

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	P.Q. Docket No. 07-0003
)	
Conway Wholesale Produce)	
)	
Respondent)	

Decision

In this decision I find that the Animal Plant and Health Inspection Service did not meet its burden of proving by the preponderance of the evidence that Respondent Conway Wholesale Produce violated the Plant Protection Act. Accordingly, I dismiss the complaint against Respondent.

Procedural Background

On October 5, 2006 a Complaint was filed by Kevin Shea, Acting Administrator of the United States Department of Agriculture's Animal Plant and Health Inspection Service (APHIS), alleging that Respondent Conway Wholesale Produce violated the Plant Protection Act (the Act) on or about January 4, 2003, by distributing five cases of Mexican Hass avocados to local Mexican restaurants in and around Conway, Arkansas, without the required compliance agreement. Respondent, through its vice president Raymond Kelley, filed an answer on October 24, 2006, denying the allegations.

On March 1, 2007, Complainant moved that an oral hearing be set. I scheduled a telephone conference for August 29, 2007. Even though he had agreed to participate in

the telephone conference, Mr. Kelley declined to participate, hanging up on my secretary, Diane Green. I conducted the conference without Mr. Kelley. Thomas Bolick, Esq., participated on behalf of Complainant. As a result of the telephone conference, a telephone hearing was scheduled to commence in Washington, D.C. on October 3, 2007.

On August 31, 2007, Complainant filed a motion to amend the complaint, to correct the alleged violations to distributing the five cases of Mexican Hass avocados when such distribution was not authorized rather than without the required compliance agreement.

On October 3, 2007, I convened a telephone hearing in Washington, D.C. Thomas Bolick, Esq. represented Complainant. At the start of the hearing, efforts to reach Mr. Kelley were unsuccessful. However, approximately 35 minutes after the hearing convened, during the examination of the second witness, Mr. Kelley called in and participated in the hearing from that time forward.

Before the first witness testified, I granted Complainant's motion to amend the complaint, which had been unopposed.

Complainant called four witnesses, and Mr. Kelley testified on behalf of Respondent. A total of six exhibits, all on behalf of Complainant, were admitted into evidence.

At the conclusion of the hearing, I allowed the parties until October 31 to submit additional written materials, including briefs, and proposed findings of fact and conclusions of law. Complainant filed its brief on October 31. No brief was filed by Respondent.

Statutory and Regulatory Background

Section 7712 of the Plant Protection Act allows the Secretary to

prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States.

7 U.S.C. § 7712(a). The Act further gives the Secretary the authority to issue regulations to implement this provision.

The Secretary has issued regulations concerning the importation of Hass avocados from Mexico. 7 CFR § 319.56-2ff. When the regulations were first promulgated in the mid 1990's, there was a major concern with preventing the importation of several insect pests that Mexican Hass avocados were known to harbor. Thus, the importation of these avocados was restricted generally to states outside the southeast and the southwest.¹ The regulations allowed importation into the United States during only for a few months each year and incorporated numerous safeguards to assure that the avocados would not be sold in states where they were banned. Among the safeguards was the requirement that a label be attached to each shipping box at the time of packing the avocados, specifically stating that these avocados were not to be distributed in the banned states, which included Arkansas. Further, avocados that were repackaged were required to be clearly marked with the same information concerning the prohibited geographic distribution. In addition, each avocado was required to be labeled with a sticker indicating the number of the Mexican packing house where the avocado was prepared for shipment. "We believe this

¹ The geographical restrictions have been eased considerably since the time of the alleged violations.

stickering requirement will make it easier to identify Mexican-origin avocados at terminal markets and present an additional obstacle to transshipments of the fruit to non-approved states.” 62 Fed. Reg. 5299.

Facts

In 2003, the importation of Hass avocados grown in Mexico into the United States was subject to a number of restrictions. Among the restrictions was a prohibition against distributing the avocados into numerous states, including the State of Arkansas. Joel Bard, the APHIS state plant health director for Arkansas, testified that he had been advised by Blaine Powell, the State Smuggling Interdiction and Trade Compliance Officer, that Mexican Hass avocados had come into Arkansas. Tr. 93-94. In particular, Kyzer Produce, a wholesaler located in Little Rock, had received the avocados and they were being distributed throughout the state. *Id.* He asked other USDA personnel to conduct an investigation to determine how the avocados made it into Arkansas. Tr. 21.

