

QUAIL VALLEY MARKETING, INC. v. JOHN A. COTTLE, d/b/a VALLEY FRESH PRODUCE.

PACA Docket No. R-98-0020.

Decision and Order filed December 4, 2000.

Shipping terms - F.o.b. - Appeal re-inspection, request untimely.

Warranty of Suitable Shipping Condition is applicable to city equidistant to agreed upon destination regardless of express agreement of parties that table grapes would not go to the city. Contrary decision will not be followed. Where the parties agree to a destination city as an explicit term of the contract, shipper may offset any damages established for a breach of the agreement against damages established for violation of the warranty, or the parties may agree to liquidated damages for prohibited destination in contract agreement. Notice of east coast inspection provided to California shipper on the date of inspection will be untimely if provided after more than half the shipment is resold as shipper is deprived of opportunity for appeal reinspection.

Thomas R. Oliveri, Newport Beach, CA., for Complainant.

Louis W. Diess, III, Washington, D.C., for Respondent.

Eric Paul, Presiding Officer.

Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. ' 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of \$45,112.25 as payment of the balance due on four f.o.b. truck lot shipments of table grapes sold to Respondent in interstate commerce, plus the recovery of the \$300.00 PACA handling fee.

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 and counterclaim admitting that Respondent had agreed to f.o.b. purchases totaling \$68,568.50 as alleged and had remitted the sum of \$23,456.25 to Complainant, but denying that table grapes shipped to Respondent's customer complied with the contract terms and that there was an unpaid balance due in the amount of \$45,112.25, and asking for the award of an unspecified amount of damages because of Complainant's failure to ship the kind, quality, grade and size of grapes called for in the contract. Complainant filed a reply denying the allegations of Respondent's counterclaim and affirmatively asserting that Respondent, at shipping point, had personally inspected the grapes as to condition and quality and approved of their shipment to Respondent's customer in Philadelphia, Pennsylvania.

As the amount in controversy exceeded \$30,000.00 and Respondent had requested an oral hearing, an oral hearing was held by audio-visual telecommunications on October 14, 1998, with

the parties and their representatives located in Fresno, California, and the presiding officer and the court reporter located in Washington, D.C. Complainant was represented by Thomas R. Oliveri, Western Growers Association, Newport Beach, California. Respondent was represented by Stephen P. McCarron, McCarron & Associates, Washington, D.C. Eric Paul, Office of the General Counsel, was the presiding officer. Complainant presented oral testimony from one witness, Robert Rocha. Respondent presented oral testimony from three witnesses, Derek Seto, William Slattery, and Michael Espinosa. By oral stipulation of the parties, the deposition of Pat Prisco was admitted as Deposition Exhibit 1 (DX 1) along with attached exhibits 1 through 46 (DX 1(1) through DX 1(46)); the deposition of Robert Rocha was admitted as Deposition Exhibit 2 (DX 2) along with attached exhibits 1 through 19 (DX 2(1) through DX 2(19)); report of investigation exhibits 1 through 6 (ROI 1 through ROI 6) were admitted; formal complaint exhibits 1 through 21 (FCX 1 through FCX 21) were admitted; Complainant's exhibit's 1 through 5 (CX 1 through CX 5) (as submitted to the Hearing Clerk on October 6, 1998) were admitted; and Respondent's exhibit's 1 and 2 (RX 1 and RX 2) (as submitted to the Hearing Clerk on October 8, 1998) were also admitted. This procedure ensured that all available relevant evidence was admitted, although in many instances the same document was admitted under multiple designations. References to the transcript are by page number (Tr._). The parties filed briefs. Complainant filed a timely claim in the amount of \$3,239.02 for fees and expenses incurred in connection with the oral hearing and the deposition of Robert Rocha. Respondent filed a timely claim in the amount of \$7,557.94 for fees and expenses incurred in connection with the hearing and the deposition of Pat Prisco.

Findings of Fact

1. Complainant, Quail Valley Marketing, Inc., is a corporation whose post office address is P.O. Box 1206, Ridley, CA 93654.
2. Respondent is an individual, John Cottle, doing business as Valley Fresh Produce, whose post office address is 255 West Fallbrook Avenue, Suite 103-A, Fresno, CA 93711-6151.
3. The parties are, and at the time of the transactions involved herein were, licensed under the Act.
4. On or about October 30, 1998, Complainant sold Respondent by oral contract 420 boxes of Red Globe table grapes, Top Knot label, plain pack, styro container, 23 pound, at a \$14.00 unit price (\$5,880.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a \$1.50 a box pre-cooling and palletizing charge (\$630.00), a \$10.00 air bag charge, and a \$23.50 charge for a temperature recorder. Respondent was given a \$0.25 per box discount as a local California buyer (\$105.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of \$6,438.50 (ROI 1D; Tr. 12-14). Complainant's order and invoice number was 963615 for this f.o.b. no grade shipment of table grapes.

5. This was the first of four f.o.b. shipments of table grapes that Respondent purchased from Complainant for delivery to C.H. Robinson Corp. in Philadelphia, Pennsylvania, without advising Complainant of the identity of its Philadelphia customer.

