

Case No.: 2017-0017

**U.S. Department of Labor
Administrative Review Board**

**Craig Watts,
Petitioner**

v.

**Perdue Farms, Inc.,
Respondent**

Petition for Rehearing

**Amicus Brief in Support of Petitioner's Request for Rehearing
by
Rural Advancement Foundation International-USA, Ranchers-Cattlemen
Action Legal Fund United Stockgrowers of America, Farm and Ranch
Freedom Alliance**

**Submitted by:
Candace A. Spencer, Esq.**

**BEFORE THE UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD**

CRAIG WATTS

Petitioner,

V.

ARB Case No.: 2017-0017

ALJ Case No.: 2016-FDA-00003

PERDUE FARMS, INC.

Respondent.

**AMICI
RURAL ADVANCEMENT FOUNDATION INTERNATIONAL-USA,
RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED
STOCKGROWERS OF AMERICA, AND
FARM AND RANCH FREEDOM ALLIANCE'S
BRIEF OF POINTS AND AUTHORITIES**

**FOR FURTHER CONSIDERATION OF FINAL DECISION AND ORDER
DATED MARCH 5, 2019**

Candace A. Spencer, Esq.

TABLE OF CONTENTS

Table of Authorities	iii
Interest of Amici	1
Introduction	3
Summary of the Argument	4
Argument	5
I. The PPIA doesn't apply because Petitioner Watts' farm is not an "official establishment"	5
II. No other statute, besides the FFDCA, governs this situation.....	6
III. The FFDCA's provisions preventing the sale of adulterated or misbranded food provide authority to address certain issues in live animals, including those in this case.....	8
IV. Animal feed and the use of antibiotics in live animals are clearly within the FFDCA.	10
Conclusion	11

TABLE OF AUTHORITIES

Statutes

7 U.S.C. § 192	6
21 U.S.C. § 321(f)(1).....	10
21 U.S.C. §331(a).....	8
21 U.S.C. § 342	8, 11
21 U.S.C. § 343.....	8
21 U.S.C. § 453(p)	5
21 U.S.C. § 467f(a)	5

Other Authorities

Martha Pulido-Landinez, <i>Food safety – Salmonella update in broilers</i> , 205 Animal Feed Science and Tech. 53-58 (2019).....	10
Cindy M. Liu et al., <i>Escherichia coli ST131-H22 as a Foodborne Uropathogen</i> . mBio 9:e00470-18 (2018). https://doi.org/10.1128.mBio.00470-18	10

INTEREST OF AMICI

The Rural Advancement Foundation International, USA (RAFI-USA) is an independent, non-partisan, nonprofit organization that cultivates markets, policies, and communities that support thriving, socially just, and environmentally sound family farms. The first tenant of our organizational vision is to ensure that family farmers have the power to earn a fair and dependable income. To that end, since our founding in 1990, RAFI-USA has advocated for the rights and protections of contract poultry farmers, parity in the contract negotiating process, and ending farmer exploitation in the industry. For decades, RAFI-USA has fielded calls from contract poultry farmers suffering retaliation from their contracting companies (integrators) for speaking out against bad actions by these integrators.

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) is the largest trade association that exclusively represents United States cattle farmers and ranchers on trade and marketing issues within the multi-segmented beef supply chain. Its more than 5,300 members reside in 43 states and primarily include cow-calf operators, cattle backgrounders and stockers, and feedlot owners. R-CALF USA's members breed, raise, and sell other forms of livestock including, for example, chickens and sheep. R-CALF USA engages on issues common to all livestock producers, including retaliation and market

concentration, because these relate to its mission to sustain the profitability and viability of independent U.S. cattle producers.

The Farm and Ranch Freedom Alliance (FARFA) is a nonprofit organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems. Many of FARFA's members raise poultry and livestock. While FARFA's farmer members typically sell direct-to-consumer or to independent outlets (rather than integrators), the conditions and laws that govern the industry as a whole have both direct and indirect impacts on both our farmer and consumer members.

