

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-02-0025
)	
M. Trombetta & Sons, Inc.,)	
)	
Respondent)	Decision
and Order)	

Decision Summary

[1] Respondent M. Trombetta & Sons, Inc. (hereinafter frequently “Trombetta, Inc.”) committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York, New York, in connection with seven illegal cash payments made by its employee Joseph (“Joe Joe”) Auricchio to United States Department of Agriculture (hereinafter frequently “USDA”) produce inspector William J. Cashin in connection with seven federal inspections of perishable agricultural commodities received or accepted in interstate or foreign commerce from six sellers. Trombetta, Inc. is responsible under the Perishable Agricultural Commodities Act (hereinafter frequently “the PACA”), notwithstanding any ignorance of the employee’s actions, for the conduct of its employee Joseph (“Joe Joe”) Auricchio, who, in the scope of his employment, paid the unlawful bribes and gratuities to the USDA produce inspector. Here, the acts of the employee are deemed to be the acts of the employer. Making illegal payments to a USDA produce inspector was an egregious failure by Trombetta, Inc. to perform its duty under

the PACA to maintain fair trade practices. The remedy of revocation of Trombetta, Inc.'s license is commensurate with the seriousness of Trombetta, Inc.'s violations of the PACA.

Procedural History

[2] The Complainant is the Administrator, Fruit and Vegetable Programs,¹ Agricultural Marketing Service, United States Department of Agriculture (hereinafter frequently "AMS").

[3] On August 16, 2002, AMS filed the Complaint, alleging, among other things, that Trombetta, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[4] Trombetta, Inc. timely filed its Answer on October 4, 2002. The Answer, among other things, denies the material allegations of the Complaint, raises five affirmative defenses, and requests an award of attorney's fees and costs.

[5] The nine-day hearing was held before me in New York, New York, on July 14-18, July 21-23, and August 21, 2003. AMS has been represented first by David A. Richman, Esq., and then by Andrew Y. Stanton, Esq., each with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture. Trombetta, Inc. has been represented by Mark C.H. Mandell, Esq., of Annandale, New Jersey. The case was very ably presented, by both AMS and Trombetta, Inc., throughout the entire proceeding.

¹ Specifically, the PACA Branch of the Fruit and Vegetable Programs, is responsible for this case.

[6] AMS called three witnesses (Joan Marie Colson, Tr. 25-127; William J. Cashin, Tr. 127-160, 172-358; and John Aloysius Koller, Tr. 359-371, 378-495, 1441-1532, 1546-1596, 1683-1725), and submitted the Certified Agency Record exhibits which are known as CARX, and 13 additional exhibits, CX 1 through CX 10; AX 1, AX 2, and AX 3.

[7] Trombetta, Inc. called 11 witnesses (Philip James (“Phil”) Margiotta, also known as Philip J. Margiotta (born in 1949), Tr. 498-551; 574-851, 996-1163, 1338-1381, 1390-1408, 1535-1545; Peter Silverstein, Tr. 872-924; Max Montalvo Tr. 932-974; Frank J. Falletta, Tr. 1199-1221; Matthew John (“Matt”) Andras, Tr. 1221-1265; Harlow E. (“H.E.”) Woodward III, Tr. 1266-1300; Stephen Trombetta, Tr. 1311-1336, Martin A. (“Marty”) Shankman, Tr. 1412-1423; Patricia Baptiste, Tr. 1424-1433; Philip Harry Lucks, Tr. 1616-1638; and Philip Joseph (“Junior”) Margiotta, also known as P.J. Margiotta (born in 1924), Tr. 1651-1681), and submitted 22 exhibits, RX A through RX U, and RX V, a DVD submitted post-hearing, which I hereby admit into evidence.

[8] All of the parties’ exhibits, and also ALJX 1 and ALJX 2 (*see* Tr. 1544-45), were admitted into evidence. The transcript is referred to as Tr.

[9] The three responsibly connected cases (PACA-APP Docket No. 03-0007, PACA-APP Docket No. 03-0008, and PACA-APP 03-0012) were consolidated with this disciplinary action for the hearing, and all the evidence is available for each of the four cases. The three responsibly connected cases will be briefed and decided at a later time.

