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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CENTER FOR FOOD SAFETY *et al.*,

Plaintiffs,

v.

THOMAS VILSACK, in his official capacity
as Secretary of U.S. Department of
Agriculture *et al.*,

Defendants.

Case No.: 4:20-cv-00256-JSW

**PROPOSED AMICUS AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES'S MOTION FOR LEAVE
TO FILE AMICUS CURIAE BRIEF IN
SUPPORT OF PLAINTIFFS; PROPOSED
BRIEF**

Judge: The Hon. Jeffrey S. White
Hearing: Not yet scheduled

NOTICE OF MOTION & MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that as soon as counsel may be heard by the above-entitled Court, located at 1301 Clay Street, 2nd Floor, Courtroom 5, Oakland, CA 94612, Proposed Amicus Curiae American Federation of Government Employees (“AFGE”) will and hereby does move this Court to grant leave to file the enclosed amicus curiae brief in the above-captioned case. AFGE’s motion is based on this Notice of Motion and Motion, and the accompanying proposed brief, which details AFGE’s special interest in this case, as well as the pleadings and papers on file in this case and any material and argument presented to the Court at a hearing.

PROPOSED AMICUS BRIEF

INTEREST OF THE AMICUS

AFGE is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government. In particular, AFGE represents federal food safety inspectors employed by the United States Department of Agriculture, Food Safety Inspection Service (“FSIS”) who perform the inspections required under the Federal Meat Inspection Act of 1906 (“FMIA”), 21 U.S.C. § 601 *et seq.* AFGE’s representation of these FSIS inspectors includes collective bargaining, and representation in grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*; representation before agency decision-makers in internal disciplinary proceedings; and representation in administrative litigation before numerous Executive agencies, including the United States Merit Systems Protection Board, the United States Equal Employment Opportunity Commission, the United States Federal Labor Relations Authority, and the United States Office of Special Counsel.

The question of what inspections are required under the FMIA is of great consequence to AFGE and the FSIS inspectors it represents. The question raised is important and will have a widespread effect on FSIS inspectors. Consequently, AFGE has a significant interest in this case as well as specialized expertise to offer to the Court.

AUTHORSHIP STATEMENT

1 AFGE’s counsel authored this brief in its entirety. No party, party’s counsel or person other
2 than AFGE contributed money that was intended to fund preparing or submitting this brief.
3

ARGUMENT

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5 Congress enacted the FMIA so that “the health and welfare of consumers [would] be protected
6 by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and
7 properly marked, labeled, and packaged” and because “[u]nwholesome, adulterated, or misbranded
8 meat or meat food products ... are injurious to the public welfare[.]” 21 U.S.C. § 602. In so doing,
9 Congress determined that the best way to protect the health and welfare of consumers was to ensure
10 that all meat is subject to mandatory inspection by federal employees.

11 Specifically, the FMIA provides that FSIS inspectors must conduct inspections both ante-
12 mortem and post-mortem. 21 U.S.C. §§ 603, 604. With respect to post-mortem inspections, the FMIA
13 requires the “examination of the carcasses and parts thereof of all amenable species to be prepared at
14 any slaughtering, meat-canning, salting, packing, rendering, or similar establishment ... which are
15 capable of use as human food[.]” 21 U.S.C. § 604.

16 The New Swine Inspection System (“NSIS”) adopted by FSIS, however, fundamentally
17 compromises the design of the FMIA by improperly delegating post-mortem inspection duties to
18 private establishment employees. *See* Modernization of Swine Slaughter Inspection, 84 Federal
19 Register 52,300 (October 1, 2019). In addition, the NSIS effectively prevents FSIS inspectors from
20 performing the required post-mortem examination of all carcasses, and parts thereof, by allowing
21 establishment employees to trim carcasses prior to the required inspection. It is critical to the
22 underlying scheme of the FMIA that all inspection duties be performed by federal employees. *Cf.* 21
23 U.S.C. § 606(a) (“For the purposes hereinbefore set forth the Secretary shall cause to be made, **by**
24 **inspectors appointed for that purpose**, an examination and inspection of all meat food products
25 prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar
26 establishment[.]”) (emphasis added).

27 Sound policy reasons support this statutory requirement. FSIS inspectors receive specialized
28 training and are supervised by experienced public health veterinarians. FSIS inspectors also do not have

1 a profit motive that would impair their ability to perform post-mortem examinations nor are they
2 beholden to a private employer in the way that an establishment employee would be. There is no
3 financial upside for a FSIS inspector to allow unwholesome or adulterated carcasses to pass inspection.
4 The same cannot be said for private establishment employees. Their jobs are solely dependent on the
5 companies that benefit from processing the maximum amount of meat per hour.

6 Moreover, in addition to having a different mission, private establishment employees may not
7 enjoy the same job protections that FSIS inspectors do, which may disincentivize them from properly
8 identifying unwholesome or adulterated carcasses for disposal. Federal employees, on the other hand,
9 have a protected property interest in their continued employment. *See, e.g.*, 5 U.S.C. § 7513; *Cleveland*
10 *Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). In addition, federal employees are protected from
11 enumerated prohibited personal practices, including retaliation, and can file complaints with the United
12 States Office of Special Counsel to exercise those rights. *See, e.g.*, 5 U.S.C. § 2302(b); 5 U.S.C. § 1212.

