Every Cattle Producer Urged to Submit Comments on Proposed Undue Preference Rule: Deadline March 13, 2020

Background: The Packers and Stockyards Act of 1921 (P&S Act) was intended to both protect competition in U.S. livestock markets and protect livestock producers from packing companies' unfair practices. These are two different protections: the first protects competition within the entire industry by, for example, prohibiting monopolies and monopoly conduct. The second protects individual producers from unfair practices that harm them individually, even where that practice might not be shown to have an industry wide anticompetitive impact.

One provision of the Packers and Stockyards Act designed to protect individual producers against unfair practices by the packers is the prohibition against making or giving any undue or unreasonable preference or advantage to any particular person or locality in any respect. That provision also prohibits packers from subjecting any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

In the absence of the U.S. Department of Agriculture (USDA) having written clear rules to implement and consequently enforce this provision, several courts have found that a packer cannot violate this provision unless it is shown that the undue preference caused harm to the competitiveness of the entire industry.

Requiring individual producers harmed by an undue preference or prejudice to have to prove harm to the entire competitiveness of their industry is a gross misinterpretation of the Packers and Stockyards Act, as several other courts have pointed out.

Congress knew this and in 2008 directed the USDA to write rules to implement the undue preference prohibition.

In 2010 the USDA proposed a rule to implement the undue preference provision. That rule reflected the USDA's longstanding position that a violation of the undue preference prohibition can be proven without evidence that the practice caused a competitive harm to the entire industry. The USDA explicitly stated that its position "is consistent with the language and structure of the P&S Act as well as its legislative history and purpose."

The USDA went even further and expressly stated that the court rulings that require a showing of harm to competition "are inconsistent with the plain language of the statute; they incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the P&S Act; and they fail to defer to the Secretary of Agriculture's longstanding and consistent interpretation of a statute administered by the Secretary."

The packers and their entire meat lobby, including the National Cattlemen's Beef Association, fought feverishly and successfully to prevent the proposed rule from being implemented for many years.

Then along came the new Secretary of Agriculture, Sonny Perdue, and one of his first official acts in 2017 was to withdraw the proposed rule altogether, meaning it would never be finalized.

But Congress' 2008 mandate that a rule be written remained in effect, so the USDA regrouped and on January 13, 2020, issued another proposed rule, this one is likely to have the packers and the entire meatpacking lobby's blessing. That's because the new proposed rule is so terribly weak.

The proposed rule sets forth four criteria the Secretary will use to determine whether a preference or advantage under consideration violates the P&S Act. A preference or advantage may be a violation if it:

(1) Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers;
(2) Cannot be justified on the basis of meeting a competitor's prices;
(3) Cannot be justified on the basis of meeting other terms offered by a competitor; and
(d) Cannot be justified as a reasonable business decision that would be customary in the industry.

In other words, if a producer files a complaint alleging he/she is being harmed by the granting of an undue preference or advantage offered to only a select few cattle feeders, the Secretary will determine if the preference or advantage can be justified using one or more of the above listed criteria. If the Secretary finds, for example, that the preference can be justified because it was a customary practice by the packer and that the packer has been granting the preference to just a few cattle feeders for years, then it appears the Secretary would be within his rights to let the packer slide.

The criteria render the statutory protection against unfair preferences toothless. For example, undue preferences based on a packer's agreement to offer only a few cattle feeders a cost-plus contract (a contract not based on cattle prices but, instead, on covering specified cattle feeding costs, including the feeder-calf price, feed, labor, etc.) would disadvantage all other feeders that remain subject to price volatility. And while we've rightfully been concerned about these cost-plus contracts for years, the proposed rules appear to allow the Secretary to conclude that they pass muster on the basis that they are now established customary practice.

One can imagine any number of "customary" practices which harm independent producers that might get wave through under these rules. It is hard to think of any other areas of the law where the defense "but, your honor, that's the way we have always done it" carries any wait. But that appears to be what the Secretary has proposed here. And in doing so he has proposed a list of defenses the packers can assert anytime a complaint for undue preference is filed. And, in failing to propose more specific criteria as to what actually constitutes a violation, the Secretary strengthened the packers' legal position because they can readily assert that a preference under consideration is based on meeting other packers' prices and terms, or because the practice has been used for years, or because it provides the packers with cost savings.

Worst of all is that the Secretary has abandoned his responsibility to assert his agency's longstanding position that a violation can occur even without a producer showing a harm to the entire competitiveness of the industry. Rather than exercise his duty to lend his agency's expertise to this issue to provide courts with the agency's expert interpretation, the Secretary states in the proposed rule that the USDA "does not intend to create criteria that conflict with

case precedent," so the USDA "expects that court precedents relating to competitive harm are likely to remain unchanged."

In other words, the USDA is purposely depriving the courts of its longstanding interpretation of the P&S Act. Moreover, in doing so, it is facilitating those court decisions, which USDA previously stated were "inconsistent with the plain language of the statute," to stand as the rule of law.

This is a terrible state of affairs. The proposed rules will ensure that the P&S Act remains incapable of protecting independent cattle producers from unlawful preference, prejudice, advantage, and disadvantage.

R-CALF USA urges all of its members to submit public comments by the March 13, 2020 deadline. Members are encouraged to think about examples of preferences or advantages that would benefit only some feeders at the expense of those who do not receive such preference or advantage. As well as examples of prejudices or disadvantages that only some cattle feeders would be subjected to while others are not.

Here are some ideas for agreements or conduct that should be unlawful:

1. A contract not based on price, such as a cost-plus contract.
2. A contract that requires feedlots to sell all their cattle to a single packer.
3. A contract that guarantees to limit a feeder's losses, such as a stop-loss contract.
4. A per head or per pound bonus for selling exclusively to a single packer.
5. A retaliatory action by a packer because the feeder complained or sold to a different packer.
6. A refusal to pay market price for slaughter-ready cattle.
7. A contract to buy only if the feeder keeps feeding the cattle beyond their optimal weight.
8. A refusal to provide carcass information if such information is provided to others.
9. An offer to finance feeder cattle and or feed at special terms.
10. A refusal to buy on a live-weight basis when the packer buys on a live-weight basis from other feeders.

You may have other examples to include in your comments. For certain, your comments should clearly state that the proposed rule must state that a violation of the undue preference prohibition can occur even if the conduct cannot be demonstrated to harm the competitiveness of the entire industry.

To submit your comments by the March 13, 2020 deadline, the USDA requires all comments to be submitted through the Federal e-rulemaking portal at http://www.regulations.gov. Your comments should reference the docket number docket number and the date and page number of the Federal Register. So, here is what to write at the beginning of your comments:

RE: Docket No. AMS–FTTP–18–0101, 85 Fed. Reg., 1771-1783, Jan. 13, 2020

To view the actual proposed rule, go to http://www.regulations.gov and type in: AMS-FTTP-18-0101.

Good luck with your comments and thank you for your ongoing support.