PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

EL RANCHO FARMS v. IM EX TRADING COMPANY.
PACA Docket No. R-97-0149.
Decision and Order filed February 10, 1999.

Inspections - Timeliness.

Where foreign inspection was conducted seven days after receipt by the customer, and eleven days after arrival in Santos, Brazil, buyer was found to have failed to prove condition of grapes on arrival. Buyer showed by a preponderance of the evidence that this was the normal time for securing inspections in Brazil, but failed to show that seller knew at time of entering the contract that a Brazilian survey would take such an extraordinary length of time to secure.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Jerome R. Aiken, Yakima, WA, for Respondent.
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 in which Complainant seeks an award of reparation in the amount of $24,912.50 in connection with a transaction in interstate commerce involving table grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer included a counterclaim in the amount of $38,133.52 arising out of the same transaction as that which formed the basis of the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal counterclaim exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed a brief.

Findings of Fact

1. Complainant, El Rancho Farms, is a partnership comprised of Jessie Kirkorian, Lynn B. Kirkorian, and Roy Kirkorian. Complainant's address is P. O. Box 596, Arvin, California. At the time of the transaction involved herein Complainant was licensed under the Act.

2. Respondent, Im Ex Trading Company, is a corporation whose address is 117 N. 50th Avenue, Yakima, Washington. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about July 24, 1995, the parties entered into a contract calling for the sale of 1,530 lugs of U. S. No. 1 Thompson Seedless Grapes, LBK brand, at $15.00 per lug, plus $.75 per lug for pallets, $.75 per lug for pre-cooling, $50.00 for a Deltatrack temperature recorder, and $.25 per lug for brokerage, or $24,912.50, f.o.b. Arvin, California, with a contract destination of Santos, Brasil, S. A.

4. The grapes were federally inspected at shipping point on July 27 and 28, 1995, and graded U.S. No. 1, Table. On July 29, 1995, at 9:35 a.m., the loading of the container was completed, and the grapes were billed to Respondent. The grapes were then sent to a controlled atmosphere facility for treatment with tectrol, and then shipped to the Maersk Line, Port of Long Beach, Long Beach, California. From the Port of Long Beach the grapes were shipped by rail to Charleston, South Carolina. At Charleston, South Carolina they were shipped by ocean freight to Santos, Brasil, S. A., where they arrived on September 2, 1995. On September 8, 1995, Respondent notified Complainant that the grapes did not arrive in good condition.

5. On September 13, 1995, 1,260 lugs of grapes were subjected to a survey performed by SGS do Brasil, S.A. This survey stated in relevant part as follows:

Certificado N°: 4401/0001E/00041
Certificate VISUAL INSPECTION REPORT - Agridiv -100041

Parcel : Described as " 1.787 boxes of Fresh Table Grapes"

Marks : a) LBK / THOMPSON SEEDLESS TABLE GRAPES NET WT 23 LBS 10,4 KG / PRODUCE OF U. S. A. / EL

RANCHO FARMS / CALIFORNIA TABLE GRAPES (Said to be 1.530 boxes)

a) GRAPE KING / PREMIUM CALIFORNIA TABLE GRAPES GUIMARRA VINGARDS (sic)/ GV PRODUCE OF U.S.A. / EXOTIC / NET WT 28 LBS (Said to be 90 boxes)

b) CASTLE ROCK / CALIFORNIA TABLE GRAPES / FANTASY SEEDLESS NET WT 23 LBS / PRODUCE OF U.S.A. (Said to be 90 boxes)

c) CARDINAL TABLE GRAPES NET WT 23 LBS 10,4 KG / TABLE GRAPES / PRODUCE3 (sic) OF U.S.A. / HEMPHILL AND WILSON ENTERPRISES (Said to be 77 boxes)

Reference
Docts (copies): - Phytosanitary certificate FPC 959531
- B/L n. SEA 309345 dd. 21.08.95
- Invoice n. 3280419-1 dd. 29.07.95

Supplier: LA COLINA EXPORTADORA, IMPORTADORA e REPRESENTACõES LTDA

. . .

We hereby certify that by order and for account of Messrs. La Colina Exportadora, Importadora E Representacões Ltda we verified the visual quality of the aforementioned parcel, and have to report the following:

PACKING : Goods were packed into new boxes duly marked and identified, being variety Cardinal and variety Exotic packed into isopor boxes and the variety Thompson Seedless and the variety Fantasy Seedless packed into cardboard boxes.

TEMPERATURE: Average temperature of chamber = + 0,2.C.

SAMPLING : At the moment of inspection we found 1.260 boxes of Thompson Seedless, 90 boxes of Exotic, 55 boxes of Fantasy Seedless and 62 boxes of Cardinal. Of these lots, 60 boxes of Thompson + 9 boxes of Exotic + 6 boxes of Fantasy Seedless + 7 boxes of Cardinal duly marked and identified were chosen at random, were opened and submitted to visual inspection.

VISUAL INSPECTION REPORT

VISUAL
QUALITY: * Product : Fresh grapes "in nature" - Vitis vinifera
* Crop / Preparation : New current, gathered and prepared on 1995
* Origin : USA

Our expert effected goods inspection and based ou (sic) visual examination it was verified that:
VARIETY THOMPSON SEEDLESS AND VARIETY FANTASY SEEDLESS: In all boxes opened we noted that the goods were with visual appearance seriously affected. In these boxes, we verified damaged berries / clusters due to rot and/or bruissing (sic), shouwing (sic) deterioration signs, presenting fungi on the surface, with your storage life being diminished, and unfit for human consumption.
VARIETY EXOTIC: 100 % of goods seemingly free from foreign matters, impurities, with fruits well grown up, with uniform colour and conformation. Taste and flavor are proper and characteristic of the specie and variety. Fruits maturation degree allows handling, transportation and conservation if goods are kept under proper storage conditions.
VARIETY CARDINAL: About 35,00 % of fruits / clusters showing presence of fungi on the surface, with your storage life being diminished, and unfit for human consumption.
Also it probably will be sent to a secuundary (sic) marketplace;

Place and date
of inspection : Effected at Frigorifo Dunivan - Rua da Mooca, 1736 São Paulo - SP (1.260 boxes of Thompson Seedless), and at CEAGESP - Rua Gastão Vidigal , Pav. HFE box 106 on September 13th, 1995.
. . .
São Paulo, September 14th, 1995.

6. Respondent has not paid any part of the purchase price of the grapes to Complainant.

7. The informal complaint was filed on November 25, 1995, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 1,530 lugs of grapes sold to Respondent on an f.o.b. basis in the course of foreign commerce, and accepted by Respondent in Brasil. Respondent seeks to recover, by its counterclaim, damages resulting from an alleged breach of the warranty of suitable shipping condition by Complainant in reference to the same shipment.

The major issue argued between the parties relates to the amount of time the grapes were in transit between the shipping point in California, and the destination in Brasil, and the length of time between arrival of the shipment in Brasil and the survey that took place in that country. In addition the parties dispute whether the terms of the f.o.b. contract contemplated acceptance by Respondent at the port of Long Beach, and whether the parties explicitly contracted for the transportation route, and the length of time the grapes were in transit.

Complainant contends that "[a]s the shipment was sold under f.o.b. terms, suitable shipping conditions (sic) warranted only to the Port of Long Beach, California." However, Complainant's invoice and the truck bill of lading clearly list the destination as "Santos, Brazil," and no documentation relative to the shipment supports this contention by Complainant. We find that the contract was f.o.b. with a contract destination of Santos, Brazil.

Respondent contends that the normal method of transit for refrigerated freight from the West Coast to Brazil, at the time in question, was for the produce to be shipped to the East Coast by rail, and from thence, by steamship to Brazil. Respondent alleges that the normal transit time was 30 to 40 days, and that Complainant was notified orally before the contract was agreed to that this was the normal time. Complainant's general manager, Mervin (Boom) Houston, who handled negotiations on Complainant's behalf, denied that he was notified that the grapes would be shipped by rail to the East Coast, or that normal transit time was 30 to 40 days. There is nothing in the documentation relative to the contract to support Respondent's assertion that Complainant was given notice of the circumstances of transit, and we find that Respondent has failed to prove its assertions in this regard by a preponderance of the evidence. However, Respondent's evidence preponderates as to the method of transit chosen, and that the normal time was 30 to 40 days, and we find on the basis of the evidence of

record that a 40 day transit period was within the limits of normality for a shipment from the West Coast to Brazil at the time in question.

Respondent's chief buyer, McKinley Williams, who handled negotiations on Respondent's behalf, asserted that the grapes were shipped by Complainant on July 29, to the Port of Long Beach. This accords with the truck bill of lading. According to Williams the grapes were treated with Tectrol at "Transfresh" on July 31, and shipped by rail to Charleston, S.C. on August 1, 1995.[2] Williams states that the grapes were loaded on the ocean vessel Maersk Miami V9513 which sailed on August 14, 1995, that they arrived at Santos, Brazil on September 2, 1995, and were transported inland to Respondent's Brazilian customer in Sao Paulo on September 6, 1995. Williams also states that Respondent was notified on the evening of September 7, that the arrival was unsatisfactory, and that he informed Complainant's office of this, verbally and by fax, on the morning of September 8. This is not denied by Complainant. Mr. Williams asserts that the container was sent back to the Port of Santos from Sao Paulo on September 8, and that a surveyor's report was scheduled for the earliest possible time, which turned out to be September 13, 1995. However, the survey report states that the survey was performed at Sao Paulo, not at the Port of Santos.

The surveyor sampled 60 boxes out of 1,260 boxes of Thompson Seedless. No explanation was given by Respondent as to what became of the remaining 270 boxes that were a part of the shipment. The surveyor also sampled 6 boxes out of 55 boxes of Fantasy Seedless grapes that are not a part of this proceeding, and then lumped these samples together with those from the Thompson Seedless lot for reporting purposes. The sample size for the Thompson Seedless grapes was slightly less than one half of one percent of the total.[3] The rule of thumb for U.S. inspections is one percent. However, a sample size of one half of one percent would be permissible if the inspector saw during the course of drawing and inspecting the randomly drawn samples that the samples were all showing

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[2]Mr. Williams asserted that the Maersk Bill of Lading #SEA309345 confirms that the container was shipped on August 1, 1995, from the Port of Long Beach by rail. However, Respondent did not place this bill of lading in evidence. Mr. Williams' statement that the vessel sailed from Charleston, S.C. on August 14, 1995, was also not supported by a copy of the ocean bill of lading. The survey done in Sao Paulo refers to a copy of bill of lading SEA 309345 seen by the surveyor, and states that it is dated August 21, 1995. No attempt at explaining these apparent discrepancies was made by Respondent.

[3]In *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992), a Mexican government inspector took a sample of 100 boxes out of a 2,756 box load, and then looked at 10 randomly drawn samples from the 100 boxes. We held that the sample was inadequate.

approximately the same percentage of the same defects. Here there is no way to ascertain that this was the case. The surveyor made the following statement as to the samples drawn:

> In all boxes opened we noted that the goods were with visual appearance seriously affected. In these boxes, we verified damaged berries / clusters due to rot and/or bruissing (sic), shouwing (sic) deterioration signs, presenting fungi on the surface, with your storage life being diminished, and unfit for human consumption.

This sounds very much like only a visual inspection was done.[4] U. S. inspections, and competent foreign surveys, are performed by removing the damaged berries and weighing or counting the berries affected by each type of condition factor.[5] The description of the berries given by the surveyor does not state a percentage for any of the damaged grapes in any of the samples. Although the description, taken as a whole, certainly sounds like the grapes were in very poor condition, there is no way to be certain as to the exact condition of the grapes. It is possible, for instance, that the described conditions in the samples applied to only 3 percent of the grapes in the samples. If this were the case there would be no indication of a breach even had the survey been performed immediately. We have refused to use surveys that do not state a percentage of condition defects.[6]

Respondent asserted that the eleven days that elapsed between the arrival of the vessel at Sao Paulo and the survey was normal, and supported this assertion with the testimony of an independent expert with an impressive curriculum vita.

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[4]Apparently the surveyor only opened the sample boxes and looked at the general appearance of the grapes in each box.

[5]Of course, there is no way to know that a foreign survey uses the same standard as to what constitutes damage from a condition defect as that used by U.S. inspections. For instance, instructions for a U. S. inspection may specify, for a given commodity, that a particular defect is not scoreable as damage unless its manifestation exceeds a certain aggregate surface area. See for example Market Inspection Instructions: Lettuce, Fruit and Vegetable Division, Fresh Products Standardization and Inspection Branch, Agricultural Marketing Service, United States Department of Agriculture, ¶ 144 (March, 1976). In the absence of international standards, and in the interest of the promotion of trade, we assume that defects reported on foreign surveys are of sufficient severity to affect marketability. In fact, we commonly do our best to utilize foreign inspections. See for example *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969 (1997).

[6]*Ontario International, Inc. v. The Nunes Company*, 52 Agric. Dec. 1661 (1993).

However, none of this expert's listed experience relates to Brazil, and there is no foundation for the specific testimony that the time period was normal. The assertion was also supported by Respondent's receiver in Brazil, but this can hardly be termed disinterested testimony. Complainant made no effort to submit evidence on the point. However, the question is not whether the eleven day period was normal, which we doubt (in spite of Respondent's preponderant evidence), but whether an inspection eleven days after arrival can be used to disclose the condition of perishables on arrival.[7] In no circumstances have we ever extended our use of arrival inspections so far. In an important case[8] involving the shipment of grapefruit from the West coast to England it was found that transit time was normal, but a survey of the fruit made seven days after arrival, and four days after the consignee's receipt, could not be used to show the condition of the fruit on arrival.[9] In this case the grapes were surveyed seven days after receipt by the customer in Brazil, and eleven days after arrival. We find that Respondent has not shown the condition of the grapes on arrival, and therefore has not shown a breach of contract by Complainant.

Since Respondent accepted the grapes, and did not prove a breach by Complainant, it became liable to Complainant for the full contract price, or $24,912.50. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act. Respondent's counterclaim arose out of the same transaction and was based on the allegation of breach of contract by Complainant. Accordingly, the counterclaim should be dismissed.

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

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[7]It should be noted that there was no showing, nor effort to show, that Complainant knew that a Brazilian survey would take such an extraordinary length of time to secure.

[8]*Trans-West Fruit Co., Inc. v. Americal*, 42 Agric. Dec. 1955 (1983).

[9]*Id.*, at 2013-14. Compare the following cases involving domestic shipments where too much time was found to have expired between arrival and subsequent inspection: *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992) [four days after arrival of pears]; *Dan R. Dodds v. Produce Products, Inc.*, 48 Agric. Dec. 682 (1989) [eight days after arrival of potatoes, citing case where seven days held too long]; *Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (1975) [six days after arrival of potatoes]; *D.L. Piazza Co. v. Stacy Distributing Co.*, 18 Agric. Dec. 307 (1959) [four days after arrival of carrots]; *Vaughn-Griffin Packing Co. v. Thomas Aeozzo & Son*, 17 Agric. Dec. 1035 (1958) [five to six days after arrival of oranges]; *P. F. Likins Co. v. Walter Holm & Co.*, 10 Agric. Dec. 593 (1951) [extensive defects in tomatoes five days after arrival].

consequence of such violations." Such damages include interest.[10] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee 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 to complainant, as reparation, $24,912.50, with interest thereon at the rate of 10% per annum from September 1, 1995, until paid, plus the amount of $300.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

PEAK VEGETABLE SALES v. NORTHWEST CHOICE, INC.
PACA Docket No. R-98-0129.
Decision and Order filed February 25, 1999.

Damages – Failure to establish.
Interest – Award for amount previously paid.

Respondent failed to establish damages because it did not submit an accounting of the resale of the commodity. No alternative method of assessing damages was found.
It was determined that Respondent owed Complainant $5,398.75 of the original $25,601.50 purchase price, since it already paid Complainant $19,617.25 when it filed its answer. Complainant's claim for interest on the $19,617.25 for the period between the original date on which it was due, and the date on which it was paid was granted. It was stated that the award of such interest is similar to the award of interest in connection with undisputed amount orders, and is in accord with precedent which views

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[10] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[11] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).

the authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."

George S. Whitten, Presiding Officer
Complainant, Pro se.
Respondent, Pro se.
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 in which Complainant sought an award of reparation in the amount of $25,601.50 in connection with six transactions in interstate and foreign commerce involving potatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant in the amount claimed, but admitting liability for $19,617.25, and including a check to Complainant for that amount.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Peak Vegetable Sales, is a cooperative whose address is 1200 King Edward Street, Winnipeg, Manitoba, Canada.

2. Respondent, Northwest Choice, Inc., is a corporation whose address is 2513 LeMister Avenue, Wenatchee, Washington. At the time of the transactions involved herein Respondent was licensed under the Act.

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

3. On or about October 10, 1996, Trademark Produce, Inc., a broker, issued a confirmation of sale covering potatoes sold by Complainant to Respondent. The confirmation stated that the potatoes were to be shipped from "Man. Canada" on a delivered basis by truck, and further provided in relevant part as follows:

QUANTITY	DESCRIPTION	PRICE
30 (thirty) truck loads Potatoes each containing —		
850 ±	Canadian #1 50# ctn size A	$7.00/Ctn
	Potatoes - 2" to 3" - 2¼" 60% ↑	US Funds
	Russetted Variety	
Pricing included all fees to Calexico, CA		
	Protecting 25¢/ctn	

Shipping to begin at N.W. Choice instruction

NWChoice Reserves option for additional 60 loads - same terms

. . .

Peak to bill NWChoice Directly -

4. On October 11, 1996, Roy Vinke, Sales and Marketing Manager of Complainant, sent a letter to Dick Dehlinger of Trademark Produce, Inc., Bend, Oregon, the broker who negotiated the contract between Complainant and Respondent, memorializing the terms of the contract between the parties herein. The letter stated, in relevant part, as follows:

Please find listed below details regarding the sale of #1 A size 60% 21/4" up russets packed in 50# ctns.

- All transactions will be in U.S. funds.

- Pricing is as follows: $7.00 50# ctn delivered to Calexico, California and Nogales, Arizona.

- Brokerage of .25 per 50# ctn will be paid to Trademark Produce Inc.

- Trademark Produce Inc. will be required to invoice Peak of the Market brokerage on a per load basis stating bill of lading # for cross referencing. If you wish you can invoice more than one load per invoice provided each load is accompanied with our bill of lading #.

- All product will be federally inspected.

- Any potential claims must be filed within 48 hours from date of receipt.

- Claims filed must have a U.S. federal inspection to substantiate claim.

- Customs, duty, phyto certificates, Canadian inspection will be paid by Peak of the Market.

- Delivery dates of product will be upon mutual agreement.

5. On October 21, 1996, Respondent's Jeff Sutton wrote to Complainant's Roy Vinke confirming the contract. The letter stated, in relevant part, as follows:

. . .

As per our agreement the following terms shall be agreed upon by Northwest Choice Inc. and Peak Vegetable Sales.

1). Product is purchased based upon 50lb carton. Each carton containing Burbank or Norkotah Russets ranging in size from 90ct to 120ct with even blend of each size.

2). Product is purchased based upon a delivered price of $7.00 U.S. to San Diego, CA, Calexico, CA, Yuma, AZ. Customs, Duty, Phytosanitary, Canadian Inspection, and In Bond costs will be included in the delivered price.

3). All product will be accompanied with a Federal Inspection

4). Any potential claims must be filed within 48 hours from date of receipt with notification to Shipper. Claims must be accompanied with a USDA Federal inspection to substantiate claim. Shipper will authorize permission to call USDA Federal Inspection.

5). Delivery dates of product shall be mutually agreed upon between Shipper and Receiver on a load to load basis.

6). Payment Terms shall be established at 15 days from date of shipment unless otherwise agreed upon by Shipper and Receiver on a load to load basis.

. . .

6. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1389 [Inv. No. 18564], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at $7.00. The shipping date was stated to be 10/22/96. Complainant shipped 840 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/24/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 10/28/96. Respondent has paid Complainant $4,536.00 of the original $5,880.00 invoice price.

7. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1390 [Inv. No. 18640], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at $7.00. The shipping date was stated to be 10/22/96. Complainant shipped 830 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/25/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 10/28/96. Respondent has paid Complainant $4,483.00 of the original $5,810.00 invoice price.

8. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1392 [Inv. No. 18643], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at $7.00. The shipping date was stated to be 10/22/96. Complainant shipped 815 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/31/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 11/05/96. Respondent has paid Complainant $4,224.75 of the original $5,705.00 invoice price.

9. On October 26, 1996, Respondent issued a purchase order to Complainant, No. 1402 [Inv. No. 18641], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at $7.00. The shipping date was stated to be 10/28/96. Complainant shipped 830 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/28/96. The load arrived at the

U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, on 10/31/96. Respondent has paid Complainant $2,623.50 of the original invoice price of $5,810.00.

10. Following unloading, the potatoes covered by purchase order 1402 [Inv. No. 18641] were federally inspected at the place of business of California Pacific Fruit Co. on 10/31/96, at 1:40 p.m., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 50 °F	Potatoes	"Peak of the Market" Russet 50lbs	M B	18641	830 Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	02	%	00	%		%	Quality (mechanical damage)	
	05	%	05	%		%	Soft Rot (3 to 6%)	Soft Rot is in early stages
	07	%	05	%		%	CHECKSUM	4 oz. To 14 oz., 2½ inch min dia.

GRADE: Fails to grade U.S. No 1 4oz or 2½ inch minimum only account condition

11. On November 19, 1996, Respondent issued a purchase order to Complainant, No. 1407 [Inv. No. 18718], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at $7.00. The shipping date was stated to be 11/21/96. Complainant shipped 600 cartons of size A, 60% 2¼" and larger, and 170 cartons of 110 count, Canadian No. 1 Russet potatoes on 11/20/96. The load arrived at the U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, on 11/22/96. Respondent has paid Complainant the entire original invoice price of $5,390.00.

12. On November 17, 1996, Respondent issued a purchase order to Complainant, No. 1412 [Inv. No. 19690], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at $7.00. The shipping date was stated to be 11/29/96. Complainant shipped 850 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 11/29/96. The load arrived at the U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, CA, on or about 12/03/96. Respondent has paid Complainant $2,897.00 of the original invoice price of $5,950.00.

13. Following unloading, the potatoes covered by purchase order 1412 [Inv. No. 19690] were federally inspected at the place of business of California Pacific Fruit Co. on 12/03/96, at 11:20 a.m., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 48 °F	Potatoes	"Peak of the Market" Russet Canada No. 1	C N	BL 19690	850 50lb Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	04	%	00	%		%	Quality (misshapen, mechanical damage)	4 oz. to 14 oz., 2½ inch min diameter.
	04	%	00	%		%	Fusarium Tuber Rot (Dry Type) (2 to 6%)	
	05	%	05	%		%	Soft Rot (2 to 8%)	Soft Rot is in early stages
	13	%	05	%		%	CHECKSUM	

GRADE: Fails to grade U.S. No 1, 4oz or 2½ inch min. diameter only account condition

14. The formal complaint was filed on May 27, 1997, which was within nine months after the causes of action herein accrued.

Conclusions

Respondent included a check for $19,617.25 with its answer. This leaves a total of $5,984.00, divided between five of the six loads, still in dispute between the parties. Basically, Respondent claims that Complainant failed to send correct paperwork as to some of the loads causing a delay in the loads crossing from the California destinations into Mexico, that sizing was incorrect for all the loads, and that, as to two of the loads, there was a breach in regard to condition on arrival in California. Respondent also claims that there was an agreement between the parties for adjustments on all of the loads.

Letters and memorandums were faxed by the parties to each other, and we have presumed receipt on the same day that such were dated. Both the October 10, broker's memorandum, and the October 11, letter from Complainant to Respondent, recite a size of A, 60 percent 2¼" and up. However the confirming

letter from Respondent to Complainant dated October 21, states that each carton is to contain 90ct to 120ct, with an even blend of each size. Respondent's purchase orders, the first three of which were dated October 21, simply stated that the pack was to be "50lb 90-120ct."[2] Respondent's November 7, and 8, letters to Complainant, in regard to the first four loads, all complain about the sizing of the potatoes. The size A, 60 percent 2¼" and up designation gives latitude for the shipments to have contained a mix that might have included potatoes that were both larger and smaller than the 90ct to 120ct designation. That they did contain such a mix was tacitly admitted by Complainant in a letter dated November 12, quoted below in part:

> A) Upon discussion with Dick Dehlinger of Trademark Produce Inc. he indicated that the product requested for sale to Mexico was #1 A size cartons. Based on Agriculture Canada specifications the product would be sized as 60% 2¼" and up. We found out that this was not the case at all well after the fact. We had already packed and shipped product when we were told that the product should be sized as a 120 - 90 count. This information was found out by contacting you direct rather than working through Trademark who is our representative for this deal.
>
> B) I also addressed on numerous occasions to both you and Dick that we were long on baker count russets. Both parties indicated that you would try to move the product for us. Both you and Dick indicated that there was no market for this product. I later found out on a three way call with your agent at the Mexican border and yourself that the bakers offered to you earlier were exactly what they wanted.

Complainant later characterized this as a verbal agreement between the parties that Complainant should continue to ship the size A, 60 percent 2¼" and up potatoes because Respondent's end user indicated that the product shipped was exactly what they wanted. However, we think it falls short of a verbal agreement. As the second paragraph of the letter quoted above says, Respondent and the broker were telling Complainant all along that there was no market for the "bakers." If, as Complainant represents, an end receiver in Mexico stated that the bakers were exactly what was

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[2]It is unlikely that Respondent meant what is literally stated in the October 11, letter, because the mixing of the 90 to 120ct sizes in each box would be both very unusual and difficult to accomplish. In any event, the parties do not raise or dispute this point, and we assume that Respondent's meaning was that there would be an even distribution of 90 to 120ct cartons of potatoes.

wanted, this does not change Respondent's demand that a different size be shipped. The dispute between Complainant and Respondent as to the size called for by the contract presents difficult and interesting issues of law, especially in light of the provisions of section 2–207 of the Uniform Commercial Code. However, in view of our conclusions hereafter in regard to Respondent's failure to substantiate damages it is not necessary that we decide these issues.

In regard to the loads covered by Findings of Fact 6 and 7, Respondent's invoices 1389 and 1390, Respondent claims that the parties agreed to an adjustment in the price at time of arrival consisting of a $1.00 per carton allowance, $.35 per carton storage fee, and a $.25 per carton brokerage fee. Respondent cites letters which it sent to Complainant on November 7, 1996, as documenting these adjustments to the invoice price. However, an examination of these letters shows that Respondent did not speak in terms of an agreement having been reached as to these charges, but rather as though it was unilaterally claiming the charges. We conclude that Respondent has failed to prove its contention that the adjustments claimed were agreed to by Complainant.

Complainant admits that incorrect paper work was sent to Respondent which caused delay in these loads crossing the border, however Complainant contends that this was caused by incorrect information being sent to Complainant by Respondent on the purchase orders. However, Complainant also admits that the correct information was at the bottom of the purchase orders, but was unnoticed by Complainant. Our examination of the purchase orders discloses that the pertinent information was in large print and clearly delineated. Complainant also claimed that incorrect import permit numbers were sent by Respondent as to these loads, but that Complainant kept no copy of the incorrect documents. We conclude that Complainant has failed to prove its contentions that the delay was caused by incorrect information being supplied by Respondent, and that Complainant caused the delay in these loads crossing the border into Mexico. Respondent has claimed that charges of $.35 per carton were incurred for storage at the border due to Complainant's failure to supply the correct paper work. This charge was not documented by Respondent, but Complainant, though it objected to paying the fee, did not contest its accuracy. The fee is modest and reasonable, and accordingly we will allow it.

Respondent has claimed the $1.00 per carton, not only as an agreed adjustment, but also as damages for Complainant's breach in causing untimely delivery into Mexico, and its alleged breach as to size. However, Respondent failed to establish this amount, or any other amount as damages since it failed to submit an accounting

of the resale of the potatoes.[3] Respondent only states that "[d]ue to the condition, sizing problem, delay in time which caused lost business to the end receiver in Mexicali, the end receiver has agreed to return $6.00 per carton." This totally fails to establish damages, and we know of no way to make any reasonable estimate of damages for these breaches, or alleged breaches.[4] Accordingly, the $1.00 claim is disallowed.

Respondent also claimed a $.25 per carton brokerage fee. Respondent admits that this was the "profit" which it negotiated in its sale of the loads to the end receiver. A profit can potentially be recovered in a proper calculation of damages, but this depends upon the applicable market price at time of arrival. There is no basis for Respondent to recover this claimed brokerage fee.

The invoice price of these two loads totaled $11,690.00. The $.35 per carton storage fee which we have allowed on these two loads amounts to $584.50. Respondent has already paid Complainant $9,019.00 on these two loads. This leaves $2,086.50 still due and owing as to the first two loads.

Respondent claims that the third load, covered by Finding of Fact 8, Respondent's purchase order 1392, was adjusted to $5.50. Complainant states that the adjustment was to $6.00. Respondent's letter of November 7, 1996, relative to this load confirms the $5.50 adjustment as having been granted orally at the time of arrival of the load in Mexico. Complainant replied on November 12, 1996, in a letter to Respondent, that it did not agree to a $5.50 adjustment, but to a $6.00 adjustment. We conclude that Respondent has failed to prove that a $5.50 adjustment was agreed to. For the same reasons as recited above relative to the

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[3]It is our policy, especially where parties are not represented by attorneys, as here, to consult applicable market reports in an attempt to assess damages. To this end we consulted the Los Angeles Wholesale Market Reports for October 28, 31, November 5, and December 3, 1996. These reports do not show sales of any potatoes from Canada, nor do they show any sales of U.S. size A potatoes (which must include 40% 2½" and larger instead of the Canadian requirement of 60% 2¼" and larger). They do show sales of 90, 100, and 120 count U.S. No. 1 Norkotahs from Nevada, Oregon, and Washington. The f.o.b. prices shown for these sizes average lower than the $7.00 per 50lb. carton delivered prices of the subject potatoes. This evidence would seem to indicate that Respondent was not harmed by the substitution of sizes. In any event, we have exhausted our ability to show damages assuming a breach by Complainant as to size.

[4]The usual measure of damages for accepted goods is the difference between the value of the goods accepted as shown by a prompt and proper resale of the goods, and the value the goods would have had if they had been as warranted. This latter figure is usually shown by applicable market reports. See UCC § 2-714(2) and *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric Dec 1643 (1979). We were also unable to show damages by a market price differential between the sizes. See note 3 *supra*.

first two loads Respondent is not entitled to a $.25 brokerage fee as to this load. Respondent's liability as to this load is $6.00 per carton, or $4,890.00. Respondent has already paid Complainant $4,224.75 of this amount which leaves $665.25 still due and owing as to this load.

As to the load covered by Findings of Fact 9 and 10, Respondent's purchase order 1402, Respondent in a letter dated November 8, 1996, memorialized a modification of the contract calling for the load to be purchased on an open basis with an accounting of sales to be provided by California Pacific Fruit Co. to Respondent, and by Respondent to Complainant. In its November 12, 1996, letter Complainant did not deny the agreement to sell this load on an open basis, but simply said: "[w]e are prepared to credit $1.00 per carton for this load." We conclude that the contract was modified to call for a sale on an open basis, with the promised accountings to be the basis for a future agreement as to the price. However, Respondent has not furnished an accounting from California Pacific Fruit Co., and the claimed accounting from Respondent is not an accounting. It does not break down the sales as to lots, nor does it disclose the dates on which the sales took place. It simply lists 830 cartons sold at $3.50, and deducts $74.00 for the inspection and $.25 per carton for brokerage. The inspection as to this load shows a breach of contract for a delivered sale of Canadian No. 1 product.[5] We could, therefore, use the inspection as a basis for computing damages.[6] However, the adjustment allowed by Complainant of $1.00 per package will be more favorable to Respondent. We find that Respondent's liability to Complainant as to this load is $4,980.00. Respondent has already paid Complainant $2,623.50, which leaves $2,356.50 still due from Respondent to Complainant on this load.

The parties agree that nothing remains due on the fifth load. As to the sixth load, covered by Findings of Fact 12 and 13, Respondent's purchase order 1412, Complainant granted Respondent a credit of $2,762.50. Complainant has been paid the remaining amount by Respondent except for a deduction of $.25 per carton for brokerage. This deduction is unwarranted for the reasons already stated as to the first two loads. Respondent still owes Complainant $290.50 as to this load.

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[5]Canadian standards allow a 2% maximum tolerance at destination for soft rot.

[6]See *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

The total that we have found due and owing from Respondent to Complainant is $5,398.75. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Damages have been held to include interest.[7] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[8] However, Complainant contends that Respondent should be required to pay interest, not just on the $5,398.75 we have found due, but also on the $19,617.25 which it paid with its answer. Complainant contemplates that this interest would run for the period for which such amount was withheld. We agree. If Respondent had admitted in its answer that the $19,617.25 was due, but had not tendered the check for that amount, we would have issued an award in Complainant's favor for the $19,617.25 as an undisputed amount.[9] Such an award would have included interest. What Complainant asks us to do in this case does not differ greatly from the award of interest in an undisputed amount order. The award would be in keeping with our precedent which views our authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."[10] Also, the award of interest in this situation will provide an additional motive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued. Of course, a Respondent will not be prohibited from negotiating an early payment which, by specific written agreement with the Complainant, could be made not subject to an interest award. Complainant, in this case, claims interest at the rate of 24 percent. However, we have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee 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.

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[7] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[8] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).

[9] See 7 U.S.C. 499g(a), and 7 C.F.R. § 47.8(b).

[10] 7 U.S.C. 499e(a).

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, $5,398.75, with interest thereon at the rate of 10% per annum from December 1, 1996, until paid, plus the amount of $300.

Within 30 days from the date of this Order Respondent shall also pay to Complainant interest at the rate of 10% per annum on the sum of $19,617.25 for the period from December 1, 1996, to September 1, 1997.

Copies of this order shall be served upon the parties.

Ta-De DISTRIBUTING COMPANY, INC. v. R.S. HANLINE & CO., INC.
PACA Docket No. R-99-0052.
Decision and Order filed June 1, 1999.

Contracts - Intent of the Parties.

Where the parties to a contract covering tomatoes imported from Mexico agreed, following their arrival at destination, to the tomatoes being handled pursuant to the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico (termed the "Commerce Dept. Rules"), it was held that, although such rules used portions of the accustomed terminology of the Uniform Commercial Code, this Department's Regulations, and decisions under the Act in a way that is foreign to the usual meaning accorded those terms, the Secretary would seek to give effect to the intent of the parties as evidenced by their agreement to abide by such rules. Accordingly the "Commerce Dept. Rules" were interpreted in a manner deemed to be consistent with the intended meaning of such rules rather than in accord with the meaning usually accorded to the terms used therein.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
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 in which Complainant seeks an award of reparation in the amount of $41,364.50 in connection with four transactions in interstate commerce involving tomatoes.

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

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Ta-De Distributing Company, Inc., is a corporation whose address is P. O. Box 1486, Nogales, Arizona.

2. Respondent, R. S. Hanline & Co., Inc., is a corporation whose address is P. O. Box 494, Shelby, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about March 9, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number TFL-6673 OH, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04244; Purchase Order No. 61125

616 ctns.	4x5 Western Pride brand vine ripe	at $7.00 per ctn.	$ 4,312.00
264 ctns.	5x6 Western Pride brand	at 5.00 per ctn.	1,320.00
880 ctns.	5x5 Western Pride brand vine ripe	at 6.00 per ctn.	5,280.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	440.00
1,760 ctns.			$11,375.50

4. On March 12, 1998, at 10:30 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number TLF-6673 OH, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268485 - 0

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 60 °F	TOMATOES	"Western" tade-Dist. 5x6	MX	Arizona 11 20 309	264 Cartons	Y
B	52 to 60 °F	TOMATOES	"Western" tade-Dist. 4x5	MX	Arizona 11 20 309 or 7300 104	616 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	12 %	04 %	01 %	quality defects (10 to 15%) scars, insects, misshapen.	Average 15% turning and pink, 80% light red to red,
	01 %	01 %	00 %	internal discoloration.	Size average 2 9/32 to 2 20/32 inches in diameter
	02 %	00 %	00 %	sunburn	
	05 %	02 %	00 %	bruising	
	09 %	03 %	01 %	sunken discolored areas (7 to 12%)	
	00 %	00 %	00 %	soft	
	03 %	03 %	03 %	Decay	
	32 %	13 %	05 %	CHECKSUM	
B	14 %	06 %	02 %	quality defects (10 to 20%) scars, insects, misshapen.	Average 20% turning to pink; 75% light red to red.
	02 %	02 %	00 %	internal discoloration	Size average 2 24/32 to 3 12/32 inches in diameter.
	03 %	00 %	00 %	sunburn	
	06 %	01 %	00 %	bruising	
	09 %	04 %	01 %	sunken discolored areas (5 to 13%).	
	00 %	00 %	00 %	soft	

04	%	04	%	04	%	Decay	Each lot decay mostly advanced, some in early to moderate stages.
38	%	17	%	07	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of grade defects.

REMARKS: For inspection on another lot of tomatoes also in load see Certificate K268486.

K-268486 - 8

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 60 °F	TOMATOES	"Western" dist. by tade-dist. Nogales, Arizona stamped (5x5)	MX	Arizona 11 20 309 or 3230 309 or 9230307	880 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
	14	%	06	%	02	%	quality defects (8 to 20%) scars, insects, misshapen	
	01	%	01	%	00	%	internal discoloration	
	01	%	00	%	00	%	sunburn	Average 40% turning to pink; 55% light red to red.
	06	%	02	%	00	%	bruising (4 to 10%)	
	10	%	04	%	02	%	sunken discolored areas (8 to 14%)	
	00	%	00	%	00	%	soft	
	04	%	04	%	04	%	Decay (0 to 6%) mostly advanced, some in early to moderate stages.	Size ranges 2 14/32 to 3 inches in diameter Practically no undersize.
	36	%	17	%	08	%	CHECKSUM	

GRADE: Fails to grade US No 1 only account of grade defects.

REMARKS: For inspection on remainder of load see certificate K 268 485

5. On March 19, 1998, 80 cartons of the size 5x6 tomatoes, stated to be from truck license TLF 6673 OH, were federally inspected at the place of business of Respondent and found to contain 4 percent serious damage by sunburn, 5 percent damage, including 3 percent serious damage by bruising, 33 percent damage, including 25 percent serious damage, including 18 percent very serious damage by sunken discolored areas (ranging from 17 to 42 percent), 5 percent soft, and 48 percent decay (range 33 to 67 percent, stated to be mostly early to moderate stages, many advanced). On the same day 297 cartons of the size 4x5 tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 6 percent serious damage by sunburn (range 5 to 13 percent), 8 percent damage, including 3 percent serious damage by bruising (range 0 to 13 percent), 26 percent damage, including 21 percent serious damage, including 15 percent very serious damage by sunken discolored areas (range 18 to 38 percent), 4 percent soft, and 33 percent decay (range 20 to 50 percent). On the same day 298 cartons of the size 5x5 tomatoes, said to be from the same truck, were found to contain 5 percent serious damage by sunburn, 8 percent damage, including 6 percent serious damage by bruising (range 0 to 14 percent), 14 percent damage, including 13 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 0 to 30 percent), 6 percent soft, and 62 percent decay.

6. On or about March 11 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number P05784 IN, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04330; Purchase Order No. 61134

528 ctns.	4x5 Azteca brand vine ripe	at $7.00 per ctn.	$ 3,695.00
880 ctns.	5x5 Azteca brand vine ripe	at 7.00 per ctn.	6,160.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	352.00
1,408 ctns.			$10,231.50

7. On March 13, 1998, at 12:45 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number P 05784 IN, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. A certificate of the inspection revealed, in relevant part, as follows:

K - 268490 - 0

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	50 to 54 °F	TOMATOES	"AZTECA" TA-DE-Dist. Co.	MX	4x5-40 Count	528 Cartons	Y

B	49 to 58 °F	TOMATOES	"AZTECA" TA-DE-Dist. Co.	MX	5x5-50 Count	880 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	11	%	05	%	01	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 10% green to breakers, 30% turning to pink, 55% light red to red.
	02	%	02	%	00	%	internal discoloration.	Size ranges 3 to 3½ inches in diameter. No undersize
	04	%	00	%	00	%	sunburn	
	11	%	04	%	02	%	sunken discolored areas (8 to 18%)	
	08	%	02	%	00	%	bruising (3 to 13%)	
	01	%	01	%	01	%	soft	
	06	%	06	%	06	%	Decay (3 to 15%)	
	43	%	20	%	10	%	CHECKSUM	
B	10	%	04	%	01	%	quality defects (6 to 14%) scars, growth cracks, misshapen.	
	04	%	00	%	00	%	sunburn	
	07	%	03	%	01	%	sunken discolored areas (4 to 10%).	
	10	%	02	%	00	%	bruising (2 to 20%)	
	02	%	02	%	02	%	soft	
	04	%	04	%	04	%	Decay	
	37	%	15	%	08	%	CHECKSUM	

GRADE: A lot fails to grade U.S. No. 1 account of grade defects. B lot fails to grade U.S. No. 1 only account of condition.

REMARKS: For inspection of 5x6's also in load see Certificate K268491.

8. On March 23, 1998, 294 cartons of the size 4x5 tomatoes, stated to be from truck license P 05784 IN, were federally inspected at the place of business of Respondent and found to contain 9 percent serious damage by bruising (range 5 to 13 percent), 32 percent damage, including 29 percent serious damage, including 20 percent very serious damage by sunken discolored areas (range 20 to 45 percent), and 53 percent decay. On the same day 245 cartons of the size 5x5 tomatoes, stated to be from the same truck, were found to contain 6 percent serious damage by bruising (range 0 to 10 percent), 30 percent damage, including 25 percent serious damage, including 15 percent very serious damage by sunken discolored areas (range 0 to 60 percent), and 58 percent decay.

9. On or about March 11, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number P10807 IN, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04331; Purchase Order No. 61135

352 ctns.	4x5 Western Pride brand vine ripe	at $7.00 per ctn.	$ 2,464.00
880 ctns.	5x5 Western Pride brand vine ripe	at 5.00 per ctn.	4,400.00
352 ctns.	5x6 Western Pride brand	at 5.00 per ctn.	1,760.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	396.00
1,584 ctns.			$9,043.50

10. On March 16, 1998, at 10:50 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number P 10807 IN, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268494 - 2

LOT	TEMPERATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	53 to 54 °F	TOMATOES	"Western" tade-dist. 5x5	MX	ARIZONA	880 Cartons	Y
B	53 to 55 °F	TOMATOES	"Western" tade-dist. 4x5	MX	INSPECTION 7400310	352 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	08	%	03	%	01	%	quality defects (6 to 14%) scars, misshapen, insect damage.	Average 55% turning to pink, 45% light red to red,

	01	% 00	% 00	%	sunburn	Size ranges 2½ to 3 inches in diameter
	01	% 01	% 01	%	internal discoloration	
	06	% 01	% 00	%	bruising (4 to 8%)	
	11	% 05	% 02	%	sunken discolored areas (6 to 14%)	
	00	% 00	% 00	%	soft	
	02	% 02	% 02	%	Decay	
	29	% 12	% 06	%	CHECKSUM	
B	10	% 05	% 02	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 10% turning to pink; 85 % light red to red.
	03	% 03	% 03	%	internal discoloration	Size range 2¾ to 3¼ inches in diameter
	10	% 03	% 00	%	bruising (5 to 18%)	
	14	% 05	% 03	%	sunken discolored areas (8 to 25%)	
	00	% 00	% 00	%	soft	
	07	% 07	% 07	%	Decay (3 to 13%) mostly early to moderate stages, some advanced	
	44	% 23	% 12	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 only account of condition.

REMARKS: For inspection on 5x6's also in load see Certificate K268495.

K-268495 - 9

LOT	TEMPERATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	52 to 54 °F	TOMATOES	"Western" tade dist.5x6	MX	ARIZONA INSPECTION 7400310	352 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
	08	%	04	%	02	%	quality defects (7 to 10%) scars, misshapen	Average 5% turning to pink; 95% light red to red.
	02	%	00	%	00	%	sunburn	
	03	%	03	%	03	%	internal discoloration	Size ranges 2 4/32 to 2¾ inches in diameter
	06	%	02	%	00	%	bruising (3 to 8%)	
	14	%	06	%	02	%	sunken discolored areas (10 to 20%)	
	00	%	00	%	00	%	soft	
	02	%	02	%	02	%	Decay	
	35	%	17	%	09	%	CHECKSUM	

GRADE: Fails to grade US No 1 only account of condition.

REMARKS: For inspection on 4x5's and 5x5's also in load see certificate K 268 494

11. On March 23, 1998, 147 cartons of the size 4x5 tomatoes, stated to be from truck license PI 10807 IN, were federally inspected at the place of business of Respondent and found to contain 5 percent damage, including 4 percent serious damage by bruising, 17 percent damage, including 13 percent serious damage, including 9 percent very serious damage by sunken discolored areas (ranging from 0 to 35 percent), and 75 percent decay (range 50 to 100 percent). On the same day 306 cartons of the size 5x5 tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 7 percent serious damage by bruising (range 4 to 10 percent), 6 percent damage, including 4 percent serious damage by sunburn (range 2 to 10 percent), 37 percent damage, including 32 percent serious damage, including 24 percent very serious damage by sunken discolored areas (range 3 to 48 percent), and 47 percent decay (range 40 to 60 percent). On the same day 171 cartons of the size 5x6 tomatoes, said to be from the same truck, were found to contain 12 percent damage, including 10 percent serious damage by bruising (range 0 to 20 percent), 23 percent damage, including 20 percent serious damage, including 14 percent very serious damage by sunken discolored areas (range 0 to 40 percent), and 55 percent decay (range 30 to 100 percent).

12. On or about March 12, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck

with license number TIR 1243 OH, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04392; Purchase Order No. 61153

264 ctns.	4x5 Azteca brand vine ripe	at	$7.00 per ctn.	$ 1,848.00
704 ctns.	5x5 Azteca brand vine ripe	at	5.00 per ctn.	3,520.00
704 ctns.	4x5 Western Pride brand vine ripe	at	7.00 per ctn.	4,928.00
	Buying Brokerage		.25 per ctn.	418.00
1,672 ctns.				$10,714.00

13. On March 16, 1998, at 10:30 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number TIR-1243 OH, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268493 - 4

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	48 to 50 °F	TOMATOES	"AZTECA" tade-dist. 5x5	MX		704 Cartons	Y
B	47 to 50 °F	TOMATOES	"Western" tade-dist. 4x5	MX	Arizona 595-0311 on many top layer cartons	704 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	13	%	06	%	03	%	quality defects (10 to 16%) growth cracks, scars, misshapen.	Average 5% green to breakers 35% turning to pink, 55% light red to red,
	04	%	00	%	00	%	sunburn	Size ranges 2¾ to 3 inches in diameter
	06	%	02	%	00	%	bruising (4 to 8%)	
	09	%	04	%	01	%	sunken discolored areas (6 to 12%)	
	00	%	00	%	00	%	soft	
	03	%	03	%	03	%	Decay	
	35	%	15	%	07	%	CHECKSUM	

B	11	%	05	%	02	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 15% turning to pink; 80 % light red to red.
	01	%	01	%	00	%	internal discoloration	Size average 3 to 3½ inches in diameter
	08	%	02	%	00	%	bruising (3 to 13%)	
	16	%	07	%	03	%	sunken discolored areas (8 to 25%)	
	00	%	00	%	00	%	soft	
	03	%	03	%	03	%	Decay	
	39	%	18	%	08	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of grade defects.

REMARKS: For inspection on remaining lots also in load see Certificate K268492.

K - 268492 - 6

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	48 to 50 °F	TOMATOES	"SUN" [?] Sales 4x5	MX		88 Cartons	Y
B	48 to 50 °F	TOMATOES	"AZTECA" TA-De-Dist. 4x5	MX		264 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	08	%	03	%	00	%	quality defects (5 to 10%) scars, growth cracks.	Average 35% turning to pink, 60% light red to red,
	10	%	00	%	00	%	sunburn (8 to 13%)	Each lot size ranges 3 to 3¼ inches in diameter. No undersize.
	08	%	08	%	04	%	internal discoloration (0 to 15%)	
	12	%	04	%	02	%	sunken discolored areas (8 to 15%)	
	12	%	03	%	00	%	bruising (10 to 15%)	
	00	%	00	%	00	%	soft	
	03	%	03	%	03	%	Decay	

	53	%	21	%	09	%	CHECKSUM
B	09	%	04	%	02	%	quality defects (5 to 10%) scars, growth cracks.
	02	%	00	%	00	%	sunburn
	09	%	04	%	01	%	sunken discolored areas (8 to 13%)
	09	%	03	%	00	%	bruising (0 to 13%)
	02	%	02	%	02	%	soft
	14	%	14	%	14	%	Decay
	45	%	27	%	19	%	CHECKSUM

Average 15% green to breakers; 15% turning to pink; 55 % light red to red.

Size each lot ranges 3 to 3¼ inches in diameter. No undersize.

GRADE: Each lot fails to grade U.S. No. 1 account of condition.

REMARKS: For inspection on other lots also in load see Certificate K268493.

14. On March 25, 1998, 80 cartons of the size 4x5 Azteca brand tomatoes, stated to be from truck license TIR 1243 OH, were federally inspected at the place of business of Respondent and found to contain 9 percent damage, including 7 percent serious damage by sunburn (range 5 to 13 percent), 9 percent damage, including 7 percent serious damage by bruising (range 5 to 13percent), 25 percent damage, including 21 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 20 to 30 percent), 10 soft (range 5 to 13 percent), and 45 percent decay (range 38 to 50 percent). On the same day 29 cartons of the size 4x5 "Sun I" tomatoes, stated to be from the same truck, were found to contain 93 percent decay (range 83 to 100 percent). On the same day 331 cartons of the size 4x5 "Western" brand tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 6 percent serious damage by sunburn (range 5 to 10 percent), 6 percent damage, including 5 percent serious damage by bruising (range 0 to 10 percent), 20 percent damage, including 17 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 0 to 33 percent), 8 percent soft (range 3 to 10 percent), and 57 percent decay (range 40 to 83 percent). On the same day 154 cartons of the size 5x5 "Azteca" brand tomatoes, said to be from the same truck, were found to contain 6 percent damage, including 4 percent serious damage by sunburn (range

0 to 10percent), 11 percent damage, including 8 percent serious damage by bruising (range 8 to 15 percent), 28 percent damage, including 24 percent serious damage, including 17 percent very serious damage by sunken discolored areas (range 15 to 38 percent), and 55 percent decay (range 38 to 75 percent).

15. The formal complaint was filed on July 27, 1998, which was within nine months after the causes of action therein accrued.

Conclusions

The contract between Complainant and Respondent was negotiated by Donna Allender of Nikademos Distributing Co., Inc. Ms. Allender maintained that following arrival of the tomatoes, and notice to Complainant of the inspection results, Complainant's Robert Bennen, Jr. agreed to the tomatoes being handled according to Commerce Department rules.[1] There has been no allegation in this proceeding that adherence to Commerce Department rules was a part of the terms of the original contract between Complainant and Respondent. However, this is not the issue raised by Ms. Allender. Rather, Ms. Allender alleges a modification of the original contract, following acceptance of the tomatoes by Respondent, that allowed Respondent to handle the tomatoes under the rules of the suspension agreement.

Complainant denied that there was any such agreement, and submitted the affidavit of Robert L. Bennen, Jr. in support of this denial. Mr. Bennen stated:

> Due to the slight condition problems upon arrival, I advised the broker, Donna Allender, of Nikademos Distributing Company, Inc., to tell R. S. Hanline & Co., Inc. to do the best they could with the tomatoes. At no time did I grant authorization for consignment handling or to have the tomatoes reworked.

In a letter to this Department which is a part of the Report of Investigation Ms. Allender strongly contended that Mr. Bennen, Jr. did agree to the handling of the tomatoes, and, in support of her allegation, pointed to corrected memorandums of

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[1]The reference is to the October 28, 1996 Suspension Agreement signed by Mexican growers/exporters of tomatoes [Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, Federal Register: November 1, 1996 (Volume 61, Number 213], as clarified May 2, 1997. Under the suspension agreement the Mexican growers/exporters agreed that certain terms and conditions would apply to the first sale of tomatoes exported to the U.S., through the first handler (importer/broker), and to the first purchaser.

sale which she issued as to each load of tomatoes. These corrected memorandums were dated on the same day as the first inspection of each of the loads, and contained words identical to or similar to the following: "Will handle as to Commerce Dept. Rules." Complainant never denied receipt of these corrected memorandums, and did not object to them until March 24, 1998, or twelve days after the issuance of the first corrected memorandum. We conclude on the basis of all the evidence of record that the parties agreed to the four loads being handled according to Commerce Department rules.

The relevant Commerce Department rules are those contained in the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico. The pertinent portion of the Clarification states as follows:

> If the USDA inspection indicates that the lot has: 1) over 8% soft/decay condition defects, or 2) over 15% of any one condition defect, or 3) greater than 20% total condition defects, the receiver may reject the lot or may accept a portion of the lot and reject the quantity of tomatoes lost during the salvaging process. In those instances, price adjustments will be calculated as described below. For these purposes, a condition defect is defined as any defect cited by USDA on an inspection certificate that is not specifically identified as a quality defect. When a lot of tomatoes has condition defects in excess of those outlined above as documented on an inspection certificate, the documented percentage of the tomatoes with condition defects are considered DEFECTIVE tomatoes.
>
> A USDA inspection certificate must be provided to support claims for rejection of all or part of a lot.
>
> . . .
>
> In calculating the transaction price for lots subject to an adjustment claim for condition defects, as defined above, the tomatoes classified as DEFECTIVE will be treated as rejected and as not having been sold.
>
> . . .
>
> The price invoiced to and paid by the receiver for the accepted tomatoes must not fall below the reference price.

The shipper may reimburse the receiver for actual destruction costs associated with the DEFECTIVE tomatoes. These expenses will not be considered in the calculation of the price for the accepted tomatoes.

The shipper may reimburse the receiver for the expenses, associated directly with salvaging and reconditioning the lot (e.g., inspection fees and repacking charges) calculated as follows:

If the salvaging and reconditioning activity is performed by a party unaffiliated with the receiver, the inspection fee and the fee charged for the service may be reimbursed.

If the salvaging and reconditioning activity is performed by the receiver or a party affiliated with the receiver, the inspection fee and either the direct labor costs or, in lieu thereof, one-half of the ordinary and customary repacking charges may be reimbursed.

Any reimbursements from, by, or on behalf of the shipper which are not specifically excepted above will be factored into the calculation of the price for the accepted tomatoes by the Department.

The receiver may not resell the DEFECTIVE tomatoes. The receiver may choose to have the DEFECTIVE tomatoes destroyed, donated to non-profit food banks, or returned to the shipper. The DEFECTIVE tomatoes may not be sold to a processor.

. . .

It is evident that this Commerce Department document uses the term "reject," and its variants, in a way that is foreign to the Uniform Commercial Code, this Department's Regulations, and to our decisions under the Perishable Agricultural Commodities Act.[2] Nevertheless, we must attempt to give effect to the intent of the

[2]In the usual sense of the word a rejection entails a reversion of title back to the seller. UCC § 2-401(4). Following a rejection a buyer has no duties relative to the rejected goods (except to hold them for a sufficient time for the seller to remove them) unless the seller has no agent or place of business at the market of rejection, and if such agent or place of business does not exist, then the obligation of the buyer is to follow whatever reasonable instructions for the disposition of the goods may be given (continued...)

parties herein as evidenced by their agreement to abide by the "rules" expressed in this document.[3] The "rules" appear to us to contemplate that the receiver may take possession of a load, have the tomatoes promptly inspected, rework the tomatoes if they do not conform to the condition standards stated in the "rules," and dump the tomatoes lost in reworking. It appears that a separate inspection must be made of the actual tomatoes that are candidates for dumping. As to the term "reject" as used in the "rules," we interpret the meaning, in most instances, to be to give notice of a breach.

The first load of tomatoes contained three lots consisting of 616 cartons of size 4x5's, 264 cartons of size 5x6's, and 880 cartons of size 5x5's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 24 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty,[4] and also exceeds the amount of condition defects allowed under the

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[2](...continued)
by the owner of the goods (the seller), or in the absence of such instructions to make a reasonable effort to sell perishables for the seller's account. Following rejection, the buyer is held only to good faith standards in dealing with the seller's goods. UCC § 2-602 and 603. A request by the seller that the goods be salvaged by reworking would be unreasonable, unless the buyer's business were set up to do reworking, and if it were not, it would clearly be only within the province of the seller to arrange for a reworking of what, by rejection, would now be the seller's goods. Also, for the buyer to rework the goods without the seller's permission would, itself, be an act of acceptance. UCC § 2-606. Once goods are rejected the burden of proof is on the seller to show that the goods were conforming, and not upon the buyer to show that the rejection was justified. *Daniel P. Crowley, et al. v. Calflo Produce, Inc.*, 55 Agric. Dec. 674 (1996) and UCC § 2-607(4). Furthermore, under the UCC, a commercial unit must be accepted or rejected in its entirety (UCC 2-606(2)), and this Department's Regulations have defined "commercial unit" for the produce industry as, generally speaking, truckload and carlot quantities. 7 C.F.R. §46.43(ii). See also *Primary Export International v. Blue Anchor, Inc.*, PACA Docket R-95-037, decided Feb. 11, 1997, 56 Agric. Dec. ____ (1997). However, under UCC § 1-102(3), the effect of the provisions of the Code may, for the most part, be varied by the parties.

[3]See *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, at note 18 (1997).

[4]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) are made applicable in f.o.b. sales. The Regulations (7 C.F.R. § 46.43 (i)) define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The rule is based upon case law predating the adoption of the Regulations. See Williston, (continued...)

May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 297 cartons of the original 616 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 319 cartons not dumped, or $2,312.75.

The 264 cartons of 5x6 tomatoes were found to have only 20 percent condition defects which does not constitute a breach of contract under the "rules." Therefore the entire original contract price of $5.25 per carton, or $1,386.00 is due as to this lot of tomatoes.

The 880 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 22 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 298 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $6.25 contract price for the 582 cartons not dumped, or $3,637.50. The total we have found due for the three lots is $7,336.25. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $7,359.25. Respondent is

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[4](...continued)
Sales § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

entitled to deduct from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 595 cartons that were dumped, or $714.00 plus the cost of the two inspections or $316.00, for total deductions of $1030.00. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $5,615.25.

The second load of tomatoes contained two lots consisting of 528 cartons of size 4x5's, and 880 cartons of size 5x5's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 32 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes, and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 294 cartons of the original 528 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 234 cartons not dumped, or $1,696.50.

The size 5x5 tomatoes were found by a prompt inspection to have a total of 27 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes, and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 245 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 635 cartons not dumped, or $4,603.75. The total we have found due for the two lots is $6,300.25. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $6,323.25. Respondent is entitled to deduct from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 539 cartons that were dumped, or $646.80, plus the cost of two inspections, or $386.50, for a total deduction of $1033.30. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $5,289.95.

The third load of tomatoes contained three lots consisting of 352 cartons of size 4x5's, 880 cartons of size 5x5's, and 352 cartons of size 5x6's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 34 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the

tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 147 cartons of the original 352 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 205 cartons not dumped, or $1,486.25.

The 880 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 21 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 306 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $5.25 contract price for the 574 cartons not dumped, or $3,013.50.

The size 5x6 tomatoes were found by a prompt inspection to have a total of 27 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 171 cartons of the original 352 cartons of 5x6 tomatoes. Under the "rules" Complainant is entitled to the $5.25 contract price for the 181 cartons not dumped, or $950.25. The total we have found due for the three lots is $5,450.00. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $5,473.00. Respondent is entitled to a deduction from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 624 cartons that were dumped, or $748.80 plus the cost of two inspections or $305.50, for a total deduction of $1054.30. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $4,395.70.

The fourth load of tomatoes contained three lots consisting of 264 cartons of size 4x5 Azteca brand, 704 cartons of size 5x5's, and 704 cartons of size 4x5 Western Pride brand. The size 264 cartons of 4x5 Azteca brand tomatoes were found by a prompt inspection to have a total of 36 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 80 cartons of the original 264 cartons of 4x5 Azteca brand tomatoes.

Under the "rules" Complainant is entitled to the $7.25 contract price for the 184 cartons not dumped, or $1,334.00.

The 704 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 22 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 154 cartons of the original 704 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $5.25 contract price for the 550 cartons not dumped, or $2,887.50.

The 704 cartons of size 4x5 Western Pride brand tomatoes were found by a prompt inspection to have a total of 28 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 331 cartons of the original 704 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 373 cartons not dumped, or $2,704.25. The total we have found due for the three lots is $6,925.75. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $6,948.75. Respondent is entitled to deduct from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 565 cartons that were dumped, or $678.00 plus the cost of two inspections or $309.00, for a total deduction of $987.00. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $5,961.75.

The total we have found due and owing from Respondent to Complainant is $21,262.65. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

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.[5] Since the Secretary is charged with the duty of awarding damages, he also has the duty,

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[5] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

where appropriate, to award interest at a reasonable rate as a part of each reparation award.[6] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee 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 to complainant, as reparation, $23,316.65, with interest thereon at the rate of 10% per annum from April 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[6]See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).