6. This first shipment departed from Sakata Farms in Biola, California, at 5:00 p.m. on October 30, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Sandstone Transport to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had the 420 boxes of unloaded Top Knot brand Red Globe grapes inspected at 8:00 a.m. on November 6, 1996. USDA Inspection Certificate K-248851-8, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that these 420 lugs had temperatures between 37 and 38 degrees and failed to grade U.S. No. 1 table on account of the following condition defects:

Average Defects	Serious Damage
03%	00% Quality
05%	00% Shattering
07%	00% Sunken areas around Capstem (5 to 10%)
03%	03% Crushed and Split Berries
05%	05% Wet and Sticky Berries
02%	02% Decay
25%	10% Checksum

The inspector noted that the decay was mostly early, some moderate stages. [DX 1(4)]

7. L & P Fruit sold these grapes to customers at the Hunts Point Terminal on November 7 and November 8, 1996, for an average unit price of \$17.51, and after granting credits of \$288.00 received sales proceeds of \$6,311.00 (DX 1(7)). These 420 lugs had been sold to L & P Fruit by Alanco Corp. as part of a 1761 lug shipment with a total freight expense of \$3,150.00. L & P Fruit ended up paying Alanco Corp. \$4,233.50 for these 420 lugs of Red Globe grapes (DX 1, pg. 8).

8. On or about October 30, 1998, Complainant sold Respondent by oral contract 692 boxes of Red Globe table grapes, Top Knot label, plain pack, styro container, 23 pound, at a \$16.00 unit price (\$11,072.00), and 358 boxes of Red Globe table grapes, Covey label, plain pack, styro container, 23 pound, at a \$14.00 unit price (\$5,012.00), for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a \$1.50 a box pre-cooling and palletizing charge (\$1,575.00) and a \$23.50 charge for a temperature recorder. Respondent was given a \$0.25 per box discount as a local California buyer (\$262.50) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of \$17,420 (ROI 1H; Tr. 16-17). Complainant's order and invoice number was 963619 for this f.o.b. no grade shipment of table

grapes.

9. This second shipment departed from Sakata Farms in Biola, California, at 2:15 p.m. on October 31, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by W.R. Stevens Trucking to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had these 1,050 lugs of Red Globe grapes inspected in two lots at 9:55 a.m. on November 6, 1996. USDA Inspection Certificate K-371691-7 shows that the two lots had temperatures between 34 and 37 degrees and failed to grade U.S. No 1 table on account of the following condition defects:

Lot A [692 lugs "Top Knot" Red Globe table grapes]

Average Defects	Serious Damage	
03%	00%	Quality (scars)
05%	00%	Shattering
07%	00%	Shriveling around Capstem (5 to 11%)
16%	16%	Flabby Berries (17 to 21%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
03%	03%	Decay (2 to 5%)
42%	27%	Checksum

Lot B [358 lugs "Covey" Red Globe table grapes]

Average Defects	Serious Damage	
03%	00%	Quality (scars)
05%	00%	Shattering
09%	09%	Flabby Berries (7 to 11%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
02%	02%	Decay (1 to 4%)
27%	19%	Checksum

The inspector noted that the decay in each of these lots was in mostly early, some moderate stages (DX 1(32)).

10. L & P Fruit Corp. sold 980 of these 1,050 lugs of Red Globe grapes to customers at the Hunts Point Terminal on November 7, 1996, at prices that initially averaged \$15.03 (for 692 lugs) and \$15.00 (for 288 lugs). The \$10,404.00 and \$4,320.00 that L & P Fruit billed for these

respective lots was reduced by credit adjustments giving L & P Fruit proceeds of \$9,354.00 (\$13.51 a lug) and \$3,718 (\$12.90 a lug). Alanco Corp. subsequently billed L & P Fruit Corp. \$11,149.50 for this shipment [\$11.50 delivered for 692 lugs and \$11.00 delivered for 288 lugs plus \$23.50 Ryan] by a November 11, 1996 invoice that was paid on December 30, 1996. The L & P Fruit Corp. sales records, and this billing and payment, fail to account for 70 of the 358 lugs of the "Covey" label Red Globe grapes that the parties have acknowledged were delivered on November 5, 1996, and inspected on November 6, 1996 (DX 1(28-36)).

11. On or about October 30, 1996, Complainant sold Respondent by oral contract 1820 lugs of Calmeria table grapes, Covey label, plain pack, styro container, 21 pound, at a \$11.00 unit price (\$20,020.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a \$1.50 a box pre-cooling and palletizing charge (\$2,730.00), and a \$23.50 charge for a temperature recorder. Respondent was given a \$0.25 per box discount as a local California buyer (\$455.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of \$22,318.50 (ROI-1L); Tr. 17-18). Complainant's order and invoice number was 963651 for this f.o.b. no grade shipment of table grapes.