No USDA inspector ever observed any of the avocados in question. The bulk of the evidence in this case consists of affidavits taken by government witnesses of individuals who did not appear at the hearing and documentary evidence obtained during the investigation.

The USDA investigation established that Kyzer Produce purchased several shipments of avocados from Proffer Wholesale, Park Hills, Missouri. Proffer had purchased avocados wholesale throughout the United States, Mexico and Canada. On October 1, 2002, they signed a Compliance Agreement with APHIS relating to Mexican Avocados and understood that it was illegal for Mexican Hass avocados to enter Arkansas. CX 1. Yet Proffer’s records established that between October 23, 2002 and

the date the affidavit at CX 1 was taken on February 5, 2003, many Mexican avocado sales were made to businesses in Arkansas. Id. The list of invoices referenced in the affidavits indicates that at least three shipments of avocados were delivered by Proffer to Kyzer Produce's facility in Little Rock. Id.

An invoice dated January 4, 2003, CX 4, appears to indicate that five boxes of avocados, each containing 48 avocados, were purchased by Conway Wholesale Produce for a total of \$125. The purchase was signed for by Conway's driver, Bill Robinson. An after the fact addition to the invoice was made by APHIS Senior Investigator David B. Head, while taking the affidavit of Linda Davis, Kyzer's office manager, four years after the transaction took place. Tr. 65. Ms. Davis falls far short of stating that the avocados were even labeled as required by the regulations, but merely stated, in her affidavit, that the avocados picked up by Mr. Robinson "would have been packed in the original boxes." Id.

Nowhere on the invoice did it indicate where the avocados were grown, nor does it indicate that the purchase was for avocados that could not legally be distributed in Arkansas. Moreover, the information on the invoice stating that the avocados were all purchased from Proffer on 12/23/02 was not added to the invoice until the affidavit was taken in January of 2007 and it was added by Mr. Head, not Ms. Davis. There is nothing in this record that would even hint as to how Ms. Davis made that determination, since Complainant did not call her to testify.

Joel Bard likewise indicated that he had never seen the avocados in question, that there was no indication on the invoice as to the origins of the avocados, Tr. 99, and that

the only way he could think of that Conway would know of the origin would be to look at the boxes which should indicate that distribution was prohibited in Arkansas. Tr. 99-100.

Raymond Kelly, the Manager of Conway Wholesale Produce, testified that he never saw the avocados in question and that Respondent would not have any way of knowing they were of Mexican origin. Tr. 115-116.

Virtually all of the substantive evidence in this case came in through the affidavits of individuals who the government did not call as witnesses. The main testimony of the witnesses who did testify was to confirm that they were the ones who took the affidavits that Complainant sought to have admitted.

Discussion

I find that Complainant has fallen woefully short of meeting its burden of proving, by a preponderance of the evidence, that Respondent Conway Wholesale Produce violated the regulation prohibiting the importation or distribution of Mexican Hass avocados in Arkansas. While it appears likely that the avocados purchased by Conway and sold to restaurants in Arkansas were in fact Mexican Hass avocados, I reject the implied contention that Respondent would be liable even if it could not reasonably have known that the avocados were from Mexico.

Respondent sold Mexican Hass avocados to one or more restaurants in Conway at a time when it was illegal to distribute or import such avocados in Arkansas. While proof of even this basic fact is somewhat shaky, being that it is based solely on hearsay testimony, I am inclined to believe the material in the affidavits, since they were timely taken and were admissions of facts that were against the interests of the

affiants.² Thus, though I do not have the actual copies of invoices from Proffer indicating that avocados of Mexican origin were purchased, the listing of invoices clearly establishes that Proffer knowingly purchased Mexican Hass avocados, and resold these avocados to a number of entities, including those doing business in Arkansas. One of these entities, Kyzer, produced an invoice indicating that Conway had purchased five boxes of avocados from it, and that these avocados were part of the boxes of Mexican Hass avocados they had purchased from Proffer. Thus, it is reasonable to conclude that these five boxes of avocados, which Conway concedes its driver picked up from Kyzer, were in fact Mexican Hass avocados of the type forbidden to be distributed or imported into Arkansas.

