UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

[redacted]	)	PACA Docket No. W-R-2014-[redacted]
Complainant	)	
v.	)	
[redacted]	)	
Respondent	)	Decision and Order

Preliminary Statement

Complainant instituted this 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 $9,144.00 in connection with one truckload of broccoli shipped in interstate commerce.

Copies of the Report of Investigation (ROI) prepared by the Department were served upon the parties. A copy of the Complaint was served upon Respondent, which filed an Answer thereto, denying liability to Complainant and asserting an affirmative defense.

The amount claimed in the Complaint does not exceed $30,000.00. 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 part of the evidence of the case, as is the ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to submit briefs. Respondent filed an Answering Statement. Complainant filed an Opening Statement, a Statement in Reply, and a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is [redacted] CA [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] CA 90040. At the time of the transaction involved herein, Respondent was licensed under the PACA.

3. On or about October 12, 2013, Complainant sold one truckload of broccoli to Respondent and billed Respondent on the same day for 480 14-count cases of bunch broccoli, produce of USA, at $19.05 per carton, f.o.b., or $9,144.00. Payment was due in 10 days, or "A monthly finance charge of 1 ½% will be assessed on invoices not receipted within stated terms." (ROI Ex. A at 2.) The bill of lading was signed by a truck driver and reflects that Complainant shipped the broccoli on October 12, 2013, from [redacted] California, to Respondent in Commerce, California, and that the truck driver agreed to transport the broccoli at 34-36°F (ROI Ex. A at 4.)

4. On October 14, 2013, a USDA inspection for condition defects was completed on 480 14-count cartons of broccoli (California origin) at Respondent's place of business. The broccoli was unloaded at the time of the inspection and the pulp temperatures of the broccoli ranged from 30-31°F. The inspection revealed that the broccoli was damaged by 9% discolored bud clusters. (ROI Ex. A at 5.)

5. On October 16, 2013, a USDA appeal inspection for condition defects was completed at Respondent's place of business on 456 of the 480 14-count cartons of broccoli

mentioned in Finding of Fact 4. The appeal inspection reversed the inspection results mentioned in Finding of Fact 5 as to the condition of the broccoli. The broccoli was unloaded at the time of the inspection and the pulp temperatures of the broccoli ranged from 32-33°F. The inspection revealed that the broccoli was damaged by 25% discolored bud clusters (3% serious) and 2% crushed bud clusters, for a total of 27% damage (3% serious). (ROI Ex. A at 6.)

6. Respondent has not paid Complainant for the broccoli

7. The informal complaint was filed on December 14, 2013 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover $9,144.00 allegedly due for one truckload (480 cartons) of broccoli sold to Respondent in interstate commerce. Complainant states that Respondent accepted the broccoli in compliance with said contract of sale but has since failed, neglected and refused to pay the agreed purchase price. (Compl. ¶¶ 4-6.)

As the moving party in this action, Complainant has the burden of proving its allegations by a preponderance of the evidence. *See Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987); *see also W.W. Rodgers & Sons v. Cal. Produce Distrib., Inc.*, 34 Agric. Dec. 914, 919. As evidence to substantiate its allegations, Complainant submitted copies of its invoice and bill of lading for the broccoli. (ROI Ex. A at 2, 4.)

In response to Complainant's allegations, Respondent filed a sworn Answer denying acceptance of the broccoli and asserting an affirmative defense that Complainant breached the suitable shipping condition warranty. (Answer ¶¶ 4, 6-8.) Respondent has the burden of proving its affirmative defense by a preponderance of the evidence. *See Jules Produce Co. v. Quality*

Melon Sales, Inc., 40 Agric. Dec. 152, 154 (1981); *see also Walker & Hagen Packing House v. Amato*, 27 Agric. Dec. 1543, 1545 (1968).

Although Respondent claims it did not accept the broccoli, we find no evidence in the record of any clear and unmistakable rejection to Complainant by Respondent. Complainant merely acknowledges having a discussion with Respondent regarding Respondent's customer rejecting the broccoli. (Opening Statement at 2.) Notice of rejection must be given in clear and unmistakable terms. Merely reporting problems with the goods does not constitute a rejection. However, it would be sufficient notice of a breach of contract. *See Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1293 (1996); *see also Crowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 677 (1996). Further, the USDA inspection report of October 14, 2013, reflects that the broccoli was unloaded at the time of the inspection. (ROI Ex. A at 5.) Unloading is an act of acceptance. *See* 7 C.F.R. § 46.2(dd)(1). We therefore find that Respondent accepted the truckload of broccoli. 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. *See Ocean Breeze Export, Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 844 (2001); *see also World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (1988). The burden to prove a breach of contract rests with the buyer of the accepted goods. *See* U.C.C. § 2-607(4); *see also W. T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (1993); *Salinas Mktg. Coop. v. Tom Lange Co., Inc.*, 46 Agric. Dec. 1593, 1597 (1987).

It is undisputed that the broccoli was sold f.o.b. The Regulations (Other than Rules of Practice) under the PACA (7 C.F.R. § 46.43(i)) define f.o.b. as follows:

> "F. O. B." means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] 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. . .

