

PROCACCI BROS SALES CORPORATION t/a PROCACCI MARKETING v. B T PRODUCE CO., INC.
PACA Docket No. R-01-0064.
Decision and Order filed April 12, 2001.

Evidence B Inference drawn from failure to follow normal practice and regulations.

Where shipper claimed a sale, and receiver claimed the produce was received on consignment, the failure of the shipper to prepare an invoice showing a sale was found to be contrary to normal practice, to contravene the Regulations, and to lend credence to the transaction having been one of consignment.

Jurisdiction B Time limitation on filing of complaint.

Complainant filed more than nine months after accrual of cause of action was timely when it came within special legislation extending time limit for claims alleging false inspections on Hunts Point Terminal Market.

Practice and Procedure B Necessary parties.

Neither the Secretary nor employees of the Secretary who performed fraudulent inspections of produce are necessary parties to reparation complaint against firm alleged to have procured fraudulent inspection.

Practice and Procedure B Conflict of interest.

No conflict of interest existed that would preclude the Secretary from adjudicating reparation complaint involving allegation that damage resulted to Complainant from fraudulent inspections performed by former Department employees.

Inspections, by inspector convicted of receiving bribes.

Where grapes were consigned to a firm whose employee subsequently pleaded guilty to paying bribes to federal inspectors to alter inspections, and where an inspector who pleaded guilty to receiving bribes to alter inspections issued an inspection certificate covering 500 cartons of grapes from the 1,280 carton consignment showing the 500 cartons were ready to be dumped, it was held that since the consignee could only profit from the resale, and not the dumping of the grapes, the inspection certificate was presumed to be valid.

Consignments B Breach of consignment contract.

Where consignee claimed damages from consignor because 500 cartons out of 1,280 cartons of consigned grapes had to be dumped, and there was no evidence that grapes were agreed to be of good quality, but consignee knew that there was a prior rejection of the load, it was held that no breach of the consignment contract had been proven.

Mark C.H. Mandell, Annandale, N.J., for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
George S. Whitten, 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 \$18,266.65 in connection with a transaction in interstate commerce involving a truck load of grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer also included a

counterclaim arising out of the same transaction as that in the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal complaint does not exceed \$30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. '47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Procacci Bros Sales Corporation is a corporation trading as Procacci Marketing Co., whose address is 3655 South Lawrence Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein Complainant was licensed under the Act.

2. Respondent, B T Produce Co., Inc., is a corporation whose address is 163 - 166 Row A, New York City Terminal Market, Bronx, NY. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about June 13, 1996, Complainant consigned to Respondent one truck load consisting of 1,280 cartons of bagged white perlette grapes. The load of grapes was shipped to Respondent on June 13, 1996, after having been rejected by Complainant's customer.

4. On June 27, 1996, at 5:30 a.m., 500 cartons of the grapes were federally inspected at the place of business of Respondent on the Hunts Point Market, Bronx, N.Y., with the following results in relevant part:

LOT: A

TEMPERATURES: 37 to 38°F

PRODUCT: Table Grapes

BRAND/MARKINGS: "Bloss" Perlette 18 lbs bagged

ORIGINS: CA

LOT ID.: 523-k34

NUMBER OF CONTAINERS: 250 Cartons

INSP. COUNT: N

LOT: B

TEMPERATURES: 36 to 38F

PRODUCT: Table Grapes

BRAND/MARKINGS: "Peter Rabbit" 18lbs Perlette bagged

ORIGINS: CA

LOT ID.: 523-k12

NUMBER OF CONTAINERS:

INSP. COUNT:

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L O T	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	100%	100%	%	Decay advanced and nested	
	100%	100%	%	Checksum	
B	21%	21%	%	Wet and Sticky berries (17 to 25%)	
	12%	00%	%	Shattered berries. (11 to 14%)	
	50%	50%	%	Decay (42 to 61%) advanced and nested	
	83%	71%	%	Checksum	

GRADE:

REMARKS: Applicant States above lots to be dumped.

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Inspector's Signature: [MICHAEL TSAMIS]

5. On July 23, 1996, Respondent sent Complainant payment by check in the amount of \$8,704.00. Complainant accepted and deposited the check. Respondent's accounting showed a breakdown of sales by lot, with gross proceeds in the total amount \$10,931.00. Expenses were shown as \$200.00 for dumping, \$20.00 terminal charge, \$50.00 unloading, \$320.00 handling charge, and a 15 percent commission in the amount of \$1,639.65. Net proceeds were shown as \$8,701.35.

6. The informal complaint was filed on May 23, 2000, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

Complainant asserts that the load of grapes was sold to Respondent on a price after sale basis. Respondent denies this assertion, and claims that the grapes were consigned. It is customary for an invoice to be issued when perishables are sold. In fact, the Regulations require that a dealer "prepare . . . memoranda . . . which shall fully and correctly disclose all transactions involved in his business."¹ This includes "memorandums of sale . . ."² The only memorandum prepared by Complainant as to this transaction was an invoice dated July 10, 1996, almost a month after shipment, for \$8,704.00. This was merely an acknowledgment and acquiescence in Respondent's resales of the grapes. Complainant's failure to prepare an invoice, as would have been both normal and required if the transaction had been one of purchase and sale, lends credence to Respondent's contention that the transaction was one of consignment. We find that Respondent has proven by a preponderance of the evidence that the load was consigned.