12. This third shipment departed Complainant's warehouse at 8:20 p.m. on November 1, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Jo Dar Dist. to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had the 1820 lugs of unloaded Covey brand Calmeria grapes inspected at 6:45 a.m. on November 6, 1996. USDA Inspection Certificate K-248174-5, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that these 1820 lugs had temperatures between 37 and 38 degrees and failed to grade U.S. No 1 table on account of the following condition defects:

Average Defects	Serious Damage
07%	00% Quality (scars)(6 to 10%)
04%	00% Shattering
17%	00% External Brown Discoloration (5 to 23%)
06%	00% Sunken Discolored areas (4 to 10%)
02%	02% Crushed and Split Berries
04%	04% Wet and Sticky Berries
01%	01% Decay
41%	07% Checksum [DX 1(15)]

13. L & P Fruit Corp. sold this third shipment of grapes for Alanco's account between November 6, 1996 and November 12, 1996 at prices that initially averaged \$9.19 for 1811 lugs and \$5.60 for 9 lugs. The \$16,702.40 billed was reduced by credit adjustments to gross proceeds

of \$12,603.40, and was further reduced to net proceeds of \$10,113.89 by the deduction of \$70.00 cartage, \$74.00 inspection, \$1,890.51 commission (15%), and \$455.00 handling (254). Alanco Corp. subsequently billed L & P Fruit Corp. \$10,579.50 for this shipment (at \$5.80 delivered plus \$23.50 Ryan) by a November 27, 1996 invoice that was paid on December 13, 1996 (DX 1(16-27)).

14. On or about October 30, 1996, Complainant sold Respondent by oral contract another 1820 lugs of Calmeria table grapes, Covey label, plain pack, styro container, 21 pound, at a \$11.00 unit price (\$20,020.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a \$1.50 a box pre-cooling and palletizing charge (\$2,730.00), a \$73.00 charge for a federal-state shipping point inspection, and a \$23.50 charge for a temperature recorder. Respondent was given a \$0.25 per box discount as a local California buyer (\$455.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of \$22,391.50 (ROI 1Q); (Tr. 18-19). Complainant's order and invoice number was 963652 for this f.o.b. no grade shipment of table grapes.

15. This fourth shipment departed Complainant's warehouse at 3:30 p.m. on November 6, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Sun Aire Trucking to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 11, 1996 (DX 1(38)). L & P Fruit had the 1820 lugs of unloaded Covey brand Calmeria grapes inspected at 7:10 a.m. on November 12, 1996. USDA Inspection Certificate K-248815-3, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that the 1820 lugs of Covey label Calmeria grapes had temperatures between 35 and 37 degrees and failed to grade U.S. No. 1 table on account of the following condition defects:

Average Defects	Serious Damage
05%	00% Quality Defects (scars)(4 to 8%)
44%	00% Brown Discoloration (17 to 62%)
05%	00% Shattered Berries
02%	02% Decay
56%	02% Checksum

The inspector noted that the decay was in early stages and that the stems were mostly green and pliable some brown and brittle (DX 1 (40)).

16. L & P Fruit Corp. sold these grapes for Alanco's account on November 12 and 13, 1996 at prices that totaled \$12,643.50 after adjustments. This \$12,643.50 in gross proceeds was reduced to net proceeds of \$10,010.97 on the accounting prepared by L & P Fruit Corp. by the deduction of \$203.00 cartage, \$78.00 inspection, \$1,896.53 commission (15%), and \$455.00 handling (254).

Alanco subsequently billed L & P Fruit Corp. \$10,579.50 for this shipment (at \$5.80 delivered plus \$23.50 Ryan) by a November 27, 1996 invoice that was paid on December 13, 1996 (DX 1(41-46)).

17. Approximately one or two days prior to the shipment of each of these four loads one of Respondent's salesmen, Mr. Derek Seto, visited Complainant's place of business and determined that Complainant possessed suitable table grapes for shipment to Philadelphia, Pennsylvania (Tr. 53-56). On November 1, 1996, Complainant obtained federal-state inspections of two 1890 lug lots of Calmeria grapes from which the third and fourth shipments were to be drawn on November 1, 1996, and November 6, 1996, respectively. The inspection reports show that the grapes inspected graded US #1 table when inspected. (FCX 6; 9).

18. Temperature tapes that were produced by Pat Prisco of L & P Fruit for the first and third shipments show transit temperatures in the low to mid-30 degree range (DX 1(3;14)). The third temperature tape produced by Mr. Prisco shows transit temperatures in the upper 20 degree range for the second shipment (DX 1(31)).¹ There is no temperature tape in the record for the fourth shipment, and the deposition testimony of this witness merely goes to the temperature ranges of the grapes on arrival at L & P Fruit (DX 1, pg. 6-7).

19. On November 6, 1996, Complainant's salesman, Robert Rocha, was advised by warehouse staff that the trucker picking up the fourth shipment had checked in that the load was going to New York. Mr. Rocha telephoned Respondent and obtained express assurance from one of Respondent's salesmen, Mr. Derek Seto, that the shipment was going to Philadelphia, Pennsylvania as had been agreed (Tr. 21). Before Mr. Seto confirmed to Mr. Rocha that the destination was Philadelphia and not New York, he spoke to Respondent's office manager, Mr. William Slattery, who talked over the telephone to the C.H. Robinson salesman who had ordered the grapes for delivery in Philadelphia and obtained his oral assurance that the destination was Philadelphia and not New York (Tr. 68).

