

PACIFIC TOMATO GROWERS, LTD. v. AMERICAN BANANA CO., INC.
PACA Docket No. R-00-176.
Decision and Order filed June 14, 2001.

Accord and Satisfaction S Return of payment.

Under UCC ' 3-311 the return within 90 days of an amount paid in full satisfaction of a claim disputed in good faith precludes the discharge of the claim unless the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Federal inspections S Credibility.

Where an inspection of a shipment of tomatoes on the Hunts Point Market was performed by an inspector who pleaded guilty to accepting bribes for the falsification of inspection certificates, and an employee of the purchasing firm was indicted for bribery of federal inspectors, but acquitted, it was held that Complainant had failed to prove by a preponderance of the evidence that the employee participated in the bribery, and it was presumed, in the absence of the motive of a bribe, that the inspector would have inspected the tomatoes in the normal fashion.

F.o.b., Suitable Shipping Condition S Normality of transportation.

Where tomatoes were packed in the field and not pre-cooled, it was found that the failure of the refrigeration equipment to bring the temperature down to the temperature specified on the bill of lading did not constitute abnormal transportation. A transit period of three and one-half to four days was held to be abnormal where the usual transit period was one and one-half to two days. However, under the judicial exception to the abnormal transportation rule, the seller was found to have breached the contract.

Mike D. Bess, Orlando, FL., for Complainant.
Respondent, Pro se.
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 \$9,864.00 in connection with a transaction in interstate commerce involving 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 defaulted in the filing of an answer. Within the time allowed Respondent filed a petition to reopen after default together with a proposed answer denying liability to Complainant. The motion and proposed answer were served on Complainant, which objected to the granting of the motion. On March 8, 2000, Respondent's motion was granted, and the proceeding was reopened.

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, American Banana Co., Inc., is a corporation whose address is 250 Coster Street, Bronx, New York. At the time of the transaction involved herein Respondent was licensed under the Act.
3. On or about November 12, 1998, Complainant sold to Respondent, and shipped from loading point in Palmetto, Florida to Respondent in Bronx, New York, one truck load containing 1,440 25 pound cartons of Field Pink vine ripe extra large tomatoes at \$11.00 per box, plus a \$.85 handling charge, or \$17,064.00, f.o.b.
4. The contract was negotiated through a broker, Brad Bolton.
5. Following arrival of the tomatoes at the place of business of Respondent the load of tomatoes was federally inspected on November 16, 1998, at 9:40 a.m., while still on the truck. The certificate of inspection stated in relevant part as follows:

LOT: A
 TEMPERATURES: 68 to 72°F
 PRODUCT: Tomatoes
 BRAND/MARKINGS: "USA" N.W. 25 lb., 5x6
 ORIGINS: FL
 LOT ID.: See Remarks
 NUMBER OF CONTAINERS: 1440 Cartons
 INSP. COUNT: Y

I C T	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	08%	08%	08%	Soft (0 to 16%)	Average approximately 80% light red and red color.
	06%	00%	00%	Sunken Discolored Areas (0 to 12%)	
	12%	12%	12%	Decay (2 to 31%)	Decay - mostly early to moderate, many advanced stages
	26%	20%	20%	Checksum	

In the process of being unloaded by applicant at time of inspection
 REMARKS: USDA Federal State Inspected Fl. Many 760363 - C 005, Some 611113 C005, Some None, Few partly illegible, few illegible

6. On November 25, 1998, Respondent issued a check to Complainant in the amount of \$7,200.00. On the face of the check the following was hand printed: "AAs per Brad Bolton payment in full for 1440 tomatoes recv'd 11/16/98"
7. On February 3, 1999, Complainant purchased an official bank check in the amount of \$7,200.00, and sent it to Respondent as a refund of the November 25, 1998 check. However, the check was returned to Complainant by Respondent.
8. The informal complaint was filed on March 1, 1999, which was within nine months after the cause of action herein accrued.

Conclusions

Respondent alleged that a copy of the inspection was promptly faxed to Complainant. Complainant did not deny receiving this notice. Respondent also asserted that, since there was a dispute between the parties, Complainant's cashing of the November 25, 1998 check marked "payment in full" accomplished an accord and satisfaction. Complainant, however, has shown that on February 3, 1999, it purchased a bank check made out to Respondent in the same amount as the full payment check, and sent it to Respondent. Although Respondent promptly returned the check, Complainant points to section 3-311(c)(2) of the Uniform Commercial Code as negating an accord because of the return of the check. Section 3-311 provides, in relevant part, as follows:

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

....

