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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent decisions entered subsequent to December 31, 1986, are no longer published. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental Table of Decisions Reported.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

JSG TRADING CORP. v. DEPARTMENT OF AGRICULTURE.
Docket No. 00-1011.
Decided January 5, 2001.

(Cite as 235 F.3d 608 (D.C. Cir.)).

Perishable agricultural commodities – Commercial bribery – License revocation.

The United States Court of Appeals for the District of Columbia Circuit held that a produce seller commits commercial bribery in violation of the Perishable Agricultural Commodities Act (PACA) when the produce seller pays or offers to pay a buyer's agent or employee more than *de minimis* consideration, without the knowledge of the principal or employer, with the intent to induce the agent or employee to purchase the seller's product. The Court concluded that substantial evidence supported the Judicial Officer's determination that JSG Trading Corp. engaged in commercial bribery in violation of the PACA. The Court also found that JSG Trading Corp.'s violations of the PACA were willful, flagrant, and repeated and held that revocation of JSG Trading Corp.'s PACA license was not an excessive penalty.

United States Court of Appeals
District of Columbia Circuit

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.
Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

This case returns to us after remand on JSG Trading Corp.'s petition for review of a Department of Agriculture order adjudging it guilty of commercial bribery and revoking its license to sell produce under the Perishable Agricultural Commodities Act. We outlined many of the financial dealings at issue here in *JSG Trading Corp. v. United States Dep't of Agric.,* 176 F.3d 536 (D.C. Cir. 1999), and will assume familiarity with that opinion. This time around JSG challenges the sufficiency of the evidence and raises three questions: (1) did the Department apply the wrong legal standard for commercial bribery? (2) were the payees principals in the victim companies, thereby precluding a finding of commercial bribery? and (3) is license revocation excessive? We answer no to each and deny the petition.

I.

Section 2(4) of the Perishable Agricultural Commodities Act of 1930 (PACA) forbids "any commission merchant, dealer or broker * * * to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such [produce] transaction." 7 U.S.C. § 499b(4).[1] The Department has drawn from this language a duty of produce sellers not to corrupt agents and employees of their buyers, and has styled the breach of this duty "commercial bribery." In brief, this duty is breached–and commercial bribery results–when a seller offers consideration to a buyer's agent or employee, without the knowledge of the principal or employer, with intent to induce purchase of the seller's product. *See In re Sid Goodman & Co.,* 49 Agric. Dec. 1169 (1990), *aff'd,* 945 F.2d 398 (4th Cir. 1991) (table), and *In re Tipco, Inc.,* 50 Agric. Dec. 871 (1991), *aff'd,* 953 F.2d 639 (4th Cir. 1992) (table).

JSG Trading Corp. is a New Jersey-based PACA licensee engaged in buying and selling produce. L&P and American Banana are produce dealers at the Hunts Point Market in New York City. L&P and American Banana purchased tomatoes from JSG through purchasing agents–Anthony Gentile for L&P; Albert Lomoriello for American Banana. In early 1993, the Department began investigating whether JSG sought to covertly influence Anthony Gentile and Albert Lomoriello to purchase more tomatoes from JSG on behalf of their respective principals in violation of PACA § 2(4), as interpreted in *Goodman* and *Tipco*. The Department identified what it considered questionable transactions and accounting practices, several of which an Administrative Law Judge found were commercial bribes. The ALJ ordered JSG's license revoked. *See In re JSG Trading Corp.,* 56 Agric. Dec. 1800 (1997). The Department's Judicial Officer affirmed the ALJ's findings and order. *See In re JSG Trading Corp.,* 57 Agric. Dec. 640 (1998).

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[1] Title 7, U.S.C. § 499b(4) states in full:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or 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; or to fail to maintain the trust as required under subsection 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

II.

A. Substantial Evidence

An agency's adjudicative orders must be supported by "substantial evidence," 5 U.S.C. § 706(2)(E), which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" when taking "into account whatever in the record fairly detracts from its weight." *See AT&T Corp. v. FCC,* 86 F.3d 242, 247 (D.C. Cir. 1996) (quoting *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), and *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951)); *McCarty Farms, Inc. v. Surface Transp. Bd.,* 158 F.3d 1294, 1300-01 (D.C. Cir. 1998). There is substantial evidence to support the Judicial Officer's finding that JSG's payments, described below, to Anthony Gentile, to his wife Gloria Gentile, and to Albert Lomoriello were commercial bribes under *Goodman* and *Tipco*.

The payments at issue here consisted of: 35 checks to Anthony Gentile totaling $62,535.60; payments to Gloria Gentile, including an unjustified gain on a stock sale; a check for $5,600 to G&T Enterprises, a company Gloria Gentile set up for tax purposes; and seven checks to Albert Lomoriello totaling $9,733.45.[2]

JSG tendered numerous "innocent" explanations for these transactions and the bizarre accounting practices surrounding them, none of which is persuasive. For instance, JSG insists that the checks made out to Anthony Gentile were "circular" because they were redeposited in JSG's accounts with no money ever reaching the payee. According to JSG, "none of the monies reflected by these checks ever reached Mr. Gentile or [was] otherwise paid by JSG to any person (or any entity) for his benefit." Final Brief of Petitioner at 18. The checks, JSG claims, functioned as "clips," a mechanism to reconcile accounts: "these 'clips' were used . . . in order to permit L&P to pay less than JSG's invoiced prices in order to make up for a loss on prior purchases." *Id.* at 20 n.19. But writing checks payable to another company's purchasing agent and then re-depositing them into one's own account is hardly a recognized or plausible way to reconcile accounts between a seller and the payee's principal, the buyer. The normal function of checks is to move money from one account to another, not to keep it in place. Making checks payable to L&P's purchasing agent and then re-depositing them does not appear, as JSG

[2]On remand, the Judicial Officer found that JSG's lease of a Mercedes to Anthony Gentile, paid for in part by JSG; its sale of a boat to Mr. Gentile for a fraction of its value; and its gift of a $3,317 Rolex watch to Mr. Gentile were not commercial bribes because they were not intended to induce him to purchase tomatoes and L&P was aware of the transactions. *See In re JSG Trading Corp.,* 58 Agric. Dec. 1041, 1061 (1999).

claims, to "permit L&P to pay less than JSG's invoiced prices." The Judicial Officer had ample evidence for finding JSG's explanations chimerical, particularly in light of the inability of JSG's officers to give a coherent explanation of this unusual accounting procedure; JSG's treatment of the payments in its records as profit-sharing with Mr. Gentile and as reductions in Mr. Gentile's debt to JSG; and the apparent relationship between the amount of each check and a per-box commission noted in JSG's records.[3] *See* 58 Agric. Dec. at 1064-77.

The Judicial Officer was also on solid ground in rejecting JSG's explanations for its payments to Mrs. Gentile and Mr. Lomoriello. No evidence indicates the payments were compensation for any legitimate service rendered. Much evidence tends to show that the payments were secret per-box commissions intended to induce the purchase of more tomatoes from JSG. *See* 58 Agric. Dec. at 1061-64 & 1081-88. We have doubts, however, about the $5,600 check to Mrs. Gentile's company, G&T. In its opposition to JSG's motion to dismiss the case on remand, the Department appeared to concede that the payment to G&T was not a commercial bribe, a statement inconsistent with its position in this court. *See* Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment at 5 & n.2; Joint Appendix at 389. At any rate, we cannot see how the $5,600 payment could affect the outcome of this case. The remaining payments to Mr. and Mrs. Gentile and Mr. Lomoriello amply support revocation of JSG's PACA license.

B. Legal Standard for Commercial Bribery

JSG claims the Judicial Officer misapplied the commercial bribery standard articulated in *Goodman* and *Tipco*. In our first opinion in this case, we held that the Judicial Officer erred in substituting a per se test for *Goodman's* and *Tipco's* intent-to-induce and secrecy standard. *See* 176 F.3d at 543-46. Under the per se test, any payment to a purchasing agent above a *de minimis* threshold constituted a commercial bribe, regardless of intent and secrecy. We remanded for the Judicial Officer either to justify or to abandon the per se test. He adopted the latter course.

On remand, the Judicial Officer interpreted PACA's duty requirement as imposing on "each commission merchant, dealer, and broker . . . an obligation . . . to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent's principal or employer, without fully informing the purchasing agent's principal or employer of the offer or payment." 58 Agric. Dec. at 1051. He

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[3] JSG stated at oral argument that it was not challenging the Judicial Officer's finding that 16 of the 35 checks were used to reduce Mr. Gentile's debt to JSG.

disaggregated this obligation into a four-part test:

> Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

58 Agric. Dec. at 1051. The presumption is rebutted by the absence of any one element. *See id.*

JSG perceives in this phrasing of the test three substantial and unexplained departures from *Goodman, Tipco,* and our opinion in *JSG Trading Corp.*: (1) failure to require a specific *corrupt* intent to induce; (2) equation of secrecy with the payee's principal's or employer's lack of full awareness of the payment or offer; and (3) omission of a *quid pro quo* requirement. This new test, JSG insists, is the per se test redux, and will "turn countless normal business transactions in to [*sic*] bribes." Final Brief of Petitioner at 33-34.

The Judicial Officer's test is consistent with *Goodman* and *Tipco*. Although couched as a presumption,[4] the post-remand articulation of the test is a more formalized version of the *Goodman*/*Tipco* intent-to-induce and secrecy standard. When the presumption language is cast aside, the test's basic structure parallels that of many criminal statutes. There are four elements, each of which is a necessary predicate for liability. Failure to satisfy any one element defeats liability. The only significant divergence from *Goodman* and *Tipco* is the addition of a *de minimis* threshold as an apparent defense to payments or offers to pay that otherwise satisfy the intent and secrecy elements. This *de minimis* element is the converse of that

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[4]The presumption language appears not to perform any burden-allocating function ordinarily associated with presumptions. *See, e.g.,* FED. R. EVID. 301 ("In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.").

which we rejected in *JSG Trading Corp.,* wherein a payment above the *de minimis* threshold was a sufficient rather than a necessary condition for liability. The addition of this liability-defeating element is innocuous and, in any event, JSG does not challenge it.

Neither *Goodman, Tipco,* nor our opinion in *JSG Trading Corp.* requires a specific corrupt intent, a lower secrecy standard, or a *quid pro quo* for commercial bribery. In both *Goodman* and *Tipco,* a generalized intent by the payer to induce purchase of its product satisfied the intent element. In *Goodman,* for example, the Judicial Officer referred to a treatise definition of commercial bribery that contains no hint of specific corrupt intent: "the 'offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors'." *Goodman,* 49 Agric. Dec. at 1184 (quoting 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 49 (3d ed. 1968)). An "expectation" is far from the specific corrupt intent JSG would require. In another place, the Judicial Officer wrote that a "PACA licensee is obligated to refrain from offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of the employer." *Goodman,* 49 Agric. Dec. at 1186. *See also Tipco,* 50 Agric. Dec. at 883. In *Tipco,* the Judicial Officer concluded that "the evidence of record is certain that licensee Tipco made surreptitious payments to its customer's employee to induce the employee to buy, or continue to buy, its produce. . . ." *Tipco,* 50 Agric. Dec. at 889. *Goodman* and *Tipco* say nothing of specific corrupt intent, let alone enough to make the Judicial Officer's formulation of the intent element in this case arbitrary and capricious.[5]

The secrecy element in *Goodman* and *Tipco* contemplates a sufficiently high level of awareness by the payee's employer or principal to justify the Judicial Officer's insistence on "full awareness." The opinions contain language equating a produce seller's breach of duty to a seller's failure to inform, which connotes an obligation to impart actual knowledge of the payments to the payee's employer or principal. *See Goodman,* 49 Agric. Dec. at 1175, 1179, 1182, & 1186; *Tipco*, 50 Agric. Dec. at 883. The opinions also contain language equating secrecy with the payer's expectation that the recipient not fully disclose the payment, which connotes an obligation that somebody–either the payer or payee–ensure the recipient's principal or employer has full awareness of the transaction. *See, e.g., Goodman,* 49 Agric. Dec. at 1184. Yet other language suggests that knowledge alone is not enough, that without an affirmative grant of consent by the payee's principal or

[5]The occasional references to corrupting agents or employees in *Goodman* and *Tipco* describe the effect of commercial bribery, not the required intent.