Where goods are sold f.o.b., the suitable shipping condition warranty is applicable. *See Martori v. Hous. Fruitland, Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The term "suitable shipping condition" is defined in the Regulations (Other than Rules of Practice) under the PACA (7 C.F.R. § 46.43(j)) as meaning: "[T]he 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."[1] By definition, the suitable shipping condition warranty is applicable to the contract destination only where transportation service and conditions are normal.[2] In the instant case, the normality of transportation has been questioned by Complainant (1) as to the length of time in transit and (2) as to the indication of freezing pulp temperatures below Complainant's recommended transit temperatures agreed to by the trucker. Where the question of abnormality of transportation

[1] 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 [PACA] 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).

[2] *See supra* n.1.

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 the transportation service and conditions were normal. *Watson Distrib. v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613, 1616-17 (1983).

Considering the evidence in support of Complainant's contentions, the bill of lading was signed by a truck driver and reflects that Complainant shipped the broccoli on October 12, 2013, from [redacted] California, to Respondent in [redacted] California, and that the truck driver agreed to transport the broccoli at 34-36°F. (ROI Ex. A at 4.) The broccoli should have been in transit for no more than one day from [redacted] California, to [redacted] California.

Although there is no evidence of the actual date or time of arrival, on October 14, 2013, two days after shipping, a USDA inspection for condition defects was completed on the 480 cartons of broccoli at Respondent's place of business. The broccoli was unloaded at the time of the inspection and the pulp temperatures of the broccoli ranged from 30-31°F. The inspection revealed that the broccoli was damaged by 9% discolored bud clusters. There is no evidence that a temperature recording device was placed in the trailer with the broccoli.

On October 16, 2013, a USDA appeal inspection for condition defects was completed at Respondent's place of business on 456 of the 480 14-count cartons of broccoli at issue. The appeal inspection reversed the inspection results of October 14, 2013, as to the condition of the broccoli. The appeal inspection revealed that the inspected broccoli was damaged by 25% discolored bud clusters (3% serious) and 2% crushed bud clusters, for a total of 27% damage (3% serious). Averaging the 27% total damage over the total shipment of 480 cartons results in an average of 26% total damage.[3]

In its Opening Statement (Opening Statement at 3, Ex. B), Complainant refers to the pulp temperatures of 30-31°F revealed in the October 14, 2013, inspection and the research findings

[3] *See M. J. Duer & Co. v. J. F. Sanson & Sons Co.*, 49 Agric. Dec. 620, 624-25 (1990).

by the Division of Agriculture and Natural Resources, University of California, Davis, California, as follows:

> ***Freezing Injury.*** Broccoli will freeze if stored at -0.6°C (30.6°F) to -1.0°C (30°F). This may also occur if salt is used in the liquid-ice cooling slurry. **Frozen and thawed areas on the florets appear very dark** and translucent, **may discolor** after thawing and are very susceptible to bacterial decay.[4] (Emphasis added.)

In addition, we note that USDA publication, *Protecting Perishable Foods During Transport by Truck*, Agricultural Handbook Number 669,[5] states that the highest freezing point for broccoli is 30.9°F(–0.6°C). (Emphasis added.)

With the indication of freezing pulp temperatures and the foregoing research that discoloration in broccoli can be caused by freezing temperatures, Respondent's case hinges on its burden to prove the normality of transportation to rule out that the damage to the broccoli was caused or aggravated by transit conditions. Lacking this evidence from Respondent, we are unable to conclude that the damage to the broccoli was not caused by transit conditions or that the suitable shipping condition warranty was applicable to the truckload of broccoli at issue. Respondent has therefore failed to prove its affirmative defense by a preponderance of the evidence.

In summary, having failed to prove its affirmative defense, we find Respondent liable to Complainant in the amount of $9,144.00 for the broccoli, no part of which has been paid. Complainant also seeks pre-judgment interest on the unpaid produce shipment listed in the Complaint at the rate of 18% per annum. Complainant's claim is based on its invoice issued to Respondent, which expressly states: "A monthly finance charge of 1 ½% will be assessed on invoices not receipted within stated terms." Payment was due in 10 days. (ROI Ex. A at 2.)

[4] http://postharvest.ucdavis.edu/pfvegetable/Broccoli/ (last visited January 30, 2015).
[5] http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3021003&acct=atpub (last visited January 30, 2015).

There is nothing in the record to indicate that Respondent objected to the interest provision in Complainant's invoice. In the absence of a timely objection by Respondent, the interest provision in Complainant's invoice was incorporated into the sales contract. *See Coliman Pacific Corp. v. Sun Produce Specialties LLC*, PACA W-R-2013-424, slip op. at 7-8 (Oct. 23, 2014). Accordingly, pre-judgment interest will be awarded to Complainant at the rate of 18% per annum (1.5% per month).

Respondent's failure to pay Complainant $9,144.00 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. *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (1963). 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.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); *Notice of Change in Interest Rate Awarded in Reparation Proceedings under the Perishable Agricultural Commodities Act* (PACA), 71 Fed. Reg. 25,133 (Apr. 28, 2006).

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 $9,144.00, with interest at the rate of 18% per annum (1.5% per month) from November 1, 2013, until the date of this order, plus interest at the rate of 0.26 of 1% per annum on the amount of $9,144.00, from the date of this Order, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.
April 3, 2015

/s/ William G. Jenson
William G. Jenson
Judicial Officer
Office of the Secretary