

PACIFIC TOMATO GROWERS, LTD. v. B. T. PRODUCE CO., INC.
PACA Docket No. R-01-0095.
Decision and Order filed May 23, 2001.

Contracts B Privity.

Where a reparation action was brought against a produce receiver involved in bribery of federal inspectors on the Hunts Point Market instead of against the firm that purchased the produce from Complainant, and negotiated an adjustment with Complainant, it was held that there was no privity of contract between Complainant and Respondent, and no jurisdiction under the Act.

Mike D. Bess, Orlando, FL., for Complainant.

Mark C.H. Mandell, Annandale, NJ., 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 \$10,690.00 in connection with transactions in interstate commerce involving five lots of tomatoes.

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.

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, Pacific Tomato Growers, LTD, is a corporation whose address is P. O. Box 866, Palmetto, Florida.

2. Respondent, B. T. Tomato Co., Inc., is a corporation whose address is New York City Terminal Market, Row A, Units 163-168, Bronx, New York. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about October 10, 1997, through April 28, 1998, Complainant sold and shipped to Southeast Tomato Distributors, Palmetto, Florida, five truck lots of tomatoes with f.o.b. prices totaling \$50,517.50. Southeast Tomato Distributors sold the loads to Respondent, and diverted them to Respondent on the Hunts Point Market.

4. As a result of inspections performed by federal inspectors who subsequently pleaded guilty to accepting bribes to falsify inspections, Complainant agreed to contract modifications which called for it to accept less than the original contract price for the five lots of tomatoes. William Taubenfield, an employee of Respondent, pleaded guilty to bribery of a federal inspector.

5. 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 brings this action to recover adjustments granted to Southeast Tomato Distributors on five lots of tomatoes sold to that firm, and diverted and sold by that firm to its customer, Respondent herein. The tomatoes were not sold by Complainant to Respondent, and there is absolutely no privity of contract between the parties to this litigation. Although Complainant advanced no reason why it should be allowed to recover against a party with which it had no contractual relationship, we will explore one basis upon which recovery might be thought to rest apart from that relationship. Section 5 of the Act provides:

If any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages (including any handling fee paid by the injured person or persons under section 499f(a)(2) of this title) sustained in consequence of such violation.

At first blush, it would seem that since the alleged bribery activity of Respondent injured Complainant, Complainant should be able to seek damages directly from Respondent even though Complainant had no contractual connection with Respondent. However, this overlooks important and pivotal considerations. First,

there can be no violation of section 2 unless the unlawfulness delineated in section 2 is in connection with interstate or foreign commerce *transactions*.¹ The question is, therefore, were Complainant and Respondent involved in the type of *transaction* with each other that is contemplated by section 2 of the Act? All of the section 2 violations involve transactions with commission merchants, dealers, or brokers.² A commission merchant is “any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another.”³ A dealer is “any person engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agricultural commodity in interstate or foreign commerce . . .”⁴ And, a broker is “any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively . . .”⁵ It is obvious that the type of transactions intended are commercial consignment, brokerage, or purchase and sale transactions.⁶ In these type transactions there is always an underlying contract.⁷ Thus, the unlawfulness delineated in section 2 is intended to be in connection with contractual transactions. A transaction under the Act contemplates an action, or intended action, whereby produce is transferred from

¹Section 2 begins with the words: “It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:”

²Each of the seven subsections of section 2 begins with a continuation of the language quoted in footnote 2 in which the delineated unlawful activities are limited to commission merchants, dealers, and/or brokers.

³Section 1(5) of the Act. 7 U.S.C. 499a(5).

⁴Section 1(6) of the Act. 7 U.S.C. 499a(6).

⁵Section 1(7) of the Act. 7 U.S.C. 499a(7).

⁶“The term ‘interstate or foreign commerce’ means *commerce* . . .” (emphasis supplied). Section 1(3) of the Act. 7 U.S.C. 499a(3).

⁷A perishable transaction is required by the Act to be considered in interstate or foreign commerce if it is “part of the current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, *after purchase*, in another, . . .” (emphasis supplied). Section 1(8) of the Act. 7 U.S.C. 499a(8).

one party to another. The parties involved in the transfer, or intended transfer, are involved in the transaction, and the unlawfulness contemplated by the relevant portions of section 2 is relative to the other party with whom the transaction is conducted. This is clear from the broad language of section 2 which forms the basis of most reparation liability:

. . . to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any *undertaking* in connection with any such transaction; . . . (emphasis supplied)⁸

There must have been a failure to perform a duty arising out of an *undertaking* in connection with a covered transaction. A tort can be, and often is, committed without any allied “undertaking.” In contrast, an “undertaking” always implies contract. Contractual obligation requires privity.⁹ We conclude that the Secretary has no jurisdiction under the Act to adjudicate the complaint against Respondent, and that Respondent was incorrectly joined as a party to this proceeding. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

⁸Section 2(4) of the Act. 7 U.S.C. 499b(4).

⁹See *Magic Valley Produce, Inc. v. National Produce Distributors, Inc., and/or Eastern Idaho Packing Corp.*, 24 Agric. Dec. 1117 (1965).