PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

OMEGA PRODUCE COMPANY, INC. v. BOSTON TOMATO & PACKING, LLC, d/b/a BOSTON TOMATO.
PACA Docket No. R-05-033.
Decision and Order.
Filed February 15, 2005.

PACA - Tomato Suspension Agreement – Exclusion of Implied Warranties.

Where tomatoes were purchased by Respondent from Complainant pursuant to the December 4, 2002 Suspension Agreement on Fresh Tomatoes Imported from Mexico, Respondent's claim that the tomatoes were not merchantable due primarily to the quality defects disclosed by a USDA inspection cannot be considered because the Suspension Agreement permits adjustments to the sales price for the condition defects listed in the Agreement and for *no other defects.* The language used in the Suspension Agreement is sufficiently explicit to bring the exclusion of warranties to the buyer's attention and make plain that there are no implied warranties.

Daniel Deutsch, for Complainant.
Kimberly A. Howard, for Respondent.
Patrice Harps, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.). A timely complaint was filed with the Department within nine months from the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $11,365.20 in connection with one trucklot of tomatoes shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

Since the amount claimed in the formal complaint does not exceed

$30,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Complainant also submitted a Brief.

Findings of Fact

1. Complainant, Omega Produce Company, Inc., is a company whose post office address is P.O. Box 277, Nogales, Arizona, 85628.

2. Respondent, Boston Tomato & Packaging, LLC, doing business as Boston Tomato, is a limited liability company whose post office address is 117-118 New England Produce Ctr., Chelsea, Massachusetts, 02150-1721. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about January 21, 2004, Complainant, by oral contract, sold to Respondent one trucklot of tomatoes comprised of 72-25 lb. cartons of extra large, 90-110 count, Roma tomatoes at $14.35 per carton, or $1,033.20, and 720-25 lb. cartons of large, 110-130 count, Roma tomatoes at $14.35 per carton, or $10,332.00, for a total f.o.b. contract price of $11,365.20.

4. The sale of the tomatoes mentioned in Finding of Fact 3 was negotiated by a broker, Agri-Sales Limited, Inc. (hereafter "Agri-Sales"), who acted in negotiating the sale as an agent for Respondent.

5. On February 3, 2004, the tomatoes were shipped from loading point in the state of Arizona, to Respondent in Chelsea, Massachusetts, in a truck operated by Central Coast Transport, Inc. (hereafter "Central Coast"), of Nogales, Arizona.

6. On February 10, 2004, Mr. Dino Robles of Central Coast sent a fax message to Complainant, Respondent, and Agri-Sales, advising as follows:

I'm writing this letter to inform you that the truck been [sic] up in

Boston since 5 AM EST. Feb. 9, 04 Monday. I need this trk. off by 2:00 PM EST. or we are going to sell the tomato for some one [sic] acct. or put in a cold storage. Please get back to me.

Later that same day, Central Coast moved the tomatoes to Stea Brothers, Inc., in Philadelphia, Pennsylvania, to be handled for their account.

7. On February 11, 2004, Mr. W. Winston Lopez of Agri-Sales sent a fax message to Central Coast's Mr. Dino Robles stating:

> As per our conversation yesterday after, in order to clearify [sic] that you and I did speak on this matter. I did receive your call advising me of this fax, which I reviewed upon my return to the office.
>
> 1. I am in accord of said action on your part of which you stated that Boston Tomato had said to you they would not unload without a confirmation of adjustment of price.
>
> 2. A confirmation was sent to them once it was approve [sic] by the shipper. Although the time frame did not allow for the shipment to be unload [sic] yesterday afternoon Boston did state that it be [sic] done this morning upon open [sic] his place of business.
>
> 3. You and I did discuss this matter, and agreed the truck to be present [sic] this morning for that purpose.
>
> 4. Presently there was no confirmation from the trucker or your office that truck attempted to get unloaded this morning other than you mentioning that the driver was present at 2:00am.
>
> I am going to speak with Boston in order to advise of the present position of this matter. Please contact me if you have any questions regarding this matter.