20. Mr. Slattery subsequently learned, from faxed USDA inspection reports received on that same day, that the first three shipments had been delivered to L & P Fruit at the Hunts Point Terminal Market, Bronx, NY. Mr. Slattery decided to make inquiries with C.H. Robinson and the PACA Branch before contacting Complainant (Tr. 69-71).

¹Abnormal transportation is not apparent from this reading because the freezing point for grapes is about 28 degrees and the relevant inspection certificate contains no specific notation as to freeze damage as is required when such damage is present.

21. On the afternoon of November 12, 1996, a date that Mr. Rocha remembered because it was his birthday, he was informed by Mr. William Slattery in a telephone conversation that the grapes in these shipments had all gone to New York City and not to Philadelphia, Pennsylvania (Tr. 22-24).

22. On November 14, 1996, Mr. Rocha received a letter from Bill Slattery by fax, the body of which reads as follows:

To reiterate our phone conversation of November 12, Valley Fresh Produce placed orders with Quail Valley for 1470 Red Globes and 3640 Calmerias on October 30 and November 1, with destinations listed as Philadelphia, PA. On November 6, Robert called Valley Fresh to double check the destination of order #963652, because the truck was checking in for Bronx, NY. At the same time, Kurt with C.H. Robinson (Philadelphia) was on another phone line and I asked him whether or not the grapes were going to New York, which he denied.

We want to make it clear with Quail Valley that Valley Fresh's position in this matter is that the responsibility of the grapes lies with C.H. Robinson, because they diverted the grapes from the original destination. With Quail Valley's approval Valley Fresh will hold our position with C.H. Robinson and keep Quail Valley apprised of the situation as events proceed. We are also aware that after my conversations with PACA that they agree with my position at this time, but he did also make me aware of the possibility of recourse by the inspections due to the destinations being equidistant and the same day arrival from shipping point, but he did not see this being brought up in this case.

(DX 2(10)).

23. On November 16, 1996, Mr. Rocha received by fax a copy of a letter that Mr. Slattery had sent to Mr. Greg Goven at C.H. Robinson's headquarters Eden Prairie, MN, on November 15, 1996, that went over the same information that had been covered in Mr. Slattery's prior letter to Mr. Rocha, and explained that he had discovered that L & P Fruit had purchased the grapes from Alanco Corp., who purchased them from C.H. Robinson-NYC, who bought the grapes from Kurt at C.H. Robinson's Paulsboro, NJ, branch office. Mr. Slattery went on to state "Now, after conversations with the Paulsboro office I am being told that my failure to investigate the true destination of the grapes will result in all deductions on these files to be the responsibility of Valley Fresh Produce." (DX 2(11)).

24. On December 3, 1996, Complainant received from Respondent by fax copies of Respondent's trouble file reports pertaining to the first and second shipments, the 1,470 lugs of Red Globe table grapes, as well as the USDA inspection reports pertaining to the third and fourth shipments, the 3,640 lugs of Calmeria table grapes (CX 4). On the following day, Complainant

returned copies of these trouble reports and inspections to Respondent with notes from Robert Rocha stating "These Inspections were not received in a timely manner. Quail Valley is unable to grant any adjustments." (CX 5).

25. Pursuant to these trouble reports, Respondent sought Complainant's agreement to accept remittance of the following amount's that Respondent was to receive from C.H. Robinson:

\$8.25 x 692 "Top Knot" Red Globes
\$7.75 x 358 "Covey" Red Globes
less \$95.25 for federal inspection [\$8,388.25]

and

\$8.25 x 420 Red Globes
less \$74.00 for federal inspection [\$3,391.00]

26. Complainant has received Respondent's check no. 02886, dated December 17, 1996, in the amount of \$25,456.25 as the undisputed amount involved in this reparation proceeding (ROI 2a; Complaint; Answer).

27. The formal complaint was received by the Department on March 28, 1997, which is within 9 months after the cause of action herein accrued.

Conclusions

Respondent has purchased and received from Complainant in interstate commerce four f.o.b. shipments of table grapes, a perishable agricultural commodity. The Regulations² in relevant part, 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 defined³ in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and condition, will assure delivery

² 7 C.F.C. ' 46.43(i) [Note: 7 C.F.R. ' 46.43(i) - Editor]

³ 7 C.F.R. ' 46.43(j)

without deterioration at the contract destination agreed upon the between the parties."⁴ The

⁴The 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). As an illustration of how the rule operates, 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 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. For all commodities other than lettuce (for which see 7 C.F.R. ' 46.44) what is "normal" or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce*

warranty of suitable shipping condition is made applicable only when transportation service and conditions are normal. It is well established that where that where the question of abnormality of transportation service is raised, either by a party or on the face of the record, a buyer who has accepted a commodity has the burden of proving that transportation service and condition were normal.⁵

Complainant contends that the warranty of suitable shipping condition is not applicable to any of the four transactions in dispute because of unauthorized changes in the agreed contract destination for these shipments from Philadelphia, Pennsylvania, to New York City that were made by Respondent's customer, C.H. Robinson. In addition, Complainant has asserted that the warranty of suitable shipping condition is not applicable because Respondent's representative, Derek Seto, inspected and approved each load of grapes prior to its shipment from Complainant's place of business. Finally, Complainant contends that even if the warranty of suitable shipping condition was applicable to these transactions, that the failure of Respondent to give Complainant timely notice of the condition defects determined by USDA inspection reports bars any reliance upon these inspection reports to establish that the shipments failed to make good delivery. Complainant has not attempted in this proceeding to establish that the transportation service and conditions were abnormal with respect to any of the four shipments of table grapes in controversy, or that the warranty of suitable shipping condition is not applicable because of abnormal transportation.

It is necessary to determine whether the warranty of suitable shipping condition should be applied to these transactions because we have four USDA inspection certificates that show excessive condition defects in a 22% to 56% range that were revealed by timely inspections. With

Co., 39 Agric. Dec. 703 (1980).

⁵Admiral Packing Company v. Sam Viviano & Sons, 40 Agric. Dec. 1993 (1981); Dave Walsh v. Rozak's, 39 Agric. Dec. 281 (1980).

respect to table grapes, we have held that condition defects at destination averaging 17% will establish a breach of the warranty of suitable shipping condition. *Robert A. Shipley, d/b/a Shipley Sales Service v. Peacock Sales*, 46 Agric. Dec. 702 (1967). See also *Lester Distributing Co. v. Levatino Produce Corp.*, 43 Agric. Dec. 1606 (1984).

We will first examine Complainant's contention that Respondent inspected and approved the grapes prior to shipment. Respondent's office in Fresno, California, is located within 25 miles of Complainant's place of business at Reedley, California (Tr. 45). Complainant was engaged in the marketing of fresh fruit as a grower's agent, and had table grapes and other perishable agricultural commodities obtained from various growers on hand at its warehouse facility during the months of October and November. One of the regular duties of a former employee of Respondent, Mr. Derek Seto, was to visit Complainant's place of business and to determine whether Complainant had produce available that would be suitable for shipment to Respondent's customers. Mr. Rocha testified that, prior to these four shipments, Derek Seto inspected the table grapes that were located at Complainant's warehouse, and determined that the table grapes were suitable for shipment to Philadelphia, Pennsylvania (Tr. 13, 17-18). However, Mr. Rocha acknowledged that he was not present when Derek Seto looked at the grapes (Tr. 38-39). Mr. Seto presented the following credible testimony with respect to his inspections of the grapes in these shipments:

Q. The four truck lot shipments of grapes covered by this reparation proceeding, were you the individual on behalf of Respondent's firm, that being Quail -- excuse me -- Valley Fresh Produce that inspected the grapes?

A. Yes, I was.

Q. There seems to be some type of confusion on the dates that you might have gone out to look at the grapes.

Did you look at the grapes on the date of shipment?

A. No, I didn't.

Q. Did you look at the grapes maybe the day before they were shipped?

A. Yes. Actually, I'd say on some occasions it was on probably one or two days before they shipped.

Q. I'm assuming you did not look at every lug of grapes?

A. You're right, I didn't.

Q. Did you look at a representative sample of the grapes that were to be shipped?

A. Yes, I did.

Q. In your opinion, were these grapes suitable for shipping to the east coast?

A. Certainly. Definitely east coast quality.

Q. From your experience--

A. When I say "east coast quality," there are different types of products that you want to keep on the west coast, different types of products that you want to keep, you know, in the southwest

area to the midwest, and then there are east coast type of boxes which are a little bit under export standards that is in cases.

Q. Would you -- in your opinion, are these the types of grapes that the markets in Hunts Point, New York, like to order?

A. I wouldn't -- my personal opinion, just dealing with the New York market, I wouldn't send anything to New York because myself, I don't have a relationship with a customer in that area buying, and I've just heard some horrible stories about sending product there.

Q. Were you aware of where these four truck lot shipments of grapes were to be shipped to, what city they were to be shipped to?

A. Yes. Pennsylvania.

Q. To Philadelphia, Pennsylvania.

Did you happen to know the name of the buyer in Philadelphia, Pennsylvania, who was purchasing these grapes?

A. We were dealing with C.H. Robinson.

(TR. 53-54).

There is documentary evidence that Complainant, in connection with the two purchase orders placed for Respondent by Derek Seto, instructed its warehouse personnel not to load the two shipments of Calmeria grapes until they were inspected by Respondent's representative. Complainant's shipping orders nos. 963651 and 963652 for the third and fourth shipments contain the following special instruction: "Do not load until Valley Fresh inspects." (Tr. 38-39; DX 2).

We conclude that Complainant has failed to establish by a preponderance of the evidence that Respondent's employee inspected the specific lugs of grapes that were going to be shipped in these four shipments. It is not clear whether Mr. Seto's inspections were conducted only at Complainant's facility or included visits to specific grower locations such as Sakata Farms. It appears that Mr. Seto looked at a representative sample of an unspecified volume of table grapes that were on hand one or two days prior to the actual loading of these shipments. We have nothing in the record as to the size of Complainant's table grape inventory at the time that Mr. Seto performed his inspections, and we can not determine what part of the grapes shipped to fill Respondent's orders were actually inspected by Mr. Seto. The two federal-state inspections of Calmeria grapes that Complainant obtained on November 1, 1996, were conducted after the two shipping orders were taken that contained the special instructions "Do not load until Fresh Valley inspects." It appears that the inspection that were performed by Mr. Seto were for the purpose of checking the quality and condition of the general run of Complainant's table grapes and were not inspections made for the purpose of determining the quality and condition of a specific quantity. We have held that such an inspection does not establish the existence of a sale after inspection.

See *Kirby & Little Packing Co. v. United Fruit & Produce Company*, 16 Agric. Dec. 1066, 1069 (1957). Even if we were able to find that Mr. Seto had inspected a representative sample of the grapes purchased by Respondent, it does not appear that the parties agreed to “Purchase after Inspection” terms in their contract negotiations⁶, and their use of the contract term “f.o.b.” on the shipping orders and invoices relating to these shipments was inconsistent with these being purchase after inspection transactions which do not carry a warranty of suitable shipping condition. In a number reparation cases where the significance of the use of these trade terms under the Department’s Regulations was not fully addressed, it was held that if a buyer, directly or through its agent, inspects specific produce prior to its purchase, the warranty of suitable shipping condition does not apply, as the buyer is deemed to have made a purchase after inspection at shipping point. *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970); *Goldstein Fruit & Produce v. East Coast Distributors*, 18 Agric. Dec. 493 (1957); *L.T. Malone v. Al Kaiser & Bros.*, 18 Agric. Dec. 1221 (1959); *PACA Docket No. 5123*, 9 Agric. Dec. 146 (1950). More recently, in *Delano Farms Company v. Suma Fruit International*, 57 Agric. Dec. 749, 754 (1998); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 977-78 (1997), we held that under the Regulations the waiver of the suitable shipping condition warranty requires the use of the trade term “purchase after inspection,” and that the use of the trade term “f.o.b.” under the Regulations expressly entails the suitable shipping warranty. We also rejected the exclusion of the suitable shipping warranty as an implied warranty, by a prior examination of the goods under section 2-316(3)(b) of the Uniform Commercial Code, since under the Department’s Regulations in f.o.b. sales the suitable shipping condition warranty is an extension of the warranty of merchantability and more equivalent to an express warranty. *Id.* at 979-80. We find that Respondent did not waive the warranty of suitable shipping condition.

We now turn to Complainant’s contention that the warranty of suitable shipping condition is not applicable to any of the four transactions in dispute because of unauthorized changes in the agreed contract destination for these shipments from Philadelphia, Pennsylvania, to New York City that were made by Respondent’s customer, C.H. Robinson. There is no question that Respondent consistently represented in good faith that the contract destination for these shipments was Philadelphia, Pennsylvania. It is also true that Philadelphia, Pennsylvania, and New York City are essentially equidistant from California shipping points and share the same five day transit time. If these two destinations had been regarded by the parties in this proceeding as equally good destinations in which to market California table grapes during October and November, 1996, we

⁶Section 46.43(ff) of the Regulations provides:

“Purchase after inspection” means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition except warranties expressly made by the seller.” (7 C.F.R. ‘ 46.43(ff))

would follow, without further analysis, the precedent of a number of cases where contract destination diversions that did not materially alter transit time and distance were held inadequate to waive the warranty of suitable shipping condition. *Merrill Farms v. Tom Lange Company, Inc.*, 44 Agric. Dec. 1253 (1985); *Kirby & Little Valley Packing Co. v. United Fruit & Produce Company, supra*. See, also *Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co., Inc., et al.*, 42 Agric. Dec. 1602 (1983) where we said (dicta) “ the diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in determining whether the commodity would have been abnormally deteriorated at the destination specified.” We find in the present case, that the parties shared an implicit understanding throughout their course of dealing that none of these four shipments was going to New York City, and that in the case of the fourth shipment, Respondent provided an express representation to this effect that induced Complainant to release the shipment to Respondent’s trucker.

We know from the testimony of Robert Rocha that Complainant would not have agreed to sell the grapes to a buyer located on the Hunts Point Market because of a reasonable fear that they would not bring an adequate return at this destination. Mr. Rocha explained Complainant’s understanding with respect to sending grapes to the New York market in the following testimony:

Q. Was that an important factor to you, were contract destination would be?

A. Yes.

Q. Why was it important to you that the grapes were going to be going to Philadelphia?

A. Well, at the time it was a very tight grape market, table grape market. It was a demand exceed situation and we wanted to make sure that our grapes were going to the right market, and we thought the grapes were fine to go to Philadelphia, and knowing that it was going to go there, and we kind of were picking what markets we would go to and who we were going to sell them to.

Q. Would you consider going to a market let's say of Hunts Point, New York, or the Bronx with these grapes?

A. Absolutely not.

Q. Could you -- excuse.

Are you done with your answer? I don't want to stop you if want to continue.

Why would you not want to go to the Hunts Point area?

