Order

Within 30 days from date of order, respondent shall pay complainant as reparation, $721.25 with interest thereon, at the rate of 10% per annum from June 1, 1994, until paid.

Copies of this order shall be served upon the parties.

SHARYLAND, LP, d/b/a PLANTATION PRODUCE v. LLOYD A. MILLER, d/b/a L & M PRODUCE CO.
PACA Docket No. R-97-0021.
Decision and Order filed February 24, 1998.

Suitable Shipping Condition - Exception to normal transportation Requirement. - Transportation - Failure to Supply Temperature Tape.

A partial truck load of sweet peppers was sold f.o.b., and, after shipment, was filled out with citrus which had not been precooled. A shipping point inspection showed U.S. Grade No. 2, with 80 percent U.S. No. 1. The bill of lading specified that transit temperatures were to be held at 36 to 38 degrees, and noted that a temperature recorder had been placed on board. The peppers were shipped from South Texas, and arrived in Portland, Oregon within normal transit time. A timely federal inspection noted temperatures of 45 to 46 degrees (which was stated to be normal for sweet peppers), and 63 percent average decay. The receiver failed to secure the temperature tape from the recorder, or explain such failure. It was held that, in view of the failure to supply the temperature tape, the buyer had failed to prove that transportation temperatures were normal. Although the decay was stated to be grossly excessive, it was found that it was possible that the decay was caused by abnormal temperatures, and consequently the exception to the rule requiring normal transit conditions in order for the suitable shipping condition warranty to apply could not be invoked.

George S. Whitten, Presiding Officer.
Byron E. White, Arlington, TX, for Complainant.
Respondent, Pro se.
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 $4,615.50 in connection with a transaction in interstate commerce involving green peppers.

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, and therefore the shortened method of 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. Complainant filed a brief.

Findings of Fact

1. Complainant, Sharyland LP, is a partnership composed of Aghoc, Inc., and Agri Management Group, Inc., doing business as Plantation Produce Co., whose address is P. O. Box 1043, Mission, Texas.

2. Respondent, Lloyd A. Miller, is an individual doing business as L & M Produce, whose address is Route 7, Box 206H, Edinburg, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about November 3, 1995, complainant sold to respondent one lot of green peppers consisting of 448 cartons, no grade, at $9.50 per carton, plus $.75 for precooling and pallatization, and $23.50 for a temperature recorder, or a total of $4,615.50, f.o.b.

4. A Federal-State Inspection Certificate was issued on November 6, 1995, covering the lot of 448 cartons of peppers. The certificate disclosed that the inspection was started 11/02/95 at 9:30 a.m., and competed 11/04/95 at 5:00 p.m. The inspection was noted to have taken place at Mission, Texas, and a box labeled "SUBLOT" was checked. The applicant was stated to be Plantation Produce, and the certificate further revealed, in relevant part, as follows:

PRODUCT/VARIETY	:	Select Pepper
NUMBER AND SIZE OF CONTAINER	:	448 - 1 1/9 BU. CTN.
DESCRIPTION OF PRODUCT	:	Valley Kist (Green)
GRADE	:	U.S. No. 2 Approx. 80% U.S. No.1 Quality
REMARKS	:	Applicant states loaded on Tra. 20R 012 TX.

5. On November 4, 1995, a bill of lading was issued showing that the peppers were loaded on a trailer with license number 20R-012 TX at 12:10 p.m. on November 4, 1995, with instructions to ship to L & M Produce Co., Portland, OR. The bill of lading also showed that "STIRES RECORDER. #674968" was loaded

on the truck. The bill of lading contained the instructions: "MAINTAIN TEMPERATURES AT 36/38. DEGREES," and "DELIVER MON. 11/06/95 A.M. PER BUYERS REPORTING INSTRUCTIONS."

6. The truck proceeded first to a citrus packing shed in the Texas Rio Grande Valley where the load was competed with citrus which had not been precooled. The temperatures on November 4, 1995, in Brownsville, Texas ranged between 50 and 56 degrees.

7. The truck arrived at Albertsons in Portland, Oregon on November 8, 1995, at 3:00 p.m. Albertsons rejected the peppers on the following day, and respondent moved the peppers to the United Salad Warehouse where they were federally inspected at the request of Botsford & Goodfellow, Inc. of Milwaukie, Oregon, at 1:35 p.m. on November 9, 1995, with the following results in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 46 °F	Sweet Peppers	"VALLEY KIST"	TX	11/9 Bu	448 Cartons	N

LOT	AVERAGE DEFECTS		including DAM	SER	including DAM	V. S.	OFFSIZE/DEFECT	OTHER
A	63	%	63	%		%	Decay (53 to 76%)	Remainder Fresh, (illegible) & Crisp
	63	%	63	%		%	Checksum	Decay is in Mostly Early, Many Moderate, and some advanced stages. Decay Includes 10% affecting stems, remainder affecting walls and calyxes(?) only

8. Respondent has not paid complainant any part of the purchase price of the peppers.

9. An informal complaint was filed on January 8, 1996, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 448 cartons of green pepper sold to respondent on an f.o.b. basis. Complainant asserts that the peppers were unloaded at Albertsons, in Portland, and thus accepted, but were later rejected by Albertsons. Respondent asserts that the peppers were not unloaded at Albertsons. This dispute is, of course, irrelevant to the issues between complainant and respondent because the peppers were never rejected by respondent to complainant, but were accepted when they were unloaded at the

place of inspection, the Fruit Salad warehouse.

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 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

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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).

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. 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.[7]

Complainant does not dispute the results of the inspection at destination, which shows a grossly excessive amount of decay, but asserts that since transportation services and conditions were abnormal the warranty of suitable shipping condition does not apply. Complainant first states that transportation was abnormal in that the bill of lading specified that delivery was to be accomplished by the morning of Monday, November 6, 1995. However, respondent correctly points out that this would require a less than two day transit period which would be, if not impossible, at least illegal. The peppers arrived at Albertsons on November 8, 1995, which was normal for a trip of some 2,400 miles.

Complainant also points out that the bill of lading specified that temperatures were to be maintained at between 36 and 38 degrees, but that in keeping with respondent's directions the truck proceeded to another pickup point in South Texas and loaded citrus which had not been precooled. Complainant asserts that the temperatures of 45 to 46 degrees shown by the federal inspection at destination show that the citrus caused the temperature to be elevated, and show that transportation was abnormal. However, there is nothing abnormal about temperatures in the 45 to 46 degree range for sweet peppers.[8] Instead, it was complainant's specification of 36 to 38 degrees that was abnormal, since peppers

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[6]See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S. 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]See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[8]All recommendations for transportation of Sweet Peppers specify 45 to 55 degrees F. See *Protecting Perishable Foods During Transport by Truck*, Agricultural Handbook Number 669, Office of Transportation, United States Department of Agriculture, p.54 (1987); *Protection of Rail Shipments of Fruits and Vegetables*, Agriculture Handbook No. 195, Agricultural Research Service, United States Department of Agriculture, p.41 (Revised ed. 1969); and *Tropical Products Transport Handbook*, Agricultural Handbook Number 668, Office of Transportation, United States Department of Agriculture, p.117 (revised ed. Sept., 1989).

are subject to chilling injury at such temperatures.[9]

Complainant next asserts that it stamped the bill of lading with the words "THIS LOAD CONTAINS A TEMPERATURE RECORDER. NO CLAIMS HONORED UNLESS RECORDER SECURED AND NOTED ON TRUCKS RECEIPTS." Complainant maintains that this constituted a part of the contract with respondent. This, of course, is not true. A bill of lading is a contract with the trucker, not a contract between the seller and buyer. However, even if the bill of lading had contained no such notation, the failure of respondent to secure the temperature recorder was a serious breach of its duty to complainant, and carries serious consequences. We have stated that:

> . . . the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation services and conditions were normal.[10]

There are commonly only two parties with the opportunity, or motive, to wrongly "lose" a temperature recorder or tape, namely the receiver and the trucker. In both cases the only motive would be that the tape disclosed improper transportation. Therefore if a shipper proves by submitting a bill of lading signed by the trucker (as the shipper in this case did) that a temperature recorder was placed on the truck, it is hard to imagine an adequate excuse for a receiver's failure to produce the tape. In this case respondent has offered no excuse. A receiver may, indeed, be entirely innocent, in that the recorder may have been thrown away by the trucker before arrival of the truck. However, since a trucker would thus dispose of a recorder only if transportation was bad, one is inevitably led to the presumption that transportation temperatures were abnormal.

