PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

STEVE ALMQUIST d/b/a STEVE ALMQUIST SALES & BROKERAGE V. MOUNTAIN HIGH POTATOES & ONION, INC.
PACA -R-05-095.
Decision and Order.
Filed July 26, 2006.

PACA-R - Reparations – Jurisdiction - Interstate Commerce- Movement of a commodity across a state border not a prerequisite.

Respondent, located in Oregon, purchased one trucklot of onions from Complainant, whose business was located in the southern part of California. Complainant arranged for the shipment to be sent from Brawley, California to Respondent's customer located in Bakersfield, California.
The jurisdictional prerequisite of interstate commerce was found even though the commodity never physically left the state of California during the course of this transaction. When parties to a transaction are located in different states PACA jurisdiction exists even if there is no evidence that the commodity physically crossed a state line. Additional factors, including the type of commodity shipped, the interstate nature of the businesses involved, and the contemplation of interstate commerce, combined with the PACA's status as remedial legislation to be broadly interpreted, contributed to a finding of interstate commerce jurisdiction.

Presiding Officer Gary Ball.
Decision and Order by Judicial Officer, William G. Jenson.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks an award of reparation in the amount of $1,350.00 in connection with the sale of one trucklot of onions.
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 does not exceed $30,000.00, and therefore the documentary 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 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 verified statements, and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Neither party elected to submit a Brief.

Findings of Fact

1. Complainant is an individual, Steve Almquist, doing business as Steve Almquist Sales & Brokerage, whose post office address is 14510 S. Broadway, Blythe, California 92226.
2. Respondent, Mountain High Potato & Onion, Inc., is a corporation whose post office address is 440 McVary Heights Drive, N.E., Kaizer, Oregon 97303. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about May 6, 2004, Complainant, by oral contract, sold to Respondent, and shipped from loading point in Brawley, California, to Respondent's customer in Bakersfield, California, 250-50 lb. bags of medium white onions at $5.75 per bag, or $1,437.50, and 200-50 lb. bags of medium white onions at $5.75 per bag, or $1,150.00, for a total f.o.b. contract price of $2,587.50.
4. On May 13, 2004, Respondent issued a ATrouble Notification@ for the onions mentioned in Finding of Fact 3, advising Complainant to re-invoice for the onions at a price of $2.75 per bag, net f.o.b., to account for market decline.
5. On June 4, 2004, Respondent paid Complainant $1,237.50 for the onions with check number 09747, based on a price of $2.75 per bag.
6. The informal complaint was filed on September 23, 2004, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one trucklot of onions sold to Respondent. Complainant states that Respondent accepted the onions in compliance with the contract of sale, but that he has been paid only $1,237.50 of the agreed purchase price of $2,587.50. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the onions for the amount claimed, but alleges that, following delivery, the parties orally agreed to modify the terms of the original sales contract. Respondent asserts that the oral agreement was

to reduce the sales price per bag from $5.75 to $2.75 to account for a significant decline in the market price of white onions.

Before considering the merits of this claim the Department must establish whether it has jurisdiction, under the Act, over the disputed transaction. Relevant to establishing the existence of jurisdiction in this case, we must determine whether the subject transaction was in interstate commerce. The term "interstate commerce" is defined in section 1 of the Act as: "...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia." (7 U.S.C.§ 499a (3)).

Under the same section the Act states:

> A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

(7 U.S.C.§ 499a (8))

As an initial matter, the jurisdictional question in this case can be readily resolved by looking at the business transaction that gave rise to this dispute. Respondent, located in Oregon, entered into an agreement with Complainant, located in California, to purchase a load of onions.[1] (Answer at 1). *In Tulelake Potato Distributors, Inc. v. John M. Guistino, d/b/a Grand Slam Produce,* 52 *Agric. Dec*. 752, 757 (1993), the Department established that: "[w]hen the parties to a transaction are in different states, the purchase or sale transaction is in interstate commerce even if there is no evidence that the commodity physically

[1] Though Respondent apparently has business locations in Oregon, California, and Idaho, the subject transaction was entered into out of Respondent's Keizer, Oregon office.

crossed a state line." Under *Tulelake*, because the Complainant and Respondent were in two different states when they entered into their transaction, the shipment resulting from that transaction is deemed to be in interstate commerce, regardless of whether it actually moved between states.