A. Well, at least from our experience, we've had a lot of trouble with New York City. It's a very tough market. You have -- you just always run into problems, either the inspections' adjustments, pay whatever it is into that market.

And like Philadelphia, we've had good experience with; dealt with, you know, people there and everything has gone fine with that market. And so, especially with the demand exceed situation we had with the grapes, we were definitely going to pick a better market to go to, and

New York City definitely that year was not in any way we were going to go that market with grapes that we know we can go to a different market with better success.

(Tr. 14-15).

When specifically questioned with respect to the fourth shipment, Mr. Rocha testified:

A. Given the choice, given the choice, and if they were told -- if it was asked to me in the beginning to go to New York City, I would not have shipped these grapes to New York City.

Q. Because you expected there would be problems?

A. We've had bad experiences. New York City, especially that year, we did not ship any grapes to New York City because they went into demand exceeds market. You go into your other markets, and we didn't have to sell to New York City.

(Tr. 41-42).

We find that there was a clear perception, shared by both Complainant's witness Robert Rocha and Respondent's witness Derek Seto, that a shipper would be better off selling table grapes at other locations than New York City.

We find that the diversions of these shipments from Philadelphia to New York City by Respondent's customer, which are acceptances of the shipments by Respondent, constitute breaches of the oral contract between the parties to this reparation proceeding.

The effect that a breach of an express agreement between parties that a shipment would not go to New York City would have on the applicability of the warranty of suitable shipping condition was recently considered in *The Chuck Olsen Co. v. Produce Distributors Inc., and Produce Etc. Marketing*, 57 Agric. Dec. 1689 (1998), a case in which a truckload of California table grapes was diverted from a Paterson, New Jersey, contract destination and also sold by L & P Fruit at the Hunts Point market. In that case we determined that:

The clearly manifested intent of the parties must be upheld where it is not illegal, and does not conflict with public policy. We find the warranty of suitable shipping condition to be inapplicable to this transaction.

Id. at 1694.

The reasoning we followed in *Chuck Olsen* was that the suitable shipping condition warranty provision of the Regulations expressly uses the term "contract destination" and that the extension to other equidistant locations was an expansive interpretation that should not followed when it is

found that the parties specifically excluded the actual destination where the shipment was delivered. On further consideration, the warranty of suitable shipping condition is a warranty that the shipper has supplied product in good condition and, absent abnormal transportation, the shipper warrants that the product will arrive in good condition. So long as the destination of the product is virtually equidistant from the point of shipment as the agreed upon destination, there is no reason that the warranty that goods would arrive in good condition should not continue to apply. Accordingly, it is not appropriate to reject the applicability of the suitable shipping condition warranty in this proceeding. We conclude that this warranty remains applicable, but that Complainant has the right to claim damages resulting from breach of the agreement not to ship to New York City. Complainant has failed to establish that it incurred any specific amount of damages because of Respondent's breach.⁷

Having concluded that the warranty of suitable shipping condition remains applicable in this matter, we must now determine whether Respondent is precluded from using the results of the first three USDA inspections to determine whether the warranty was breached because Respondent has failed to provide Complainant with timely notice of the inspection results. There is a direct conflict in the testimony that was provided by Robert Rocha and Bill Slattery as to when Complainant received notice of the inspection results. We find the testimony of Mr. Rocha, that he was not advised by Mr. Slattery that the first three shipments had gone to New York City until November 12, 1996, to be more credible on this matter. Mr. Slattery testified that he talked to Mr. Rocha regarding both the diversions to New York, and the condition of the grapes upon delivery, on November 7, 1996, one day after he had received faxed copies of the three inspections that were done on the morning of November 6, 1996., and after he had spoken to the salesman at C.H. Robinson and the PACA Branch. He failed to confirm that he had provided such oral notification with a follow up letter, a common business practice that he followed after his telephone conversation with Mr. Rocha on November 12, 1996. He did not fax copies of the inspection reports to Complainant upon receipt. Although he also testified that he started to fax them, and received a telephone call from Mr. Rocha inquiring as to the reason for the interrupted fax transmission, we do not believe that such a telephone conversation would have occurred without a

⁷As a practical matter, establishing a dollar amount for such damages may prove to be difficult. Parties wishing to expressly exclude a specific location, to or exclude all locations other than a specified contract destination, while retaining the warranty of suitable shipping condition for an agreed contract destination, could so provide in writing on the transaction records adding that in case of a breach the agreed f.o.b. contract amount shall constitute liquidated damages.

follow up written transmission of information. The telephone records that have been produced are not persuasive since Complainant has established that there were numerous unrelated transactions between the parties that occurred shortly after the transactions that are the subject of this proceeding. We find that Complainant has established that it received only an unrelated fax respecting Navel orange prices from Respondent at about the time and date that Mr. Slattery testified that his broken off transmittal of the first three inspection reports to Complainant had occurred (CX 2).

A shipper is entitled to receive timely notice of an inspection that does indicate abnormal deterioration and breach of warranty before a buyer can rely upon such inspection report.⁸ Even assuming that the oral notification of shipment diversion provided by Bill Slattery to Robert Rocha on November 12, 1996, contained an adequate disclosure of the condition defects set forth on the USDA inspection certificates, a conclusion that is strongly disputed by Mr. Rocha, it would clearly be untimely as to the three inspections conducted on the morning of November 6, 1996. The 420 lugs of Red Globe grapes included in the first shipment were resold to customers by L & P Fruit on November 7 and November 8, 1996. Some 980 lugs of the 1050 lugs of Red Globe grapes included in the second shipment were resold to customers by L & P Fruit on November 7. All 1820 lugs of Calmeria grapes included in the third shipment were resold to customers by L & P Fruit by the close of business on November 12, 1996. Notice received on November 12, 1996, was far too late to provide Complainant with any possibility of getting a reinspection. Considering the fact that Complainant had a federal-state inspection report that showed that this shipment of Calmeria grapes graded US No. 1 Table on November 1, 1996, the date they were shipped, it is highly likely that Complainant would have sought a reinspection if Respondent had provided Complainant with a copy of USDA Inspection Certificate K-248174-5 on November 6 or November 7, 1996.

The question of timely notice is less clear with respect to the fourth shipment which was

⁸ Failure to provide timely notice of breach will bar the buyer from any remedy under ' 2-607(3)(a) of the Uniform Commercial Code; see *Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994) (right to pursue appeal process established for USDA inspections).

inspected in New York at 7:10 a.m. EST on November 12, 1996. Bill Slattery's telephone call on the afternoon of November 12, 1996, which took place on Pacific time, was probably made too late to permit a reinspection before November 13, 1996, and L & P Fruit reported reselling 1240 lugs of the 1820 lugs of Calmeria grapes included in this shipment on November 12, 1996, and the balance on November 13, 1996 (DX 2(41)). The record does not establish the time of day when Respondent received the faxed inspection certificate from this fourth inspection. It would have gone first to Alanco Corp, as the named shipper, and probably gone from Alanco to one or more C.H. Robinson offices before being sent to Respondent's office. A copy of Inspection Certificate K-248815-3 was not faxed to Complainant upon its arrival at Respondent's office, and nobody present telephoned Complainant. Instead, a telephone call was made to Respondent's office manager, Bill Slattery, who was out of town on business. At some unspecified time during the afternoon of November 12, 1996, Bill Slattery telephoned Robert Rocha at Complainant's place of business. A copy of the actual inspection certificate itself was not faxed to Complainant until December 3, 1996. Even assuming that Bill Slattery orally provided Robert Rocha will full details of the results of this inspection at 12:01 p.m. Pacific time, which is the earliest possible "afternoon" time, it would have been at least 3:01 p.m. EST time before they started talking. Notice provided after more than half of the inspected commodity is resold and not available for an appeal reinspection is untimely. We conclude that Respondent failed to provide Complainant with timely notice of the results of this fourth inspection, and is barred from using this inspection to prove breach of the warranty of suitable shipping condition.

Since Respondent accepted the four loads of grapes, and has not proven any breach of contract on the part of Complainant, Respondent became liable to Complainant for the full purchase price of the four loads, or \$68,568.50. Respondent has paid Complainant \$23,456.25 as the undisputed amount involved in this reparation proceeding. Respondent's failure to pay Complainant the \$45,112.25 balance of the purchase price 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 (including any handling fee paid by the injured person or persons under section 6(a)(2)) 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). 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 part of each reparation award. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

In accordance with the applicable provisions of the Rules of Practice the parties each filed

claims for fees and expenses.⁹ Complainant as prevailing party is entitled to “reasonable fees and expenses incurred in connection with [the] hearing.” We have followed the standard court practice of multiplying the prevailing market rate by the number of hours expended unless the hours claimed are deemed excessive.¹⁰ In this case Complainant’s representative has claimed a total of \$3,239.02 in fees and expenses. The fees for representation break down to: (1) 9 hours at \$165.00 per hour for preparing for the oral hearing; (2) 3 hours at \$165.00 per hour for appearance the oral hearing; and (3) 4 hours at \$165.00 per hour for appearance at the deposition of Robert Rocha. The costs break down to: (1) \$278.00 for airfare; (2) \$84.75 in lodging expenses in Fresno, CA (1 night); (3) \$75.00 for meals (2 days); (4) \$45.27 for rental car; and (5) \$116.00 for the hearing transcript. We may not award the \$116.00 sought in costs for the hearing transcript. This is a post-hearing expense that is not recoverable. The balance of the fees and expenses claimed are found to be reasonable, resulting in an allowable award of \$3,123.02.

Order

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation, \$45,112.25 with interest thereon at the rate of 10 percent per annum from December 1, 1996, until paid. Respondent shall pay Complainant \$300.00 as additional reparation for the handling fee paid by Complainant.

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation for fees and expenses, \$3,123.02 with interest thereon at the rate of 10 percent per annum from the date of this Order, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

⁹7 C.F.R. § 47.19(d). The filing time was extended at the close of the hearing to permit the simultaneous submission of applications for fees and expenses with the filing of briefs.

¹⁰*Newbern Groves, Inc. v. C.H. Robinson Co., et al.*, 53 Agric. Dec. 1766, 1858 (1994); *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273 (1979).