complaint, ¶ II(b).

employees and gather information. Tr. 107-111, 131-142. Upon completion of the on-site portion of the investigation, Ms. Flynn took copies of most of the documents they had collected back to the Atlanta Office for her analysis. Tr. 111.

### **Evaluation of the Evidence**

The underpinning of the Department's case against Tyson is based upon assumptions and conclusions drawn from the analysis of the data collected by Taylor and Flynn. According to her testimony, Flynn analyzed each transaction, reviewing electronic flock data and written information on the flocks, reconciling any discrepancies with the help of Tyson's bookkeeper and written data that was available. Tr. 134-142, 145-150. Organizing the data into files (CX-14-15, 18-19), her preliminary analysis indicated to her that the Cobb 700 breed had an average weight that was approximately a half a pound less than the Cobb 500 breed at the time of settlement.<sup>13</sup> Tr. 158.

Flynn's analysis was then reviewed by Gary McBryde, Ph.D., the Director of the Business and Economic Analysis Division in the Packers and Stockyards Program. Tr. 194, 200-222. Using Flynn's data, McBryde applied ordinary averages and graphic analysis of the pure Cobb 500 and Cobb 700 flocks and concluded that the difference in relative performance of the two breeds resulted in a difference of less than \$.04 per bird in the payments made to growers. McBryde then went on to calculate a projected deficiency of \$834,707 in the payment to growers raising the Cobb 700 chicks. CX-16. Using regression analysis, McBryde concluded that growers with a high concentration of Cobb 700 birds should have been compensated an additional \$1,540 per flock had Tyson placed a uniform ratio of Cobb 500 and 700 with the growers or, alternatively all Cobb 700 birds in each grower's settlement group flocks. Tr. 200-

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<sup>13</sup> Data from Cobb-Vantress in their Broiler Management Guides however reflects that the two breeds have virtually identical weights at harvest age. CX-21, 27, Tr. 88, 179. On cross examination, Ms. Flynn admitted that had she been aware of that information, it might have caused her to question her conclusions. Tr. 180.

222.

Contrary to operational feasibility and the actual facts of Tyson's transition, McBryde's analysis assumed that Tyson could have and should have placed an equal ratio of 59% Cobb 700 birds and 41% Cobb 500 birds with each grower each week. Tr. 214. Due to the fact that his model was based upon a flock-by-flock basis rather than a bird-by-bird basis, the impact of the smaller flocks was exaggerated thereby further skewing the data. Tr. 471-475. Most significantly however, the analysis completely failed to account for grower skill and effectiveness, a factor obviously indicated by the fact that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups. Tr. 459-471, CX-15.

As the evidence indicates the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups, the selection of the breed mix was expressly addressed in the contracts entered into between Tyson and its growers, and Tyson paid its contract poultry growers in full and on time in accordance with the terms of those contracts,<sup>14</sup> I will conclude that the Cobb 700 were not disadvantaged and there is no violation of section 410. It accordingly will be unnecessary for me to address whether the Department's prosecution of this action was *ultra vires*.

#### **Statement of Facts**

1. Respondent Tyson Farms, Inc., a subsidiary of Tyson Foods, Inc., is a corporation organized under the laws of and registered in the state of North Carolina, with offices in Raleigh, North Carolina.

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<sup>14</sup> Complainant's position that Tyson's contracts contain an "implied term" that would require Tyson to pay growers something other than what they received is clearly contrary to the terms of the contract.



2. Tyson operates a poultry production complex (the complex) located in Oglethorpe, Georgia where Tyson processes broiler chickens for sale to various consumers, primarily Wendy's, with other parts going to Applebee's, Hooters and other restaurant chains. Tr. 260-262.

3. Although the processing, sale, and distribution of the chicken products is handled by Tyson, it contracts with independent growers to raise newborn chicks which Tyson purchases from a variety of entities to be raised by the growers for the 44-48 day maturing process until the birds reach the weight desired by Tyson's customers. Tr. 72-73, 84, 293-294.

4. The contract growers are compensated for their services through tournament style competitions. Tr. 39, 70. The competition rules and compensation formula are spelled out in detail in uniform broiler production contracts which Tyson enters into with each contract grower. CX-3, 4; RX-1, 2.