While the interstate nature of the transaction itself triggers Departmental interstate commerce jurisdiction, there are a number of other elements of this transaction that cause this shipment to come under PACA jurisdiction.

It is reasonable to conclude that the shipment in this case was made in the course of interstate commerce. The Respondent is a PACA licensee and appears to regularly conduct business in interstate commerce. This transaction was arranged between offices in California and Oregon, and the record indicates that a subsequent transaction between the Complainant and Respondent involved a shipment to Saskatchewan, Canada. (Answer Ex. 5) Additionally, this transaction involves onions, a commodity that regularly moves in interstate commerce. These factors, combined with the fact the Respondent has business locations in three different states, reasonably indicates that the Respondent does a significant part of its business in interstate commerce. Under the D.C. Circuit court's decision in *The Produce Place v. United States Department of Agriculture,* 319 U.S. App. D.C. 369 (1996), the Department need only show that the commodity was of the type that regularly moves in interstate commerce and was shipped to or from a dealer that does a substantial portion of its business in interstate commerce. The transaction between Complainant and Respondent satisfies both of these jurisdictional elements and, thus, properly falls within the Department's jurisdiction under the Act.

The jurisdictional issue in this matter was only briefly addressed by the Complainant and Respondent. In his Complaint, Complainant asserts that the agreement to sell to the Respondent and the subsequent shipment under that agreement were made "in the contemplation and the course of interstate commerce." (Complaint at 1) As discussed above, if this contemplation were reasonably held by the Complainant, then this shipment can be fairly considered to have been "in commerce" for the purpose of establishing Departmental jurisdiction under the Act.

Respondent acknowledges Complainant's interstate commerce claim in its Answer, but provides very little in the way of amplifying information or persuasive argument on the matter. Respondent states: "the load of onions never moved into or out of the State of California therefore was not in the course of interstate commerce." (Answer at 1) As noted

above, in *The Produce Place*, the U.S. Court of Appeals for the D.C. Circuit made it quite clear that actual movement between states is not required for PACA jurisdiction to exist. Likewise, the notion that "limiting the provisions of PACA to commodities that have physically crossed state lines, or to situations where the parties specifically envisioned such a crossing" has been soundly rejected. *Fishgold v. Onbank & Trust Co*., 43 F. Supp. 2d 346 (1999). Without some additional information suggesting that the transaction in question was not entered into in the course of interstate commerce, we are not persuaded by Respondent's argument.

Given all of the information above, it was reasonable for the Complainant to view the Respondent's company as an interstate business, and it was similarly reasonable for him to conclude that the transaction in question would be considered "in commerce" as defined by the PACA. The sale in this case was not explicitly "for shipment to another State" and, therefore, is not covered by that portion of the definition of interstate commerce requiring such actual interstate movement. However, this shipment would be within our jurisdiction if it were made in contemplation of interstate commerce. The Department has determined that the provisions of the PACA apply to intrastate transactions that contemplate future movement in interstate commerce. *Bacon Brothers v. Cad Heaton Fruit Co*., 5 *Agric. Dec*. 547 (1946). Based on this concept, it is now well settled that any transaction in which interstate movement is contemplated is considered in interstate commerce under the PACA. *Tulelake* at 757.

The bill of lading for the shipment shows that the Complainant sourced the onions from a shipper located in Brawley, California, and that the onions were destined for Respondent's customer in Bakersfield, California. (Complaint Ex. 4) The record in this proceeding does not reveal the place of origin of this commodity, nor does it tell us the ultimate destination of the 450 bags of onions in this shipment. The record does show that the Complainant, located in California, and the Respondent, located out-of-state in Keizer, Oregon, entered into an agreement for the sale of produce. (Complaint at 1; Answer at 1) Respondent, according to its own letterhead, operates a multi-state business having its main office in Oregon and additional operations in Idaho and California. (See Respondent correspondence dated 7/2/2004 & 10/12/2004 in ROI) The Department's decision in *Tulelake* states: "[t]he Department reasoned that if a party sells a commodity to someone who does business in other states, the selling party could not argue that it was sold without contemplating interstate commerce." *Tulelake* at 756-757 (referencing *Troyer v. Blue Star Potato Chip Corp*., 27 *Agric. Dec*. 301 (1968)). Because Complainant entered into a transaction with

a business operating in several different states, under Tulelake, it is reasonable to conclude that the Complainant, arranged and dispatched this produce shipment "in contemplation of interstate commerce." In addition to finding jurisdiction based on the interstate nature of the sales transaction, there is ample evidence to find, as asserted in Complainant's sworn Complaint, that the transaction was entered into in contemplation of interstate commerce under the Act. As such, the Complainant may rightly make use of the protections afforded him by the PACA, and the Department may properly exercise its jurisdiction in resolving this matter.

The basic facts regarding the transaction between Complainant and Respondent are fairly simple and are not in controversy. The Complainant and Respondent agree that 450 bags of onions of the kind, quality, and size called for under the contract were delivered to, and accepted by, the Respondent. (Answer at 1-2) Having accepted the produce, Respondent became liable for the full purchase price thereof, less any damages resulting from any breach of warranty by Complainant. *Norden Fruit Co. v. E D P Inc*., 50 *Agric. Dec*. 1865 (1991); *Granada Marketing Inc. v. Jos. Notarianni & Co.*, 47 *Agric. Dec*. 329 (1988); *Jerome M. Mathews v. Quong Yuen Shing & Co.*, 46 *Argic. Dec*. 1681 (1987). Respondent does not allege a breach by Complainant. As previously stated, the dispute between the Complainant and Respondent revolves around a conversation that took place between Complainant's sales representative, Mike Cyr, and Respondent's sales representative, Lance Renfrow, after the delivery and acceptance of the shipment in question. Keeping in mind that the party alleging the modification of original contract terms has the burden of proof in establishing its existence, the essential question in this case is whether the conversation between the two sales representatives effectively modified the original contract. *F. H. Hogue Produce Company v. M. Singer's Sons Corp*., 33 *Agric. Dec*. 451 (1974).

Respondent's President, Paul B. Butler, filed the sworn Answer to the formal Complaint. Mr. Butler does not assert that he was personally involved in this particular produce transaction. With respect to the contract terms, the Respondent's Answer asserts that three days after the shipment was accepted, "Respondent's salesman, Lance Renfrow, and Complaint's salesman, Mike Cyr, verbally agreed to modify the terms of the original sales contract and reduce the sales price from $5.75 per sack to $2.75." (Answer at 2) According to Mr. Butler, Mr. Cyr consented to this reduction based on Respondent's agreeing to purchase additional loads at $2.75 per sack. In the Answer, Mr. Butler

additionally states that sales representative Renfrow "confirmed the adjustment on the first load in writing by faxing to Complainant a memorandum showing the agreed upon price and the reason for the adjustment."

As its Opening Statement, Complainant submitted a sworn affidavit of his sales associate, Mike Cyr. Mr. Cyr confirms that he negotiated the contested sales transaction with Respondent's sales representative, Lance Renfrow. (Opening Statement at 1) Mr. Cyr states that, while he discussed the possibility of making a market-decline adjustment on the load shipped to the Respondent, no such adjustment was promised or granted. (Opening Statement at 2) Mr. Cyr asserts that he told Respondent's sales representative, Lance Renfrow, that, "if [Mr. Renfrow] would order another load for the same customer; [he] would consider adjusting this particular invoice." Mr. Cyr goes on to state that because Mr. Renfrow did not order another load for that customer, no adjustment was granted on the previous contract. Mr. Cyr further points out that there is nothing documented in the record indicating that the adjustment alleged by the Respondent was ever actually granted. There is no indication that Mr. Cyr dealt with anyone at Respondent's business other than Lance Renfrow.

In its Answering Statement, Respondent's President, Paul Butler points out that the market was in decline around the time of this transaction, that Complainant's sales representative did grant market declines for some contracts, and that there was a post-delivery discussion between the two sales representatives about market adjustments. (Answering Statement at 1) Respondent also notes that it has submitted a "Trouble Memo detailing the adjustment and fax logs confirming the memo was sent...." (Answering Statement at 1)

In Complainant's Statement in Reply, Complainant's sales associate, Mike Cyr, points out two significant facts. First, Mr. Cyr notes that, though he dealt with Lance Renfrow on the disputed shipment, Respondent did not submit any evidence from Mr. Renfrow regarding the contract modification allegedly agreed to by the two sales representatives. Second, Mr. Cyr denies receiving any trouble memo from the Respondent and notes that there is nothing in the record indicating that Mr. Cyr agreed to a post-delivery price reduction on the shipment in question. (Statement in Reply at 1-2)

Respondent contends that Mr. Cyr and Mr. Renfrow agreed to an oral modification that reduced Respondent's obligation under the original contract. Though the Respondent submitted a copy of a trouble memo purportedly sent to the Complainant, there is nothing to suggest that the memo was acknowledged, or agreed to, by the Complainant. (Answer Ex. 2) In fact, the Respondent's trouble notification form has a space

for the recipient to sign in acknowledgment and fax back to Respondent. The copy submitted by Respondent is unsigned and not acknowledged by the Complainant. (Answer Ex. 2). Assertions made by the Respondent that the market was in decline around the time of this transaction, that Complainant"s sales representative did grant market declines for some contracts, and that there was a post-delivery discussion between the two sales representatives about market adjustments are of little assistance in determining the actual existence of an enforceable contract-modifying agreement between Mr. Cyr and Mr. Renfrow.

In claiming the existence of an agreement between two parties, testimony from the parties themselves can be a critical factor in determining whether a binding agreement was or was not reached. *See Senter Bros. v. Rene N. Moreau*, 18 *Agric. Dec.* 145 (1959). While Complainant submitted a sworn affidavit with a first-hand account of the conversation between Mr. Cyr and Mr. Renfrow, Respondent did not put forth testimony from Mr. Renfrow as to the contents of his disputed communication with Mr. Cyr. Because this matter turns on the very contents of the conversation between the two sales representatives, the importance of testimony from Mr. Renfrow cannot be overstated. Because he was not directly involved in the disputed transaction or subsequent communications between the two sales representatives, Mr. Butler's statements are not of his own knowledge and should be afforded very little weight. Applying case precedent to this dispute we can conclude, with regard to Mr. Butler's testimony, that "[i]n the absence of written testimony by [Mr. Renfrow] or any other person having actual knowledge of the facts, such statements are insufficient to satisfy respondent's burden of proof with respect to proving his allegations." *Id*. at 147.

The Respondent has failed to meet its burden in proving the existence of a modification of the original contract. Therefore, Respondent is obligated to perform in accordance with the original contract terms.

The Complainant was due a total of $2,587.50 under the terms of the contract with Respondent. Respondent paid Complainant $1,237.50 of that amount on June 4, 2004. Therefore, Respondent owes Complainant the difference between these two sums, or $1,350.00.

Respondent's failure to pay Complainant $1,350.00 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. *Louisville & Nashville Railroad Co. v.*

Sloss-Sheffield Steel & Iron Co., 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. ., 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 *Agric. Dec.* 66 (1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, i.e., the rate of interest will equal the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week ending prior to the date of the Order.

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, $1,350.00 with interest thereon at the rate of 5.22% per annum from June 1, 2004, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

———————

AMERIFRESH, INC., V. WILLIAMS AG COMMODITIES BROKERAGE, INC.
PACA Docket No. R-05-076.
Decision and Order.
Filed October 31, 2006.

PACA-R – Jurisdiction –-Interstate Commerce.

Where there is no indication that the commodity involved in the complaint ever physically crossed state lines, the transaction is nevertheless considered as entering the current of interstate and foreign commerce where the commodities involved are commodities that commonly move in interstate commerce, and where the parties involved regularly engage in interstate purchases and sales of produce.

Presiding Officer Patricia Harps.
Decision and Order by Judicial Officer, William G. Jenson..