[10] AMS’s proposed transcript corrections, filed April 5, 2004, are hereby accepted. Trombetta, Inc’s proposed transcript corrections, filed April 12, 2004, are hereby accepted. On my own motion, I change Jo-Jo to Joe Joe in the transcript excerpts included in this Decision.

[11] AMS's Proposed Findings of Fact, Conclusions and Order with opening brief were timely filed on February 6, 2004; AMS's Reply brief was timely filed April 30, 2004.

[12] Trombetta, Inc.'s Proposed Findings of Fact, Conclusions, and Order with supporting response brief were timely filed April 12, 2004.

Findings Of Fact

[13] M. Trombetta & Sons, Inc. is a New York corporation, holding PACA license no. 021070, with an address of Units 100-105, Row A, Hunts Point Terminal Market, Bronx, New York, New York 10474. CX 1.

[14] The "company" (the beginning of Trombetta, Inc.) was started in the 1890s, and the fifth generation of the family is now in the business. Tr. 500. The current managers are Philip James ("Phil") Margiotta, also known as Philip J. Margiotta (at the Hunts Point Terminal Market), and Stephen ("Steve") Trombetta (at the Bronx Terminal Market). Tr. 1677.

[15] Trombetta, Inc. was owned 60% by Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta, and 40% by Stephen ("Steve") Trombetta, at all times material herein and particularly in 1999. Tr. 1676-1677.

[16] Trombetta, Inc.'s President and Treasurer were Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta; Trombetta, Inc.'s Vice-President was Stephen ("Steve") Trombetta; and Trombetta, Inc.'s Secretary was Philip James ("Phil") Margiotta, also known as Philip J. Margiotta, at all times material herein and particularly in 1999. Tr. 1662, 1679.

[17] Trombetta, Inc. began doing business in the Hunts Point Terminal Market, in the Bronx, New York, New York, when Hunts Point opened, in about 1967 or 1968. Tr. 502.

[18] Trombetta, Inc. hired Joseph ("Joe Joe") Auricchio in about 1994 to do various jobs at the

company. Tr. 504-05.

[19] Joseph (“Joe Joe”) Auricchio continued to work for Trombetta, Inc. at all times material herein, and particularly in 1999, when he worked as a salesperson. Tr. 508, 1158.

[20] In 1999, Joseph (“Joe Joe”) Auricchio was earning between \$800 and \$900 per week as a salesperson for Trombetta, Inc. Tr. 1131. Mr. Auricchio did not earn any commissions as part of his salary; he would receive bonuses equivalent to one or two weeks pay at Christmas. Tr. 1131.

[21] On March 14, 2000, Joseph (“Joe Joe”) Auricchio pled guilty to one count of the 4-count indictment in criminal Case No. 99 CR 1088, in the United States District Court for the Southern District of New York, United States v. Joseph Auricchio. CX 4, RX N.

[22] The elements of the offense, bribery of a public official, to which Joseph (“Joe Joe”) Auricchio pled guilty, are that he gave a thing of value to a person who is a public official with the corrupt intent to influence an official act by that public official. RX N at 11-12.

[23] In connection with his guilty plea, Joseph (“Joe Joe”) Auricchio told the Judge under oath that on July 7 (1999) he offered a government official \$100 to inspect a load of vegetables in the Hunts Point Terminal Market in the Bronx, New York; that he knew what he was doing was wrong; that he did it willfully and knowingly; that the government official was a U.S. government inspector; that he wanted the inspector to lower the grade; so that “we could sell it cheaper.” RX N at 12-14.

[24] On June 21, 2000, Joseph Auricchio was found to have paid approximately \$29,100 in cash bribes² to USDA produce inspectors at the Hunts Point Terminal Market between 1996 and

² The \$29,100 in cash bribes paid by Joseph (“Joe Joe”) Auricchio was determined by agreement of the parties for sentencing purposes (ALJX 1, p. 2; see A. Offense Level,

September 1999 (the only time period for which data was available), in connection with inspections of fresh fruit and vegetables at M. Trombetta & Sons, Inc., and was sentenced on Count 4 to the custody of the Bureau of Prisons for one year and a day; followed by supervised release of 2 years; plus a \$5,000 fine; plus a \$100 special assessment. The other three counts of the 4-count indictment were dismissed. ALJX 1, CX 4.

