

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

[REDACTED])	PACA Docket No. R-09-042
)	
Complainant)	
)	
v.)	
)	
[REDACTED])	
)	
Respondent)	Decision and Order

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 a reparation award against Respondent in the amount of \$20,809.20 in connection with two truckloads of romaine hearts shipped in the course of interstate commerce.

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

The amount claimed in the formal Complaint does not exceed \$30,000.00. 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 part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence

in the form of verified statements and to file Briefs. Complainant submitted an Opening Statement and a Statement in Reply. Respondent submitted an Answering Statement and a Brief.

Findings of Fact

1. Complainant, [REDACTED], is a corporation whose post office address is P.O. Box [REDACTED], Salinas, California, 93912 [REDACTED]. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, [REDACTED], is a corporation whose post office address is P.O. Box [REDACTED] Pennsylvania, [REDACTED]. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about May 14, 2007, Complainant, by oral contract, sold to Respondent and agreed to ship from a loading point in the state of California to Respondent in [REDACTED] Pennsylvania, 1120 cartons of 15 x 3 [REDACTED] romaine hearts at \$8.00 per carton, or \$8,960.00, plus \$25.00 for a temperature recorder, for the total agreed price of \$8,985.00, f.o.b., net 10 days, billed on invoice number 4768970. (Complaint, Ex. 1).
4. The corresponding bill of lading is signed by the truck driver for Alliance Shippers, Inc., and shows the 15 x 3 [REDACTED] romaine hearts listed on invoice number 4768970 were picked up from Complainant's loading point in the state of California on May 15, 2007, at 1:11 a.m., and a temperature recorder was placed in the trailer. The bill of lading shows the pulp temperature of the romaine hearts when loaded was 34 degrees Fahrenheit and Complainant requested the temperature be maintained between 34 and 36 degrees Fahrenheit. (Complaint Ex. 1b). The trailer/container tracing report shows the trailer/container was in transit by truck and by rail car from 7:24 a.m. on May 15, 2007,

to 21:15, or 9:15 p.m. on May 22, 2007, when the rail car arrived at Respondent's place of business. (Answering Statement, Declaration of ██████████, Ex. 1, p. 1-2).

5. On May 23, 2007, a U.S.D.A. inspection report was issued at Respondent's place of business in ██████████ Pennsylvania, on the 1120 cartons of 15 x 3 "██████████" romaine hearts mentioned in Finding of Fact number 4. The romaine hearts had already been unloaded at the time of the inspection. The pulp temperatures ranged from 36 to 38 degrees Fahrenheit and the inspector verified the count was 1120 cartons. The inspection revealed the romaine hearts were affected by an average of 15% marginal browning, 12% tipburn, 3% discoloration following bruising, and 3% decay for a checksum of 33% average defects, including 13% serious damage. (Complaint, Ex. 1a).

6. On or about September 1, 2007, Complainant, by oral contract, sold to Respondent and agreed to ship from a loading point in the state of California to Respondent in ██████████ Pennsylvania, 1000 cartons of 15 x 3 "██████████" romaine hearts at \$12.85 per carton, or \$12,850.00, and 168 cartons of jumbo 12 x 3 "██████████" romaine hearts at \$10.85 per carton, or \$1,822.80, plus \$25.00 for a temperature recorder, for the total agreed price of \$14,697.80, f.o.b., net 10 days, billed on invoice number 4954560. (Complaint, Ex. 2).

7. The corresponding bill of lading is signed by the truck driver, and shows the romaine hearts listed on invoice number 4954560 were picked up from Complainant's loading point in the state of California on September 1, 2007, at 10:34 a.m., and a temperature recorder was placed in the trailer. The bill of lading shows the pulp temperature of the romaine hearts when loaded was 34 degrees Fahrenheit and

Complainant requested the temperature be maintained between 34 and 36 degrees Fahrenheit. (Complaint, Ex. 2b).

8. On September 5, 2007, a U.S.D.A. inspection report was issued at Respondent's place of business in ██████, Pennsylvania, on the 1000 cartons of 15 x 3 "██████" romaine hearts mentioned in Finding of Fact number 6. The romaine hearts had already been unloaded at the time of the inspection. The pulp temperatures ranged from 35 to 37 degrees Fahrenheit and the inspector verified the count was 1000 cartons. The inspection revealed the romaine hearts were affected by an average of 15% discoloration following bruising, 8% marginal brown discoloration, and 2% decay, for a checksum of 25% average defects, including 14% serious damage. (Complaint, Ex. 2a).

9. Respondent paid Complainant \$2,873.60 with its check number 244924, dated January 24, 2008, as the undisputed amount due Complainant. (ROI, Ex. A, p. 19-20, and Ex. D, p. 12-13).

10. The informal complaint was filed on January 16, 2008, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the contract price for two truckloads of romaine hearts sold to Respondent in the course of interstate commerce. Complainant states Respondent accepted the romaine hearts in compliance with the contracts of sale and in the manner agreed upon for a total agreed purchase price

of \$23,682.80, f.o.b., but has since paid only \$2,873.60, leaving an unpaid balance of \$20,809.20.¹

As the proponent of this claim, Complainant has the burden of proving its allegations by a preponderance of the evidence. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914, 919 (1975). Attached to the Complaint are copies of Complainant's invoice numbers 4768970 and 4954560 billing Respondent for the romaine hearts,² copies of the corresponding bills of lading signed by the truck driver,³ and copies of two U.S.D.A. inspection reports relating to the two shipments of romaine hearts.⁴ Complainant's invoices each contain a disclaimer as follows in relevant part:

ALL SALES F.O.B. NO GRADE CONTRACT WITH GOOD
DELIVERY STANDARDS APPLYING EXCLUDING BRUISING
AND/OR DISCOLORATION FOLLOWING BRUISING

We note both inspection reports show the romaine hearts had already been unloaded at the time of the inspections. Unloading produce is an act of acceptance.⁵ A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840, 844 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (1988). The burden to prove a

¹ Complaint, ¶¶4-6, and ROI, Ex. A, p. 1, and Ex. D, p. 12-13. We note that Complainant originally overstated its claim by \$4.00 by claiming an unpaid balance of \$20,813.20 in its formal Complaint, which amount it corrected in its Statement in Reply to \$20,809.20. See, also, Statement in Reply, p. 5, ¶1.

² Complaint, Ex. 1-2.

³ Complaint, Ex. 1b, and 2b.

⁴ Complaint, Ex. 1a, and 2a.

⁵ See, 7 C.F.R. § 46.2 (dd)(1).

breach of contract rests with the buyer of accepted goods. See, U.C.C. § 2-607(4).⁶

In response to Complainant's allegations and the evidence submitted in support thereof, Respondent's attorney submitted an unsworn Answer generally denying Complainant's allegations.⁷

In an f.o.b. contract the warranty of suitable shipping condition is applicable.⁸

Suitable shipping condition is defined in the Regulations (7 C.F.R. § 46.43(j)) as

meaning:

... [t]he 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.⁹

⁶ See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511, 514 (1969).

⁷ While an unverified pleading is not in evidence, it does serve to form the issues between the parties. *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991); *Chapman Fruit Co., Inc. v. Tri-State Sales Agency*, 44 Agric. Dec. 1366 (1985).

⁸ See, 7 C.F.R. § 46.43(i)), where f.o.b. is defined as meaning "... 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 the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

⁹ See, the suitable shipping condition provisions of the Regulations, (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without abnormal deterioration," or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *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 the 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 a commodity cannot remain forever in the same condition, the application of the good delivery concept requires we allow for a "normal" amount of deterioration. This means 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. 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, *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).

By definition the warranty of suitable shipping condition is only applicable when the transportation service and conditions are normal.

