

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

PACA Docket No. R-98-0020.

Order Denying Petition for Reconsideration filed February 22, 2001.

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

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

Eric Paul, Presiding Officer.

Order Denying Petition for Reconsideration issued by William G. Jenson, Judicial Officer.

Preliminary Statement

On December 4, 2000, a Decision and Order was issued awarding the Complainant in this reparation proceeding \$45,112.25 as reparation for four shipments of table grapes, plus \$300.00 for the PACA handling fee, and \$3,123.02 for fees and expenses incurred in connection with the oral hearing. Respondent filed a timely Petition for Reconsideration on December 22, 2000, before this Decision and Order became final. Respondent requests reconsideration of this Decision and Order only as to our determination that Respondent's notice of breach was untimely with respect to the fourth shipment of table grapes, which had an agreed invoice price of \$22,391.50 and a net proceeds payment of \$10,010.97, leaving \$12,380.53 in dispute. Respondent argues that it was not proper to determine that a notice of inspection results given on the same day on which the inspection was conducted was untimely without also requiring Complainant to show that it had requested an appeal inspection. For the reasons stated below, we find that Respondent's argument is without merit, and conclude that Respondent should be required to pay Complainant the reparation and interest specified in the Decision and Order issued on December 4, 2000.

The fourth shipment, consisting of 1820 lugs of Calmeria table grapes, arrived at the Hunts Point Terminal Market on November 11, 1996. The USDA inspection was performed at 7:10 a.m., on November 12, 1996, on 1800 lugs of these grapes which had been unloaded and were located at the time of the inspection on the premises of L&P Fruit Corp. The account of sales that L&P Fruit Corp. furnished to Alanco Corp. shows that 1160 cartons of the 1820 cartons received, some 63.7 percent of the total shipment, were sold to six customers of L&P Fruit on November 12, 1996 (DX 1 (41)). This accounting further shows that 659 of the remaining 660 lugs were sold to 12 customers of L&P Fruit on the following day, November 13, 1996, and that a single lug was donated to charity. Respondent's Petition for Reconsideration asserts that there is no evidence that the 1000 cases of grapes sold on November 12, 1996, had been

removed from the receiver's premises and were unavailable for inspection, and that there were still 800 cases of grapes that were unsold and available for reinspection on November 13, 1996. Respondent argues that without any attempt by the seller to obtain an immediate reinspection, it is impossible to say that a reinspection with evidentiary value could not have been conducted. Respondent requests that we reconsider and determine that in cases where there is notice given on the same day that an inspection is performed that the notice be accepted as timely unless an immediate reinspection is requested and could not be accomplished.

We find that the PACA does not place a general obligation upon shippers to immediately request an appeal inspection. Moreover, and perhaps more to the point, the law does not require actions that would be no more than an exercise in futility. The question that we will ask in cases of this kind is not "Did the shipper call for an appeal inspection?" but rather, "If the shipper had called for an appeal inspection immediately after receiving notice would an appeal inspection have been possible?" Complainant was well aware that produce firms doing business at terminal markets will normally open early and complete their daily business by about 11 a.m. It would be highly unusual for any produce sold to remain on the premises until the following day. The earliest possible Pacific time at which William Slattery could have informed Robert Rocha of the results of this inspection during their afternoon telephone call on November 12, 1996, 12:01 p.m., Pacific time, would have been 3:01 p.m. Eastern time. Therefore, Complainant had to know that even if it had immediately requested an appeal inspection that at least a full day's sales would have been completed before such an inspection could have been performed, and quite likely a substantial part of a second day's sales. We conclude that even if the Inspection Service had received a request for an appeal inspection, and had returned to the premises of L&P Fruit on the morning of November 13, 1996, that the inspector would have found no more than 660 lugs of grapes, or 36.3 percent of the shipment present. Paragraph 130 of the Appeal Inspection Procedures, which have been published by the Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, at page 49 of General Market Inspection Instructions, April 1998, provides that requests for Appeals should be denied "(3) When a large number of containers from the original (previous) manifest are not accessible for sampling or have been disposed of." There is no doubt that the sale of 1160 lugs of grapes on November 12, 1996, insured the absence of a sufficiently large number of containers in a 1820 lug shipment to preclude the conducting of an appeal inspection on November 13, 1996.

We conclude that Respondent has failed to present a valid basis for reversing our determination that Respondent's notice of the inspection results to Complainant for the fourth shipment was untimely, and that Respondent was entitled to be awarded, as reparation, the unpaid balance of the contract prices for all four of these shipments of table grapes, with

interest, handling fee, and fees and expenses incurred for the hearing.

Order

Respondent's Petition for Reconsideration is denied.

Within thirty days from the date of this Order Denying Petition for Reconsideration, Respondent shall pay to Complainant the amounts of reparation and interest required by the Order issued on December 4, 2000.

Copies of this Order shall be served upon the parties.