employer the secrecy element would be satisfied. *See Goodman,* 49 Agric. Dec. at 1186 ("payments by [Goodman] to Messrs. Crandall and Hernandes, without permission of Magruder and Fresh Value, is a violation of section 2(4) of the PACA"); *Tipco,* 50 Agric. Dec. at 883 (suggesting that a produce seller may "only make payments with the customer's permission"). Both cases give produce vendors ample notice that payments intended to induce the buyer's agents or employees to purchase produce are commercial bribes unless the payee's principal or employer is fully aware of the transaction.[6]

Similarly, *Goodman* and *Tipco* do not require a *quid pro quo* arrangement between the payer and the payee. Although a *quid pro quo* arrangement was present in each case–a 25x per box kickback–neither case turned on that fact.[7] Perhaps recognizing this, JSG instead points to our earlier opinion in *JSG Trading Corp*. for a *quid pro quo* requirement. In that opinion, we criticized the per se test's lack of an intent and secrecy element as eliding the line between bribes and legitimate transactions and elliptically suggested a *quid pro quo* element as one way to restore that line. *See JSG Trading Corp.,* 176 F.3d at 545. We did not suggest it was the exclusive means. Indeed, the Judicial Officer fully restored that line by resurrecting the intent and secrecy elements. The federal cases requiring a *quid pro quo* that JSG cites do not persuade us otherwise, for they interpret federal criminal bribery statutes containing entirely different language than PACA.[8] *See, e.g., United States v. Sun-Diamond Growers of California,* 526 U.S. 398, 404-05, 119 S.Ct. 1402, 143 L.Ed.2d 576 (1999) (interpreting language in 18 U.S.C. § 201 as requiring a *quid pro quo* for bribery because there must be "a specific intent to give or receive something of value *in exchange* for an official act"); see also 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES

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[6]In both *Goodman* and *Tipco,* the victim companies had an explicit policy forbidding employees to accept gifts from vendors, which the recipients of the payments in each case clearly breached. *See Goodman,* 49 Agric. Dec. at 1174-75; *Tipco,* 50 Agric. Dec. at 878. Neither case turned on the existence of such a policy.

[7]Notably, the Judicial Officer found, and we agree, that JSG's per-box payment scheme constituted a *quid pro quo*. *See* 58 Agric. Dec. at 1090. As in *Goodman* and *Tipco,* our decision does not turn on this fact.

[8]Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *JSG Trading Corp.*, 176 F.3d at 545 ("Given the broad language of [PACA] § 2(4), the agency is not necessarily bound by traditional statutory definitions of commercial bribery."). Our review is limited to ensuring that the Department's construction of PACA is reasonable and that the Department either follows its prior constructions of the statute or articulates a reasoned justification for departing.

§ 12.02 (1985) ("There need be no close relationship between the value of the consideration and the resulting advantage to the offeror."). JSG's related contention that its payments had no effect on the victim companies' purchases or prices merely restates the *quid pro quo* argument. To the extent the argument differs, nothing in PACA, *Goodman,* or *Tipco* bases illegality on changes in the victim company's purchasing or pricing behavior.

JSG fears that the commercial bribery test will sweep up legitimate business transactions and ordinary social hospitality. JSG forgets that the intent and secrecy elements are necessary, not sufficient, conditions for commercial bribery, so both must be satisfied. Social hospitality–for example, taking a friend who happens to be a purchasing agent to dinner–would be protected if the host lacked the intent to induce purchase of its products (or, if it had such intent, informed the agent's principal). Similarly, sales incentives offered to a purchasing agent are perfectly legal under the Judicial Officer's test if the agent's principal is informed of the transaction.

The secrecy element in particular also distinguishes the transactions at issue from a category of promotional activities recognized as legitimate by PACA. The paragraph of PACA from which the Department drew the prohibition on commercial bribery states that "this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter." 7 U.S.C. § 499b(4). The statute defines "collateral fees and expenses" as "any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. § 499a(b)(13). JSG's payments to Anthony and Gloria Gentile and Albert Lomoriello do not fall within this category. Promotional allowances, rebates, and the like are typically given with the buyer's knowledge rather than secretly directed to the buyer's agents or employees. JSG's payments also lack the requisite good faith, which Department regulations define as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." 7 C.F.R. § 46.2(hh). No reasonable conception of honesty or fair dealing includes secret payments designed to corrupt a produce buyer's agents or employees.

C. Status of the Payees

The essence of the commercial bribery offense, as defined by *Goodman* and *Tipco,* is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an employer or a principal. Nor could it, as payments made to the produce buyer itself, as opposed to its agents or employees, do not possess the requisite secrecy. If Mr. Gentile and

Mr. Lomoriello were principals in L&P and American Banana, then JSG did not commit commercial bribery.

We agree with the Judicial Officer that they were not principals. They were purchasing agents. *See* 58 Agric. Dec. at 1051 (characterizing Mr. Gentile and Mr. Lomoriello as purchasing agents). Mr. Gentile's and Mr. Lomoriello's joint account arrangements[9] with L&P and American Banana do not alter the basic fact that these companies hired them to buy and sell tomatoes on the companies' behalf. Although each man shared profits and losses on his tomato transactions, there is no evidence that either became a full partner in his respective firm. Mr. Gentile, for instance, shared 15 percent of the profits and losses on his tomato sales for L&P. Nothing indicates he shared in profits and losses on any firm activity other than that which he was specifically engaged to perform, whereas full partners in a business typically share profits and losses in all the firm's activities. *See, e.g.,* UNIF. P'SHIP ACT § 202(a) (1997) (defining partnership as "the association of two or more persons to carry on as co-owners a business for profit"). Likewise, Mr. Lomoriello shared 40 percent of the profits and losses on his produce transactions for American Banana, but nothing indicates he shared in American Banana's overall profits and losses or otherwise became a co-owner. Far from indicating co-ownership, the limited profit- and loss-sharing arrangements were a performance-based compensation mechanism fully consistent with Mr. Gentile's and Mr. Lomoriello's status as agents or employees. *See* 58 Agric. Dec. at 1093-94; *see also* UNIF. P'SHIP ACT § 202(c)(2) & (3) (1997) (Stating that "the sharing of gross returns does not by itself establish a partnership," and that "a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . for services as an independent contractor or of wages or other compensation to an employee.").

JSG nonetheless contends that Mr. Gentile and Mr. Lomoriello were independent brokers and argues, without citation, that "payments to independent brokers are permissible under the PACA." *See* Final Brief of Petitioner at 46- 48. JSG apparently believes that independent brokers are principals because they are subject to PACA. The statute itself belies this claim. Brokers by definition

[9]The Department's regulations define a joint account transaction as "a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction." 7 C.F.R. § 46.2(s).

negotiate "for or on behalf of the vendor or the purchaser."[10] 7 U.S.C. § 499a(b)(7). Agents, not principals, act on another's behalf. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 1, 2000) ("Agency is the fiduciary relationship that arises when one person (the 'principal') manifests consent to another person (the 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent consents so to act."). Nor does the requirement in 7 U.S.C. § 499c(a) that brokers obtain licenses make them principals. A broker's status as a principal, an agent, or an employee depends on its relationship to other parties in a transaction, not its possession of a license.

D. License Revocation

Section 8(a) of PACA permits license revocation for "flagrant or repeated" violations of § 2 (7 U.S.C. § 499b). *See* 7 U.S.C. § 499h(a).[11] The Judicial Officer found JSG's bribes "willful, flagrant, and repeated violations of section 2(4) of the PACA" (7 U.S.C. § 499b(4)) and revoked its license. *See* 58 Agric. Dec. at 1094. We will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates. *See Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (Upholding Department of Agriculture suspension order under the Packers and Stockyards Act and reasoning that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] 'the relation of remedy to policy is peculiarly a matter for administrative competence'."); *County*

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[10]PACA defines a "broker" as "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, except that no person shall be deemed to be a 'broker' if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year." 7 U.S.C. § 499a(b)(7).

[11]Subsection 499h(a) states in its entirety: "Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." 7 U.S.C. § 499h(a). JSG appears to be a dealer. *See* 7 U.S.C. § 499a(b)(6) (defining "dealer" as an entity "engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . .").

Produce, Inc. v. United States Dep't of Agric., 103 F.3d 263, 267 (2d Cir. 1997) (courts "must defer to the agency's judgment as to the appropriate sanctions for PACA violations" because the Department of Agriculture "is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to the requirements of PACA").

Nothing in the record persuades us that JSG's payments to the Gentiles and Albert Lomoriello were anything but flagrant and repeated. The bribes in this case were as flagrant as those in *Goodman* and *Tipco*. The Department revoked the defendants' licenses in both cases, providing ample notice that commercial bribes may result in revocation. The only difference from those cases is that JSG apparently did not surcharge its customers to pay for the bribes. That distinction does not diminish the wilfulness of JSG's conduct or the corruption it worked on its buyers' purchasing agents. The Department acted well within its discretion in revoking JSG's license.

We also reject JSG's claim that the Department's denial of its motion to reopen the record was arbitrary and capricious. Some of the supplemental points JSG wished to present were not relevant to a finding of commercial bribery under *Goodman* and *Tipco*. JSG had ample opportunity before the record closed to present the others.

Petition denied.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

C.H. ROBINSON COMPANY v. KAY GEE PRODUCE COMPANY.
PACA Docket No. R-00-0067.
Decision and Order filed February 15, 2001.

PACA - Breach of contract - Untimely filing, of counter-claim - Market value, determination of.

Complainant contended Respondent owed money for produce received. Respondent's breach of contract claim was held to be timely filed. However, the Judicial Officer (JO) held that he lacked jurisdiction to hear Respondent's counter-claim for overpayment and proceeded to rule on the evidence based upon verified pleadings and the report of the investigation by the [Secretary]. The JO determined (based upon the value of the produce shipped to Respondent using the average market price at the destination method less the reduction in market value of the goods due to defects/spoilage) that the Respondent had overpaid for the produce, but could not recover for his overpayment.

Ben G. Campbell, Minneapolis, MN, 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 $3,357.60 in connection with a transaction in interstate commerce involving watermelons.

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, and Respondent filed an answering statement.
Complainant did not file a statement in reply. Complainant filed a brief.

Findings of Fact

1. Complainant, C. H. Robinson Company, is a corporation whose address is 8100 Mitchell Road, Suite 200, Eden Prairie, Minnesota.

2. Respondent, Kay Gee Produce Company, is a corporation whose address is 4900 Crayton, Cleveland, Ohio. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about June 25, 1998, Complainant sold to Respondent, and shipped from loading point in Wauchula, Florida, to Respondent in Cleveland, Ohio, one truck load containing 2,106 watermelons, or a total 45,100 pounds. The melons were originally billed at $.12 per pound, but Complainant reduced the price on the day of shipment to $.105 per pound.

4. The melons arrived at destination on June 27, 1998, and were accepted by Respondent. On June 28, 1998, at 8:00 a.m. the melons were federally inspected following unloading from the truck. The results of that inspection were as follows, in relevant part:

LOT: A
TEMPERATURES: 68 to 71°F
PRODUCT: Watermelons
BRAND/MARKINGS: "No brand" Bulk
ORIGINS: FL
LOT ID.:
NUMBER OF CONTAINERS: 2016 melons
INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	02 %	00 %		Quality (Scars)	
	15 %	08 %		Brused (5 - 25%0 (sic)	
	12 %	12 %		Over Ripe (10 - 15%)	
	02 %	02 %		Decay	
	31 %	22 %		Checksum	

GRADE: Fails to grade US No. 1 only account condition

5. Respondent promptly faxed a copy of the inspection certificate to Complainant. Respondent paid Complainant $2,054.00 on December 23, 1998, and also paid Complainant $1,924.50 as an undisputed amount on August 30, 1999.

6. An informal complaint was filed on February 22, 1999, which was within nine months after the cause of action alleged herein accrued.

Conclusions

The first matter that should be discussed is Respondent's apparent attempt at filing a counterclaim. The formal answer (filed September 29, 1999) is very unusual. It starts off with a xerox copy of the complaint, and the complaint's one exhibit. Underneath this, on Respondent's letterhead, is a caption, and the words: "Respondent above named respectfully answers the allegations." Underneath this is another letterhead page that states "ITEM 4." Presumably this refers to paragraph 4 in the complaint. Underneath this is another letterhead page with a brief two paragraph explanation in which Respondent alleges that the one load that is the subject of the complaint was a part of a 20 load contract. The written contract is attached. The answer then proceeds with numerous letterhead pages, each followed by documentation. Respondent finally gets to ITEM 11 which reads as follows:

> Respondent hereby request[s] a judgment in its favor of $19,724.50. This includes lost profit of undelivered watermelon loads totaling $17,500 (14 x 2500 x .50¢) and the undisputed amount of $1,924.50 [See attached Kay Gee 6] and also include recovery of our filing fee of $300.00.

Although Respondent never stated that it wished to file a counterclaim, it is evident from the substance of Respondent's answer that this is what Respondent had in mind. However there are two problems with Respondent's attempt to file such a claim. First, although Respondent requests recovery of a $300.00 "filing fee," there is no record that either the $60.00 filing fee, or the $300.00 handling fee were ever filed. Second, the contract under which Respondent makes its claim specifies shipment of the 20 loads of watermelons between June 22, and July 1, 1998. A breach of that contract by failure to ship would, of necessity, have taken place on or prior to July 1, 1998. However, Respondent's attempt to file the claim was in connection with the answer filed on September 29, 1999, or far more than nine months after the cause of action accrued.[1] We conclude that we do not have

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[1] *See Bar-Well Foods Limited v. Valley Packing Services International*, 39 Agric. Dec. 1200 (1980); *B & K Produce Co. v. Shipper's Service Co.*, 33 Agric. Dec. 701 (1974); *Sanders and Drake v. Gardner Bros.*, 31 Agric. Dec. 128 (1972); *Edward G. Hirn v. Sol Fetterman Produce Co.*, 25 Agric. Dec. 258, *petition for reconsideration dismissed* 420 (1966); *I. Meltzer & Son v. J. Lerner & Son,* 21 Agric. Dec. 685 (1962); *Cardoso Bros. v. Unanue & Sons,* 20 Agric. Dec. 1188 (1961); *R. Dixon &* (continued...)

jurisdiction over the counterclaim which Respondent attempted to file.

Complainant alleges that Respondent failed to give timely notice of any breach of contract. Both parties submitted evidence on this point, and we find Respondent's evidence more convincing. Accordingly, we find that timely notice of a breach was given. The federal inspection clearly shows a breach of contract on the part of Complainant as to the June 25, shipment of watermelons. Respondent is entitled to damages flowing from the breach. According to the Uniform Commercial Code, 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 goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price shown by market reports for the destination market on the first day on which resales could have been made following arrival. No reports are issued for Cleveland, Ohio, but reports for Detroit, Michigan, for June 29, 1998, show that various red meat varieties of 16 to 24 pound watermelons from Florida were selling for $.18 per pound. The value of the 45,100 pound load, if it had been as warranted, was therefore $8,118.00. The value of the melons accepted is best shown by an accounting of a prompt and proper resale of the melons. Respondent did not offer an accounting in evidence; and we will, therefore, use the percentage of condition defects to determine Respondent's damages.[2] Condition defects totaled 29 percent. Applying this percentage to the value of the melons if they had been as warranted gives us $2,354.22 as Respondent's damages.

Respondent alleged that the original purchase price of $.12 per pound was lowered to $.105 per pound, and submitted a manifest faxed by Complainant to Respondent on June 25, 1998, that showed the new price. Complainant nowhere

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[1](...continued)
Co., Inc. v. Joseph Spagnola, 17 Agric. Dec. 1057 (1958); *Frank Kenworthy Co. v. D. L. Piazza Co.*, 16 Agric. Dec. 844 (1957); and *Ricks Fertilizer Co. v. M. Dunn & Co.*, 5 Agric. Dec. 194 (1946).

[2]*See Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993);, 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).

directly rebutted this document, or attempted to explain it. We conclude that the adjusted purchase price of the melons was, therefore, $4,735.50. Respondent's damages deducted from this amount leaves $2,381.28 as Respondent's basic liability on this load. Respondent originally paid Complainant $2,054.00, and subsequently paid Complainant $1,924.50. Respondent has, therefore, considerably overpaid Complainant what was due. Since, however, Respondent did not pay the $300.00 handling fee when it attempted to file a counterclaim, we are unable to award Respondent the excess of what it has paid over what was due. The complaint should be dismissed.

Order

The complaint is dismissed.

QUAIL VALLEY MARKETING, INC. v. JOHN A. COTTLE, d/b/a VALLEY FRESH PRODUCE.
PACA Docket No. R-98-0020.
Decision and Order filed December 4, 2000.

Shipping terms - F.o.b. - Appeal re-inspection, request untimely.

Warranty of Suitable Shipping Condition is applicable to city equidistant to agreed upon destination regardless of express agreement of parties that table grapes would not go to the city. Contrary decision will not be followed. Where the parties agree to a destination city as an explicit term of the contract, shipper may offset any damages established for a breach of the agreement against damages established for violation of the warranty, or the parties may agree to liquidated damages for prohibited destination in contact agreement. Notice of east coast inspection provided to California shipper on the date of inspection will be untimely if provided after more than half the shipment is resold as shipper is deprived of opportunity for appeal reinspection.

Thomas R. Oliveri, Newport Beach, CA., for Complainant.
Louis W. Diess, III, Washington, D.C., for Respondent.
Eric Paul, 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 $45,112.25 as payment of the balance due on four f.o.b. truck lot shipments of table grapes sold

to Respondent in interstate commerce, plus the recovery of the $300.00 PACA handling fee.

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 and counterclaim admitting that Respondent had agreed to f.o.b. purchases totaling $68,568.50 as alleged and had remitted the sum of $23,456.25 to Complainant, but denying that table grapes shipped to Respondent's customer complied with the contract terms and that there was an unpaid balance due in the amount of $45,112.25, and asking for the award of an unspecified amount of damages because of Complainant's failure to ship the kind, quality, grade and size of grapes called for in the contract. Complainant filed a reply denying the allegations of Respondent's counterclaim and affirmatively asserting that Respondent, at shipping point, had personally inspected the grapes as to condition and quality and approved of their shipment to Respondent's customer in Philadelphia, Pennsylvania.

As the amount in controversy exceeded $30,000.00 and Respondent had requested an oral hearing, an oral hearing was held by audio-visual telecommunications on October 14, 1998, with the parties and their representatives located in Fresno, California, and the presiding officer and the court reporter located in Washington, D.C. Complainant was represented by Thomas R. Oliveri, Western Growers Association, Newport Beach, California. Respondent was represented by Stephen P. McCarron, McCarron & Associates, Washington, D.C. Eric Paul, Office of the General Counsel, was the presiding officer. Complainant presented oral testimony from one witness, Robert Rocha. Respondent presented oral testimony from three witnesses, Derek Seto, William Slattery, and Michael Espinosa. By oral stipulation of the parties, the deposition of Pat Prisco was admitted as Deposition Exhibit 1 (DX 1) along with attached exhibits 1 through 46 (DX 1(1) through DX 1(46)); the deposition of Robert Rocha was admitted as Deposition Exhibit 2 (DX 2) along with attached exhibits 1 through 19 (DX 2(1) through DX 2(19)); report of investigation exhibits 1 through 6 (ROI 1 through ROI 6) were admitted; formal complaint exhibits 1 through 21 (FCX 1 through FCX 21) were admitted; Complainant's exhibit's 1 through 5 (CX 1 through CX 5) (as submitted to the Hearing Clerk on October 6, 1998) were admitted; and Respondent's exhibit's 1 and 2 (RX 1 and RX 2) (as submitted to the Hearing Clerk on October 8, 1998) were also admitted. This procedure ensured that all available relevant evidence was admitted, although in many instances the same document was admitted under multiple designations. References to the transcript are by page number (Tr.__). The parties filed briefs. Complainant filed a timely claim in the amount of $3,239.02 for fees and expenses incurred in connection with the oral

hearing and the deposition of Robert Rocha. Respondent filed a timely claim in the amount of $7,557.94 for fees and expenses incurred in connection with the hearing and the deposition of Pat Prisco.

Findings of Fact

1. Complainant, Quail Valley Marketing, Inc., is a corporation whose post office address is P.O. Box 1206, Ridley, CA 93654.

2. Respondent is an individual, John Cottle, doing business as Valley Fresh Produce, whose post office address is 255 West Fallbrook Avenue, Suite 103-A, Fresno, CA 93711-6151.

3. The parties are, and at the time of the transactions involved herein were, licensed under the Act.

4. On or about October 30, 1998, Complainant sold Respondent by oral contract 420 boxes of Red Globe table grapes, Top Knot label, plain pack, styro container, 23 pound, at a $14.00 unit price ($5,880.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling and palletizing charge ($630.00), a $10.00 air bag charge, and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($105.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $6,438.50 (ROI 1D; Tr. 12-14). Complainant's order and invoice number was 963615 for this f.o.b. no grade shipment of table grapes.

5. This was the first of four f.o.b. shipments of table grapes that Respondent purchased from Complainant for delivery to C.H. Robinson Corp. in Philadelphia, Pennsylvania, without advising Complainant of the identity of its Philadelphia customer.

6. This first shipment departed from Sakata Farms in Biola, California, at 5:00 p.m. on October 30, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Sandstone Transport to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had the 420 boxes of unloaded Top Knot brand Red Globe grapes inspected at 8:00 a.m. on November 6, 1996. USDA Inspection Certificate K-248851-8, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that these 420 lugs had temperatures between 37 and 38 degrees and failed to grade U.S. No. 1 table on account of the following condition defects:

Average Defects	Serious Damage	
03%	00%	Quality

05%	00%	Shattering
07%	00%	Sunken areas around Capstem (5 to 10%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
02%	02%	Decay
25%	10%	Checksum

The inspector noted that the decay was mostly early, some moderate stages. [DX 1(4)]

7. L & P Fruit sold these grapes to customers at the Hunts Point Terminal on November 7 and November 8, 1996, for an average unit price of $17.51, and after granting credits of $288.00 received sales proceeds of $6,311.00 (DX 1(7)). These 420 lugs had been sold to L & P Fruit by Alanco Corp. as part of a 1761 lug shipment with a total freight expense of $3,150.00. L & P Fruit ended up paying Alanco Corp. $4,233.50 for these 420 lugs of Red Globe grapes (DX 1, pg. 8).

8. On or about October 30, 1998, Complainant sold Respondent by oral contract 692 boxes of Red Globe table grapes, Top Knot label, plain pack, styro container, 23 pound, at a $16.00 unit price ($11,072.00), and 358 boxes of Red Globe table grapes, Covey label, plain pack, styro container, 23 pound, at a $14.00 unit price ($5,012.00), for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling and palletizing charge ($1,575.00) and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($262.50) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $17,420 (ROI 1H; Tr. 16-17). Complainant's order and invoice number was 963619 for this f.o.b. no grade shipment of table grapes.

9. This second shipment departed from Sakata Farms in Biola, California, at 2:15 p.m. on October 31, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by W.R. Stevens Trucking to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had these 1,050 lugs of Red Globe grapes inspected in two lots at 9:55 a.m. on November 6, 1996. USDA Inspection Certificate K-371691-7 shows that the two lots had temperatures between 34 and 37 degrees and failed to grade U.S. No 1 table on account of the following condition defects:

Lot A [692 lugs "Top Knot" Red Globe table grapes]

Average	Serious	

Defects	Damage	
03%	00%	Quality (scars)
05%	00%	Shattering
07%	00%	Shriveling around Capstem (5 to 11%)
16%	16%	Flabby Berries (17 to 21%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
03%	03%	Decay (2 to 5%)
42%	27%	Checksum

Lot B [358 lugs "Covey" Red Globe table grapes]

Average Defects	Serious Damage	
03%	00%	Quality (scars)
05%	00%	Shattering
09%	09%	Flabby Berries (7 to 11%)
03%	03%	Crushed and Split Berries
05%	05%	Wet and Sticky Berries
02%	02%	Decay (1 to 4%)
27%	19%	Checksum

The inspector noted that the decay in each of these lots was in mostly early, some moderate stages (DX 1(32).

10. L & P Fruit Corp. sold 980 of these 1,050 lugs of Red Globe grapes to customers at the Hunts Point Terminal on November 7, 1996, at prices that initially averaged $15.03 (for 692 lugs) and $15.00 (for 288 lugs). The $10,404.00 and $4,320.00 that L & P Fruit billed for these respective lots was reduced by credit adjustments giving L & P Fruit proceeds of $9,354.00 ($13.51 a lug) and $3,718 ($12.90 a lug). Alanco Corp. subsequently billed L & P Fruit Corp. $11,149.50 for this shipment [$11.50 delivered for 692 lugs and $11.00 delivered for 288 lugs plus $23.50 Ryan] by a November 11, 1996 invoice that was paid on December 30, 1996. The L & P Fruit Corp. sales records, and this billing and payment, fail to account for 70 of the 358 lugs of the "Covey" label Red Globe grapes that the parties have acknowledged were delivered on November 5, 1996, and inspected on November 6, 1996 (DX 1(28-36)).

11. On or about October 30, 1996, Complainant sold Respondent by oral contract 1820 lugs of Calmeria table grapes, Covey label, plain pack, styro container, 21 pound, at a $11.00 unit price ($20,020.00) for interstate shipment to Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling

and palletizing charge ($2,730.00), and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($455.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $22,318.50 (ROI-1L); Tr. 17-18). Complainant's order and invoice number was 963651 for this f.o.b. no grade shipment of table grapes.

12. This third shipment departed Complainant's warehouse at 8:20 p.m. on November 1, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Jo Dar Dist. to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 5, 1996. L & P Fruit had the 1820 lugs of unloaded Covey brand Calmeria grapes inspected at 6:45 a.m. on November 6, 1996. USDA Inspection Certificate K-248174-5, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that these 1820 lugs had temperatures between 37 and 38 degrees and failed to grade U.S. No 1 table on account of the following condition defects:

Average Defects	Serious Damage	
07%	00%	Quality (scars)(6 to 10%)
04%	00%	Shattering
17%	00%	External Brown Discoloration (5 to 23%)
06%	00%	Sunken Discolored areas (4 to 10%)
02%	02%	Crushed and Split Berries
04%	04%	Wet and Sticky Berries
01%	01%	Decay
41%	07%	Checksum [DX 1(15)]

13. L & P Fruit Corp. sold this third shipment of grapes for Alanco's account between November 6, 1996 and November 12, 1996 at prices that initially averaged $9.19 for 1811 lugs and $5.60 for 9 lugs. The $16,702.40 billed was reduced by credit adjustments to gross proceeds of $12,603.40, and was further reduced to net proceeds of $10,113.89 by the deduction of $70.00 cartage, $74.00 inspection, $1,890.51 commission (15%), and $455.00 handling (25¢). Alanco Corp. subsequently billed L & P Fruit Corp. $10,579.50 for this shipment (at $5.80 delivered plus $23.50 Ryan) by a November 27, 1996 invoice that was paid on December 13, 1996 (DX 1(16-27)).

14. On or about October 30, 1996, Complainant sold Respondent by oral contract another 1820 lugs of Calmeria table grapes, Covey label, plain pack, styro container, 21 pound, at a $11.00 unit price ($20,020.00) for interstate shipment to

Respondent at Philadelphia, Pennsylvania. There was a $1.50 a box pre-cooling and palletizing charge ($2,730.00), a $73.00 charge for a federal-state shipping point inspection, and a $23.50 charge for a temperature recorder. Respondent was given a $0.25 per box discount as a local California buyer ($455.00) that was shown on Complainant's invoice as a brokerage credit, resulting in an agreed invoice price of $22,391.50 (ROI 1Q); (Tr. 18-19). Complainant's order and invoice number was 963652 for this f.o.b. no grade shipment of table grapes.

15. This fourth shipment departed Complainant's warehouse at 3:30 p.m. on November 6, 1996, with a destination of Valley Fresh Produce, Philadelphia, Pennsylvania, shown on the bill of lading. It was actually delivered by Sun Aire Trucking to L & P Fruit Corp. at the Hunts Point Terminal, Bronx, NY, on November 11, 1996 (DX 1(38)). L & P Fruit had the 1820 lugs of unloaded Covey brand Calmeria grapes inspected at 7:10 a.m. on November 12, 1996. USDA Inspection Certificate K-248815-3, which identifies Alanco Corp., Bronx, NY, as the shipper, shows that the 1820 lugs of Covey label Calmeria grapes had temperatures between 35 and 37 degrees and failed to grade U.S. No. 1 table on account of the following condition defects:

Average Defects	Serious Damage	
05%	00%	Quality Defects (scars)(4 to 8%)
44%	00%	Brown Discoloration (17 to 62%)
05%	00%	Shattered Berries
02%	02%	Decay
56%	02%	Checksum

The inspector noted that the decay was in early stages and that the stems were mostly green and pliable some brown and brittle (DX 1 (40)).

16. L & P Fruit Corp. sold these grapes for Alanco's account on November 12 and 13, 1996 at prices that totaled $12,643.50 after adjustments. This $12,643.50 in gross proceeds was reduced to net proceeds of $10,010.97 on the accounting prepared by L & P Fruit Corp. by the deduction of $203.00 cartage, $78.00 inspection, $1,896.53 commission (15%), and $455.00 handling (25¢). Alanco subsequently billed L & P Fruit Corp. $10,579.50 for this shipment (at $5.80 delivered plus $23.50 Ryan) by a November 27, 1996 invoice that was paid on December 13, 1996 (DX 1(41-46)).

17. Approximately one or two days prior to the shipment of each of these four loads one of Respondent's salesmen, Mr. Derek Seto, visited Complainant's place of business and determined that Complainant possessed suitable table grapes

for shipment to Philadelphia, Pennsylvania (Tr. 53-56). On November 1, 1996, Complainant obtained federal-state inspections of two 1890 lug lots of Calmeria grapes from which the third and fourth shipments were to be drawn on November 1, 1996, and November 6, 1996, respectively. The inspection reports show that the grapes inspected graded US #1 table when inspected. (FCX 6; 9).

18. Temperature tapes that were produced by Pat Prisco of L & P Fruit for the first and third shipments show transit temperatures in the low to mid-30 degree range (DX 1(3;14)). The third temperature tape produced by Mr. Prisco shows transit temperatures in the upper 20 degree range for the second shipment (DX 1(31).[1] There is no temperature tape in the record for the fourth shipment, and the deposition testimony of this witness merely goes to the temperature ranges of the grapes on arrival at L & P Fruit (DX 1, pg. 6-7).

19. On November 6, 1996, Complainant's salesman, Robert Rocha, was advised by warehouse staff that the trucker picking up the fourth shipment had checked in that the load was going to New York. Mr. Rocha telephoned Respondent and obtained express assurance from one of Respondent's salesmen, Mr. Derek Seto, that the shipment was going to Philadelphia, Pennsylvania as had been agreed (Tr. 21). Before Mr. Seto confirmed to Mr. Rocha that the destination was Philadelphia and not New York, he spoke to Respondent's office manager, Mr. William Slattery, who talked over the telephone to the C.H. Robinson salesman who had ordered the grapes for delivery in Philadelphia and obtained his oral assurance that the destination was Philadelphia and not New York (Tr. 68).

20. Mr. Slattery subsequently learned, from faxed USDA inspection reports received on that same day, that the first three shipments had been delivered to L & P Fruit at the Hunts Point Terminal Market, Bronx, NY. Mr. Slattery decided to make inquiries with C.H. Robinson and the PACA Branch before contacting Complainant (Tr. 69-71).

21. On the afternoon of November 12, 1996, a date that Mr. Rocha remembered because it was his birthday, he was informed by Mr. William Slattery in a telephone conversation that the grapes in these shipments had all gone to New York City and not to Philadelphia, Pennsylvania (Tr. 22-24).

22. On November 14, 1996, Mr. Rocha received a letter from Bill Slattery by fax, the body of which reads as follows:

> To reiterate our phone conversation of November 12, Valley Fresh

[1] Abnormal transportation is not apparent from this reading because the freezing point for grapes is about 28 degrees and the relevant inspection certificate contains no specific notation as to freeze damage as is required when such damage is present.

> Produce placed orders with Quail Valley for 1470 Red Globes and 3640 Calmerias on October 30 and November 1, with destinations listed as Philadelphia, PA. On November 6, Robert called Valley Fresh to double check the destination of order #963652, because the truck was checking in for Bronx, NY. At the same time, Kurt with C.H. Robinson (Philadelphia) was on another phone line and I asked him whether or not the grapes were going to New York, which he denied.
>
> We want to make it clear with Quail Valley that Valley Fresh's position in this matter is that the responsibility of the grapes lies with C.H. Robinson, because they diverted the grapes from the original destination. With Quail Valley's approval Valley Fresh will hold our position with C.H. Robinson and keep Quail Valley appraised of the situation as events proceed. We are also aware that after my conversations with PACA that they agree with my position at this time, but he did also make me aware of the possibility of recourse by the inspections due to the destinations being equidistant and the same day arrival from shipping point, but he did not see this being brought up in this case.

(DX 2(10)).

23. On November 16, 1996, Mr. Rocha received by fax a copy of a letter that Mr. Slattery had sent to Mr. Greg Goven at C.H. Robinson's headquarters Eden Prairie, MN, on November 15, 1996, that went over the same information that had been covered in Mr. Slattery's prior letter to Mr. Rocha, and explained that he had discovered that L & P Fruit had purchased the grapes from Alanco Corp., who purchased them from C.H. Robinson-NYC, who bought the grapes from Kurt at C.H. Robinson's Paulsboro, NJ, branch office. Mr. Slattery went on to state "Now, after conversations with the Paulsboro office I am being told that my failure to investigate the true destination of the grapes will result in all deductions on these files to be the responsibility of Valley Fresh Produce." (DX 2(11)).

24. On December 3, 1996, Complainant received from Respondent by fax copies of Respondent's trouble file reports pertaining to the first and second shipments, the 1,470 lugs of Red Globe table grapes, as well as the USDA inspection reports pertaining to the third and fourth shipments, the 3,640 lugs of Calmeria table grapes (CX 4). On the following day, Complainant returned copies of these trouble reports and inspections to Respondent with notes from Robert Rocha stating "These Inspections were not received in a timely manner. Quail Valley is unable to grant any adjustments." (CX 5).

25. Pursuant to these trouble reports, Respondent sought Complainant's agreement to accept remittance of the following amount's that Respondent was to

receive from C.H. Robinson:

$8.25 x 692 “Top Knot” Red Globes
$7.75 x 358 “Covey” Red Globes
less $95.25 for federal inspection [$8,388.25]

and

$8.25 x 420 Red Globes
less $74.00 for federal inspection [$3,391.00]

26. Complainant has received Respondent’s check no. 02886, dated December 17, 1996, in the amount of $25,456.25 as the undisputed amount involved in this reparation proceeding (ROI 2a; Complaint; Answer).

27. The formal complaint was received by the Department on March 28, 1997, which is within 9 months after the cause of action herein accrued.

Conclusions

Respondent has purchased and received from Complainant in interstate commerce four f.o.b. shipments of table grapes, a perishable agricultural commodity. The Regulations[2] 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[3] 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 condition, will assure delivery without deterioration at the contract destination agreed upon the between the parties."[4] The warranty of

[2] 7 C.F.C. § 46.43(i) [Note: 7 C.F.R. § 46.43(i) - Editor]

[3] 7 C.F.R. § 46.43(j)

[4] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43 (j)) which require delivery to contract destination “without abnormal deterioration”,
(continued...)

suitable shipping condition is made applicable only when transportation service and conditions are normal. It is well established that where 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 condition were normal.[5]

Complainant contends that the warranty of suitable shipping condition is not applicable to any of the four transactions in dispute because of unauthorized changes in the agreed contract destination for these shipments from Philadelphia, Pennsylvania, to New York City that were made by Respondent's customer, C.H. Robinson. In addition, Complainant has asserted that the warranty of suitable shipping condition is not applicable because Respondent's representative, Derek Seto, inspected and approved each load of grapes prior to its shipment from Complainant's place of business. Finally, Complainant contends that even if the warranty of suitable shipping condition was applicable to these transactions, that the failure of Respondent to give Complainant timely notice of the condition defects determined by USDA inspection reports bars any reliance upon these inspection reports to establish that the shipments failed to make good delivery. Complainant has not attempted in this proceeding to establish that the transportation service and

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[4](...continued)
or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, Sales § 245 (rev. ed. 1948). As an illustration of how the rule operates, 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 the 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. For all commodities other than lettuce (for which see 7 C.F.R. § 46.44) what is "normal" or abnormal deterioration is judicially determined. *See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[5]Admiral Packing Company v. Sam Viviano & Sons, 40 Agric. Dec. 1993 (1981): Dave Walsh v. Rozak's, 39 Agric. Dec. 281 (1980).

conditions were abnormal with respect to any of the four shipments of table grapes in controversy, or that the warranty of suitable shipping condition is not applicable because of abnormal transportation.

It is necessary to determine whether the warranty of suitable shipping condition should be applied to these transactions because we have four USDA inspection certificates that show excessive condition defects in a 22% to 56% range that were revealed by timely inspections. With respect to table grapes, we have held that condition defects at destination averaging 17% will establish a breach of the warranty of suitable shipping condition. *Robert A. Shipley, d/b/a Shipley Sales Service v. Peacock Sales,* 46 Agric. Dec. 702 (1967). *See also Lester Distributing Co. v. Levatino Produce Corp.*, 43 Agric. Dec. 1606 (1984).

We will first examine Complainant's contention that Respondent inspected and approved the grapes prior to shipment. Respondent's office in Fresno, California, is located within 25 miles of Complainant's place of business at Reedley, California (Tr. 45). Complainant was engaged in the marketing of fresh fruit as a grower's agent, and had table grapes and other perishable agricultural commodities obtained from various growers on hand at its warehouse facility during the months of October and November. One of the regular duties of a former employee of Respondent, Mr. Derek Seto, was to visit Complainant's place of business and to determine whether Complainant had produce available that would be suitable for shipment to Respondent's customers. Mr. Rocha testified that, prior to these four shipments, Derek Seto inspected the table grapes that were located at Complainant's warehouse, and determined that the table grapes were suitable for shipment to Philadelphia, Pennsylvania (Tr. 13, 17-18). However, Mr. Rocha acknowledged that he was not present when Derek Seto looked at the grapes (Tr. 38-39). Mr. Seto presented the following credible testimony with respect to his inspections of the grapes in these shipments:

Q. The four truck lot shipments of grapes covered by this reparation proceeding, were you the individual on behalf of Respondent's firm, that being Quail -- excuse me --Valley Fresh Produce that inspected the grapes?

A. Yes, I was.

Q. There seems to be some type of confusion on the dates that you might have gone out to look at the grapes.

Did you look at the grapes on the date of shipment?

A. No, I didn't.

Q. Did you look at the grapes maybe the day before they were shipped?

A. Yes. Actually, I'd say on some occasions it was on probably one or two days before they shipped.

Q. I'm assuming you did not look at every lug of grapes?

A. You're right, I didn't.

Q. Did you look at a representative sample of the grapes that were to be shipped?

A. Yes, I did.

Q. In your opinion, were these grapes suitable for shipping to the east coast?

A. Certainly. Definitely east coast quality.

Q. From your experience--

A. When I say "east coast quality," there are different types of products that you want to keep on the west coast, different types of products that you want to keep, you know, in the southwest area to the midwest, and then there are east coast type of boxes which are a little bit under export standards that is in cases.

Q. Would you -- in your opinion, are these the types of grapes that the markets in Hunts Point, New York, like to order?

A. I wouldn't -- my personal opinion, just dealing with the New York market, I wouldn't send anything to New York because myself, I don't have a relationship with a customer in that area buying, and I've just heard some horrible stories about sending product there.

Q. Were you aware of where these four truck lot shipments of grapes were to be shipped to, what city they were to be shipped to?

A. Yes. Pennsylvania.

Q. To Philadelphia, Pennsylvania.

Did you happen to know the name of the buyer in Philadelphia, Pennsylvania, who was purchasing these grapes?

A. We were dealing with C.H. Robinson.

(TR. 53-54).

There is documentary evidence that Complainant, in connection with the two purchase orders placed for Respondent by Derek Seto, instructed its warehouse personnel not to load the two shipments of Calmeria grapes until they were inspected by Respondent's representative. Complainant's shipping orders nos. 963651 and 963652 for the third and fourth shipments contain the following special instruction: "Do not load until Valley Fresh inspects." (Tr. 38-39; DX 2).

We conclude that Complainant has failed to establish by a preponderance of the evidence that Respondent's employee inspected the specific lugs of grapes that were going to be shipped in these four shipments. It is not clear whether Mr. Seto's inspections were conducted only at Complainant's facility or included visits to specific grower locations such as Sakata Farms. It appears that Mr. Seto looked at a representative sample of an unspecified volume of table grapes that were on

hand one or two days prior to the actual loading of these shipments. We have nothing in the record as to the size of Complainant's table grape inventory at the time that Mr. Seto performed his inspections, and we can not determine what part of the grapes shipped to fill Respondent's orders were actually inspected by Mr. Seto. The two federal-state inspections of Calmeria grapes that Complainant obtained on November 1, 1996, were conducted after the two shipping orders were taken that contained the special instructions "Do not load until Fresh Valley inspects." It appears that the inspection that were performed by Mr. Seto were for the purpose of checking the quality and condition of the general run of Complainant's table grapes and were not inspections made for the purpose of determining the quality and condition of a specific quantity. We have held that such an inspection does not establish the existence of a sale after inspection. *See Kirby & Little Packing Co. v. United Fruit & Produce Company*, 16 Agric. Dec. 1066, 1069 (1957). Even if we were able to find that Mr. Seto had inspected a representative sample of the grapes purchased by Respondent, it does not appear that the parties agreed to "Purchase after Inspection" terms in their contract negotiations[6], and their use of the contract term "f.o.b." on the shipping orders and invoices relating to these shipments was inconsistent with these being purchase after inspection transactions which do not carry a warranty of suitable shipping condition. In a number reparation cases where the significance of the use of these trade terms under the Department's Regulations was not fully addressed, it was held that if a buyer, directly or through its agent, inspects specific produce prior to its purchase, the warranty of suitable shipping condition does not apply, as the buyer is deemed to have made a purchase after inspection at shipping point. *Ritepak Produce v. Green Grove Markets,* 29 Agric. Dec. 165 (1970); *Goldstein Fruit & Produce v. East Coast Distributors,* 18 Agric. Dec. 493 (1957); *L.T. Malone v. Al Kaiser & Bros.*, 18 Agric. Dec. 1221 (1959); *PACA Docket No. 5123,* 9 Agric. Dec. 146 (1950). More recently, in *Delano Farms Company v. Suma Fruit International*, 57 Agric. Dec. 749, 754 (1998)*; Primary Export International v. Blue Anchor, Inc.,* 56 Agric. Dec. 969, 977-78 (1997), we held that under the Regulations the waiver of the suitable shipping condition warranty requires the use of the trade term "purchase after inspection," and that the use of the trade term "f.o.b." under the Regulations expressly entails the suitable shipping warranty. We also rejected the

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[6]Section 46.43(ff) of the Regulations provides:

"Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition except warranties expressly made by the seller." (7 C.F.R. § 46.43(ff))

exclusion of the suitable shipping warranty as an implied warranty, by a prior examination of the goods under section 2-316(3)(b) of the Uniform Commercial Code, since under the Department's Regulations in f.o.b. sales the suitable shipping condition warranty is an extension of the warranty of merchantability and more equivalent to an express warranty. *Id.* at 979-80. We find that Respondent did not waive the warranty of suitable shipping condition.

We now turn to Complainant's contention that the warranty of suitable shipping condition is not applicable to any of the four transactions in dispute because of unauthorized changes in the agreed contract destination for these shipments from Philadelphia, Pennsylvania, to New York City that were made by Respondent's customer, C.H. Robinson. There is no question that Respondent consistently represented in good faith that the contract destination for these shipments was Philadelphia, Pennsylvania. It is also true that Philadelphia, Pennsylvania, and New York City are essentially equidistant from California shipping points and share the same five day transit time. If these two destinations had been regarded by the parties in this proceeding as equally good destinations in which to market California table grapes during October and November, 1996, we would follow, without further analysis, the precedent of a number of cases where contract destination diversions that did not materially alter transit time and distance were held inadequate to waive the warranty of suitable shipping condition. *Merrill Farms v. Tom Lange Company, Inc.,* 44 Agric. Dec. 1253 (1985); *Kirby & Little Valley Packing Co. v. United Fruit & Produce Company, supra*. See, also *Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co., Inc., et al.,* 42 Agric. Dec. 1602 (1983) where we said (dicta) " the diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in determining whether the commodity would have been abnormally deteriorated at the destination specified." We find in the present case, that the parties shared an implicit understanding throughout their course of dealing that none of these four shipments was going to New York City, and that in the case of the fourth shipment, Respondent provided an express representation to this effect that induced Complainant to release the shipment to Respondent's trucker.

We know from the testimony of Robert Rocha that Complainant would not have agreed to sell the grapes to a buyer located on the Hunts Point Market because of a reasonable fear that they would not bring an adequate return at this destination. Mr. Rocha explained Complainant's understanding with respect to sending grapes to the New York market in the following testimony:

Q. Was that an important factor to you, were contract destination would be?
A. Yes.

Q. Why was it important to you that the grapes were going to be going to Philadelphia?

A. Well, at the time it was a very tight grape market, table grape market. It was a demand exceed situation and we wanted to make sure that our grapes were going to the right market, and we thought the grapes were fine to go to Philadelphia, and knowing that it was going to go there, and we kind of were picking what markets we would go to and who we were going to sell them to.

Q. Would you consider going to a market let's say of Hunts Point, New York, or the Bronx with these grapes?

A. Absolutely not.

Q. Could you -- excuse.

Are you done with your answer? I don't want to stop you if want to continue.

Why would you not want to go to the Hunts Point area?

A. Well, at least from our experience, we've had a lot of trouble with New York City. It's a very tough market. You have -- you just always run into problems, either the inspections' adjustments, pay whatever it is into that market.

And like Philadelphia, we've had good experience with; dealt with, you know, people there and everything has gone fine with that market. And so, especially with the demand exceed situation we had with the grapes, we were definitely going to pick a better market to go to, and New York City definitely that year was not in any way we were going to go that market with grapes that we know we can go to a different market with better success.

(Tr. 14-15).

When specifically questioned with respect to the fourth shipment, Mr. Rocha testified:

A. Given the choice, given the choice, and if they were told -- if it was asked to me in the beginning to go to New York City, I would not have shipped these grapes to New York City.

Q. Because you expected there would be problems?

A. We've had bad experiences. New York City, especially that year, we did not ship any grapes to New York City because they went into demand exceeds market. You go into your other markets, and we didn't have to sell to New York City.

(Tr. 41-42).

We find that there was a clear perception, shared by both Complainant's witness Robert Rocha and Respondent's witness Derek Seto, that a shipper would be better off selling table grapes at other locations than New York City.

We find that the diversions of these shipments from Philadelphia to New York City by Respondent's customer, which are acceptances of the shipments by Respondent, constitute breaches of the oral contract between the parties to this reparation proceeding.

The effect that a breach of an express agreement between parties that a shipment would not go to New York City would have on the applicability of the warranty of suitable shipping condition was recently considered in *The Chuck Olsen Co. v. Produce Distributors Inc., and Produce Etc. Marketing*, 57 Agric. Dec. 1689 (1998), a case in which a truckload of California table grapes was diverted from a Paterson, New Jersey, contract destination and also sold by L & P Fruit at the Hunts Point market. In that case we determined that:

> The clearly manifested intent of the parties must be upheld where it is not illegal, and does not conflict with public policy. We find the warranty of suitable shipping condition to be inapplicable to this transaction.

Id. at 1694.

The reasoning we followed in *Chuck Olsen* was that the suitable shipping condition warranty provision of the Regulations expressly uses the term "contract destination" and that the extension to other equidistant locations was an expansive interpretation that should not followed when it is found that the parties specifically excluded the actual destination where the shipment was delivered. On further consideration, the warranty of suitable shipping condition is a warranty that the shipper has supplied product in good condition and, absent abnormal transportation, the shipper warrants that the product will arrive in good condition. So long as the destination of the product is virtually equidistant from the point of shipment as the agreed upon destination, there is no reason that the warranty that goods would arrive in good condition should not continue to apply. Accordingly, it is not appropriate to reject the applicability of the suitable shipping condition warranty in this proceeding. We conclude that this warranty remains applicable, but that Complainant has the right to claim damages resulting from breach of the agreement not to ship to New York City. Complainant has failed to establish that it incurred

any specific amount of damages because of Respondent's breach.[7]

Having concluded that the warranty of suitable shipping condition remains applicable in this matter, we must now determine whether Respondent is precluded from using the results of the first three USDA inspections to determine whether the warranty was breached because Respondent has failed to provide Complainant with timely notice of the inspection results. There is a direct conflict in the testimony that was provided by Robert Rocha and Bill Slattery as to when Complainant received notice of the inspection results. We find the testimony of Mr. Rocha, that he was not advised by Mr. Slattery that the first three shipments had gone to New York City until November 12, 1996, to be more credible on this matter. Mr. Slattery testified that he talked to Mr. Rocha regarding both the diversions to New York, and the condition of the grapes upon delivery, on November 7, 1996, one day after he had received faxed copies of the three inspections that were done on the morning of November 6, 1996., and after he had spoken to the salesman at C.H. Robinson and the PACA Branch. He failed to confirm that he had provided such oral notification with a follow up letter, a common business practice that he followed after his telephone conversation with Mr. Rocha on November 12, 1996. He did not fax copies of the inspection reports to Complainant upon receipt. Although he also testified that he started to fax them, and received a telephone call from Mr. Rocha inquiring as to the reason for the interrupted fax transmission, we do not believe that such a telephone conversation would have occurred without a follow up written transmission of information. The telephone records that have been produced are not persuasive since Complainant has established that there were numerous unrelated transactions between the parties that occurred shortly after the transactions that are the subject of this proceeding. We find that Complainant has established that it received only an unrelated fax respecting Navel orange prices from Respondent at about the time and date that Mr. Slattery testified that his broken off transmittal of the first three inspection reports to Complainant had occurred (CX 2).

A shipper is entitled to receive timely notice of an inspection that does indicate abnormal deterioration and breach of warranty before a buyer can rely upon such

[7] As a practical matter, establishing a dollar amount for such damages may prove to be difficult. Parties wishing to expressly exclude a specific location, to or exclude all locations other than a specified contract destination, while retaining the warranty of suitable shipping condition for an agreed contract destination, could so provide in writing on the transaction records adding that in case of a breach the agreed f.o.b. contract amount shall constitute liquidated damages.

inspection report.[8] Even assuming that the oral notification of shipment diversion provided by Bill Slattery to Robert Rocha on November 12, 1996, contained an adequate disclosure of the condition defects set forth on the USDA inspection certificates, a conclusion that is strongly disputed by Mr. Rocha, it would clearly be untimely as to the three inspections conducted on the morning of November 6, 1996. The 420 lugs of Red Globe grapes included in the first shipment were resold to customers by L & P Fruit on November 7 and November 8, 1996. Some 980 lugs of the 1050 lugs of Red Globe grapes included in the second shipment were resold to customers by L & P Fruit on November 7. All 1820 lugs of Calmeria grapes included in the third shipment were resold to customers by L & P Fruit by the close of business on November 12, 1996. Notice received on November 12, 1996, was far too late to provide Complainant with any possibility of getting a reinspection. Considering the fact that Complainant had a federal-state inspection report that showed that this shipment of Calmeria grapes graded US No. 1 Table on November 1, 1996, the date they were shipped, it is highly likely that Complainant would have sought a reinspection if Respondent had provided Complainant with a copy of USDA Inspection Certificate K-248174-5 on November 6 or November 7, 1996.

The question of timely notice is less clear with respect to the fourth shipment which was inspected in New York at 7:10 a.m. EST on November 12, 1996. Bill Slattery's telephone call on the afternoon of November 12, 1996, which took place on Pacific time, was probably made too late to permit a reinspection before November 13, 1996, and L & P Fruit reported reselling 1240 lugs of the 1820 lugs of Calmeria grapes included in this shipment on November 12, 1996, and the balance on November 13, 1996 (DX 2(41)). The record does not establish the time of day when Respondent received the faxed inspection certificate from this fourth inspection. It would have gone first to Alanco Corp, as the named shipper, and probably gone from Alanco to one or more C.H. Robinson offices before being sent to Respondent's office. A copy of Inspection Certificate K-248815-3 was not faxed to Complainant upon its arrival at Respondent's office, and nobody present telephoned Complainant. Instead, a telephone call was made to Respondent's office manager, Bill Slattery, who was out of town on business. At some unspecified time during the afternoon of November 12, 1996, Bill Slattery telephoned Robert Rocha at Complainant's place of business. A copy of the actual inspection certificate itself was not faxed to Complainant until December 3, 1996. Even assuming that Bill Slattery orally provided Robert Rocha will full details of the results of this

[8] Failure to provide timely notice of breach will bar the buyer from any remedy under § 2-607(3)(a) of the Uniform Commercial Code; *see Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994) (right to pursue appeal process established for USDA inspections).

inspection at 12:01 p.m. Pacific time, which is the earliest possible "afternoon" time, it would have been at least 3:01 p.m. EST time before they started talking. Notice provided after more than half of the inspected commodity is resold and not available for an appeal reinspection is untimely. We conclude that Respondent failed to provide Complainant with timely notice of the results of this fourth inspection, and is barred from using this inspection to prove breach of the warranty of suitable shipping condition.

Since Respondent accepted the four loads of grapes, and has not proven any breach of contract on the part of Complainant, Respondent became liable to Complainant for the full purchase price of the four loads, or $68,568.50. Respondent has paid Complainant $23,456.25 as the undisputed amount involved in this reparation proceeding. Respondent's failure to pay Complainant the $45,112.25 balance of the purchase price is a violation of section 2 of the Act for which reparation should be awarded to Complainant.

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 (including any handling fee paid by the injured person or persons under section 6(a)(2)) sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Steel & Iron Co.,* 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). 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 part of each reparation award. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., 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).

In accordance with the applicable provisions of the Rules of Practice the parties each filed claims for fees and expenses.[9] Complainant as prevailing party is entitled to "reasonable fees and expenses incurred in connection with [the] hearing." We have followed the standard court practice of multiplying the prevailing market rate by the number of hours expended unless the hours claimed are deemed excessive.[10] In this case Complainant's representative has claimed a total of $3,239.02 in fees and expenses. The fees for representation break down to: (1) 9 hours at $165.00

[9] 7 C.F.R. § 47.19(d). The filing time was extended at the close of the hearing to permit the simultaneous submission of applications for fees and expenses with the filing of briefs.

[10] *Newbern Groves, Inc. v. C.H. Robinson Co., et al.*, 53 Agric. Dec. 1766, 1858 (1994); *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273 (1979).

per hour for preparing for the oral hearing; (2) 3 hours at $165.00 per hour for appearance the oral hearing; and (3) 4 hours at $165.00 per hour for appearance at the deposition of Robert Rocha. The costs break down to: (1) $278.00 for airfare; (2) $84.75 in lodging expenses in Fresno, CA (1 night); (3) $75.00 for meals (2 days); (4) $45.27 for rental car; and (5) $116.00 for the hearing transcript. We may not award the $116.00 sought in costs for the hearing transcript. This is a post-hearing expense that is not recoverable. The balance of the fees and expenses claimed are found to be reasonable, resulting in an allowable award of $3,123.02.

Order

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation, $45,112.25 with interest thereon at the rate of 10 percent per annum from December 1, 1996, until paid. Respondent shall pay Complainant $300.00 as additional reparation for the handling fee paid by Complainant.

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation for fees and expenses, $3,123.02 with interest thereon at the rate of 10 percent per annum from the date of this Order, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

QUAIL VALLEY MARKETING, INC. v. JOHN A. COTTLE, d/b/a VALLEY FRESH PRODUCE.
PACA Docket No. R-98-0020.
Order Denying Petition for Reconsideration filed February 22, 2001.

Thomas R. Oliveri, Newport Beach, CA., for Complainant.
Louis W. Diess, III, Washington, D.C., for Respondent.
Eric Paul, Presiding Officer.
Order Denying Petition for Reconsideration issued by William G. Jenson, Judicial Officer.

Preliminary Statement

On December 4, 2000, a Decision and Order was issued awarding the Complainant in this reparation proceeding $45,112.25 as reparation for four shipments of table grapes, plus $300.00 for the PACA handling fee, and $3,123.02 for fees and expenses incurred in connection with the oral hearing. Respondent filed a timely Petition for Reconsideration on December 22, 2000, before this

Decision and Order became final. Respondent requests reconsideration of this Decision and Order only as to our determination that Respondent's notice of breach was untimely with respect to the fourth shipment of table grapes, which had an agreed invoice price of $22,391.50 and a net proceeds payment of $10,010.97, leaving $12,380.53 in dispute. Respondent argues that it was not proper to determine that a notice of inspection results given on the same day on which the inspection was conducted was untimely without also requiring Complainant to show that it had requested an appeal inspection. For the reasons stated below, we find that Respondent's argument is without merit, and conclude that Respondent should be required to the pay Complainant the reparation and interest specified in the Decision and Order issued on December 4, 2000.

The fourth shipment, consisting of 1820 lugs of Calmeria table grapes, arrived at the Hunts Point Terminal Market on November 11, 1996. The USDA inspection was performed at 7:10 a.m., on November 12, 1996, on 1800 lugs of these grapes which had been unloaded and were located at the time of the inspection on the premises of L&P Fruit Corp. The account of sales that L&P Fruit Corp. furnished to Alanco Corp. shows that 1160 cartons of the 1820 cartons received, some 63.7 percent of the total shipment, were sold to six customers of L&P Fruit on November 12, 1996 (DX 1 (41)). This accounting further shows that 659 of the remaining 660 lugs were sold to 12 customers of L&P Fruit on the following day, November 13, 1996, and that a single lug was donated to charity. Respondent's Petition for Reconsideration asserts that there is no evidence that the 1000 cases of grapes sold on November 12, 1996, had been removed from the receiver's premises and were unavailable for inspection, and that there were still 800 cases of grapes that were unsold and available for reinspection on November 13, 1996. Respondent argues that without any attempt by the seller to obtain an immediate reinspection, it is impossible to say that a reinspection with evidentiary value could not have been conducted. Respondent requests that we reconsider and determine that in cases where there is notice given on the same day that an inspection is performed that the notice be accepted as timely unless an immediate reinspection is requested and could not be accomplished.

We find that the PACA does not place a general obligation upon shippers to immediately request an appeal inspection. Moreover, and perhaps more to the point, the law does not require actions that would be no more than an exercise in futility. The question that we will ask in cases of this kind is not "Did the shipper call for an appeal inspection?" but rather, "If the shipper had called for an appeal inspection immediately after receiving notice would an appeal inspection have been possible?" Complainant was well aware that produce firms doing business at terminal markets will normally open early and complete their daily business by

about 11 a.m. It would be highly unusual for any produce sold to remain on the premises until the following day. The earliest possible Pacific time at which William Slattery could have informed Robert Rocha of the results of this inspection during their afternoon telephone call on November 12, 1996, 12:01 p.m., Pacific time, would have been 3:01 p.m. Eastern time. Therefore, Complainant had to know that even if it had immediately requested an appeal inspection that at least a full day's sales would have been completed before such an inspection could have been performed, and quite likely a substantial part of a second day's sales. We conclude that even if the Inspection Service had received a request for an appeal inspection, and had returned to the premises of L&P Fruit on the morning of November 13, 1996, that the inspector would have found no more than 660 lugs of grapes, or 36.3 percent of the shipment present. Paragraph 130 of the Appeal Inspection Procedures, which have been published by the Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, at page 49 of General Market Inspection Instructions, April 1998, provides that requests for Appeals should be denied "(3) When a large number of containers from the original (previous) manifest are not accessible for sampling or have been disposed of." There is no doubt that the sale of 1160 lugs of grapes on November 12, 1996, insured the absence of a sufficiently large number of containers in a 1820 lug shipment to preclude the conducting of an appeal inspection on November 13, 1996.

We conclude that Respondent has failed to present a valid basis for reversing our determination that Respondent's notice of the inspection results to Complainant for the fourth shipment was untimely, and that Respondent was entitled to be awarded, as reparation, the unpaid balance of the contract prices for all four of these shipments of table grapes, with interest, handling fee, and fees and expenses incurred for the hearing.

Order

Respondent's Petition for Reconsideration is denied.

Within thirty days from the date of this Order Denying Petition for Reconsideration, Respondent shall pay to Complainant the amounts of reparation and interest required by the Order issued on December 4, 2000.

Copies of this Order shall be served upon the parties.

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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 – 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 – 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 – 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 – 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 – 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:

LOT	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.

. . . .

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 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:

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[1] 7 C.F.R. §46.14(a).

[2] 7 C.F.R. §46.15

[3] *See 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).

[4] The 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

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

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.

SPENCER FRUIT COMPANY v. NORTHWEST CHOICE, INC.
PACA Docket NO. R-01-0054.
Decision and Order filed May 1, 2001.

Federal inspections – Credibility.

Where two inspections of shipments of cantaloupes on the Hunts Point market were performed by inspectors who pleaded guilty to accepting bribes for the falsification of inspection certificates, but there was no evidence that the firms which received the produce on the Hunt's Point market were involved in the paying of bribes, it was held that Complainant had not submitted sufficient evidence to raise credible doubts as to the integrity of the federal inspections, and the complaint was dismissed.

Complainant, Pro se.
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 $8,725.50 in connection with transactions in interstate commerce involving six shipments of cantaloupes.

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, however, neither party did so. Respondent 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, Reedley, California 93654-1246.

2. Respondent, Northwest Choice Inc., is a corporation whose address is 2513 Lemaister, Wenatchee, Washington 98801.

3. On or about July 16, through August 17, 1996, Complainant sold to Respondent, and shipped to Respondent's customer, Superior Foods, New York, New York, six truck loads of cantaloupes for f.o.b. prices totaling $27,066.00.

4. Following arrival at destination each of the loads of cantaloupes was federally inspected on the application of L & P Fruit Co., Inc., at their store in Bronx, New York. On the basis of excessive damage disclosed by these inspections the parties negotiated adjustments to the contracts. Pursuant to these adjustments Respondent paid Complainant a total of $18,340.50 for the six loads of cantaloupes.

5. The formal complaint was filed on April 4, 2000, which was within the time permitted under section 6(a)(1) of the Act, as amended.

Conclusions

Complainant seeks to recover $8,725.50 which is the total amount of the adjustments granted on six loads of cantaloupes sold to Respondent. Complainant states that "this balance is due to federal inspections done by fraudulent federal inspectors." While this laconic statement leaves much to inference, especially as it regards the liability of Respondent who was not based on the Hunt's Point market, we can dispose of the claim without engaging in imaginative expansion of Complainant's pleading. Only two of the six inspections were clearly performed by an inspector who pled guilty to accepting bribes, the copies supplied of one of the inspections has the name of the inspector clipped off, and the remaining three inspections were signed by an inspector who was not implicated in the bribery. More importantly, there is no proof that either Superior Foods, the apparent purchaser of the cantaloupes from Respondent, or L & P Fruit Co., Inc., the firm that called for all the inspections,[1] was involved in the bribery of federal inspectors through their officers or employees. Complainant has not submitted sufficient evidence to raise credible doubts as to the integrity of the federal inspections relevant to this proceeding. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

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

Contracts – 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.

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[1] The relationship of L & P Fruit Co., Inc. to Superior Foods, or to Respondent, is nowhere disclosed in the record.

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

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

[2] Each 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.

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

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

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 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

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[5] Section 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).

[7] A 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).

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

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

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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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 – 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 – 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 indited 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 – 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 Wiliam 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

LOT	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: “As 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 is it 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."

The suitable shipping condition provisions of the Regulations[3] 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

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[1] 7 C.F.R. § 46.43(i).

[2] 7 C.F.R. § 46.43(j).

[3] 7 C.F.R. § 46.43(j).

[4] 7 C.F.R. § 46.44.

[5] See Williston, *Sales* § 245 (rev. ed. 1948).

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 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]

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

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[6] *See 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. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[7] As 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*.

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

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

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

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.

Since this is the rational 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.

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

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

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

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] 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.

Section 5(a) of the Act requires that we award to the person or persons injured

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

[13] See 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 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).

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.

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[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).

[17] *See 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).

MISCELLANEOUS ORDERS

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Order Lifting Stay as to Irene T. Russo, d/b/a Jay Brokers, filed February 28, 2001.

Kimberly D. Hart, for Complainant.
Irene T. Russo, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, concluding that Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA] and revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506 (1999). Respondent filed a petition for reconsideration of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, which I denied. *In re Produce Distributors*, 58 Agric. Dec. 535 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers).

On May 4, 1999, Respondent filed a request for a stay of the January 25, 1999, Order, pending the outcome of proceedings for judicial review. On May 17, 1999, I granted Respondent's request for a stay. *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers).

The United States Court of Appeals for the Second Circuit affirmed the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers. *Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999). Respondent filed a petition for writ of certiorari which the Supreme Court of the United States denied on October 10, 2000. *Russo v. Department of Agric.*, 121 S. Ct. 308 (2000). Respondent filed a petition for rehearing for writ of certiorari which the Supreme Court of the United States denied on January 16, 2001. *Russo v. Department of Agric.*, 121 S. Ct. 871 (2001).

On January 23, 2001, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay Order for Irene T. Russo d/b/a Jay Brokers [hereinafter Motion to Lift Stay] requesting that I issue an order

lifting the May 17, 2000, Stay Order.[1] Complainant further requests that any order lifting the May 17, 2000, Stay Order,[2] become effective 15 days from the date of issuance.

On February 23, 2001, Respondent filed a response to Complainant's Motion to Lift Stay. On February 26, 2001, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for consideration and a ruling on Complainant's Motion to Lift Stay.

I find that proceedings for judicial review of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, are concluded. Therefore, Complainant's Motion to Lift Stay is granted. However, Complainant has provided no basis for modifying the January 25, 1999, Order to make it effective 15 days from the date of issuance of this Order Lifting Stay as to Irene Russo, d/b/a Jay Brokers. Therefore, I decline to modify the effective date of the January 25, 1999, Order.

The Stay Order issued on May 17, 1999, *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers), is lifted. The Order issued in *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506 (1999), is effective, as follows:

Order

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Petition to Reopen Hearing and Remand Order filed April 6, 2001.

Petition to reopen – Opportunity to file – Remand order – Oral decision – Bench decision.

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[1]The record does not reveal that a May 17, 2000, Stay Order was issued in this proceeding. I infer Complainant's reference to a Stay Order issued May 17, 2000, is a typographical error and Complainant intends to refer to the Stay Order issued May 17, 1999. *In re Produce Distributors, Inc.*, 58 Agric. Dec. 542 (1999) (Stay Order as to Irene T. Russo, d/b/a Jay Brokers).

[2]See note 1.

The Judicial Officer denied the Respondent's petition to reopen the hearing stating the Respondent did not state the nature and purpose of the evidence to be adduced or set forth a good reason for the Respondent's failure to adduce evidence at the November 17, 1999, hearing. The Judicial Officer found that Administrative Law Judge Edwin S. Bernstein did not afford the Respondent a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with 7 C.F.R. § 1.142(b). Therefore, the Judicial Officer remanded the proceeding to the Chief Administrative Law Judge to assign the case to an administrative law judge and ordered that the administrative law judge provide the Respondent a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as provided in 7 C.F.R. § 1.142(b), and issue a decision.

Jane McCavitt, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding on November 16, 1998. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section

1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately $769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of Respondent's violations (Tr. 95-101). On November 30, 1999, the ALJ filed a document entitled "Bench Decision," which is a written excerpt of the decision orally announced at the close of the hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed Complainant's Response to Respondent's Appeal. On February 15, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent's Appeal Petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order

[1]On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance).

Denying Late Appeal).

On March 15, 2000, Respondent filed Respondent's Petition for Reconsideration. On March 29, 2000, Complainant filed Complainant's Response to Respondent's Motion for Reconsideration. On March 30, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent's Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ's denial of Respondent's request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent's opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). I granted Complainant's and Respondent's requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures. On April 4, 2001, Respondent filed Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure.

On April 5, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge.

Petition to Reopen Hearing

Respondent requests reopening of the hearing for two reasons. First, Respondent contends "errors of fact and law that occurred at the hearing that denied Respondent due process of law" require reopening the hearing. Second, Respondent contends the appearance that Complainant scripted the ALJ's decision

orally announced at the close of the hearing requires reopening the hearing (Respondent's Appeal Pet. at 2, 4).

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . . .
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I deny Respondent's petition to reopen the hearing because Respondent has not stated the nature and purpose of the evidence to be adduced. Moreover, Respondent has not set forth a good reason for Respondent's failure at the November 17, 1999, hearing to adduce evidence that Respondent now wants to adduce.

Opportunity to Submit Proposed Findings of Fact, Conclusions, Order, and Brief

On November 12, 1999, Complainant filed a Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent with additional time within which to submit for the ALJ's consideration proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order. The ALJ denied Respondent's request and issued a

decision orally at the close of the November 17, 1999, hearing. (Tr. 6, 94-101.)

Section 1.142(b) of the Rules of Practice provides that prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as follows:

> **§ 1.142 Post-hearing procedure.**
>
> . . . .
>
> (b) *Proposed findings of fact, conclusions, orders, and briefs*. Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.

7 C.F.R. § 1.142(b).

Respondent contends Complainant was permitted to file proposed findings of fact, conclusions, order, and a brief, but the ALJ denied Respondent a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as provided in 7 C.F.R. § 1.142(b). Further, Respondent contends the use of the word "shall" in section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) indicates that the provisions of section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) are mandatory. (Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure at 2-3.)

Complainant states "[t]he PACA allows that if a complaint is issued the respondent is afforded the opportunity for a hearing. 7 U.S.C. § 499f(c)(2)." Complainant contends that "[t]here is no statutory requirement for the filings of findings of facts, conclusions of law, and briefs by a respondent, rather, the Department's Rules of Practice allow for that opportunity when it is deemed appropriate." (Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures at 10.)

I disagree with Complainant's contention that the Rules of Practice allow for the filings of findings of fact, conclusions of law, and briefs when it is deemed appropriate. The Rules of Practice do not provide that parties have an opportunity to file proposed findings of fact, conclusions of law, order, and a brief only "when it is deemed appropriate." Instead, section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) states that, prior to the administrative law judge's decision, each party *shall* be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. The word *shall* is ordinarily the language of command and leaves no room for

administrative law judge discretion.[2] Thus, under the Rules of Practice an administrative law judge must afford each party a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief. Moreover, there is no provision in the Rules of Practice which makes section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) inapplicable when a decision is issued orally in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)).

Complainant also contends an interpretation of the Rules of Practice that requires that each party be given a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief would defeat the purpose of issuing an oral decision in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)) (Complainant's Objection to Remanding Case to

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[2] *See generally Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (stating the word "shall" is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); *Barbieri v. RAJ Acquisition Corp.*, 199 F.3d 616, 619 (2d Cir. 1999) (stating the term "shall" generally is mandatory and leaves no room for the exercise of discretion by the trial court); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999) (stating the word "shall" is used to express a command or exhortation and is used in laws, regulations, or directives to express what is mandatory); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999) (stating that "shall" is an imperative); *United States v. Insurance Co. of North America*, 83 F.3d 1507, 1510 n.5 (D.C. Cir. 1996) (stating the cases are legion affirming the mandatory character of "shall"); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (stating the word "shall" generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive); *Lefkowitz v. Arcadia Trading Co.*, 996 F.2d 600, 603 (2d Cir. 1993) (stating the word "shall" ordinarily connotes language of command); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (stating "shall" is a term of legal significance, in that it is mandatory or imperative, not merely precatory); *Randolph-Sheppard Vendors v. Weinberger*, 795 F.2d 90, 102 n.19 (D.C. Cir. 1986) (stating "shall" is normally the language of command in a statute); *American Federation of Government Employees v. FLRA*, 739 F.2d 87, 89 (2d Cir. 1984) (stating "shall" is ordinarily the language of command and indicates a mandatory intent unless a convincing argument to the contrary is made); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (stating the word "shall" is the language of command in a statute); *Boyden v. Commissioner of Patents*, 441 F.2d 1041, 1043 n.3 (D.C. Cir.) (stating "shall" is the language of command), *cert. denied*, 404 U.S. 842 (1971); *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949) (stating the word "shall" is mandatory); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

Administrative Law Judge for Further Procedures at 11). However, compliance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) does not preclude the issuance of an oral decision. Section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)) provides that an oral decision may be issued within a reasonable time after the close of the hearing. Thus, parties can be afforded a reasonable opportunity to submit proposed findings of fact, conclusions, orders, and briefs after the close of a hearing, and an administrative law judge may still issue an oral decision.[3]

I find the ALJ did not afford Respondent a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). Therefore, I remand this proceeding to Chief Administrative Law Judge James W. Hunt for assignment of this proceeding to an administrative law judge in accordance with 5 U.S.C. § 3105.[4] The administrative law judge to whom this proceeding is assigned must provide Respondent with a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). After providing Respondent with a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief, the

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[3]Complainant cites 7 U.S.C. § 499f(c)(2) as the statutory provision requiring hearings in disciplinary administrative proceedings under the PACA. Complainant contends "[t]here is no statutory requirement for filings of findings of fact, conclusions of law, and briefs" in disciplinary administrative proceedings under the PACA (Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures at 10). I agree with Complainant that 7 U.S.C. § 499f(c)(2) does not require that litigants be provided a reasonable opportunity to file proposed findings of fact, conclusions, orders, and briefs. I deduce from Complainant's argument that Complainant takes the position that the Administrative Procedure Act is not applicable to disciplinary administrative proceedings under the PACA, and consequently the requirement in the Administrative Procedure Act that parties be given a reasonable opportunity to submit proposed findings of fact, conclusions, and reasons for the proposed findings of fact and conclusions (5 U.S.C. § 557(c)) is not applicable to disciplinary administrative proceedings under the PACA. I do not address this issue in this Order Denying Petition to Reopen Hearing and Remand Order. However, if Complainant is correct, the Rules of Practice may be amended to make section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)) inapplicable to disciplinary administrative proceedings under the PACA.

[4]If Administrative Law Judge Edwin S. Bernstein, the administrative law judge who issued the decision orally at the close of the November 17, 1999, hearing, was available, I would have remanded this proceeding to him. However, Administrative Law Judge Edwin S. Bernstein retired on August 26, 2000, and he is no longer available to conduct this proceeding on remand.

administrative law judge to whom this proceeding is assigned should then issue a decision (or adopt the ALJ's November 17, 1999, decision), which either party may then appeal to the Judicial Officer in accordance with 7 C.F.R. § 1.145(a).

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In re: UNIVERSAL PRODUCE & ITALIAN PRODUCTS, LLC and JEFFREY LOMORIELLO.
PACA Docket No. APP-00-0002.
Dismissal of Responsibly Connected Cases filed June 7, 2001.

Ruben D. Rudolph, for Complainant.
John M. Himmelberg, Washington, D.C., for Respondent.
Dismissal issued by Jill S. Clifton, Administrative Law Judge.

A Consent Decision and Order regarding Universal Produce & Italian Products, LLC and Albert S. Lomoriello, Jr., PACA Docket No. D-00-0007, was filed on June 5, 2001.

Consequently, on behalf of Jeffrey Lomoriello, PACA-APP 00-0002 (PACA RC 20-0005) and Jason Lomoriello, PACA-APP 00-0003 (PACA RC 20-0004), John M. Himmelberg, Esq., withdrew the appeals in the above cases, by letter dated June 6, 2001.

Accordingly, pursuant to the facsimile copy of Mr. Himmelberg's June 6, 2001 letter, the cases are hereby dismissed.

Copies hereof shall be served upon the parties.

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In re: UNIVERSAL PRODUCE & ITALIAN PRODUCTS, LLC and JASON LOMORIELLO.
PACA Docket No. APP-00-0003.
Dismissal of Responsibly Connected Cases filed June 7, 2001.

Ruben D. Rudolph, for Complainant.
John M. Himmelberg, Washington, D.C., for Respondent.
Dismissal issued by Jill S. Clifton, Administrative Law Judge.

A Consent Decision and Order regarding Universal Produce & Italian Products, LLC and Albert S. Lomoriello, Jr., PACA Docket No. D-00-0007, was filed on June 5, 2001.

Consequently, on behalf of Jeffrey Lomoriello, PACA-APP 00-0002 (PACA RC 20-0005) and Jason Lomoriello, PACA-APP 00-0003 (PACA RC 20-0004), John M. Himmelberg, Esq., withdrew the appeals in the above cases, by letter dated

June 6, 2001.

Accordingly, pursuant to the facsimile copy of Mr. Himmelberg's June 6, 2001 letter, the cases are hereby dismissed.

Copies hereof shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: STATE PRODUCE BROKERS, INC.
PACA Docket No. D-00-0016.
Decision and Order filed October 18, 2000.

PACA - Default - Full payment, failure to make, when due - Bankruptcy creditors.

Mary Hobbie, for Complainant
R. Jason Read, Newport Beach, CA, for Respondent
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a Complaint filed on June 7, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period May 1999, through July 1999, Respondent State Produce Brokers, Inc., (hereinafter "Respondent") failed to make full payment promptly to 3 sellers of the agreed purchase prices, or balances thereof, in the total amount of $328,794.22 for 68 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The Complaint also noted that on July 14, 1999, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Central District of California pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*). This petition was converted to a Chapter 7 Petition for Bankruptcy on October 15, 1999, pursuant to Bankruptcy Code (7 U.S.C. § 700 *et seq.*) and designated Case No. LA-99-36391-EC. Complainant requested that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

Respondent has admitted in documents filed in connection with its Chapter 7 bankruptcy proceeding entitled Scheduled F - Creditors Holding Unsecured Nonpriority Claims that it owes all of the 3 sellers listed in Paragraph III of the Complaint $462,347.31. The Complaint alleged debt to those same 3 sellers of $328,794.22. This admission warrants the immediate issuance of a Decision without Hearing by Reason of Admissions. Complainant has filed a Motion for the issuance of a Decision without a Hearing by Reason of Admissions, and the

following Decision is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practices (7 C.F.R. 1.139).

Finding of Fact

1. Respondent is a corporation whose business address was P.O. Box 2399, Bell Gardens, California 90201.

2. Pursuant to the licensing provisions of the PACA, license number 671960 was issued to Respondent on May 3, 1967. This license terminated on May 3, 2000, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. Respondent, during the period May 1999 through July 1999, on or about the dates and in the transactions set forth in paragraph III of the Complaint, purchased, received and accepted 68 lots of perishable agricultural commodities with agreed purchase prices in the total of $328,794.22 from 3 sellers in interstate commerce.

5. On July 14, 1999, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq*.) in the United States Bankruptcy Court for the Central District of California. This petition was converted to a Chapter 7 Petition for Bankruptcy on October 15, 1999, pursuant to Bankruptcy Code (7 U.S.C. § 700 *et seq*.) and designated Case No. LA-99-36391-EC.

6. Respondent admitted in bankruptcy pleadings that it owed an amount that totals $462,347.31, an amount greater than that which the Complaint alleged, to the same 3 sellers that are alleged to be unpaid for the purchases in the Complaint. Schedule F consists of a table reflecting the name and address of the creditor and the amount of the unpaid produce debt as shown in the Complaint and in Respondent's bankruptcy filing.

SELLER'S NAME & ORIGIN	**BANKRUPTCY PLEADING**	**COMPLAINT**
Blakal Packing, Inc. Quincy, WA	$ 31,362.50	$ 36,854.90
L & M Produce Inc. Merirll, OR	$ 3,272.50	$ 3,272.50

Jones Produce, Inc. Quincy, WA	$427,712.31	$288,666.82
	Total Amount: $462,347.31	Total Amount $328,794.22

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 3 sellers at least $462,347.31 for 68 lots of perishable agricultural commodities on July 14, 1999. However, a follow-up investigation conducted on August 28, 2000, through August 29,2000, by Lisa Velez, a Marketing Specialist with the PACA Branch, showed that 1 seller was paid in full and partial payments were made to the other 2 sellers under the PACA trust, leaving a balance of $26,288.55 (see following table).

SELLER'S NAME & ORIGIN	**BANK-RUPTCY PLEADING**	**COMPLAINT**	**AMT PAID UNDER TRUST**	**UNPAID BALANCE**
Blakal Packing, Inc. Quincy, WA	$ 31,362.50	$ 36,854.90	$ 11,162.63	$ 25,692.27
L & M Produce Inc. Merirll, OR	$ 3,272.50	$ 3,272.50	$ 2,681.22	$ 591.28
Jones Produce, Inc. Quincy, WA	$427,712.31	$288,666.82	$288,666.82	$ 0
	Total[1] Amount: $62,3472.31	Total Amount $328,794.22	Total Amount $302,510.67	Total Amount $ 26,288.55

Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. 499b(4)). Accordingly, the following Order is issued.

Order

[1]Total amount should agree with prior table at $462,347.31 - Editor

Respondent committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b) and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became effective July 11, 2001.-Editor].

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In re: PRODUCE MANAGEMENT SERVICE.
PACA Docket No. D-00-0011.
Decision and Order filed October 20, 2000.

PACA - Default - Full payment, failure to make, when due - Flagrant violation.

Andrew Y. Stanton, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA), instituted by a complaint filed on March 20, 2000, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleged that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period February 1998 through March 1999, by failing to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $312,900.90 for 1,080 lots of perishable agricultural commodities which it purchased, received and accepted in interstate and foreign commerce. The complaint requested that the Administrative Law Judge issue a finding that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA and order Respondent's license revoked.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default,

the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Produce Management Service (hereinafter, "Respondent"), is a corporation organized and existing under the laws of the State of California. Its business mailing address is 1630 Florance Street, Los Angeles, California 90023.

2. At all times material herein, Respondent was licensed under the PACA. License number 960003 was issued to Respondent on October 2, 1995. This license has been renewed annually and is next subject to renewal on October 2, 2000.

3. As more fully set forth in paragraph III of the complaint, Respondent, during the period February 1998 through March 1999, failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of $312,900.90 for 1,080 lots of perishable agricultural commodities which it purchased, received and accepted in interstate and foreign commerce.

Conclusions

Respondent's actions, as set forth in Finding of Fact 3 above, constitute willful, flagrant and repeated violations of section 2(4) of the PACA, for which the Order below is issued.

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision Without Hearing by Reason of Default will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became effective April 10, 2001.-Editor]

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In re: H.P. ISLAND-WIDE, INC.
PACA Docket No. D-01-0012.
Decision and Order filed May 1, 2001.

PACA - Default - Full payment, failure to make, when due.

Christopher P. Young-Morales, for Complainant.
Donald M. Lefari, New York, NY, for Respondent.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint and Notice to Show Cause filed on March 2, 2001, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint and Notice to Show Cause alleges that during the period August 1999 through August 2000, Respondent violated Section 2(4) of the PACA (7 U.S.C. §499b(4)), by failing to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $347,444.65 for 166 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce. The Complaint and Notice further asks that Respondent be required to show cause why it should not be denied a license.

A copy of the Complaint and Notice to Show Cause was served upon Respondent on March 5, 2001. Pursuant to Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent had 10 days from that date to respond and file an answer with the Hearing Clerk. No answer was filed. The time for filing an answer having run, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. H. P. Island-Wide, Inc. is a corporation organized and existing under the laws of the State of New York. Its business and mailing address is 1681 Richmond Terrace, Staten Island, New York 10310.

2. Respondent became incorporated on March 18, 1999. Mario L. Tiberi is its president and 100 percent stockholder.

3. Respondent has never been licensed under the PACA.

4. As more fully set forth in paragraph 3 of the Complaint, during the period

August 1999 through August 2000, Respondent violated Section 2(4) of the PACA (7 U.S.C. §499b(4)), by failing to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $347,444.65 for 166 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce

5. Respondent filed an application for a PACA license with the PACA Branch of the Agricultural Marketing Service on February 2, 2001.

Conclusions

Respondent's failure to make full payment promptly with respect to the 166 transactions set forth in Finding of Fact No. 4, above, constitutes willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b). The facts and circumstances set forth above shall be published and Respondent shall be denied a license pursuant to Section 4(d) of the PACA (7 U.S.C. § 499d).

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became effective July 2, 2001.-Editor]

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CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Jacobson Produce, Inc. PACA Docket No. D-00-0023. 1/26/2001.

Multi Fruit USA, Inc. PACA Docket No. D-00-0018. 3/8/2001.

A. Sam & Sons Produce, Inc., Dayoub Marketing, Inc., and Michael P. Schindler. PACA Docket No. D-01-0014. 5/2/2001.

Glacier Distribution Company, Inc. PACA Docket No. D-00-0026. 5/3/2001.

Universal Produce & Italian Products, LLC and Albert S. Lomoriello, Jr. PACA Docket No. D-00-0007. 6/5/2001.

Captain Jack's Tomatoes, Inc. and The Fresh Group, Ltd., d/b/a Maglio and Company. PACA Docket No. D-00-0008. 6/15/2001.

American Produce Company. PACA Docket No. D-01-0017. 6/19/2001.

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