

ARK.] RAILWAY EXPRESS AGENCY, INC., v. J. W. MYERS COMMISSION Co. 1123
RAILWAY EXPRESS AGENCY, INC. v. J. W. MYERS
COMMISSION COMPANY.

Opinion delivered January 18, 1932.

1. COMMERCE—DAMAGE TO SHIPMENT.—In the case of an interstate shipment, the rights and liabilities in respect to damages depend upon acts of Congress and the common-law principles expressed in the decisions of the Federal courts.
2. CARRIERS—SHIPMENT OF PEACHES—EVIDENCE.—In an action for damage to a shipment of peaches caused by brown rot developed in transit, evidence held insufficient to show that the carrier failed to furnish a properly equipped refrigerator car, or to ice it properly in transit.

Appeal from Crawford Circuit Court; *J. O. Kinn-
cannon*, Judge; reversed.

STATEMENT BY THE COURT.

J. W. Myers Commission Company sued Railway Express Agency, Inc., to recover damages for an alleged injury to a carload of peaches shipped by the plaintiff from Heavener, Oklahoma, to St. Louis, Missouri. Two grounds of negligence are alleged: One is that the express company failed to furnish a properly equipped refrigerator car in which to carry the peaches, and the second, that there was negligence in the handling of the peaches during transit. The suit was defended on the ground that the carrier had not been guilty of negligence at all.

On June 10, 1929, plaintiff delivered to defendant at Heavener, Oklahoma, 967 crates of peaches consigned to the Fiorita Distributing Company at St. Louis, Missouri. The car in which the peaches were loaded was one especially designed and built for that purpose. It was the latest and most improved type refrigerator car, and there were no defects in it. The car had been cleaned and inspected at Heavener on June 9, 1929, and found to be in good condition by the carrier. On June 10, the car was placed at the loading docks for initial icing, and was iced to full capacity at 3:15 P. M. that day. On the evening before, 300 crates of peaches had been brought to the ice plant and placed in storage. When the car was placed for initial icing, 300 crates were loaded from the storage room

into the car. The car was then moved into the loading shed at Heavener, and the remaining crates were loaded there. Of the remainder, 100 crates had been grown near Heavener, and had been placed in a shed after having been picked the day before. The temperature of the car at the time the loading started at the ice plant was seventy degrees and registered sixty-four degrees when the loading was completed. The loading was finished at 9:45 P. M., June 10.

Floyd Myers, a son of J. W. Myers, inspected the peaches in the car. He went on top of the car, opened the hatches and found the bunkers were down about six inches. He commenced the loading of the car about noon and finished it at 7 P. M. On cross-examination, witness stated that he was nineteen years of age, and that in inspecting the peaches, he took them out of six or seven crates out of a load of thirty crates. He stated that brown rot starts in the stem of the peach when it gets hot. He does not know whether this starts in the peach when it is growing. He would not know whether there was an inherent disease of brown rot in the peach or not.

Charles T. Frissell, manager of C. H. Robinson Company, St. Louis, was a witness for the plaintiff. His company acted as agent in selling the peaches. The car arrived in St. Louis June 12 at 7:22 A. M., and was placed on the team track at 8:56 A. M. on the same day. He inspected the peaches about eleven o'clock A. M. on that day. Decay was found in the peaches consisting of brown rot, ranging from nothing to twenty-five per cent. On cross-examination, witness stated that he was familiar with this disease. He said that in these peaches the disease was brown rot, a brown discoloration under the skin, starting at the stem and ranging from nothing to twenty-five per cent. Brown rot develops very rapidly, depending upon conditions.

According to the testimony of J. W. Myers, he did not see the peaches at any time, but sold them. He was familiar with diseases in peaches, such as brown rot. Many peaches have brown rot fungi in the field, and the

peaches have this disease when brought in. Only one thing can cause brown rot in peaches in sound condition at Heavener and consigned to St. Louis, and arriving there with disease as high as twenty-five per cent., and this was improper refrigeration. Insufficient ice causes this. On cross-examination, he stated that the purpose of spraying peaches is to control brown rot. It is a progressive disease. If the peaches in question had any brown rot when put in the car, even though not apparent to the eye, if kept in good refrigeration, the brown rot would have been checked.

According to the testimony of the defendant, it used 11,800 pounds of ice in the initial icing, and this filled the bunkers to capacity. The car was reiced 8½ hours after the initial icing, and this took 3,000 pounds, filling the bunkers to capacity. The peaches were carried out on the first train that left Heavener after they were loaded in the car, and were deposited in schedule time at St. Louis. An agent of the express company inspected the peaches when they were loaded in the car, and saw nothing wrong with them. There was no rough handling of the peaches by the employees of the carrier during transit. Drains were left open and dripping all of the time, and the ice was tamped down, and the bunkers were filled to capacity when they were iced. The regular schedule of the train which carried the peaches was introduced in evidence, and shows that the peaches arrived at St. Louis and were placed on the storage track on schedule time. The consignee of the peaches inspected the car as soon as it arrived at St. Louis, and found there was from ten to twenty-five per cent. decay in the peaches which showed brown rot. On cross-examination, he stated that brown rot would develop in peaches faster in high temperature than if the temperature was below forty-five degrees. He received the highest market price obtainable for the peaches in the condition they were in.

