

**OPINION
71-8**

August 27, 1971 (OPINION)

Mr. Leland R. Miller
Dairy Commissioner
Department of Agriculture

RE: Agriculture - Livestock Sales Rings and Dealers - Licenses

This is in reply to your letter of 18 August 1971 requesting an opinion of this office with regard to livestock dealers.

Your first question is stated as:

1. Can livestock markets or sales rings purchase livestock to protect the market without being legally licensed or bonded by this department?"

For an example you give us:

"Example: A market or sales ring owner, manager, or operator when approached for selling or purchasing livestock, and who does not have a license or bond from this department as a dealer or agent, tells us that he is only buying or selling to protect the market and as such his bond issued by the Livestock Sanitary Board covers these purchases and sales."

Your second question is stated as:

2. Can a livestock dealer or agent license be revoked by the Dairy Commissioner due to failure to produce the required amount of bonds necessary to validate the license? Also, must all dealers or agents register at each market prior to purchasing livestock?"

For an example you give us:

"Example: We have some attorneys in this state who are advising some of the dealers and agents of livestock who buy and sell, that even due to the increase in bonds by this last legislative session, and which increase became effective on July 1, 1971, that their license is good for one year from the date of issue and cannot be revoked by the Dairy Commissioner for failure to produce sufficient bonds required by law for their operation as livestock dealers and agents. Also, this license should be returned so that it may be canceled by this office and not used by the dealer or agent to continue his buying or selling without being properly bonded by using the license for identification."

These questions are not without difficulty. We hope, however, the following will help in clarifying the situation. In response to your first question, we note first the first sentence of section 36-04-03 of the 1971 Supplement to the North Dakota Century Code which provides:

"36-04-03. * * * All dealers shall be licensed as provided in this chapter. * * * "

The term "dealer" is defined by subsection 1 of section 36-04-01 of the 1971 Supplement to the North Dakota Century Code as:

1. 'Dealer' shall mean any person, copartnership, association, or corporation engaged in the business of buying, selling, or dealing in horses, mules, cattle, hogs, sheep, poultry, or wool from the producer, terminal market, or livestock auction market for resale or shipment within or without the state, and also resale in the local market."

We note specifically that the definition does not in the terms of that statute apply to any person buying, selling, or dealing in the named livestock, etc. but rather to any person, etc. "engaged in the business" of so buying, selling, or dealing in the named livestock. Thus, while, for example, a dairy farmer may have to on occasion buy or sell a cow or two to properly maintain his herd, he is engaged in the business of dairy farming, not in the business of buying, selling, or dealing in livestock. His purchases, sales and deals in livestock are only incidents of his dairy farming business, not a business in which he is engaged for its own sake, on which basis he would not be required to obtain a livestock dealer's license to engage in the transactions necessary to his dairy farming business. This is not, of course, to suggest that a person may not be engaged in more than one business; and the mere fact that a particular individual happens to be a dairy farmer does not exempt him from licensure provisions of this act if he also happens to be engaging in the business of buying, selling or dealing in livestock. As such time, of course, as the dairy farmer's buying, selling or dealing in livestock is not necessarily incidental to his dairy farming business, he would be required to obtain a livestock dealer's license.

While you do not explain in detail this concept of to "protect the market," mentioned in your letter, we at least tentatively assume that this is a practice somewhat like the practice of "shilling" at auctions generally. While such a practice is not necessarily favored in the law of auctions, in proper circumstances it is at least permitted. Thus, subsection 4 of Section 51-01-22 of the North Dakota Century Code (a part of our uniform sales act) provides:

" * * * "

4. Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller himself to bid or to employ or induce any person to bid at such sale on his behalf or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this section may be treated as fraudulent by the buyer."

While we do not claim to be thoroughly familiar with the method of

operating of Livestock Auction Markets, their usual trade practices, or whether this activity is carried on by them, it does appear that there is legislative recognition of such a practice. Thus, section 36-05-04 of the 1971 Supplement to the North Dakota Century Code provides in part that:

"36-05-04. * * *

The livestock sanitary board shall be the obligee in the bond, and it shall be for the benefit of, and for the purpose of protecting, any person selling to or through or buying livestock through or from the licensee or his or its agent. * * *

Thus, we will note that the license bond required for operation of a livestock auction market is not only for the purpose of protecting persons buying or selling "through" such market but is also for the purpose of protecting persons buying "from" or selling "to" such market. If the legislature would have contemplated that the livestock auction market buying or selling in its own name would have been required to have a dealer's license, they obviously would have not put in these provisions as to protection of persons buying from or selling to the livestock auction market itself as such protection is already afforded by the dealer's license bond as outlined in section 36-04-05 of the 1971 Supplement to the North Dakota Century Code. It would appear to us, however, that the legislature in enacting this statutory provision did contemplate that the livestock auction market would be buying and selling such livestock in its own name as an incident of its business of being a livestock auction market.