5. Ranking in the tournament system is determined by the grower's productivity under the contract relative to that of other growers in the same settlement by calculating Tyson's cost of placing the flock with the grower (chick cost, feed, medicines, and other expenses) and dividing that cost by the weight of the mature birds delivered to Tyson. Tyson then ranks the productivity of each flock in relation to the average of all flocks settled that week, with flocks outperforming the average receiving an upward adjustment and those that underperform receiving a downward adjustment, capped by a minimum amount. *Id.*

6. Prior to the fall of 2009, Tyson had placed a single breed of chicken, the Cobb 500, with its growers to be processed at the Georgia complex. Tr. 262-263.

7. In September of 2009 Tyson decided to shift its production from the Cobb 500 to the Cobb 700. Tr. 263-264. In making the change, Tyson believed that the Cobb 700 bird's characteristics of having a larger breast would better suit its primary customer.

8. While both breeds possess low feed conversion rates, *i.e.* produces more meat using less feed than other broiler breeds, the Cobb 500 and Cobb 700 birds have different characteristics, with industry literature suggesting that the Cobb 700 grows more slowly than the Cobb 500, but produces a larger percentage of breast meat.<sup>15</sup> Tr. 45, 263, CX-21, 27.

9. For both economic and operational reasons the transition from the Cobb 500 bird to the Cobb 700 bird was phased in over time due to the requirements to both acquire sufficient numbers of Cobb 700 chicks to make the conversion and to avoid disruption of the retirement cycle and the additional costs inherent with retirement of the Cobb 500 hens prior to their normal replacement date. Tr. 271-272, 418, 419.

10. As each cycle of Cobb 500 hens was replaced with Cobb 700 hens, the percentage of Cobb 700 chicks placed with the growers increased and Tyson's Georgia complex processed a varied mix of Cobb 500 and 700 birds for a total of 74 weeks, from September 19, 2009 to February 26, 2011. Tr. 186.

11. Throughout the transition period during which mixed flocks of birds were processed, placement of the chicks was done on a random basis and no pattern of placement discrimination against any individual grower was established.

12. Although industry literature concerning the characteristics of the two breeds of bird indicates that the Cobb 700 bird typically grows more slowly than the Cobb 500, the evidence of record clearly establishes that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups. CX-15, Complainant's Post Hearing Brief at 9.

13. Complainant's statistical analysis was flawed in that it failed to account for differences in

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<sup>15</sup> The evidence of record however suggests that the most significant drivers of flock performance are growing practices and the skill and expertise of individual growers. Tr. 75-77. Management of such factors such as temperature, feed, ventilation and litter management are critical to the success of the operation. Tr. 76-83, 206, 299-310. Failure to manage flocks in accordance with the best practices can and will lead to less successful flocks regardless of the breed. *Id.*

grower expertise.

### Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Tyson, at all times pertinent to the Complaint was:
  - a. Engaged in the business of obtaining live poultry by purchase or under poultry growing arrangements for the purpose of slaughter,
  - b. Shipping processed poultry products in commerce, and
  - c. Operating as a live poultry dealer subject to the provisions of the Act.
3. Tyson's contracts with its growers authorize Tyson to provide their growers with any "type" of bird breed.<sup>16</sup> CX-3, 4; RX-1, 2. Its terms allow Tyson to determine the amount, *type*, frequency, and time of delivery to and pick-up from the Producer of chickens. CX-3,4; RX-1, 2. An express disclaimer of the "quality, merchantability, or fitness for purpose of" provides further amplification of Tyson's discretion over breed type and any related characteristics. CX-3, 4; RX-1, 2.
4. Tyson's contracts contain an integration clause with explicit language expressly rejecting imposition of any implied or unwritten terms. *Id.*
5. The evidence of record establishes that the best performing Cobb 700 growers outperformed Cobb 500 growers in certain tournament groups; accordingly, placement of the Cobb 700 birds did not result in those growers being disadvantaged.
6. Tyson's contract poultry growers were paid in full and on time in accordance with their contract.
7. No violation of section 410 of the Act by Tyson was established.

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<sup>16</sup> "Company will determine the amount, *type*, frequency, and time of delivery to and pick-up from Producer of chickens...." Para 2A of cited exhibits. (emphasis added)

## Order

1. No violation of the Act having been established, the relief sought in the Complaint is **DENIED.**

2. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondents, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice, 7 C.F.R. §1.145.

Copies of this Decision and Order shall be served upon the parties.

March 8, 2013

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**Peter M. Davenport**  
Chief Administrative Law Judge

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