[25] The one count of “Bribery of a Public Official”, on July 7, 1999, of which Joseph Auricchio was convicted (CX 4), was based on the undercover work of William J. Cashin, a USDA produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes and gratuities from many produce workers.

[26] From July 1979 until August 1999, William J. Cashin was employed as a produce inspector for the United States Department of Agriculture at the Hunts Point, New York office of the Department’s Fresh Products Branch. Tr. 128-29.

[27] William J. Cashin first inspected produce at Trombetta, Inc. when Mr. Cashin started working for the Inspection Service, in 1979. Tr. 134.

[28] William J. Cashin was not paid a bribe at Trombetta, Inc. until Joseph (“Joe Joe”) Auricchio at Trombetta, Inc. began paying him bribes, in 1997. Tr. 137, 142.

[29] William J. Cashin had already begun a bribe-taking relationship with Joseph (“Joe Joe”) Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working at Trombetta. Tr. 139.

[30] William J. Cashin agreed, immediately after having been arrested himself on March 23,

including footnote); the bribe associated with the one count to which he pled guilty was \$50.

1999, to cooperate with the Federal Bureau of Investigation (FBI) in its investigation by continuing to operate as he had in the past and reporting daily the payments he collected. Tr. 143, CX 6 - CX 9.

[31] In response to William J. Cashin's daily reports to the FBI, the FBI prepared FD-302s as a summary. See CX 5. The portions of the FD-302s which correlate to the unlawful bribes and gratuities Mr. Cashin received from Joseph ("Joe Joe") Auricchio are organized for each count of the Indictment, together with applicable inspection certificates, which show Trombetta, Inc. as having applied for the inspections. CX 6 through CX 9.

[32] Joseph ("Joe Joe") Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc. when he paid the unlawful bribes and gratuities. When he paid the unlawful bribes and gratuities, he was acting on behalf of his employer Trombetta, Inc.; the unlawful payments could have benefited Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. Tr. 363-65.

[33] Joseph ("Joe Joe") Auricchio was acting within the scope of his employment as a produce salesman for Trombetta, Inc. each time he paid an unlawful bribe or gratuity to William J. Cashin as reported in CX 6 through CX 9, and as reflected in the one count of which he was convicted, regardless of whether anyone at Trombetta, Inc. directed him to make the unlawful payments, provided him the money to make the unlawful payments, or was even aware that he was making the unlawful payments. Tr. 363-64.

[34] After careful consideration of all the evidence before me, I accept as credible the testimony

of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Philip James (“Phil”) Margiotta, also known as Philip J. Margiotta; Peter Silverstein; Max Montalvo; Frank J. Falletta; Matthew John (“Matt”) Andras; Harlow E. (“H.E.”) Woodward III; Stephen Trombetta; Martin A. (“Marty”) Shankman; Patricia Baptiste; Philip Harry Lucks; and Philip Joseph (“Junior”) Margiotta, also known as P.J. Margiotta.

Discussion

[35] Here, there is no question whether Trombetta, Inc.’s employee Joseph (“Joe Joe”) Auricchio paid unlawful bribes and gratuities to USDA produce inspector William Cashin during April 20, 1999 through July 7, 1999, in connection with produce inspections requested by Trombetta, Inc.. He did. Unquestionably. The only question is whether what Joseph (“Joe Joe”) Auricchio did, causes his employer Trombetta, Inc. to suffer the consequences under the Perishable Agricultural Commodities Act, the PACA.

[36] Trombetta, Inc. argues that the seven inspection certificates may not have contained any false information. Trombetta, Inc. suggests that what William J. Cashin recorded was true; that in actuality, he gave no “help”. I do not discuss the evidence that Trombetta, Inc cites in support of its argument (*see* Trombetta, Inc.’s Brief), because the outcome here remains the same even if the inspection certificates were accurate. The unlawful payments to William J. Cashin were egregious even if Trombetta, Inc. got nothing in return. *See JSG Trading Corp. v. USDA*, 235 F.3d 608, 614-15 (D.C. Cir. 2001), which held that there is no requirement that there be a *quid pro quo* arrangement between the payer and payee in bribery cases under the PACA.

[37] Trombetta, Inc. argues that AMS’s entire case is founded upon the allegation that the inspections in issue contained false information. *See* Trombetta Inc.’s Brief at page 21. I disagree.

Making the unlawful payments to the USDA produce inspector is the unfair trade practice, regardless of the produce inspector's response. See AMS's Reply Brief at pages 15-16.

[38] Trombetta, Inc. argues that the recorded conversations between Joseph ("Joe Joe") Auricchio and USDA Produce Inspector William J. Cashin, while Mr. Cashin was working undercover, impeach Mr. Cashin's credibility when Mr. Cashin testified that he "gave help" by reporting the produce he inspected to be in worse condition than it actually was. RX V. I disagree. To me, the recorded conversations that Trombetta, Inc. relies upon, reveal caution on the part of both Mr. Auricchio and Mr. Cashin, regarding the extent to which the produce should be misrepresented, if at all, but I find Mr. Cashin's testimony to be credible. The daily reporting to the F.B.I. while Mr. Cashin was working undercover provides reliable verification of Joseph ("Joe Joe") Auricchio's unlawful payments on behalf of Trombetta, Inc. to a USDA produce inspector. CX 6 - CX 9.

[39] USDA Produce Inspector William J. Cashin testified, in part, as follows:

Mr. Richman: Was there any basic understanding between you and Mr. Auricchio about what you would be doing with regard to your inspections for Respondent?

Mr. Cashin: Yes.

Mr. Richman: What was that understanding?

Mr. Cashin: He was looking for help on the various loads of produce.

Mr. Richman: And how did that understanding come about between you and Mr. Auricchio?

Mr. Cashin: At M. Trombetta I don't remember the exact how it came about there, but I knew "Joe Joe" from another location in the market before he started working at Trombetta.

Mr. Richman: And you had that understanding from that time as well?

Mr. Cashin: Yes.

Mr. Richman: How did Mr. Auricchio let you know that he wanted help on a particular load?

Mr. Cashin: Usually I would in fact every time he was there, when I was sent to Trombetta, I would always talk to him. And he and I would discuss the load and he would tell me he needed help on the load.

Mr. Richman: And what was your understanding of the meaning of the phrase help, when it was requested in connection with the produce inspection?

Mr. Cashin: Help came in any one of three ways, and they weren't always done at the same time. The first one was he was asking me to write the condition defects on the certificate in such a way that they were over the delivery marks.

Mr. Richman: Can you explain that actually what is good delivery?

Mr. Cashin: Okay, in the USDA Standards there are tolerances for certain defects. The delivery standards are a parallel set of standards set forth either by the PACA or within the industry itself and these standards were set a little bit higher than the USDA Standards. And for example if the USDA allowed three percent decay in a certain defect, the good delivery standard would be five percent. So one of the ways of help was that "Joe Joe" would want me to write the product up in such a way that it was over the good delivery standard, because he didn't want the product to fail USDA, but still make good delivery.

Mr. Richman: Okay and you mentioned there are three ways in which you would give help?

Mr. Cashin: Yes, the second way was the number of containers. He sometimes would need or want the number of containers reported on the certificate to closely match to the manifest of what was originally sent when loaded.

Mr. Richman: Why would you do that?

Mr. Cashin: It was my understanding it would make the certificate more legitimate, and also they would get more money back from the shippers.

Mr. Richman: And what is the third way that you would give help?

Mr. Cashin: The third help was temperature. You would need the temperature reported on the certificate to closely match the accepted levels of shipment. So again it would lend legitimacy to the inspection certificate.

Mr. Richman: Were the figures that you put down on the inspection certificate when you gave help, an accurate reflection of the produce you were inspecting?

Mr. Cashin: No.

Mr. Richman: When you gave help with respect to the condition of the produce, how would the figure that you put down on the certificate for the condition of the produce help the Respondent?

Mr. Cashin: Again, it was my understanding that they would be able to get more money back from the shippers or renegotiate their deals.

Mr. Richman: And when you gave help with respect to the quantity of the produce, I think you just answered this, but just to clarify. When you gave help with respect to the quantity of the produce inspected, how would the figures you put down for the quantity of the produce inspected help the Respondent?

Mr. Cashin: Again, it was my understanding that it would lend legitimacy to the certificate and they were able to get more money back.

Mr. Richman: And when you gave help with respect to the temperature of the produce, how would the figures that you put down for the temperature of the produce help the Respondent?

Mr. Cashin: It again was my understanding it would lend legitimacy to the whole inspection package.

Mr. Richman: On what percentage of the loads that you inspected of Respondent would you give help?

Mr. Cashin: When “Joe Joe” was there, about 100 percent.

Mr. Richman: And when did you first start receiving these payments at Trombetta?

(emphasis added)

Mr. Cashin: **In 1997.** (emphasis added)

Tr. 139-42.

[40] Trombetta, Inc. argues that what Joseph Auricchio did, may not have been “in connection with a produce transaction”. *See* Trombetta Inc.’s Brief at page 22. Trombetta, Inc.’s argument is strained (AMS’s Reply Brief calls it absurd, at page 17), in light of all the evidence that the money Auricchio gave Mr. Cashin was in connection with a produce transaction. But this is how Trombetta, Inc. summarizes it:

Without an active Auricchio connection to the purchasing of the produce shipments and/or negotiations with suppliers, or Respondent’s actual knowledge (with active or tacit approval) of Auricchio’s alleged illegal activities down in the sales booth, the vital link between the actions alleged by (Trombetta, Inc.) and the produce transactions it seeks to protect is broken, and (AMS) cannot establish the violations of Section 2(4) that it has alleged. Since (AMS) has failed to make that connection, the Complaint must be dismissed.

Trombetta Inc.’s Brief at page 23.

I disagree. Mr. Auricchio worked for Trombetta, Inc. Even though Phil Margiotta, the buyer/broker for much of the produce, may have had no idea that Mr. Auricchio was arranging for incoming produce to be reported by the USDA produce inspector to be in worse condition than it

actually was, the unlawful payments were nonetheless made in connection with produce transactions. Further, even though Trombetta, Inc.'s negotiations of the prices to be paid for the incoming produce may have been honest and trustworthy, the unlawful payments were nonetheless made in connection with produce transactions.

[41] Trombetta, Inc. argues that it provided proper supervision for Mr. Auricchio. Brief at page 22-23. Actually, Trombetta, Inc. did very little, in 1999 and before, to surveil its own employees Tr. 1140-1155. During the time since Mr. Auricchio's criminal activity was exposed, Trombetta, Inc. has taken commendable precautions. Tr. 1161-63.

[42] Trombetta, Inc. argues that USDA inspectors may have committed extortion; that Joseph Auricchio may have been the victim of extortion. RX O. Trombetta Inc.'s Response Brief at page 27. There is no evidence that Joseph ("Joe Joe") Auricchio was the victim of extortion. ALJX 1. Tr. 1129.

[43] The PACA, section 16, incorporates principal-agent common law, making no exception for criminal activity of the agent:

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

Both the D.C. Circuit³ and the 6th Circuit⁴ have affirmed the PACA's use of its principal-agency

³ *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475.

provision under circumstances like those here.

[44] Trombetta, Inc. argues that Section 16 of the Act is inapplicable to this case. Trombetta, Inc. argues that Auricchio's illegal payments to USDA produce inspector William J. Cashin were beyond the scope of his employment; that Joseph ("Joe Joe") Auricchio's criminal activity here cannot have been within the scope of his employment and cannot become Trombetta, Inc.'s violation of the PACA. I find to the contrary, that Joseph ("Joe Joe") Auricchio was working within the scope of his employment when he paid the unlawful bribes and gratuities.

[45] Joseph ("Joe Joe") Auricchio did pay the unlawful bribes and gratuities within the scope of his employment as Trombetta, Inc.'s produce salesman. During Joseph ("Joe Joe") Auricchio's working hours, at his employer Trombetta, Inc.'s location, as part of his job as a salesman for Trombetta, Inc., Joseph ("Joe Joe") Auricchio met with USDA produce inspectors to give them the information needed regarding the produce inspections. See Findings of Fact paragraph [32]. Making illegal payments to the USDA produce inspectors in connection with the produce inspections, even if he did that on his own, unknown to others, did not remove Joseph ("Joe Joe") Auricchio from the scope of his employment.