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Respondent has shown compliance with all the elements of paragraph (a). Except that paragraph (b) is subject to paragraph (c), Respondent has shown compliance with paragraph (b). However, Complainant has shown compliance with paragraph (c)(2) except that paragraph (c) is subject to paragraph (d). Respondent, in its earliest communication with the Department during the informal stages of this proceeding stated that the tomatoes were "ordered through Brod Bolton, the broker on the transaction, and Tony Hale, Pacific's salesman." Tony Hale, in the opening statement, affirmed that the contract was negotiated through the broker, Brod Bolton, and stated that:

American Banana obtained a USDA inspection (ROI ex. 3A) and submitted a \$7,200 check marked "payment in full per Brod Bolton", while I was away on vacation. (ROI ex. 3D). The check was inadvertently deposited in my absence. When I returned from vacation I saw what had happened and did not accept their return.

Respondent's secretary, George Contos, stated in Respondent's answering statement that:

Contrary to Mr. Hale's statement, I spoke to him in a conference call with the broker to discuss the condition of the tomatoes and the results of the inspection. He acknowledged the problems and asked AB to handle the load for Pacific's account and to do the best under the circumstances. He was fully aware of the \$7,200 settlement

that was sent to him only 10 days after AB received the tomatoes.

In the statement in reply Mr. Hale responded:

Mr. Contos stated in paragraph 2 that I spoke with him in a conference call about these tomatoes. As I stated in my opening statement, I did not speak with Mr. Contos after the tomatoes were purchased. He obviously negotiated with his broker, as the check is marked "paid in full per Brod Bolton."

It is clear that Respondent has not shown that the conditions set forth in paragraph (d) were met. Accordingly, the return of the check within three months under paragraph (c)(2) was effective to negate the attempted accord. We find that there has been no accord and satisfaction of Complainant's claim against Respondent.

Complainant asserts that Respondent has not shown a breach of contract because the inspection upon which Respondent relies to show a breach was performed by a federal inspector who pleaded guilty to accepting bribes to downgrade produce, and that American Banana was indicted for paying bribes to USDA inspectors. While it is certainly true that the inspector who performed the inspection involved herein pleaded guilty to accepting bribes to downgrade produce, it is not true that American Banana was ever indicted. An employee of American Banana was indicted, and pleaded not guilty to the charge. This employee was subsequently tried and acquitted. Complainant, however, argues that the acquittal was in a criminal trial where the standard is proof beyond a reasonable doubt, and the evidence adduced at the trial nevertheless met the standard of proof by a preponderance of the evidence that obtains in civil trials, and in reparation proceedings. Complainant attached a few pages of the criminal trial transcript to its brief in an attempt to buttress this argument. Neither the brief, nor the attachments, are in evidence in this proceeding. According to the examiner's report (see 7 C.F.R. ' 47.19(c)), the Presiding Officer read the entire transcript of the criminal trial, and was not convinced that it demonstrated bribery on the part of the American Banana employee even using the preponderance of the evidence standard. We must, therefore, conclude that Complainant has failed to show by a preponderance of the evidence herein that American Banana's employee participated in the bribery of the inspector. It is presumed that, absent the motive of a bribe, the inspector would have inspected produce in the normal fashion. We find that the results of the federal inspection must be considered.

The contract of sale included f.o.b. terms. The Regulations,¹ 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 defined,² 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 conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

¹7 C.F.R. ' 46.43(i).

²7 C.F.R. ' 46.43(j).

The suitable shipping condition provisions of the Regulations³ which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery,"⁴ are based upon case law predating the adoption of the Regulations.⁵ 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 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. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.⁶ This is true because under the f.o.b. terms the grade description applies only at

³7 C.F.R. ' 46.43(j).

⁴7 C.F.R. ' 46.44.

⁵See Williston, *Sales* ' 245 (rev. ed. 1948).

⁶See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v.*

shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination.⁷ If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined.⁸

Robinson & Gentile, 10 Agric. Dec. 968 (1951).

⁷As an illustration, the United States Standards for Grades of Lettuce (7 C.F.R. ' 51.2510 *et seq.*) allow lettuce to grade U.S. No. 1 with 1 percent decay at shipping point or 3 percent decay at destination. The good delivery standards, however, allow an additional “2 percent decay . . . in excess of the destination tolerances provided . . . in the U.S. Standards for Grades of Lettuce.” Thus lettuce sold as U.S. No. 1, f.o.b., could have 4 percent decay at destination and therefore fail to grade U.S. No. 1, but nevertheless make good delivery since the amount of decay would not exceed the total of 5 percent allowed by the good delivery standards. Of course, in the case of other commodities for which specific good delivery standards have not been promulgated, the concept of good delivery allows a similar expansion of any destination grade tolerances under the judicial determination of good delivery. See cases cited at note 6, *supra*.

⁸See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

The warranty of suitable shipping condition is made applicable only when transportation services and conditions are normal. It is well established 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 conditions were normal.⁹

Complainant asserts that the 68 to 72 degree temperatures disclosed by the arrival inspection are much higher than the 55 degrees which it instructed the carrier to maintain on the bill of lading. This is correct. However, it is not indicative of abnormal transportation. The refrigeration equipment used on the trucks that transport produce is typically able only to maintain the temperature of the commodity. The subject tomatoes were packed in the field, and were not precooled. If the tomatoes were loaded on the truck at 70 degrees, which is not unlikely considering the region from which they were shipped, the refrigeration equipment would not likely have lowered the temperature of the tomatoes even if the air produced by the equipment was at 55 degrees.

According to Respondent the load was received on November 16, 1998, and the inspection was taken on the same morning. Shipment was on November 12, from Palmetto, Florida. Palmetto is near Sarasota, approximately half way down the peninsula, and on the western shore. It is approximately 1,200 miles from the New York destination, and is thus a one and one-half to two day trip by truck. An arrival on the fourth morning after shipment is approximately double the transit time which we would consider normal. Accordingly, we find that transportation service was abnormal.

This finding, however, does not automatically mean that the warranty of suitable shipping condition is voided. A judicial exception to the requirement that transportation be normal in order for the warranty to apply has been long recognized. This exception allows a buyer to prove a breach of the seller's warranty of suitable shipping condition, in spite of the presence of abnormal transportation, if the nature of the damage found at destination is such as could not have been caused or aggravated by the faulty transportation service. The exception was explained in *Anonymous*, 12 Agric. Dec. 694 (1953) as follows:

It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal

The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.

⁹*Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (1981); *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980).

Since this is the rationale of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by, or aggravated by, the faulty transportation service. The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal.¹⁰

The inspection disclosed the presence of 8 percent soft with a range up to 16 percent, 6 percent sunken discolored areas with a range up to 12 percent, and 12 percent decay with a range up to 31 percent. The total condition defects were 26 percent, with 20 percent being soft and/or decayed. We would allow a maximum of 6 to 7 percent soft and/or decayed tomatoes under the suitable shipping condition warranty for a 2 day transit period. The subject tomatoes exceeded this by approximately three times. We are confident that these tomatoes would not have met the 6 to 7 percent soft and/or decay limit even if they had arrived two days earlier. Accordingly, we find that Complainant breached the contract of sale.

¹⁰See *Sanbon Packing Co. v. Spada Distributing Co., Inc.*, 28 Agric. Dec. 230 (1969).

Under UCC section 2-714(2), the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the produce accepted and the value it would have had if it had been as warranted, unless special circumstances show proximate damages of a different amount. Respondent had the burden of proving its damages. The best method of ascertaining the value the produce would have had if it had been as warranted is to use the average price for the commodity at time and place of arrival, as shown by Market News Service Reports.¹¹ Respondent did not submit any reports into evidence, however, we commonly consult market reports in an effort to ascertain damages. Applicable market reports for New York, New York, on November 16, and 17, do not show any sales for extra large vine ripe tomatoes from Florida. As an alternative to use of market reports we can use the delivered price of the commodity, i.e. the f.o.b. price plus freight.¹² Nowhere in the record do the parties disclose the freight rate that was applicable to this shipment of tomatoes. However the Market News Branch publishes freight rates for selected shipping areas. The freight rate for trucks carrying tomatoes from central Florida to New York was \$1,500 to \$1,760 on November 17, 1998, which is the only available date near the November 12, 1998, shipping date for the subject tomatoes.¹³ Since the shipping point for the summary is not the exact point from which the subject load was shipped, and since any uncertainty should disadvantage the party which had the burden of proof, but failed to submit evidence, we will use the lower of these rates, or \$1,500. The per carton freight rate for the 1,440 cartons contained on the subject shipment was, therefore, \$1.04. We conclude that the value of the tomatoes if they had been as warranted was the \$11.85 per carton f.o.b. cost, plus freight at \$1.04 per carton, or \$12.89.

The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale.¹⁴ However, Respondent did not submit an accounting of the resale of the tomatoes. Absent an accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection.¹⁵

¹¹*Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990).

¹²*Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983).

¹³See Fruit and Vegetable Truck Rate Summary for 1998, p. 9, published by the Market News Branch of the Fruit & Vegetable Division of the Agricultural Marketing Service of this Department.

¹⁴*R. F. Taplett Fruit & Cold Storage Co. v. Chinnok Marketing Co. et al.*, 39 Agric. Dec. 1537 (1980).

¹⁵*South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, PACA Docket No. R-92-83, decided

Applying the 26 percent condition defects to the delivered cost of this load, or \$12.89, gives us \$3.35 as Respondent's damages. Respondent's damages for the entire load were \$4,824.00.

Since Respondent accepted the load it became liable for the original contract price of \$17,084.00, less its damages of \$4,824.00, or \$12,260.00. Respondent has already paid Complainant \$7,200.00 of this amount, which leaves \$5,060.00 still owing from Respondent to Complainant. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

January 21, 1993, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

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 sustained in consequence of such violations." Such damages include interest.¹⁶ 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 a part of each reparation award.¹⁷ We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a \$300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$5,060.00, with interest thereon at the rate of 10% per annum from December 1, 1998, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

¹⁶*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

¹⁷See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).