Complainant did not demonstrate, by a preponderance of the evidence, that the avocados purchased by and resold by Conway were labeled or stickered as required by the regulations. No witnesses testified who saw the avocados in question. Complainant elected not to call Respondent's driver as a witness. The only testimony in support of Complainant's case on this issue is contained in an affidavit prepared four years after the fact by Linda Davis, Kyzer's office manager, who indicated that the avocados "would have" been labeled. No foundation whatsoever has been established for this apparent belief of Ms. Davis. I find that this is inadequate evidence to support a finding that the avocados, at the time they were purchased by Conway, bore any indication that they were Mexican Hass avocados which were by regulation not to be imported or distributed in Arkansas.

² Even so, there was no foundation evidence offered that the information contained in the affidavits was generated as a result of examining business records which were usual and customary in the business.

It is well established that hearsay evidence is admissible in administrative hearings³, and I did not hesitate to admit the affidavit of Linda Davis when it was proffered by Complainant. However, acceptance of a document into evidence does not automatically entitle it to great weight. The fact that the document was hearsay, that it was prepared fully four years after the fact, and that Ms. Davis could only surmise that the boxes of avocados would have contained the required warnings renders this piece of evidence virtually without worth. If Ms. Davis could positively state that she saw the labels on the boxes that would be worth something; if her affidavit was taken during the time of the initial investigation that too might have given the document some probative value. But the fact that her statement was merely surmise at best, coupled with the fact that Respondent would have no opportunity to cross examine her, leads me to conclude that there is no credible evidence to support a finding that the avocados were labeled. Accordingly, I find that Complainant has not met its burden of proof on this issue.

In the absence of any showing that the avocados in question were labeled or otherwise identified as Mexican Hass avocados not for sale or distribution in Arkansas, I find that Complainant has failed to meet its burden of proof that the violations alleged in the amended complaint were committed by Respondent. I agree with Complainant's contention in its brief that failure to be aware of the law itself is not an excuse for the alleged violations. However, I do not recall Mr. Kelley ever making such an argument on behalf of Conway. Rather, his principal contention, repeated in his questioning of Complainant's witnesses and his own direct testimony, was that there was no direct evidence that would indicate that Respondent had any notice that the avocados

³ See. e.g., In re Post & Taback, Inc., 62 Agric. Dec. 802, 817 (2003). “. . . responsible hearsay has long been admitted in the United States Department of Agriculture's administrative proceedings.”

he purchased were Mexican Hass avocados illegal for sale or distribution in Arkansas. He repeatedly asked witnesses how he or his driver could have known that the avocados were from Mexico rather than Chile or Florida, particularly since the invoice gave no indication of the provenance of the avocados. Tr. 115. He questioned why the only person mentioned at the hearing who surmised that the avocados were properly labeled was not called by Complainant, who also failed to call the driver, Bill Robinson, to testify.

Complainant's principal theory for holding Conway liable is that even if Conway did not know and could not have known that the avocados purchased and distributed by them were Hass avocados from Mexico, Conway would still be liable as knowledge was not "an element of the violation that merits the assessment of a civil penalty." Under Complainant's theory, the Secretary's requirements concerning labeling and stickering are mere window dressing. It is stunningly obvious to me that a major, if not the sole, purpose of labeling and stickering requirements is to alert the produce handler concerning the legal distribution of Mexican Hass avocados. Complainant's interpretation would essentially nullify the labeling aspects of this carefully crafted regulatory program, which specifically mandated not one but two labeling requirements to alert potential bulk purchasers of the origin of the avocados to prevent their unlawful sale or distribution. Complainant made no effort to show that the avocados had the required stickers, and only a lame effort through hearsay surmise to show that the boxes were properly labeled.

The importance of labeling and stickering, while self-evident, is worth discussing further. With respect to stickering, the regulations required:

(vi) Prior to being packed in boxes, each avocado fruit must be cleaned of all stems, leaves, and other portions of plants and labeled with a sticker that bears the Sanidad Vegetal registration number of the packinghouse.