8. Also on February 11, 2004, at 9:18 a.m., the tomatoes were subjected to a USDA inspection at the place of business of Stea Brothers, Inc., in Philadelphia, Pennsylvania, the report of which disclosed 67% average defects, including 57% quality (puffiness, scars) and 10% sunken discolored areas, in the 720 cartons of large Roma tomatoes, and 66% average defects, including 60% quality (puffiness, scars) and 6% sunken discolored areas, in the 72 cartons of extra large Roma tomatoes. Pulp temperatures at the time of the inspection ranged from 50 to 52 degrees Fahrenheit.

9. Following the inspection, Mr. Dino Robles of Central Coast sent

a second fax message to Complainant, Respondent, and Agri-Sales, advising as follows:

I'm writing this letter to inform you that the tomato are [sic] placed at Stea Bros. in Phila, PA 215-336-2170 will work for my acct. on freight and remit balance to shipper. Also here's copy [sic] of inspection.

10. Stea Brothers, Inc. accounted to Central Coast for the tomatoes as follows:

Sales:

23 @	$10.00 = 230.00	80 @	$ 3.00 = 240.00
1 @	8.00 = 8.00	232 @	2.00 = 464.00
18 @	6.00 = 108.00	77 @	1.00 = 77.00
111 @	4.00 = 444.00	250 @	0.00 = 0.00

Total Packages sold 792
Average 1.98 per package

Total Sales $ 1571.00

Less:

15% Commission	$ 235.65
Handling 792pkgs @ .25	198.00
Inspection	144.00
Dump Charge 250pkgs @ 1.00	250.00
Total Net Due:	$ 743.35

11. Stea Brothers, Inc. paid Central Coast $743.35 for the tomatoes with check number 52331, dated February 27, 2004.

12. Respondent did not receive any of the proceeds from the sale of the tomatoes from Central Coast, nor has Respondent remitted any sums to Complainant toward the agreed purchase price of the tomatoes.

13. The informal complaint was filed on March 3, 2004, which is within nine months from the accrual of the cause of action.

Discussion

Complainant brings this action to recover the agreed purchase price for one trucklot of Roma tomatoes sold and shipped to Respondent. Complainant states Respondent accepted the tomatoes in compliance with the contract of sale, but that it has since failed, neglected and refused to pay the negotiated contract price of $11,365.20. As evidence in support of this allegation, Complainant attached to the formal complaint a copy of its invoice billing Respondent for the tomatoes in the amount stated, as well as a copy of the bill of lading signed by the trucker, which lists the destination for the tomatoes as Respondent's place of business in Chelsea, Massachusetts.[1]

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it raises several issues in defense of its failure to pay Complainant the amount claimed. Respondent maintains first that the broker, Agri-Sales, confirmed that Complainant granted protection for market decline for the subject load of tomatoes. According to Respondent, the market for Roma tomatoes was continuously dropping while the tomatoes were in transit. As a result, Respondent states that in each of three conversations with Agri-Sales, and between Agri-Sales and Complainant, the sales price of the tomatoes was adjusted downward by $2.00 per carton, thereby ultimately reducing the price from $14.35 to $8.35 per carton. Respondent states Complainant confirmed this by faxing a revised invoice to Respondent reflecting the new price of $8.35 per carton. To substantiate this contention, Respondent attached to the Answer a copy of Complainant's invoice for the tomatoes whereon the original sales price of $14.35 per carton is crossed through and $8.35 is handwritten in beside it.[2]

Upon review, we note first that the Report of Investigation prepared by the Department includes a copy of a February 12, 2004 letter addressed to Respondent from Complainant's attorney, wherein counsel advises Respondent, in pertinent part, as follows:

In the interest of resolving this matter and for settlement purposes only, Omega Produce Company is willing to grant a credit of $6.00 per

[1] Formal Complaint Exhibits 1A and 3A.

[2] Answer Exhibit A.

package leaving a total of $6,613.20 payable, if such amount is paid within twenty-one (21) days from shipment of the load. If Boston Tomato Company, Inc. fails to pay $6,613.20 by such period of time, we will proceed with a PACA complaint for $11,365.20, the full balance owed. [3]

Also included in the Report of Investigation is a May 27, 2004 statement issued by Complainant to Respondent showing the amount due for the invoice in question as $6,613.20.[4] It is therefore apparent that in spite of Respondent's failure to pay Complainant $6,613.20 within the time period stated in the February 12, 2004 correspondence prepared by Complainant's attorney, Complainant still considered the amount due for the shipment to be $6,613.20 several months later, when the statement just mentioned was prepared. On this basis, we find that the preponderance of the evidence supports Respondent's contention that the contract price of the tomatoes was reduced to $8.35 per carton, or a total of $6,613.20.

Respondent also maintains that when the truck arrived to deliver the tomatoes on February 9, 2004, Respondent discovered that there were 72 cartons of extra large and 720 cartons of large Roma tomatoes, and that the tomatoes were green in color, which was not in conformance with the purchase order. Respondent states it notified Agri-Sales of the non-conforming color and size of the tomatoes, after which it received instructions on February 10, 2004 to have the tomatoes inspected. At that time, the truck was reportedly requested to return to Respondent's place of business so that the tomatoes could be inspected; however, Respondent states the truck did not return by 2:00 p.m. on February 10, 2004, the time by which the trucker insisted the tomatoes should be unloaded. As a result, Respondent states the tomatoes were delivered on February 11, 2004 to Stea Brothers, Inc., in Philadelphia, Pennsylvania, where a USDA inspection was performed. Respondent states that based on the USDA inspection results, which showed that the tomatoes contained 67% defects, including 57% "puffy" and "scars," and substantial amounts of sunken or discolored areas, the tomatoes were not

[3] Report of Investigation Exhibit No. 9F, ¶2.

[4] Report of Investigation Exhibit No. 12C.

merchantable for consumption. Respondent adds that due to the poor condition and quality, the tomatoes generated only $743.35 when sold by Stea Brothers, Inc. for the account of the trucker, and points out that the return from Stea Brothers, Inc. shows that more than 94% of the tomatoes were either dumped or sold at a price not even meeting the floor price.

Although Respondent claims that the tomatoes were not merchantable, there is no indication that Respondent ever notified Complainant that it was rejecting the tomatoes. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). We conclude, on this basis, that Respondent accepted the tomatoes.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.,* 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.,* 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.,* 46 Agric. Dec. 1681 (1987). As we mentioned, Respondent contends that the tomatoes in question were not merchantable and cites the USDA inspection results and the account of sales prepared by Stea Brothers, Inc. as proof in support of this contention.

On the issue of merchantability, the Uniform Commercial Code (UCC), section 2-314, states that "[u]nless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." It is well-established that Complainant is a dealer of fresh tomatoes. Thus, any sale by Complainant of fresh tomatoes would normally include an implied warranty of merchantability in accordance UCC § 2-314. Moreover, the substantial quality defects disclosed by the USDA inspection of the tomatoes in question would certainly be sufficient to establish a breach by Complainant of this warranty. We note, however, that in reference to the account of sales, Respondent mentions a "floor price."[5] Respondent's mention of a "floor price" is an implicit acknowledgement on the part of Respondent that the tomatoes in question were sold subject to the December 4, 2002

[5] Answer, pg. 3, ¶6.

Suspension Agreement for Fresh Tomatoes from Mexico[6] ("Suspension Agreement"), which provides that such tomatoes must be sold at or above an established reference price. In addition, Complainant's invoice to Respondent for the tomatoes bears a statement that reads:

The tomatoes sold pursuant to this invoice are subject to that Suspension Agreement dated December 4, 2002 between the U.S. Department of Trade and certain tomato growers, the Clarification thereof, and to (a) certain letter agreement(s) between yourselves and ourselves regarding the same, each of which is incorporated by this reference as if set forth in full. Said agreements will be mailed to you upon request.

We conclude, therefore, that the tomatoes at issue herein were sold subject to the Suspension Agreement.

Appendix D, subsection (A)(5) of the Suspension Agreement states:

Under this Agreement, adjustments to the sales price of signatory tomatoes will be permitted only for the condition defects identified in the table below and for no other defects.

Condition Defects

(1) Sunken & Discolored Areas
(2) Sunburn
(3) Internal Discoloration
(4) Freezing Injury
(5) Chilling Injury
(6) Alternaria Rot
(7) Gray Mold Rot
(8) Bacterial Soft Rot
(9) Soft/Decay

As we mentioned, the implied warranty of merchantability is applicable in the contract for the sale of goods if the seller is a merchant with respect to the type of goods, *unless excluded or modified*. In this regard, subsection 3(a) of UCC § 2-316, Exclusion or Modification of Warranties, states "unless the circumstances indicate otherwise, all

[6] See 67 FR 77044, dated December 16, 2002, "Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico," issued by the Department of Commerce, International Trade Administration, Import Administration.

implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." The language used in Appendix D, subsection (A)(5), of the Suspension Agreement expressly limits the seller's responsibility for the defective nature of the tomatoes to the defects listed therein. In so doing, we find that the Suspension Agreement specifically excludes any other implied warranties that would normally apply.

We should also note that even if the implied warranty of merchantability was in effect for the shipment in question, the Suspension Agreement would nevertheless limit the remedies available to Respondent for the recovery of damages resulting from a breach. UCC section 2-719(1), Contractual Modification or Limitation of Remedy, states "(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this article... and (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy" Official Comment 2 to UCC § 2-719(1)(b) states this section "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive," and that "[i]f the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." In this regard, the Suspension Agreement in question provides a specific procedure for making adjustments to the sales price for tomatoes sold under the Agreement and expressly limits the conditions under which such adjustments will be permitted.

> Pursuant to the Suspension Agreement, Respondent's claim for damages is deficient in several respects. First, the Suspension Agreement requires that a USDA inspection be called for no more than six hours from the time of arrival at the destination specified by the receiver, and that the inspection be performed in a timely fashion thereafter. (Appendix D, subsection (A)(4)¶1). As the record reflects, this was not accomplished by Respondent. In addition, subsection (A)(4)¶3 of the Suspension Agreement states, "no adjustments will be granted for a USDA inspection at a destination that is different from the destination specified by the first receiver of the product." In the instant case, the destination specified by

Complainant for the tomatoes was Respondent's place of business in Chelsea, Massachusetts. However, as we mentioned, the USDA inspection was performed at Stea Brothers, Inc., in Philadelphia, Pennsylvania. Finally, as we already mentioned, Appendix D, subsection (A)(5) of the Suspension Agreement states specifically that, "adjustments to the sales price of signatory tomatoes will be permitted *only* for the condition defects identified in the table below *and for no other defects*." (emphasis supplied). While the condition defects listed in the table include sunken discolored areas, subsection (A)(2) of Appendix D establishes a threshold for any one condition defect of 15%, and subsection (A)(3) of Appendix D provides that no adjustments will be granted unless the percentage of defects disclosed by the USDA inspection exceeds this threshold. Therefore, since the USDA inspection in question disclosed no more than 10% sunken discolored areas in either of the lots of tomatoes inspected, no adjustment for the condition defects disclosed by the USDA inspection are permitted under the Suspension Agreement. Moreover, Respondent's claims regarding the quality, size and color of the tomatoes cannot be considered because, as we mentioned, the Suspension Agreement specifically provides that adjustments will be granted for condition defects only, and for no other defects.

Therefore, having failed to establish that it is entitled to any adjustments pursuant to the Suspension Agreement under which the tomatoes were purchased, Respondent is liable to Complainant for the tomatoes it accepted at the adjusted contract price of $6,613.20. Respondent's failure to pay Complainant $6,613.20 is a violation of section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.,* 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.,* 29 Agric. Dec. 978 (1970); *John W.*

Scherer v. Manhattan Pickle Co., 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.,* 22 Agric. Dec. 66 (1963).

Complainant in this action paid $300.00 to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $6,613.20, with interest thereon at the rate of 10% per annum from March 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

In re: THE NUNES COMPANY, INC. v. WEST COAST DISTRIBUTING, INC.
PACA Docket No. R-04-107.
Decision and Order.
Filed March 7, 2005.

PACA - Evidence, best – Good Delivery Standard.

Where a shipment of 630 cartons of lettuce were shipped, and 620 cartons were inspected indicating that the product met the Good Delivery Standard for iceberg lettuce, the receiver called for and obtained an appeal inspection two hours later, covering only 420 cartons of the shipment. The appeal inspection, although it did not nullify the first inspection, was considered to represent the best evidence of the condition of the lettuce. In determining whether the appeal inspection revealed a breach of the Good Delivery Standard, the missing 210 cartons were considered to have contained no defects.

Mark C.H. Mandell, for Complainant.
Thomas R. Oliveri, for Respondent.
Patrice Harps, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement