UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

[redacted]	)	PACA Docket No. [redacted]
Complainant	)	
v.	)	
[redacted]	)	
Respondent	)	Decision and Order

Preliminary Statement

Complainant instituted a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (PACA); and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) (Rules of Practice), by filing a timely Complaint. Complainant seeks a reparation award against Respondent in the amount of $9,672.00 in connection with one truckload of broccoli crowns shipped in the course of interstate and foreign commerce.

A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting a Counterclaim in the amount of $3,526.50 for losses allegedly incurred in connection with its handling of the load of broccoli crowns at issue in the Complaint. Complainant filed a reply to the Counterclaim denying liability to Respondent.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the

evidence of the case, as is the Department's Report of Investigation; however, no Report of Investigation was prepared in this case.[1]

The parties were also given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Complainant also submitted a brief.

Findings of Fact

1. Complainant is an individual, [redacted] doing business as [redacted], whose post office address is [redacted]. At the time of the transaction involved herein, Complainant was licensed under the PACA.

2. Respondent is a corporation whose post office address is [redacted]. At the time of the transaction involved herein, Respondent was licensed under the PACA.

3. On or about June 23, 2015, Complainant, by oral contract, sold to Respondent one truckload of broccoli crowns. The broccoli crowns were shipped on the same date from loading point in the state of Texas, to Respondent.[2] (Compl. Ex. 3.) Complainant issued invoice number 287039 billing Respondent for 1,248 cartons of

[1] Where the informal handling of the claim by a P.A.C.A. Branch office generates correspondence and other documents pertinent to the dispute, a Report of Investigation is prepared by the Department. These documents become a part of the record considered by the Presiding Officer in deciding the case. In the instant case, Respondent did not respond to the informal complaint submitted by Complainant, so no Report of Investigation was prepared.

[2] Complainant's invoice and passing indicate that the broccoli crowns were shipped to Respondent in [redacted] (Compl. Ex. 3-4); however, Respondent's sales associate, [redacted] asserts in affidavit testimony submitted as Respondent's Answering Statement that the broccoli crowns were destined for [redacted], in [redacted] (Answering Stmt. at 2.) There are no documents in the record showing the actual delivery location of the broccoli crowns.

broccoli crowns at $7.75 per carton, for a total f.o.b. invoice price of $9,672.00. (Compl. Ex. 4.)

4. On June 30, 2015, a USDA inspection was performed on 1,248 cartons of broccoli crowns at the warehouse of [redacted] New Jersey. (Compl. Ex. 5.) The inspection disclosed 19 percent average condition defects, including 16 percent damage by bruising, 3 percent damage by broken stalks/stems, and less than one-half percent decay.

5. Respondent has not paid Complainant for the broccoli crowns billed on invoice number 287039.

6. The informal complaint was filed on August 14, 2015, which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for one truckload of broccoli crowns purchased from Complainant. Complainant states Respondent accepted the broccoli crowns in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price of $9,672.00. (Compl. ¶¶ 6, 8.) In response to Complainant's allegations, Respondent asserts that Complainant failed to mark the cartons of broccoli crowns with the country of origin, and that as a result, Respondent's customer rejected the broccoli crowns. (Answer ¶ 5.)

Initially, we note that while Respondent asserts that the broccoli crowns were rejected by its customer, Respondent does not assert that it rejected the broccoli crowns to Complainant. Failure to reject produce in a reasonable time is considered an act of

acceptance. 7 C.F.R. § 46.2(dd)(3). We therefore find that Respondent accepted the subject load of broccoli crowns.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (1994); *Theron Hooker Company v. Ben Gatz Company*, 30 Agric. Dec. 1109, 1112 (1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4). *See, also, W. T. Holland & Sons, Inc. v. Clair Sensenig d/b/a C. K. Sensenig Potatoes*, 52 Agric. Dec. 1705, 1710 (1993); *Salinas Marketing Cooperative v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1593, 1597 (1987).

In support of its contention that Complainant was required to mark the broccoli crown cartons with the country of origin, Respondent cites the Code of Federal Regulations, Title 19, subpart B, section 134.11, titled "Country of origin marking required," which reads, in pertinent part:

> Unless excepted by law, section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article, at the time of importation into the Customs territory of the United States. Containers of articles excepted from marking shall be marked with the name of the country of origin of the article unless the container is also excepted from marking.

(Answer ¶ 5.) To substantiate its allegation that the cartons of broccoli crowns shipped by Complainant were not marked, Respondent submitted two photos, each showing a carton of broccoli crowns that purportedly was not marked with the country of origin.

(Answer Ex. 4 at 1, 4.) Respondent also submitted two other photos of pallets of broccoli crowns stamped with the label "Product of Mexico." (Answer Ex. 4 at 2-3.) Respondent states this labeling was placed on the cartons after they were rejected by Respondent's original customer. (Answer ¶ 6.)