7 C.F.R. § 319.56-2ff(c)(3)(vi). “We believe this stickering requirement will make it easier to identify Mexican-origin avocados at terminal markets and present an additional obstacle to transshipment of the fruit to nonapproved States.” 62 Fed. Reg. 5299. Thus, the requirement was clearly intended to alert companies such as Conway, which purchased avocados at terminal markets, of the origin of the avocados, to prevent their transshipment into a state, such as Arkansas, which was not approved for Mexican Hass avocados. Complainant made no attempt to show the avocados purchased by Conway were stickered as required by the regulations.

With respect to labeling, the regulations required:

(vii) The avocados must be packed in clean, new boxes, or clean plastic reusable crates. The boxes or crates must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement “Not for distribution in AL, AK, AZ, AR, CA, FL, GA, HI, LA, MS, NV, NM, NC, OK, OR, SC, TN, TX, WA, Puerto Rico, and all other U.S. Territories.

7 C.F.R. § 319.56-2ff(c)(3)(vii). As I have already concluded, there was no probative evidence to support the contention that the boxes were labeled so that Conway, through its driver Bill Robinson, could have known that the avocados were of Mexican origin. Complainant seems to have abandoned or at least downplayed this aspect of the case and is focusing its argument on the premise that, even if there were no proper labels and stickers, Conway would be liable just because these were in fact Hass avocados. The Valkering⁴ case relied on by Complainant to show that knowledge is not a prerequisite to

⁴ In re: Unique Nursery and Garden Center, Butternut Creek Sales., Inc., Valkering U.S.A., Inc., Heyl Truck Lines, Inc., and Lebarnd, Inc., 53 Agric. Dec. 377 (1994), affirmed sub nom Valkering, U.S.A., Inc. v. United States Department of Agriculture, 48 F. 3d 305, 54 Agric. Dec. 386 (C.A. 8, 1995).

liability in this case is easily distinguishable. In that case there was no labeling requirement. More significantly, the Respondent in Valkering was knowingly engaged in a certification process where it hired another company, on a commission basis, to purchase trees for which certain inspections were required. The ALJ, the Judicial Officer and the Court of Appeals all found it significant that Valkering was directly involved in the shipment of the uncertified trees. Indeed, Valkering was involved in the transaction from the time before the trees were even dug up, let alone transported and sold. Here, Conway was merely a wholesale purchaser of a small amount of avocados from a warehouse, having no involvement in any of the transactions that brought the avocados to Little Rock in the first place.

Furthermore, I have some question as to whether the regulation even impacts avocados that have already been illegally imported into one of the banned states. The purpose of the regulation, and the labeling requirements, is to prevent avocados from ever even entering the states from which they were banned. Here, through the combined activities of Proffer and Kyzer, the act of illegally shipping the Mexican Hass avocados into Arkansas was already accomplished before Conway ever arrived on the scene. Complainant's theory—essentially one of absolute liability since knowledge is irrelevant—becomes even more onerous when a company purchasing unlabeled avocados already in the state of Arkansas can be held liable for an illegal activity performed by the prior handlers of the avocados, in which Respondent had absolutely no involvement. While I think it a stretch to find a party potentially liable for transporting avocados which are unlabeled into a state where their importation is forbidden, I find that an interpretation of this regulation which would hold a party liable for the purchase and distribution of

unlabeled avocados purchased within the state to be well outside the purview of this regulation.

Findings of Fact

1. Respondent Conway Wholesale Produce is located at 1202 Markham Street, Conway, Arkansas 72032.

2. On or about January 4, 2003, Respondent, through its driver Bill Robertson, picked up five cases of avocados from Kyzer Produce in North Little Rock, Arkansas. These avocados were Mexican Hass avocados, which were not approved for distribution in Arkansas.

3. The avocados purchased by Respondent did not bear any indicia of their origin, even though the regulations required that Mexican Hass avocados bear a sticker indicating their provenance, and that the cases containing the avocados were required to be labeled with information indicating that the avocados were not to be distributed in Arkansas.

4. The avocados purchased by Respondent were delivered to restaurants in the Conway, Arkansas area.

Conclusion of Law

Complainant did not prove, by a preponderance of the evidence, that Respondent violated the regulations at 7 C.F.R. § 319.56-2ff.

Order

The complaint against Respondent Conway Wholesale Produce is dismissed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. §

1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 15th day of February, 2008

Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge