

SPENCER FRUIT COMPANY v. L & M COMPANIES, INC.
PACA Docket No. R-01-0023.
Decision and Order.
Filed July 3, 2001.

Contracts — Mistake

Federal inspections – credibility rebutted by bribery of federal inspectors

Burden of proof – not met where federal inspections found unconvincing due to bribery of inspectors

Complainant sold a load of grapes to Respondent, and Respondent sold the load to a firm on the Hunts Point Terminal Market whose employee later pleaded guilty to bribing federal inspectors. On the basis of inspections performed by inspectors who later pleaded guilty to accepting bribes, contract modifications were negotiated by the Hunts Point firm with Respondent, and by Respondent with Complainant. It was held that the modifications negotiated between Complainant and Respondent were based upon a mutual mistake of fact, and were voidable by Complainant.

Under the original f.o.b. contract the Respondent who accepted the grapes had the burden of proving a breach on the part of Complainant. Although under the Act federal inspections are prima facie evidence of the truth of the statements recorded therein, it was held that such prima facie evidence is rebuttable, and that the credibility of the inspections was rebutted by the guilty pleas of the inspectors coupled with the implication of the buyer in the bribery of inspectors. It was found that the federal inspections were unconvincing, and that the Respondent failed to prove a breach of contract. The Complainant was awarded the original contract price that was based on inspections by inspectors who pleaded guilty to accepting bribes.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Louis W. Diess, III, for Respondent.

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 \$16,540.50 in connection with transactions in interstate commerce involving two truckloads 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.

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 did not file an opening statement, Respondent filed an answering statement, and Complainant did not file a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Spencer Fruit Company, is a partnership composed of Spencer Fruit Company Investors, LP, and Far Western Securities Company. Complainant's address is P. O. Box 1246, Reedly, California.

2. Respondent, L & M Companies, Inc., is a corporation doing business as L & M West Coast, whose address is 2925 Huntleigh Dr., Suite 204, Raleigh, North Carolina. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 17, 1998, Complainant sold to Respondent, 540 cartons of Pride and Joy brand Flame grapes at \$8.00 per carton, or \$4,320.00, and 900 cartons of Sun Star brand Thompson Seedless grapes at \$7.00 per carton, or \$6,300.00, plus \$1.50 per carton for cooling and palletizing, or \$2,160.00, plus \$10.00 for an air bag, and \$23.50 for a temperature recorder, less a shipper discount of \$.25 per carton, or \$260.00, or a total for the load of \$12,453.50, f.o.b.

4. Respondent resold the load to Johnson Associated Fruit Company, Inc., in Rockaway, New Jersey, and Johnson Associated Fruit Company, Inc. resold the load to Jacobson Produce in Bronx, New York.

5. On or about September 17, 1998, Complainant shipped the load of grapes to Respondent in New York, New York. Following arrival of the load of grapes at the place of business of Jacobson Produce the grapes were federally inspected on September 23, 1998, after unloading from the truck, with the following results in relevant part:

LOT: A
TEMPERATURES: 35 to 37°F
PRODUCT: Table Grapes
BRAND/MARKINGS: "Sun Star" 19 lbs. TH. SDLSS
ORIGINS: CA
LOT ID.: 820-362
NUMBER OF CONTAINERS: 90?
INSP. COUNT: ?

LOT: B
TEMPERATURES: 36 to 37°F
PRODUCT: Table Grapes
BRAND/MARKINGS: "Pride & Joy" 19 lbs. A. SDLSS
ORIGINS: CA
LOT ID.:
NUMBER OF CONTAINERS: 5??
INSP. COUNT: ?

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	00 %	%	Shattered berries (8 to 16%).	
	04 %	00 %	%	Sunken and Shriveled Cap stems	
	04 %	00 %	%	Brown discoloration	
	02 %	02 %	%	Wet and Sticky berries	
	01 %	01 %	%	Crushed and Split berries	
	1/2%	1/2%	%	Decay	
	23 %	03 %	%	Checksum	
B	14 %	00 %	%	Shriveled berries (5 to 21%)	
	09 %	00 %	%	Shattered berries (8 to 11%)	
	03 %	03 %	%	Wet and Sticky berries	
	01 %	01 %	%	Crushed and Split berries	
	01 %	01 %	%	Decay	
	28 %	05 %	00 %	Checksum	

GRADE:

...

Inspector's Signature [Michael Tsamis]

6. On the basis of the inspection Respondent negotiated an adjustment with Complainant in the amount of \$9,033.00, and remitted a balance of \$3,420.50.

7. On or about November 10, 1998, Complainant sold to Respondent, 2,002 cartons of Sun Star brand Red Globe grapes at \$7.00 per carton, or \$14,014.00, plus cooling and palletizing at \$1.50 per carton, or \$3,003.00, and a temperature recorder at \$23.50, less a shipper discount of \$.25 per carton, or \$500.50, or a total of \$16,540.00, f.o.b.

8. Respondent resold the load to Jacobson Produce in Bronx, New York.

9. On or about November 10, 1998, Complainant shipped the load of grapes to Respondent in New York, New York. Following arrival of the load of grapes at the place of business of Jacobson Produce the grapes were federally inspected on November 12, 1998, at 9:15 a.m., while still loaded on the truck, with the following results in relevant part:

LOT: A

TEMPERATURES: 36 to 38°F

PRODUCT: table grapes

BRAND/MARKINGS: "Sunstar" Red Globe, 19 lbs n/wt

ORIGINS: CA

LOT ID.: 919-361, 362

NUMBER OF CONTAINERS: 2000 lugs
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	12 %	12 %	%	Wet and sticky (0 to 45%)	Decay Early to moderate some advance stages
	01 %	01 %	%	Torn around capstem	
	04 %	04 %	%	Decay (- 1/2 to 16%)	
	17 %	17 %	%	Checksum	

GRADE:

REMARKS: inspected During process of unloading

...

Inspector's Signature: [Edmond Esposito]

10. On the basis of the inspection Respondent negotiated an adjustment with Complainant in the amount of \$7,507.50 and remitted a balance of \$9,032.50.

11. Two employees of Jacobson Produce, Lawrence Gisser and John Tucci, pleaded guilty to the bribing of federal fruit and vegetable inspectors to secure the falsification of federal inspections. The two inspectors, Michael Tsamis and Edmond Esposito, who inspected the two loads of produce involved in this proceeding pleaded guilty to taking bribes to falsify federal inspections of fruit and vegetables.

12. The informal complaint was filed on December 9, 1999, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

The background to this proceeding involves the joint investigation by the Department's Office of the Inspector General, and the F.B.I., known as Operation Forbidden Fruit. As a consequence of the investigation nine USDA fruit and vegetable inspectors were arrested in October of 1999 for taking bribes from employees of various produce firms on the Hunts Point Terminal Market, Bronx, New York. Eight of the inspectors have pleaded guilty in Federal Court to the acceptance of bribes, and the remaining inspector is a cooperating witness who agreed to plead guilty, and has testified in open court as to his guilt. Fifteen employees of fourteen produce firms were implicated in the investigation. One of the employees of one of the produce firms has been acquitted, one has been convicted in a jury trial, and two employees of one firm are unindicted cooperating

witnesses. In all, twelve employees of Hunts Point firms have either been convicted of, or pleaded guilty to, the bribery of a public official.

Complainant seeks to recover the amounts of the adjustments which it granted to Respondent on the two loads of grapes, and states that the "balance is due to federal inspections done by fraudulent federal inspectors." Implicit in Complainant's claim is the contention that these adjustments, which were granted because of the problems shown by the inspections performed on arrival at Jacobson Produce, would not have been made had Complainant known that the receiving firm had been involved in the bribery of the inspectors that inspected the grapes that were the subject of the adjustment. There is no contention that Respondent had any knowledge, at the time of the negotiation of the adjustments, of the involvement in the bribery by the employees of Jacobson or by the federal inspectors. In essence Complainant is contending that the adjustments were based upon a mutual mistake of fact.

The Restatement (Second) of Contracts, section 152, states that:

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution or otherwise.

There has been no relief granted to Complainant such as is referred to in paragraph (2) above, and it is clear that Complainant does not bear the risk of the mistake under the rule stated in section 154. That section states:

A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

First, as to clause (a), the risk of the mistake was not allocated to Complainant by any agreement between the parties. Second, as to clause (b), it is clear that

Complainant was not aware, at the time the adjustments were made, that he had only limited knowledge with respect to the integrity of the federal inspections. The general limited knowledge that all people share is not in view here. Instead, what is meant by clause (b) is awareness of a specific area of limited knowledge, coupled with a determination to treat that area of limited knowledge as unimportant for purposes of the contract. As we have pointed out:

Any belief that is not in accord with the facts must *always* be due to limited knowledge. If § 154(b) had in view that general awareness of limited knowledge which all reflective humans possess, all parties would always bear the risk of their mistake under §§ 152 and 153 and there would be no law relating to mistake.¹

And third, as to clause (c) there is nothing in the circumstances of this case that would make it reasonable to allocate the risk of the mistake to Complainant.

Complainant made the adjustments because the federal inspections indicated that Complainant had breached the contract of sale. A basic assumption on which Complainant made the adjustments was the integrity of the federal inspection process applicable to produce inspected at Jacobson Produce. Clearly, if Complainant had known that employees of Jacobson Produce had bribed federal inspectors, and that the very inspectors who inspected the subject grapes were guilty of accepting bribes to falsify inspections, Complainant would not have been willing to rely upon the inspections performed by those inspectors as a basis for adjusting the contract of sale. There is no reason to believe that Respondent was any more aware of these factors than was Complainant. We conclude that Complainant and Respondent, in agreeing to the adjustments, made a mistake as to a basic assumption on which the adjustments were made. The contract modification is voidable at Complainant's option, and Complaint seeks to avoid the modification by its action herein. We conclude that the modifications should be set aside.

The two loads of grapes were accepted by Respondent, and Respondent, therefore, became liable to Complainant for their full contract price, less any damages resulting from any breach of contract on the part of Complainant. Respondent had the burden of proving both a breach and damages.

The Act, section 14(a), provides in relevant part that:

. . . official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. 1 et seq.) as prima-facie evidence of the truth of the

¹ *Nalbandian Farms, Inc. v. McDonnell & Blankfard, Inc.*, 46 Agric. Dec. 674, at 682 (1987).

statements therein contained.

This provision is no more than the typical statutory exception to the hearsay rule which excludes documents apart the testimony of the person who wrote them.² Prima facie evidence is always subject to rebuttal and contradiction. The guilty pleas of the inspectors, coupled with the implication of the receiving firm in the bribery of inspectors, rebuts the prima facie evidence presented by the federal inspections submitted in evidence in this proceeding. As the trier of the facts we are unconvinced by the statements in the federal inspections which testify to the poor condition of the subject grapes. Respondent submitted no further evidence of the condition of the grapes on arrival in New York. We find that Respondent has not met its burden of proving a breach on the part of Complainant. Accordingly, Respondent is liable to Complainant for the balance of the contract price of the two loads of grapes, or \$16,540.50.

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.³ 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.⁴ 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, \$16,540.50, 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.

²See C. McCormick, *Handbook of the Law of Evidence*, §§ 291-292, pp. 614-615 (1954).

³*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).

⁴See *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).