We must, therefore, conclude in response to your first question that a livestock auction market buying and selling cattle as an incident of its livestock auction market business to the extent of "protecting the market" would not be required to have a livestock dealer's license and would not be required to have a livestock dealer's license for such purpose. We are not, of course, suggesting at this time that a livestock auction market can engage in the business of being a livestock dealer, except as an incident of its livestock auction market business and more specifically for "protecting the market."

The relevant change in section 36-04-06 of the 1971 Supplement to the North Dakota Century Code is shown by senate bill number 2467 of the 1971 Session as follows:

1. For a dealer in livestock ten twenty thousand dollars and for agents of livestock dealers five ten thousand dollars each."

In other words, prior to July 1, 1971, the bonds for dealer and agent were respectively ten thousand dollars and five thousand dollars. After July 1, 1971, the bonds for dealer and agent are respectively twenty thousand dollars and ten thousand dollars.

Section 36-04-05 of the 1971 Supplement to the North Dakota Century Code does require that appropriate bond be filed with application for

license. As we understand departmental practice, these licenses generally run from January 1 through December 31 of each year. (See section 36-04-07, 1971 Supplement) License is not issued except upon furnishing of appropriate bond. Said section 36-04-05 of the 1971 Supplement to the North Dakota Century Code provides in part also that:

" * * * The dairy department may demand an additional bond for either the principal or agent whenever in its judgment the volume of business of the principal or of any agent named by the principal warrants such demand."

The statute does not in specific terms prescribe the remedy of the department when the licensee fails to comply with the demand of the department, or when the bond for other reason becomes inadequate. There may well be serious questions as to whether the license is effective for any purpose when the bond required for same does not meet the statutory requirement for same. Also, insofar as the department has sent to the dealers a paper purporting to show the department's determination that the applicant is licensed as a dealer, as of a definite date, and denominated a license, which generally is considered to not expire for the period of one year, we do feel that the department is obligated to take action to prevent the use of such "license" to defraud the public into believing that the "licensee" is validly licensed when it is not.

Perhaps, in the usual instance, a simple notice that the license has been canceled should suffice to accomplish such result; however, we do note the provision of section 36-04-11 of the North Dakota Century Code that:

" * * * Before any license issued shall be revoked, the licensee shall be furnished with a copy of the complaint made against him, and a hearing shall be had thereon before the dairy department to determine whether or not such license shall be revoked. * * *"

Said section 36-04-11 then prescribes the procedure for holding such a hearing.

The grounds for revocation specified in section 36-04-10 of the North Dakota Century Code include the following:

1. The applicant or licensee has violated any of the laws of this state governing the handling, shipment, or transportation of livestock, poultry, or wool; * * *"

The laws of this State do, of course, forbid any entity as described in said section 36-04-11 to act or purport to act as a licensed dealer in handling, shipment or transportation of livestock, poultry or wool without a bond or file in the amount specified by the statutes heretofore quoted.

We are not, of course, suggesting that any purported "license" whether or not issued by the department is valid, at any time, when the bond required by the statute or by the department has not been furnished. However, formal demand for increase of bond and formal

notice of revocation hearing, hearing, order, etc. are an appropriate method of issuing a formal determination of such matter. Such formal order should, of course, include a requirement that the "license" document be returned to the department.

We do further feel that insofar as the license issued, where the bond does not comply with the requirement of the statute at the current time, is probably not effective for any purpose, the dairy commissioner might request its return for cancellation and upon receipt of same cancel same upon his records.

In response to the second part of your second question, while it may be very convenient to a market operator to require licensed dealers or agents to be identified prior to commencement of an auction, to prevent interruption of proceedings for license investigation, etc. and to identify buyers as either licensees, persons exempt from licensure or persons not permitted to participate, we do not find a requirement for formal registration prior to an auction in the provisions of chapter 35-04 of the North Dakota Century Code as amended to date.

HELGI JOHANNESON

Attorney General