We will now consider the evidence and the testimony of the parties with respect to each transaction by Complainant's invoice numbers as follows:

Complainant's invoice number 4768970¹⁰

On or about May 14, 2007, Respondent purchased 1120 cartons of 15 x 3 "██████" romaine hearts from Complainant for a total agreed price of \$8,985.00, f.o.b. Complainant shipped the romaine hearts to Respondent on May 15, 2007, by truck.

On May 23, 2007, eight days after Complainant shipped the romaine hearts, a U.S.D.A. inspection report was issued at Respondent's place of business in ██████ Pennsylvania, on the 1120 cartons of 15 x 3 "██████" romaine hearts.¹¹

Complainant's sales associate, ██████, in his sworn Opening Statement, asserts that he has personal knowledge of the transaction, and questions the timeliness of the inspection stating as follows:

This shipment of May 14, 2007 was not inspected by Respondent until May 23, 2007.... This inspection was taken nine (9) days after shipment which in my opinion was not secured in a timely fashion. I immediately put Mr. ██████ "on notice" verbally that I was expecting payment in full due to the fact that a timely inspection was not secured. . . This was an FOB no grade contract in which all risk in-transit lies with Respondent in the event that the truck was late....¹²

In rebuttal, Respondent's ██████, asserts the following in his sworn

Answering Statement:

The product was picked up at Complainant's warehouse on May 15, 2007 at 1:11 am.... The load arrived at respondent's warehouse on May 22,

¹⁰ Complaint, Ex. 1.

¹¹ Complaint, Ex. 1a.

¹² Opening Statement, ¶1.

2007 at 21:15, which is normal transit time. The doors to the refrigerated rail car were opened on May 23, 2007 at 8:49 am. A timely USDA inspection was conducted on May 23, 2007.... Tony Colagiovanni immediately forwarded a copy of the inspection to complainant.¹³

Where goods sold f.o.b. are accepted, the burden is upon to the buyer to prove the transportation was normal. *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980). To support his allegation that the transit period was normal, Respondent attached an unverified statement from ██████████, the general manager of Alliance Shippers, Inc., the company responsible for the transportation of the romaine hearts according to the Answering Statement, Affidavit of ██████████¹⁴ Mr. ██████████ does not address the issue of whether transportation service and conditions were normal but provides a trailer/container tracing report showing that the shipment was in transit in excess of seven days since it was in transit from Complainant's location on May 15, 2007, to May 22, 2007, when it was delivered to Respondent's location.¹⁵ Both Mr. ██████████ and Mr. ██████████ state that the trailer containing the romaine hearts was transported by rail.

However, Complainant denies knowing that the romaine hearts would be transported by rail car. Complainant submitted an affidavit of its Sales Associate ██████████ as its Statement in Reply. Mr. ██████████ states that he had "no idea on the transportation mode other than the truck showing up at our facility... on May 14th 2007."¹⁶ In addition, Complainant states that the romaine hearts were "shipped in the manner agreed upon in a

¹³ Answering Statement, Affidavit of Frank Camera, ¶¶3-6.

¹⁴ Id.

¹⁵ Answering Statement, Ex. 1, Declaration of Doug Lawson, p. 1-2.

¹⁶ Statement in Reply, Affidavit of Vince Mier, p.2.

[sic] trucks...”¹⁷ Apparently, Complainant thought the shipment would be made by truck. *In Trans West Fruit Co., Inc. v. Ameri-Cal Produce, Inc.* we said:

The assumption underlying the normal transportation clause of the suitable shipping condition warranty is that the shipper, who is in a better situation than anyone else to know the condition and keeping quality of his particular fruit, selects fruit for shipment or contracts to ship, with a view to the contract destination, mode of transit, and expected duration of transit. Thus, we have held many times that if no contract destination is specified, the warranty is not applicable.

42 Agric. Dec. 1955, at 2004 (1983).

In this case, Respondent asserts that the romaine hearts were picked up from Complainant’s facility by truck and then transported by rail. Respondent has provided no evidence that Complainant was made aware of its intention to use both truck and rail as the mode of transit for this shipment and Complainant denies any knowledge of rail transit. Complainant could not warrant that the produce would arrive at destination without abnormal deterioration when it was not made aware of the chosen mode of transit, which would affect the length of time in transit. Under these circumstances, we find that the warranty of suitable shipping condition does not apply to this shipment. Therefore, Respondent’s claim that Complainant breached the suitable shipping condition warranty fails.

Respondent, having failed to prove that Complainant breached the contract is liable to Complainant for the full agreed purchase price for the romaine hearts billed on invoice number 4768970, or \$8,985.00.

¹⁷ Complaint, ¶5.

Complainant's invoice number 4954560¹⁸

On or about September 1, 2007, Respondent purchased from Complainant, 1000 cartons of 15 x 3 "[REDACTED]" romaine hearts and 168 cartons of jumbo 12 x 3 "[REDACTED]" romaine hearts, for a total agreed price of \$14,697.80, f.o.b.

On September 5, 2007, four days after Complainant shipped the romaine hearts, a U.S.D.A. inspection report was issued at Respondent's place of business in [REDACTED] Pennsylvania, on only the 1000 cartons of 15 x 3 "[REDACTED]" romaine hearts on the shipment.¹⁹

In his sworn Opening Statement, Complainant's Sales Associate, [REDACTED], contends to have personal knowledge of the transaction and asserts the following:

After I was apprised of the results of the USDA inspection I expressed to Frank that his firm should sell the romaine hearts and do the best he could. At no time did I ever authorize consignment handling or direct him to donate any product to the food bank in Philadelphia.²⁰

In rebuttal, Respondent's [REDACTED], asserts the following in his sworn Answering Statement:

The load arrived at Respondent's warehouse on September 5, 2007.... A timely USDA inspection was conducted on September 5, 2007.... After the inspection was completed I immediately forwarded the USDA inspection to complainant. Because of the extensive amount of condition defects, the product was sold at respondent's dock sale on September 7, 2007.... After the dock sale, the remaining 525 cartons, which were not purchased by a customer from this load, were sent to Philabundance, a local homeless shelter.... If the remaining produce had had any salable value, it would have been sold at the dock sale.²¹

¹⁸ Complaint, Ex. 2.

¹⁹ Complaint, Ex. 2a.

²⁰ Opening Statement, p. 2, ¶1.

²¹ Answering Statement, Affidavit of [REDACTED], ¶¶9-12.

Complainant's [REDACTED], however, in his sworn Statement in Reply, alleges the romaine hearts subjected to federal inspection by Respondent were not the same romaine hearts it shipped and billed on its invoice number 4954560 as following:

... Respondent is stating that it gave 525 cartons of romaine hearts to the Food Bank (Philabundance), a hunger relief organization located in Philadelphia, Pennsylvania. However there are no labels or identifiable marking on the donation receipt apparently issued by Philabundance. In addition, the USDA inspection also does not have identifiable lot numbers reflecting that these were indeed the romaine hearts shipped pursuant to this complaint.... I am seeking payment in full as invoiced.²²

A shipper has the burden of proving the produce subjected to a U.S.D.A. inspection by the receiver were not the goods shipped. *Great American Farms, Inc. v. William P. Hearne Produce Co., Inc.*, 59 Agric. Dec. 466 (2000). We find the description of the romaine hearts on the inspection report exactly matches what Complainant shipped and the inspection report shows the inspector verified 1000 cartons were available for inspection, which exactly matches the quantity of cartons Complainant shipped. On this basis, we find Complainant has not proven the romaine hearts were not the ones it shipped.

To determine whether the results of a destination inspection show a produce item was not in suitable shipping condition, we first refer to the shipping point tolerances for defects set forth in the U.S. Grade Standards for the item. The *United States Standards for Grades of Romaine*²³ provide a shipping point tolerance for romaine sold under the U.S. No. 1 Grade of 10% for plants that fail to meet the requirements of the specified grade, including therein not more than 5% for serious damage and 2% decay. In the

²² Statement in Reply, p. 3-4, ¶2-3.

²³ See, 7 C.F.R. §§ 51.3295 - 51.3304, *United States Standards for Grades of Romaine*, which is available on the Internet at: <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050323>.

instant case, where the contract does not specify a grade, these tolerances apply only to condition defects disclosed by the inspection.²⁴

To allow for normal deterioration in transit for romaine sold f.o.b., we increase these tolerances depending on the number of days in transit.²⁵ For four days in transit the tolerances are 14% for average defects including 8% serious damage and 4% decay. The inspection report for this shipment revealed that the romaine hearts were affected by an average of 15% discoloration from bruising, 8% marginal brown discoloration, and 2% decay for a checksum of 25% average defects, including 14% serious damage.²⁶ We note that the invoice excludes the defect of “discoloration following bruising”²⁷ from any other warranties applicable to the sale of the romaine hearts. This exclusion is common in the produce trade and the exclusion was listed on Complainant’s invoice as previously mentioned. We also note Respondent has not objected to this exclusion. A failure to promptly complain as to the terms set forth in an invoice is considered strong evidence such terms are correctly stated. *Pemberton Produce, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 1630 (1983).

After excluding all of the discoloration following bruising revealed by the U.S.D.A. inspection secured by Respondent, the 10% remaining average condition defects including the remaining 4% serious damage by condition defects and 3% decay revealed by the inspection do not exceed the four day tolerances. On this basis, we find

²⁴ Quality and condition are terms of art used in inspection certificates, U. S. Grade Standards, and within the produce industry. Generally condition defects are those which are subject to change due to a worsening of the defect. All decays are condition defects. Quality or permanent grade defects are generally not subject to change. The U.S. Grade Standards for a commodity will generally have tolerances specified for both quality and condition defects. Grade is often, but not always, used as a synonym for quality. *Sales King International, v. Danny & Sons, Inc.*, 52 Agric. Dec. 715 (1993).

²⁵ See, n. 9.

²⁶ Complaint, Ex. 2a.

²⁷ Complaint, Ex. 2.

the inspection results do not establish a breach by Complainant of the warranty of suitable shipping condition. We assume the uninspected 168 cartons of jumbo 12 x 3 romaine hearts were free of all defects and were in full compliance with the contract. For these reasons, we find Respondent liable to Complainant for the full agreed purchase price for all of the romaine hearts billed on Complainant's invoice number 4954560, or \$14,697.80.

In summary, we find Respondent liable to Complainant for the full agreed purchase price for the romaine hearts billed on invoice number 4768970, or \$8,985.00, plus the full agreed purchase price for the romaine hearts billed on Complainant's invoice number 4954560, or \$14,697.80, for a total of \$23,682.80. Subtracting Respondent's payment of \$2,873.60²⁸ from \$23,682.80, we find Respondent's total liability to Complainant is \$20,809.20.

Respondent's failure to pay Complainant \$20,809.20 is a violation of section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217, 238-240 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916). Since the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest. *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978, 979 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 339 (1970); and

²⁸ Complaint, ¶6, and ROI, Ex. A, p. 19-20, and Ex. D, p. 12-13.

W.D. Crockett v. Producers Marketing Association, Inc., 22 Agric. Dec. 66, 67 (1963).

The interest to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to 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 preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, 65 Agric. Dec. 669, 672 (2006).

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

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$20,809.20 with interest thereon at the rate of 0.41 % per annum from October 1, 2007, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington DC
March 26, 2010
/s/ William G. Jenson

William G. Jenson
Judicial Officer
Office of the Secretary