[46] Even if Joseph ("Joe Joe") Auricchio was not authorized or directed by Trombetta, Inc. to pay unlawful bribes and gratuities to USDA inspectors, and even if Trombetta, Inc. was unaware of his doing so, Trombetta, Inc. is indeed responsible under the PACA for the payment of unlawful bribes and gratuities that Joseph ("Joe Joe") Auricchio paid in connection with the produce inspections ordered by Trombetta, Inc. 7 U.S.C. § 499p. *Post & Taback, Inc. v. (United States)*

⁴ *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

Department of Agriculture, not selected for publication⁵ in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475, a copy of which is attached as Appendix A. *H.C. MacClaren, Inc. v. United States Department of Agriculture*, 342 F.3d 584 (6th Cir. 2003).

[47] Regarding payment of the unlawful bribes and gratuities, there may not have been unity between employee and employer factually, but the principal-agent legal principle imposes unity between employee and employer. Consequently, whether Joseph (“Joe Joe”) Auricchio was authorized or directed by his employer Trombetta, Inc. to pay the unlawful bribes and gratuities does not affect the outcome here.

[48] After careful review of the evidence as a whole, I am unable to determine whether anyone at Trombetta, Inc. besides Joseph (“Joe Joe”) Auricchio was involved in making the unlawful payments. Yet the evidence on that subject, together with the six years of experience AMS has had with Trombetta, Inc. since the unlawful payments were made in 1999, may impact the future course of AMS’s interaction with Trombetta, Inc. and Trombetta, Inc.’s principals.

[49] It is difficult to believe that Joseph (“Joe Joe”) Auricchio paid the unlawful bribes and gratuities out of his own pocket (*see* Finding of Fact paragraph [20]). The evidence fails to prove whether the money Joseph (“Joe Joe”) Auricchio gave unlawfully to the USDA inspector was his own money, or Trombetta, Inc.’s money, or money from some other source.

[50] Joseph (“Joe Joe”) Auricchio was not a witness before me. Neither the parties nor I had the opportunity to see Joseph (“Joe Joe”) Auricchio confronted or cross-examined. From the evidence

⁵ Unpublished judgments of the United States Court of Appeals for the D.C. Circuit entered on or after January 1, 2002, may be cited as precedent. Circuit Rule 28(c)(1)(B). A panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition. Circuit Rule 36(c)(2).

before me, including particularly the plea agreement letter (ALJX 1), and the transcript of Mr. Auricchio's guilty plea (RX N), there is no evidence suggesting that anyone at Trombetta, Inc. besides Joseph ("Joe Joe") Auricchio may have involved in paying the unlawful bribes and gratuities. Joseph ("Joe Joe") Auricchio did not implicate his employer. The evidence does not prove that anyone else at Trombetta, Inc. knew Joseph ("Joe Joe") Auricchio was illegally giving money to USDA inspectors.

[51] John A. Koller, a USDA employee (Senior Marketing Specialist, PACA Branch, Fruit and Vegetable Programs, AMS), testified that the bribery of the USDA produce inspector was such a serious violation of the PACA that a strong sanction is necessary as a deterrent, and that USDA recommends license revocation as the only adequate option. I agree. I find that Joseph ("Joe Joe") Auricchio's actions within the scope of his employment are deemed to be the actions of Trombetta, Inc., and that those actions were so egregious that nothing less than license revocation is an adequate remedy. Mr. Koller explained USDA's recommendation for license revocation as follows:

Mr. Richman: Are you aware of the sanction Complainant recommends in this case?

Mr. Koller: Yes, I am.

Mr. Richman: How are you aware of the sanction?

Mr. Koller: I participated in the development of the sanction recommendation.

Mr. Richman: And what is the sanction recommendation in this case?

Mr. Koller: A license revocation.

Mr. Richman: And what is the basis for Complainant's sanction recommendation?

Mr. Koller: Well, the basis of Complainant's recommendation for a license revocation is based on several factors. The evidence clearly shows that Respondent (Trombetta, Inc.) paid bribes to a

produce inspector. The FBI has documented that over a two-and-a-half month period of time, bribery payments were made that affected seven inspections. Further aggravating the situation, Mr. Cashin has testified that he had been accepting bribes from Respondent (Trombetta, Inc.) since 1997. And bribery payments to a produce inspector has an effect on the trade as a whole. And these - - what will happen is thousands of dollars in adjustments could arise or will arise from these false inspections. Another factor is the industry relies on the produce - - on the inspection certificate to quickly resolve disputes. And approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it is important that these inspections are accurate. If there is any suspicion that these inspections have been tainted due to bribery payments being made to the produce inspector to change the outcome of the results, change the outcome of the inspection, this is something that affects the industry as a whole. Because as the sellers become aware of this bribery situation coming along, then it affects the credibility of the inspection certificate itself and the inspection process. It provides a problem for the industry. The trades rely on the results of that inspection to be impartial and accurate. Another concern is the concern of when you have got a wholesaler that is paying bribes to a produce inspector, other wholesalers on the market may very well feel - - may very well pay bribes as well to the produce inspector. For example, when you have got a wholesaler in the Hunts Point Market who is paying bribes to a produce inspector to affect the outcome of the inspection and be in a position to get price adjustments on a particular commodity, then they will be able to sell the produce for less. And when other wholesalers become aware of this, they will feel that they are in a position to have to pay the bribes as well in order to compete with the wholesalers that are paying these bribes. And, again, with this is consideration, the effects that this causes on the inspection process and the effect on the Hunts Point Market itself

is that whether there is a wholesaler paying bribes or not, it casts a concern to the industry as to who they can rely on in the market there at the market - - the wholesalers on the market. Excuse me.

And finally, the Department strongly believes that a strong sanction not only on the Respondent will also - - will not only be a deterrent to Respondent, but will also be a deterrent to other members of the trade who are contemplating making bribery payments to a produce inspector.

* * *

Mr. Richman: Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

Mr. Koller: No.

Mr. Richman: Why not?

Mr. Koller: Bribery payments being made to a produce inspector is a serious violation of the PACA. Whether it is to a produce inspector or to any member of the trade, and in the situation where a produce inspector has taken bribes on an inspection, does not excuse the PACA licensee from those actions of committing the bribery itself.

Mr. Richman: Does Complainant recommend a civil penalty in this case as an alternative to license revocation?

Mr. Koller: No.

Mr. Richman: Why not?

Mr. Koller: The Department feels that - - or it believes that this type of violation is a most serious violation under the Act. And as, you know, the effects of bribery payments, you know, first off, it is bribery payments of the produce inspector. You have got that. The bribery payments have been taking place over a period of time, they are repeated. The bribery payments affect the credibility of

the inspection certificate, and then that consequently affects the reliability and credibility of that inspection to the industry to quickly resolve disputes. The other concern, again, is the competitive nature, the competitive aspect of the industry on the Hunts Point Market or any other market. If you have got firms paying bribes that are giving - - that are getting an advantage with price adjustments, there again, causes a problem with competition. Those firms that are not in the same situation, they are not able to compete in that situation. Also, the aspect of Department - - in order to deter this type of action, this violation, from occurring, a strong sanction of a license revocation to deal with one of these most serious violations of the Act would be the appropriate thing. And the Department has also consistently recommended that a revocation of a license be the recommendation for sanction where a serious violation of the PACA by committing a bribe has taken place.

Mr. Richman: Is that the policy of the Department?

Mr. Koller: That is the policy of the Department.

Tr. 367-371.

Conclusions

[52] Joseph (“Joe Joe”) Auricchio, an employee of Respondent M. Trombetta & Sons, Inc., paid unlawful bribes and gratuities to a United States Department of Agriculture inspector, during April through July 1999, in connection with seven federal inspections covering perishable agricultural commodities from six sellers received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[53] Joseph (“Joe Joe”) Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc., when he did what is described in paragraph [52], even if what he did was unauthorized. When he paid the unlawful bribes and gratuities, he was acting on behalf of his

employer Trombetta, Inc.; the unlawful payments could have benefitted Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. 7 U.S.C. § 499p.

[54] Joseph (“Joe Joe”) Auricchio was acting as Trombetta, Inc.’s agent, when he did what is described in paragraph [52]. 7 U.S.C. § 499p.

[55] Joseph (“Joe Joe”) Auricchio’s willful violations of the PACA are deemed to be Trombetta, Inc.’s willful violations of the PACA. *In re: H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff’d* 342 F.3d 584 (6th Cir. 2003).

[56] M. Trombetta & Sons, Inc., through its employee and agent, paid unlawful bribes and gratuities to a USDA inspector, during April through July 1999, in connection with seven federal inspections covering perishable agricultural commodities from six sellers received or accepted in interstate or foreign commerce, in violation of section 2(4) of the PACA. 7 U.S.C. § 499b(4).