INTRODUCTION

For 30 years, Amici RAFI-USA has operated a farmer crisis hotline responding to the needs of farmers and providing referrals for outside services. One of the most common complaints from poultry farmers is that their contracting integrator has retaliated against them for issues they have raised, including problems with animal health, animal feed composition, and the misuse of antibiotics. *See* Attachment A, Affidavit of Tyler Whitley (“Whitley Aff.”), at ¶ 1. These issues raise concerns as to the quality and safety of the finished food product for consumption.

Typically, integrators direct farmers to raise any issues first with their assigned service technician or flock advisor, the lowest level of company representation. Farmers have reported that their concerns often go unaddressed, so they move up the ladder, and then find themselves the target of integrator retaliation. *See* Whitley Aff. at ¶ 2-3. This retaliation negatively impacts the viability of the farmer’s business, can result in the loss of contract, and can lead to the eventual loss of farm and home.

RAFI-USA has witnessed the extreme lengths these companies will go to in order to silence these farmers, cover up their bad actions, and hide the truth from the public. Amici R-CALF USA and FARFA represent both farmers and consumers who are impacted by these serious recurring problems.

SUMMARY OF THE ARGUMENT

Amici support the Petitioner's assertion that his whistleblower claims fall under the Federal Food, Drug, and Cosmetic Act (FFDCA) and oppose the Respondent's assertion that the issue falls under the Poultry Products Inspection Act (PPIA).

The Board need not reach the issue of whether or not live animals fall within the definition of "food" under the FFDCA because there are multiple clear grounds for the Board to find that the FFDCA's whistleblower protections apply to farmers such as Petitioner Watts.

First, the PPIA covers only "official establishments," namely poultry processing plants. A farm, such as Petitioner Watts' farm, is not covered by the PPIA. Nor are the Petitioners' claims covered by other statutes besides the FFDCA.

Second, the FFDCA unambiguously covers several of the issues raised by Petitioner Watts' action. FFDCA prevents the sale of adulterated or misbranded food. There is no question that Respondent is selling chicken meat. Nor is there any question that the conditions that the live chickens are kept under – whether or not those live animals are "food" – affect whether that chicken *meat* is adulterated or misbranded, as discussed below.

In addition, the FFDCFA unambiguously covers both the use of antibiotics on farm animals and animal feed, both of which are also raised in Petitioner Watts' action.

Respondent is thus a covered entity under the whistleblower provision of the FFDCFA and the FFDCFA governs this claim.

ARGUMENT

I. The PPIA doesn't apply because Petitioner Watts' farm is not an "official establishment"

The PPIA exempts poultry and poultry products from regulation under the FFDCFA (and thus the whistleblower provision added by FSMA) only to the extent that the poultry is otherwise regulated under the PPIA: "Poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] *to the extent of the application or extension thereto of the provisions of this chapter...*" 21 U.S.C. § 467f(a) (2018) (emphasis added).

The PPIA applies to poultry and poultry products in an "official establishment" that is regulated by the USDA. An "official establishment" is "any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing poultry products, is maintained under the authority of [the PPIA]." 21 U.S.C. § 453(p).

Petitioner Watts owns and manages a farm on which he raises live poultry. No one alleges that he has an “official establishment” under the PPIA. Nor does anyone claim that the PPIA addresses the issue of whistleblowers; it neither provides protections nor does it explicitly pre-empt or contradict any provisions in other laws. Therefore, this case involves a farmer whose business is *not* covered by the PPIA, making claims that are *not* addressed by the PPIA.

A finding that the PPIA’s silence bars a farmer in the Petitioner’s position from invoking the whistleblower protections in the FFDCa would not only be inconsistent with the relevant statutes, but it would cause significant harm to the general public, who are the true beneficiaries of whistleblower provisions.

II. No other statute, besides the FFDCa, governs this situation.

Based on Amici’s experience, if the Board finds that the FFDCa does not apply, farmers have no viable avenue to address problems in the raising of live poultry that can impact the safety of the finished food product.