An inspector of fruits and vegetables for the United States Department of Agriculture in St. Louis was also a witness for the defendant. He had been a farmer and

had grown produce and vegetables for many years. He made a written report of the condition of the car. Brown rot is a disease which originates in the field where the peaches are growing. There was no evidence of rough handling of the car. If there had been, witness said that it would have been shown on his report. When fruit is decaying, it gives off more temperature, and it is hard to keep the temperature down when it is decaying. Brown rot is progressive. You cannot kill that disease after it commences without freezing the peaches. Low temperature has a tendency to arrest the disease. Brown rot can exist in peaches when they are loaded and not be apparent to the eye. If that condition exists, the disease continues to progress until it reaches the state which witness found in these peaches when he inspected them at St. Louis. If the peaches in question had been placed in an ice storage room and held over night, then placed in the car while being iced, the warm air in the car would help to bring on decay.

A. M. Hartung and *Warner & Warner*, for appellant.

D. H. Howell, for appellee.

There was a verdict and judgment for the plaintiff in the sum of \$215. The defendant has appealed.

HART, C. J., (after stating the facts). This is not a case where the common-law presumption against carriers who have received perishable commodities in good condition and have delivered them in damaged condition is applicable, as was the case in *Chicago, Rock Island & Pacific Railway Company v. George E. Shelton Produce Company*, 172 Ark. 1017, 291 S. W. 428, and *Railway Express Agency, Inc., v. S. L. Robinson & Co.*, ante p. 660. In cases like those, when the goods are damaged in the hands of the carrier, the burden of proof is upon it to show that its negligence did not contribute to the damage. The reason is that the goods are exclusively in its custody during transit, and it alone would know whether or not it had been guilty of negligence in handling the goods in transit.

The shipment involved is an interstate one, and it is settled that the rights and liabilities in respect to damage depend upon acts of Congress, and upon the common-law principles expressed in the federal courts. *Chicago & Northwestern Railway Company v. C. C. Whitnack Produce Company*, 258 U. S. 371, 42 S. Ct. 328; *St. Louis-San Francisco Railway Company v. H. Rouw Company*, 174 Ark. 1, 294 S. W. 414; *St. Louis-San Francisco Railway Company v. Burford*, 180 Ark. 562, 22 S. W. (2d) 328; *St. Louis-San Francisco Railway Company v. Greig*, 182 Ark. 262, 31 S. W. (2d) 290; *Missouri Pacific Railroad Company v. Fine*, 183 Ark. 13, 34 S. W. (2d) 755; and *American Railway Express Company v. Cole*, ante p. 485. In these cases, it is held that, where specific acts of negligence are alleged as a right to recover by plaintiff, he must rely thereon and make proof thereof in order to recover. In such cases, he will not be permitted to recover under the common-law doctrine that a carrier must account for the deteriorating condition of commodities received by it in good condition and delivered in bad condition.

The first ground of negligence relied upon in the present case is that the carrier did not furnish a properly equipped refrigerator car. There is no evidence on the part of the plaintiff at all to sustain this allegation of negligence. On the part of the defendant, it was shown by evidence of witnesses, which was consistent in itself and uncontradicted, that the car was of the latest modern type and was properly equipped in every respect without any defect in it.

The next allegation of negligence is that the car was not properly iced in transit, and that this caused the damage to the peaches. On this branch of the case, the defendant introduced witnesses who had iced the car at the point of shipment and en route from Heavener, Oklahoma, to St. Louis, Missouri. The testimony shows that the bunkers were kept filled to capacity and the ice was tamped down. The drains were left open, and there was no negligence whatever on the part of the express com-

pany in handling the peaches. The train which carried the peaches arrived at its destination in St. Louis on schedule time, and was promptly placed on the side track for unloading. When inspected there, they were found to contain brown rot, which is a progressive disease. Peaches may be loaded in a car in apparently good condition, and brown rot may develop in them to the extent that was discovered while in transit. According to the evidence for the defendant, the damage to the peaches in question was caused by brown rot, a field disease, and not by any negligence whatever of the defendant.

It is insisted, however, that the evidence for the plaintiff is to the contrary and establishes negligence in failing to properly ice the car in transit. We do not so regard the effect of the evidence. The most that can be said of the evidence for the plaintiff on this branch of the case is that brown rot will develop more rapidly in peaches when the refrigerator car in which they were carried is not properly iced. On this point, the son of the plaintiff testified that he inspected the peaches when they were loaded and that the ice was down six inches. In the very nature of things, ice will melt, but the testimony of the defendant, which is uncontradicted, tends to show that the initial icing was completed at 3:15 p. m. and that the car was reiced eight and a half hours afterwards. The plaintiff loaded the peaches into the car through its agent, 300 crates of peaches being taken out of cold storage and the balance from sheds at the loading point. According to the testimony of J. W. Myers, the only thing that could cause development of brown rot in peaches loaded at Heavener in sound condition and arriving at St. Louis with as high as twenty-five per cent. decay is improper refrigeration. It is apparent from reading his testimony that brown rot is a field disease, and that peaches are often sprayed in the fields to control it. He only states that, if the peaches had had brown rot when put in the car, good refrigeration would have checked the brown rot. The uncontradicted proof shows that the peaches had the disease called brown rot, and

that this was a disease which originated in the fields. The condition in which the peaches were found in the car when it arrived at its destination showed that there had been no improper handling of the peaches. The decayed condition of the peaches was due solely to a field disease which was not caused by any negligence on the part of the defendant. The disease originated in the peaches before they were delivered to the carrier, and the undisputed evidence shows that the disease is frequently not apparent at the beginning. Here the uncontradicted proof shows that the decay in the peaches was due to this field disease called brown rot, and not to any negligence of the defendant in handling the peaches in transit.

Therefore the court should have directed a verdict in favor of the defendant as requested by it. For its failure to do so, the judgment must be reversed; and, inasmuch as the cause of action seems to have been fully developed, it will be dismissed here.. It is so ordered.