The cartons of broccoli crowns shown in the photographs submitted by Respondent do not bear any markings that identify the broccoli crowns as being the same as those shipped by Complainant. Moreover, the photographs were not taken by a financially disinterested party and therefore do not constitute independent evidence of a lack of markings on the cartons.[3] Furthermore, even if we were to accept such evidence, the photos that purportedly show the lack of markings on the cartons cover only the visible sides of two cartons. We must therefore conclude that Respondent has failed to sustain its burden to prove that Complainant breached the contract by shipping the broccoli crowns in cartons that were not marked with the country of origin.

Respondent also asserts that the USDA inspection performed on the broccoli crowns after they were rejected and moved to [redacted] shows that the broccoli crowns failed to make good delivery. The broccoli crowns were sold under f.o.b. terms, which means that the warranty of suitable shipping condition is applicable.[4] Suitable shipping condition is defined in the Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and

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[3] In the absence of an inspection by a neutral party at destination, the buyer fails to prove a breach. *Tantum v. Weller*, 41 Agric. Dec. 2456, 2457 (1982); *O.D. Huff, Jr., Inc. v. Pagano & Sons, Inc.*, 21 Agric. Dec. 385, 387 (1962).

[4] The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) 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."

conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[5]

Under the warranty of suitable shipping condition, a receiver may establish that the produce did not comply with the contract requirements at the time of shipment by providing independent evidence, such as a USDA inspection, showing that the produce was abnormally deteriorated when it was received at the contract destination.

The United States Standards for Grades of Italian Sprouting Broccoli (7 C.F.R. §§ 51.3555-76) provide a tolerance at shipping point of 10 percent for broccoli crowns in any lot that fail to meet the requirements of the specified grade, including therein not more than two percent for broccoli crowns that are affected by decay. *See* 7 C.F.R. § 51.3560. Where, as here, there is no indication that the produce was sold with a grade specification, only the condition defects disclosed by the inspection are considered in the determination of whether the produce was in suitable shipping condition. *The Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 457 (2000).

[5] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. 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. 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. *Harvest Fresh Produce Inc. v. Clarke-Ehre Produce Co.*, 39 Agric. Dec. 703, 708-09 (1980).

For broccoli crowns sold f.o.b., we also apply an additional allowance to the tolerances mentioned above to account for normal deterioration in transit. For a shipment in transit for four days, the allowance is 14 percent for average defects, including not more than four percent decay. The USDA inspection of the broccoli crowns in question disclosed 19 percent average condition defects, including less than one-half percent decay. (Compl. Ex. 5.) While these defects exceed the suitable shipping condition allowance, the inspection was performed on June 30, 2015, three days after the broccoli crowns were accepted by Respondent, and there is no evidence in the record showing the conditions under which the broccoli crowns were held between the time of arrival and the time of inspection. It is therefore impossible to conclude with reasonable certainty that the defects present in the broccoli crowns would have exceeded 14 percent at the time of arrival.

There is also the issue of the exclusion that appears on Complainant's passing. Specifically, the record shows Complainant prepared a passing for the subject load of broccoli crowns that bears the statement: "Broccoli Exception: Bruising, discoloration after bruising and hollow stem not scorable." (Compl. Ex. 3.) The record also includes a copy of a fax confirmation sheet indicating that Complainant sent the passing to Respondent. (Compl. Ex. 3a.) Respondent does not deny receiving the passing or assert that it took exception to its contents. It therefore appears that the 16 percent average bruising disclosed by the inspection would not be considered in the determination as to whether Complainant breached the contract. This would reduce the average defects to just three percent, an amount that would not establish that Complainant breached the

warranty of suitable shipping condition even if the inspection was performed at the time of arrival.

As Respondent has failed to sustain its burden to prove that Complainant breached the contract either by failing to mark the broccoli crown cartons with the country of origin, or by shipping broccoli crowns that were not in suitable shipping condition, Respondent is liable to Complainant for the broccoli crowns it accepted at the full purchase price of $9,672.00. Respondent's Counterclaim, which seeks recovery of losses incurred in connection with the alleged breach of contract by Complainant, should be dismissed.

Respondent's failure to pay Complainant $9,672.00 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Rou v. Severt Sons Produce, Inc.*, 70 Agric. Dec. 489, 498 (2011); *Roger Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1618 (2010).

Complainant seeks pre-judgment interest on the unpaid produce shipment listed in the Complaint at a rate of 15 percent per annum. (Compl. ¶ 8.) Complainant's claim is based on his invoice to Respondent which expressly states: "UNPAID BALANCES WILL BE CHARGED @ 1 1/4 % PER MONTH." There is nothing to indicate that Respondent objected to the interest charge provision stated on Complainant's invoice. In

the absence of a timely objection by Respondent, the interest charge provision stated on Complainant's invoice was incorporated into the sales contract. *See Coliman Pacific Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 646 (2014). Accordingly, prejudgment interest will be awarded to Complainant at the rate of 15 percent per annum (1.25 percent per month). Post-judgment interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

Complainant in this action paid $500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the PACA (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $9,672.00, with interest thereon at the rate of 15 percent per annum from August 1, 2015, up to the date of this Order. Respondent shall also pay Complainant interest on the sum of $9,672.00 at the rate of 0.83 of one percent per annum from the date of this Order, until paid, plus the amount of $500.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.
February 9, 2017

/s/ William G. Jenson

William G. Jenson
Judicial Officer
Office of the Secretary