

## 10/02/2003 Entry: "Pickett Versus IBP"

Pickett Versus IBP

By Lee Pitts

Quite possibly your future as an independent cattleman rests in the hands of a single man in Omaha. His name is Lyle Strom and he is a United States District Judge. Mr. Strom is the judge who will hear the case of a bunch of angry cattlemen and cattle feeders who have sued the largest cattle packer in the country: IBP. The case is widely known simply as Pickett versus IBP and the trial will start sometime after the first of next year. The decision could alter the face of the cattle industry. And even though Tyson bought out IBP it changes things not one bit. Tyson bought IBP warts and all, with the lawsuit in its state at the time, and even though they could change lawyers, which they haven't done, they cannot add a single new witness or alter what transpired before they bought IBP. (Maybe that's why Tyson got cold feet and tried to back out of the deal before the government forced them to go through with the purchase?)

Pickett against IBP is a lawsuit originally brought by ten people, all cattlemen, who had fed cattle in feedyards and sold them under the current captive supply system whereby you wait for a call on Thursday to hear what the packers are offering this week. If you bid them a pass you probably won't hear from them for a couple weeks while your fat cattle get overripe. These men allege that IBP uses captive supply arrangements to depress the cash price for cattle and that packers use discriminatory pricing contracts to manage inventory and destroy the negotiated weekly market used by independent sellers.

Pickett v. IBP is the first lawsuit in history of the United States to be certified as a national class action lawsuit in which the operative statute is the Packers and Stockyards Act of 1921. Even though the statute was passed in the Warren Harding administration as a trade protective legislation, this is the first time it has been invoked on behalf of ranchers en masse.

Since Pickett vs. IBP was allowed by the courts to be a "class action lawsuit" not only do the brave men who brought the suit stand to benefit but so do another estimated 30,000 cash sellers who sold cattle to IBP.

Basically the case boils down to this: The plaintiffs argue that IBP entered into secret contracts with big feeders to acquire a captive supply that would then allow them to stay off the market during crucial pricing periods and thereby reduce the price they would have to pay for other cattle they did not have under contract. They contend that cattle feeders are left with two choices: either selling their cattle at an unacceptably low price or being left without a buyer all together.

Specifically they say that IBP practices violate section 202 of the Packers and Stockyards Act which states in part: "It shall be unlawful for any packer to: (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The brave men who are seeking damages and injunctive relief include industry stalwarts like Henry Lee Pickett, Sam Britt, Paul Horton, Mike Callicrate, Jim Bower, Pat Goggins, Johnny Smith, Stayton Weldon, Lovel Blain, Bob Rothwell, Chris Abbott and David Smith. Others who could benefit from a ruling in their favor include all cattle producers who sold fed cattle directly to IBP since February 1994.

The lead attorney for the ranchers is David Domina, an intelligent, knowledgeable and articulate speaker who has done battle with IBP before. He defended Robert Cook who was sued by IBP for slander after he spoke out against IBP during a 1994 producer's meeting in Omaha. Cattle prices had just dropped 17 cents per pound during a six week period and cattle feeders were mad. Especially Cook. He stood up and told it like it was and IBP tried to browbeat him into submission by suing him. Domina was able to get his hands on private IBP data that clearly showed during some weeks that they controlled as much as 122 percent of its slaughter capacity as captive supply for the following week, allowing the company to significantly underbid the cash market. Domina and Cook won the case in what was a preliminary bout to the real heavyweight fight... Pickett versus IBP. Domina is also aided by attorneys Joe Whatley, Randy Beard, Clay Hornsby and Steve Griffith.

At first the ranchers tried to make this a class action lawsuit where all cattlemen would get relief whether they sold their cattle as weaners or as fats, based on the idea that captive supply lowers all cattle prices. But the district court declined to certify such a class.

Next the ranchers moved for reconsideration, narrowing the class to include all cattle feeders "who had sold fed cattle directly to IBP" since February 1994." They won this round and so all cattle producers who sold fed cattle directly to IBP from February 1994 through and including the date of certification could receive reparations.

Even though the cattlemen specifically chose to only go after IBP, rather than pick off too big a fight, that did not stop others from following their lead. At least two other similar lawsuits that we know of have been filed: Murdock vs. Excel and Luking vs. ConAgra. A group of pork producers also filed a similar suit on Dec. 28, 1999 against IBP and Smithfield, the nation's two largest pork packers.

All of these suits basically allege what Pickett versus IBP does, that the companies used illegal practices to manipulate and depress prices for livestock.

Domina has stated that Pickett versus IBP will not be an easy case to win but lawyers don't usually take on cases like this, and devote so much of their time and energy unless they think they stand a good chance of winning. Five law firms have engaged themselves on behalf of the cattlemen, four from Alabama and one from Nebraska. It is significant to note that they have taken the case on a contingency basis: they only get paid if the ranchers win their case. In small skirmishes so far they have more than held their own. First they fended off several attempts by IBP lawyers to have the case thrown out of court with Judge Strom ruling that the economic evidence is reliable and that a jury should decide who is right. IBP also lost its class certification motion and lost the appeal that followed that defeat. IBP lost again when Strom ruled that members of IBP's board of directors were not exempt from being deposed. Some of those IBP directors we might look forward to seeing grilled on the witness stand include Robert Peterson, former IBP Chairman and CEO; Wendy Gramm, former Chairman of the Commodity Futures Trading Commission and wife of US Senator Phil Gramm of Texas and JoAnn Smith, past National Cattlemen's Association President and former Assistant Secretary for the US Department of Agriculture.

Over 100 depositions were taken, ranging from economists to cowboys with enough paperwork already in the case to fill "a large ballroom." If the good guys in the white cowboy hats win they will be entitled to damages and an injunction. Meaning that not only would IBP have to pay up for past transgressions, they would also have to change the way they do business. "The person who will write the injunction, if we get there, and I believe we will," says Domina, "is the Honorable Lyle Strom, United State District Judge."

Domina says "The Pickett case looks really good. He says that expert witnesses can prove the destructive powers of captive supply both economically and econometrically. "The equation of the case is as simple as this," Domina said. "If you're in business and you need 100 of something to conduct your business and you've already got 50 of them, will you work harder to get the other 50 than you have to work to get all 100?"

If they win the terms of a settlement could be staggering. "You may not know that the lawsuit goes back to February of 1994," says Domina. So we are basically talking about nine years worth of fat cattle. At ten million head of cattle a year that would mean an adjustment on 90 million head of cattle! Domina hypothesizes, "Assume that half their cattle came from the cash market. That's 45 million head of cattle. Assuming that the captive supplies adversely impacted the price an average of \$50 per head, that's \$2.25 billion without interest!"

Needless to say if the jury in Pickett versus IBP rules for the cowboys it would be an event comparable to the 1920's when the feds broke up the Big Four. And all because some cattlemen had the guts to simply ask the government to enforce laws that have been on the books for decades. For their bravery we salute the plaintiffs in Pickett versus IBP as members of this year's Digest 25.