13 Private establishment employees do not have the same protections. Consequently, FSIS
14 inspectors, unlike establishment employees, need not fear being terminated for condemning or
15 destroying unwholesome or adulterated meat. And in their role as public servants, FSIS inspectors have
16 an incentive to err on the side of caution and over-condemn rather than under-condemn meat that poses
17 a danger to consumers.

18 The NSIS unravels the statutory scheme created by Congress by unlawfully delegating
19 inspection duties to private establishment employees and by requiring those employees to trim certain
20 defects from carcasses prior to inspection. For example, the NSIS provides that “[e]stablishment sorters
21 must incise mandibular lymph nodes and palpate the viscera to detect the presence of animal diseases
22 as part of their sorting activities.” 9 C.F.R. § 310.26(b). This is an improper delegation of federal
23 inspection duties to private actors. It cannot be argued that the palpation of mandibular lymph nodes is
24 not required to detect to presence of condemnable diseases. For if this were true, there would be no
25 basis for requiring establishments to palpate the lymph nodes in the first place. Additionally, FSIS has
26 acknowledged that it cannot forgo this inspection because it “needs more information” to determine
27 whether there is an acceptable alternative to incising and palpating the mandibular lymph nodes of each
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1 hog. 84 Fed. Reg. at 52,301. Moreover, incising and palpating lymph nodes requires specialized
2 training.

3 It is for these reasons that FSIS inspectors must perform all inspection tasks. As FSIS training
4 materials make clear, “[t]he incision technique is critical.” AR101229. “The cut edges must be smooth,
5 not ragged or torn[,]” and the lymph nodes must be “sliced in thin parallel slices” using a specific
6 “wrist rolling motion” that permits the observation of both sides of the slice. *Id.* It is thus indisputable
7 that the NSIS improperly delegates inspection duties that are necessary “to detect the presence of
8 animal diseases” to establishment employees. This is contrary to the plain text of the FMIA which
9 requires that post-mortem examinations be performed by federal employees. 21 U.S.C. § 604.

10 Furthermore, the NSIS permits, and in fact requires, establishment employees to trim certain
11 defects on carcasses and parts prior to being subject to federal inspection. 84 Fed. Reg. at 52,300
12 (requiring establishment employees to “trim and identify defects on carcasses and parts before post-
13 mortem inspection”); *see also* 84 Fed. at Reg. 52,324 (establishments “will be required to ... trim and
14 identify defects, such as dressing defects, contamination, and pathology defects, on carcasses and parts
15 before post-mortem inspection[.]”). For example, establishments are required to trim “scabs, minor
16 bruises, skin lesions, bile” and “fecal, ingesta, and milk contamination[.]” AR100805 (FSIS Directive
17 6600.1 dated Dec. 19, 2019). This is in stark contrast to the traditional inspection system in use prior to
18 the adoption of NSIS, under which establishment employees were only permitted to trim correctable
19 defects “as directed by” FSIS inspectors. 84 Fed. Reg. at 52,311.

20 The trimming of carcasses and parts prior to post-mortem examination substantially impairs
21 FSIS inspectors’ ability to identify carcasses and parts with condemnable diseases. In particular, the
22 pre-inspection trimming of carcasses and parts prevents FSIS inspectors from assessing the condition of
23 the whole hog to determine whether a particular disease or condition is generalized. For example,
24 certain types of bruising are an indicator of septicemia, a food safety hazard which requires
25 condemnation. AR101331-AR101332 (providing that “[p]ostmortem findings [of septicemia] may
26 include ... infected wounds or bruises”); AR101330 (“Septicemia is a condition of public health
27 significance[.]”); AR101332 (“A carcass manifesting septicemia is never passed.”).

1 The ability of establishment employees to trim “minor” or “slight” bruising unsupervised under
 2 the NSIS precludes FSIS inspectors from conducting the statutorily required inspection of all carcasses
 3 and parts for two reasons. One, FSIS inspectors are no longer able to assess the overall condition of the
 4 hog to identify generalized diseases because the pre-inspection trimming has removed critical indicia of
 5 disease. *See* AR020694-AR020695 (Comment by FSIS Veterinarian) (“It would not be difficult for
 6 plant personnel to trim specific lesions from carcasses to give the false appearance of a passible animal;
 7 when in fact, the carcass should have been initially condemned.”). Two, establishment employees can
 8 inadvertently trim septic or hemorrhagic bruising preventing FSIS inspectors from observing indicia of
 9 septicemia. In both cases, the unsupervised trimming of carcasses and parts prevents FSIS inspectors
 10 from identifying food safety hazards and thwarts them from conducting the post-mortem examination
 11 required by the FMIA. Consequently, both the FMIA and sound policy demand that the final rule
 12 adopting the NSIS be vacated.

CONCLUSION

14 For the foregoing reasons, the Court should grant the Plaintiffs’ motion for summary judgment
 15 and vacate the final rule.

16 Dated: March 10, 2022

Respectfully Submitted,
 MCCracken, Stemerman & Holsberry, LLP
*I attest that each of the other signatories have concurred in the
 filing of the document.*

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