The conclusion that transportation was abnormal does not lead inevitably to the conclusion that the warranty of suitable shipping condition is inapplicable. 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

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[9]There is, however, no indication in the literature that 36 to 38 degrees for only a few days would have had any serious ill effects on the peppers. See *McColloch, Lacy P., Chilling Injury and Alternaria Rot of Bell Peppers*, Marketing Research Report No. 536, Market Quality Research Division, Agricultural Marketing Service, United States Department of Agriculture (August, 1962).

[10]*Louis Caric & sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 at 1500-01 (1979). See also *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce Inc. v. A. J. Produce Corp.*, 43 Agric. Dec. 563 (1984).

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 has been explained as follows:

> It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal . . . .
>
> The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.
>
> Since this is the rationale of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by or aggravated by the faulty transportation service.

The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal.[11]

The federal inspection at destination did not reveal the type of decay in the peppers. However, one of the most prevalent types of decay is Bacterial Soft Rot. A Department publication states that:

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[11]See *Sharyland Corp. v. Milrose Food Brokers*, 50 Agric. Dec. 994 (1991); *Tony Mista & Sons Produce v. Twin City Produce*, 41 Agric. Dec. 195 (1981); and *Sanbon Packing Co. v. Spada Distributing Co., Inc.*, 28 Agric. Dec. 230 (1969).

> Bacterial soft rot on peppers is characterized by water soaking and rapid softening of the tissues. Infection initiated at the stem end progresses rapidly through stem and calyx lobe tissues . . . into the pod. Under humid conditions and optimum temperatures (75° to 85° F.) The entire pod can be reduced to a soupy mass within 3 to 6 days after infection. . . .[12]

Although the temperatures of the peppers at the time the destination inspection was performed were normal, we do not know to what temperatures the peppers may have been exposed during the days of transit prior to arrival in Portland. In view of the fact that we must assume, as a result of respondent's failure to supply the temperature tape from the Stires recorder, that transportation temperatures were abnormal, we cannot be certain that the 63% average decay present in the peppers at destination was not caused by abnormal temperatures.[13] Accordingly, we find that the warranty of suitable shipping condition was voided by abnormal transportation, and that respondent has not proven a breach of contract on the part of complainant. Since respondent accepted the peppers, he became liable to complainant for the full purchase price thereof, or $4,615.50.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[14] 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.[15] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300 handling fee to file the formal

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[12]*Market Diseases of Tomatoes, Peppers, and Eggplants*, Agriculture Handbook No. 28, Agricultural Research Service, United States Department of Agriculture, p. 53 (1968).

[13]*See Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (1981). The fact that the pathogen that was at the root of the decay was likely in the peppers prior to shipment is inconsequential. See *Lookout Mountain Tomato & Banana Co., Inc. v. Consumer Produce Co., Inc. of Pittsburgh*, 50 Agric. Dec. 960 (1991).

[14]*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).

[15]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).*

complaint. Pursuant to 7 U.S.C. 499e(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, $4,615.50, with interest thereon at the rate of 10% per annum from December 1, 1995, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

DeBACKER POTATO FARMS, INC. v. PELLERITO FOODS, INC.
PACA Docket No. R-96-0038.
Decision and Order filed March 3, 1998.

Interstate and Foreign Commerce.

Where potatoes were shipped intrastate to a processing plant located near the Canadian border that fact alone was insufficient to show that the resulting processed potatoes were then exported to Canada, or that it was contemplated by the parties that they would be so exported. It was concluded that the transactions were not in interstate or foreign commerce within the meaning of the Act, and the complaint was dismissed.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Mark D. Evans, Bloomfield, MI, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $140,176.19 in connection with transactions involving potatoes.

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 included a counterclaim arising out of the same transactions. This counterclaim was later withdrawn by respondent.

Although the amount claimed in the formal complaint exceeds $15,000, the parties waived oral hearing. Therefore the shortened method of procedure