[57] Trombetta, Inc. is responsible under the PACA, notwithstanding any ignorance of the employee’s actions, for the conduct of its employee who paid the unlawful bribes and gratuities to the USDA produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. (United States) Department of Agriculture*, not selected for publication in the Federal Reporter, February 11, 2005, 123 Fed. Appx. 406; 2005 U.S. App. LEXIS 2475, *see* Appendix A.

[58] M. Trombetta & Sons, Inc. willfully, flagrantly and repeatedly violated Section 2(4) of the Perishable Agricultural Commodities Act during April 1999 through July 1999, by failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any

undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4).

[59] The duty that Trombetta, Inc. failed to perform is the duty to maintain fair trade practices required by the PACA. Paying the unlawful bribes and gratuities to the USDA produce inspector is the unfair trade practice and failure to maintain fair trade practices. Regardless of the produce inspector's response - - even if the produce inspector had not falsified his inspection reports - - and even if the wholesaler gained no unfair economic advantage and made no attempt to gain any unfair economic advantage - - making the unlawful payments to the USDA produce inspector is the unfair trade practice. The unlawful payments to the USDA produce inspector were egregious even if Trombetta, Inc. got nothing in return. *JSG Trading Corp. v. USDA*, 235 F.3d 608, 614-15 (D.C. Cir. 2001).

[60] Trombetta, Inc.'s violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Company, Inc.*, 62 Agric. Dec. 763, 780-781 (2003). Although suspension was the chosen remedy in *Heimos*, which concerned Heimos' employees altering inspection certificates, suspension would not be adequate to respond to the seriousness of Trombetta, Inc.'s failures here.

[61] Trombetta, Inc.'s failures here threatened the integrity of the USDA inspection process, casting suspicion on inspection results and tending to taint the marketplace.

[62] This case, and a similar case I recently decided, *In re KOAM Produce, Inc.*, PACA Docket No. D-01-0032, April 18, 2005, ____ Agric. Dec. _____, illustrate how difficult it is to determine and prove where the money came from that was used to pay the unlawful bribes and gratuities to the USDA inspector. Responsibility under principal-agent law is indispensable under the PACA.

[63] Considering all of the evidence, Trombetta, Inc., but for the actions of Joseph (“Joe Joe”) Auricchio, appears to have been trustworthy and honest and fair dealing. For the purpose of this Decision, I find no culpability on the part of anyone within Trombetta, Inc. other than Joseph (“Joe Joe”) Auricchio. Of particular significance is the fact that USDA Produce Inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years, and had been inspecting at Trombetta, Inc. for about 20 years, collected no bribes at Trombetta, Inc. until Joseph (“Joe Joe”) Auricchio started to work as a salesman there, in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph (“Joe Joe”) Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working at Trombetta. See Findings of Fact paragraphs [27], [28], and [29]. Nevertheless, I hold Trombetta, Inc. responsible for the actions of Joseph (“Joe Joe”) Auricchio, just as if Trombetta, Inc. itself had performed each of Mr. Auricchio’s acts.

[64] USDA is charged with overseeing the integrity of the USDA inspection process and must take appropriate action against a licensee committing a unfair trade practice, even where there is evidence of only one employee of the licensee committing the unfair trade practice, and whether or not such employee is a manager, supervisor, officer, director, or shareholder of licensee.

[65] Revocation of Trombetta, Inc.’s license is commensurate with the seriousness of Trombetta, Inc.’s violations of the PACA. Tr. 367-71.

[66] Any lesser remedy than revocation would not be commensurate with the seriousness of Trombetta, Inc.’s PACA violations, even though many of Trombetta, Inc.’s competitors were committing like violations, and even though USDA inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them. Tr. 367-71.

Order

[67] Respondent Trombetta, Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

[68] Respondent Trombetta, Inc.'s PACA license shall be revoked.

[69] This Order shall take effect on the 11th day after this Decision becomes final.

Finality

[70] This Decision becomes final without further proceedings 35 days after service unless appealed to the Judicial Officer within 30 days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 12th day of May 2005

Jill S. Clifton
Administrative Law Judge

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