In spite of the above conclusions, the essential basis of Complainant's claim herein does not depend upon the transaction having been one of purchase and sale.³ Complainant asserts that the worth of the grapes was \$26,240.00 and that due to a false inspection it

¹7 C.F.R. ' 46.14(a).

²7 C.F.R. ' 46.15

³See *Ronnie Carmack v. Delbert E. Selvidge*, 51 Agric. Dec. 892 (1992); *B. G. Sales v. Sin-Son Produce Co., Inc.*, 43 Agric. Dec. 1991 (1984); and *Coastal Produce Co. v. Joe Perrone & Co.*, 8 Agric. Dec. 1050 (1949).

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was induced to accept the lesser sum of \$8,704.00.⁴ Against this claim Respondent offers several defenses. First, Respondent asserts that the complaint is time barred because it was not filed within nine months after the cause of action accrued. This assertion was made prior to the passage of the amendment to section 6(a)(1) of the Act, which provides that:

⁴The inspection was performed by Michael Tsamis, a federal fruit and vegetable inspector who pleaded guilty to accepting bribes to alter federal inspections, and the inspection was performed at the request of B. T. Produce, a firm whose employee, William Taubenfeld, pleaded guilty to paying bribes to federal inspectors to alter federal inspections.

Notwithstanding section 6(a)(1) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f(a)(1)), a person that desires to file a complaint under section 6 of that Act involving the allegation of a false inspection certificate prepared by a grader of the Department of Agriculture at Hunts Point Terminal Market, Bronx, New York, prior to October 27, 1999, may file the complaint not later than January 1, 2001.⁵

Accordingly, Respondent's defense on the basis of untimely filing is without foundation.

Respondent also asserts that since Complainant's "damages arise from Respondent's obtaining 'a false USDA inspection'," the Secretary is a necessary party to this action through its agents or employees. Respondent asserts that although such employees performed the allegedly fraudulent inspections which were the causes of Complainant's damages, they are not commission merchants, dealers, or brokers, and were not licensed under the Act, and cannot be joined as parties in this reparation action because the Secretary lacks subject matter jurisdiction over them. Respondent is in error in the overall thrust of these assertions. Neither the Secretary, nor its employees, is a necessary party to this proceeding. Complete justice can be done as regards the claim brought by Complainant against Respondent in this forum. Other forums are open for any allegations Respondent may have against those who perpetrated the alleged fraud, and their presence here, as parties, is not necessary to the resolution of this matter.

Respondent additionally contends that the Secretary of Agriculture "must recuse and/or abstain from ruling or considering the Complaint due to a conflict of interest, and or a direct financial interest in the outcome of this matter." However, Respondent has shown no direct, or indirect, financial interest by this Department in the outcome of this matter. Furthermore, even if the Department did have such a financial interest that would not be a cause for the Secretary to refuse to decide this matter. Federal agencies, including this Department, continually adjudicate tort claims made against themselves, just as the courts of the United States continually adjudicate claims against the United States.

We come now to the merits of Complainant's claim. Complainant consigned the grapes to Respondent after they had been rejected by another customer. Complainant asserts that the rejection was due to untimely delivery, but offered no evidence to bolster this contention. Respondent assumes that the rejection was due to the condition of the grapes. The consignment of the grapes lends some minimal credence to this assumption. However, it is not necessary that we decide this issue. The grapes remained the property of Complainant while they were in the hands of Respondent. Respondent's profit was directly dependant upon the realization of as high a price as possible for the grapes. As Respondent's counterclaim makes clear, the dumping of a portion of the grapes lessened the profit which would otherwise have been realized from the sale of the grapes. Complainant has shown no motive for Respondent to have bribed the federal inspector to issue what was essentially a dump certificate in a consignment transaction. We presume, therefore, that the inspection certificate is valid. The complaint should be dismissed.

Respondent's counterclaim is based upon the contention that by shipping grapes which were in poor condition so that 500 out of an original 1,280 cartons had to be dumped, Complainant deprived Respondent of the commission it would have normally made on the cartons that were dumped. However, there is no evidence that the consignment agreement between Complainant and Respondent required the grapes to be of any particular quality or condition. In fact, Respondent points to the fact of the prior rejection of the grapes as implicit evidence that the grapes were in poor condition. We conclude that the poor condition of the grapes was an implicit aspect of the consignment agreement, and that such agreement was not breached by Complainant. The counterclaim should be dismissed.

Order

The complaint is dismissed.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

⁵Grain Standards and Warehouse Improvement Act of 2000, Pub. L. No. 106-472, ' 309, 114 Stat 2058 (November 9, 2000).