The primary department regulating interactions between integrators and contract poultry farmers is the Packers & Stockyards Division (PSD) of the Agricultural Marketing Services (AMS) under the U.S. Department of Agriculture (USDA-AMS-PSD). The USDA-AMS-PSD is tasked with assuring fair competition and trade practices, and protecting livestock, meat, and poultry

industry members from unfair, deceptive, unjustly discriminatory, and monopolistic practices. *See generally* Packers & Stockyards Act at 7 U.S.C. § 192 (2018); *see also* AGRIC. MARKETING SERV., U.S. DEPT. OF AGRIC., THE PACKERS & STOCKYARDS ACT FACTSHEET (Apr. 2018), <https://www.ams.usda.gov/sites/default/files/media/PSActFactSheet.pdf>. Notably absent from this list is anything involving animal health or raising practices. In other words, while the USDA-AMS-PSD addresses aspects of the interactions between farmers like Watts and integrators like Perdue, it is only in the limited arena of anti-competitive practices, not the sorts of issues raised by the Petitioner in this matter.

In addition, even those issues that are within the USDA-AMS-PSD's jurisdiction often cannot be addressed because of the threat of retaliation. Since farmers typically first go through the internal "chain of command" established by integrators such as Perdue, if a regulatory agency starts investigating issues that the farmer raised in the weeks or months preceding the official investigation, the integrator can easily identify which farmer alerted the authorities. Thus, the farmers know they are likely to face retaliation for blowing the whistle to USDA-AMS-PSD, even for the anti-trust issues covered by that agency.

The situation stands as follows: USDA-FSIS regulates the processing plants under the PPIA, and USDA-AMS-PSD regulates anti-competitive issues between

the integrator and farmer. Neither division of the USDA regulates how the animals are raised in relation to food safety, and neither governing statute protects whistleblowers. Thus, neither division of the USDA has jurisdiction over the claims raised by the Petitioner in this matter. In contrast, as discussed next, the FDA does have jurisdiction under the FFDCA for the types of claims raised by the Petitioner.

III. The FFDCA’s provisions preventing the sale of adulterated or misbranded food provide authority to address certain issues in live animals, including those in this case.

The FFDCA prevents the sale of adulterated or misbranded food. 21 U.S.C. §331(a). The definition of these terms is expansive, and effectively covers anything that causes the food not to be safe in any manner or truthfully labeled. *See* 21 U.S.C. §§ 342, 343.

There is no question that Defendant is selling chicken meat, and that chicken meat is “food” as defined by the FFDCA. The conditions that the live chickens are kept under – whether or not those live animals are “food” – affect whether that chicken meat is adulterated or misbranded.

As thoroughly addressed in FDA’s amicus brief, the FDA has regulatory authority over live animals *intended* for food. *See Brief for the United States Food and Drug Administration as Amici Curiae Supporting Respondents, Watts v.*

Perdue Farms, Inc., ARB Case No.: 2017-0017; ALJ Case No.: 2016-FDA-00003. Thus, the question of whether live animals fall within the definition of “food” need not even be reached.

Farmers witness many issues that impact the safety and legitimacy of food products and their labeling, but that are not related to the processing of the live birds as governed by the PPIA. In particular, farmers observe diseases within their flocks that may not be identified during the processing of the live birds for food products, but that can impact the quality and safety of the finished food product.

For example, farmers often observe symptoms of enteritis (inflammation of the small intestine), such as depression, poor growth, diarrhea, and mortality. *See Whitley Aff.* at ¶ 5. The farmers cannot simply cull the sick birds because only those with the worst infections exhibit symptoms obvious enough to be noticed among the thousands of birds that the farmers deal with each day. Thus, it is likely that many more birds have enteritis. But when farmers contact their integrator representative, the diseased flock may or may not receive treatment on farm before the live birds are processed for food product. *See Whitley Aff.* at ¶ 4-5.

Enteritis is frequently associated with *Salmonella*, a cause of foodborne illness. Since *Salmonella* is a bacterial contamination issue that is invisible to the naked eye, and many birds with enteritis exhibit only minor symptoms, it is easy to understand why infected birds can easily pass through the slaughterhouse without

being identified – and thus enter the food chain. Research indicates that the recent rise in *Salmonella* is related to the production of the live poultry and that measures to decrease the incidence of *Salmonella* must target the farm.¹ Similar situations occur with other foodborne diseases, such as *E. coli* infections.²

Because these farmers do not own these birds and are charged only with the raising of these birds per the integrators’ instructions, they are not in control of whether these birds are processed and put into the food system. Yet they have unique access to information that impacts food safety on products squarely within FDA’s jurisdiction under the FFDCA.

III. Animal feed and the use of antibiotics in live animals are clearly within the FFDCA.

In addition to live animal health issues that impact the final food product, contract poultry farmers are able to observe problems with the animal feed provided by the integrators that can result in poor health outcomes in the live birds and raise concerns as to the safety of the finished product. This issue is directly covered by the FFDCA, which defines food to include “articles used for food or drink for man *or other animals*.” 21 U.S.C. § 321(f)(1) (emphasis added).

¹ Martha Pulido-Landinez, *Food safety – Salmonella update in broilers*, 205 ANIMAL FEED SCIENCE AND TECH. 53 – 58 (2019).

² Cindy M. Liu et al., *Escherichia coli ST131-H22 as a Foodborne Uropathogen*. MBIO 9:e00470-18 (2018). <https://doi.org/10.1128.mBio.00470-18>.

Similarly, the use of antibiotics in animals intended for food is also regulated under the FFDCA's provisions to prevent the sale of adulterated food. This is necessary to protect the public from potential harm associated with unsafe drug residues, which falls within the provisions for adulteration. *See* 21 U.S.C. § 342(a)(2)(C)(ii).

Petitioner Watt's claims include both these issues, and he is not alone. For example, one farmer that called RAFI-USA provided details on a serious disease outbreak, during which his service technician delivered antibiotics to his farm to administer to the live birds. These antibiotics were delivered *without* the on-farm consultation of a veterinarian and without a corresponding prescription. *See* Whitley Aff. at ¶ 4-5. This situation called into question the safety of the finished poultry food product, as well as whether the finished birds would be misbranded if labeled as "no antibiotics ever (NAE)." While antibiotic misuse is not the most common issue raised by farmers in Amici's experience, this is far from an isolated incident based on the calls to RAFI-USA's hotline. *See* Whitley Aff. at ¶ 3-5.

Without FFDCA's whistleblower provision, there is no viable option for farmers like Petitioner Watts, and others similarly situated, to alert authorities to these significant problems.

Conclusion

Contract poultry farmers are in a precarious situation due to their contractor status and lack of legal protection. Raising concerns to either their contracting integrator or an outside authority places them at high risk for losing their contract, their income, and possibly their farm and home. Without FFDCA whistleblower protection, the federal law is inadequate to address these on-farm integrator decisions that result in potentially unsafe food products.

Whether or not live animals fall within the definition of “food” under the FFDCA, there are multiple clear grounds for the Board to find that the FFDCA’s whistleblower protections apply to farmers such as Petitioner Watts so that these concerns can be properly addressed.

The PPIA’s scope is narrowly limited to poultry processing, not the care of the live animals. Petitioner and other farmers are not covered.

In contrast, the FFDCA unambiguously covers both animal feed and the use of antibiotics in animals intended for food, regardless of the location. Fundamentally, the FFDCA prevents the sale of adulterated or misbranded food – and there is no question that the live chickens are intended for food and that the conditions that they are kept under will impact the safety of such food.

Amici thus urge the Board to find that Perdue is a covered entity under the whistleblower provision of the FFDCA and allow the case to proceed so that the serious issues raised by the Petitioner can be properly addressed.

Respectfully submitted,

Candace Spencer

CANDACE A. SPENCER, ESQ.

Dated: April 8, 2020

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Attorney for Amici

Dated: April 8, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Amici RAFI-USA, R-CALF USA, and FARFA's Brief of Points and Authorities has been served on the following via United States Mail, postage prepaid, on this 8th day of April, 2020:

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