MISCELLANEOUS CEREALS AND CEREAL PRODUCTS*

29322. Wheat. (Inj. No. 451.)

COMPLAINT FOR INJUNCTION FILED: 3–16–63, N. Dist. N.Y., aganist Cargill, Inc., Albany, N.Y., Glenn E. Erlandson, grain elevator superintendent, and Donald E. Hart, assistant elevator superintendent.

CHARGE: The complaint alleged that the defendants were engaged in operating a terminal grain elevator which had a capacity of approximately 12 million bushels, was constructed of concrete, and was located immediately west of the Hudson River at the Port of Albany, Albany 7, N.Y., that was owned by the Albany Port Authority, Albany, N.Y., and was leased from that authority by the defendant, Cargill, Inc., and was utilized for the receipt, storage, and shipment of wheat for human consumption, a food within the meaning of the Act; that the terminal grain elevator was a structure which included an easterly row of four 125′ x 130′ rectangular bins, and a westerly row of four 125′ x 130′ rectangular bins which rows were situated at the easterly side and westerly side, respectively, of a central row of circular bins, together with additional circular bins to the north and south of those bins; that the four rectangular bins of the easterly row were denominated from north to south as "Bin A," "Bin B," "Bin C," and "Bin D," respectively, and the four rectangular bins of the westerly row were denominated from south to north as "Bin E," "Bin F," "Bin G," and "Bin H," respectively.

It was alleged further that the wheat was being held at the terminal grain elevator under insanitary conditions whereby the food had become contaminated with filth thereby rendering such food adulterated within the meaning of 402(a)(3) and 402(a)(4); that the insanitary conditions of the terminal grain elevator resulted from and consisted of the following conditions: in each of the rectangular bins rodent trails, rodent tunnels, rodent nests, and rodent excreta pellets on the surface of the food; on the walls and roofs of the rectangular bins heavy layers of insect webbing with thousands of insect exit holes and dead insects; in Bin A, 500 fresh rat pellets adjacent to the double door of the bin, 3 dead mice and 1 live mouse; in Bin B, rodent urine on the wheat, 7 live mice, insect webbing, live cadelle larvae and wheat kernels damaged by insects; in Bin D, 4 live mice, and live cadelle beetles; in Bin F, 57 dead pigeons on the surface of the wheat, rodent nests in the feathers of some of the pigeon carcasses, insect webbing, live granary weevils and 4 dead mice; in Bin G, 1 dead and 1 live mouse, live cadelle and dermestid beetles, live and dead granary weevils and 3 foreign grain beetles; in Bin H, a heavy layer of insect webbing on the surface of the wheat, 20 dead mice, 1 live mouse, cadelle beetles and granary weevils; on the passageways between the bins at the top of the elevator, several hundred mouse pellets; on the steel catwalk over the bins, a live mouse; and in the headhouse above the conveyor belts of the elevator, a live pigeon.

The complaint alleged further that the defendants violated the law by causing wheat to be placed in rectangular bins and to be exposed to contamination with filth in that such acts were done after shipment in interstate commerce and resulted in such food being adulterated as specified above; and that the defendant corporation was well aware that its activities were in violation of the Act; that on 1–21–58, a consent decree of permanent injunction was entered in the United States District Court for the District of South Dakota enjoining

*See also No. 29310.

Cargill, Inc., from committing similar violations at its grain elevators and annexes at Claremont and Huffton, S. Dak., (Food Notice of Judgment No. 25165); that Cargill, Inc., was also the shipper-of-record of several shipments of rodent-contaminated wheat which were seized and condemned, namely, a shipment from Chester, Mont., libeled on 3–13–62 (Food Notice of Judgment No. 27766), and a shipment from East St. Louis, Ill., libeled on 3–31–60 (Food Notice of Judgment No. 26414); and that despite the warnings conveyed to the defendant corporation by the United States Court for the District of South Dakota, and by such seizure actions, the defendants failed to correct the insanitary conditions at their terminal grain elevator at Albany, N.Y., and they continued to violate the Act.

DISPOSITION: On 3–20–63, the court denied a motion for a temporary restraining order which had been sought by the Government at the time the complaint was filed. On or about 4–2–63, the defendants filed an answer in which they admitted the allegations concerning the facts that the action was brought under the Federal Food, Drug, and Cosmetic Act and that Cargill, Inc., was a Delaware corporation trading and doing business at Albany, N. Y., and denied all the other allegations of the complaint.

On 4–3–63, the Government's motion for a preliminary injunction was heard by the court and the defendants moved that the case be dismissed. On 5–20–63, the court rendered the following decision and order:

FOLEY, *District Judge:* "This suit is for injunction and the motion at hand for decision is for a preliminary injunction pending the trial of the issues. The government department complaining is the Food and Drug Administration and the violations charged against the defendants are specified in the complaint as ones involving Sections 331(a), (b), (k); 342(a)(3); and 342(a)(4) of 21 U.S.C.A. Justice Frankfurter, dissenting, characterized the provisions of the Act as 'x x its meaning can hardly be so clear that he who runs may read, or that even he who reads may read'. (*U.S.* v. *Sullivan*, 332 U.S. 689, 705).

"However, the factual situation upon which the suit is based as well as the motion for preliminary injunctive relief is a simple one in my judgment. It was clarified by detailed affidavits and exhibits submitted and then the holding of a hearing on April 3, 1963. The minutes of such hearing were ordered by Cargill, Inc., and I have been furnished a copy by the Court Reporter which I shall file with the Clerk. It was my impression at the hearing that the government was weak in its position and such instinctive reaction as a trial judge gave me no fear there was danger to the public interest or health by the existent circumstances on the date of the hearing. Such feeling has now been reinforced after a study of the voluminous briefs and the transcript of testimony. There was no need for quick judicial action and it is my judgment the government should not prevail in the request for grant of serious and drastic injunction.

"The eight large rectangular bins which were the only targets of complaint and criticism were completely empty on March 27, 1963. The Inspector who began the first inspection in November, 1962, testified that tremendous strides of improvement have been made in correcting the undesirable conditions that existed over a period of months. Approximately $60,000 will be expended to complete extensive alterations and repairs to correct the conditions that previously existed, and the good faith of Cargill and its employees to meet government demands for correction is evident throughout the record. It is also undisputed that the condition was an unforeseen and emergency one caused mainly by the activity of the Port of Albany Commission to dredge and improve its Port as an important asset to commercial development in the northeastern part of New York. I detect no pattern of stubbornness or disinterest for public health on the part of the defendants that would lead to the conclusion that chronic violators of government regulations and statutes should be supervised and struck down by the most serious sanction that a court can grant.

"The significant factors that impel me to my conclusion are these: These rectangular bins are extremely large, and it was admitted by the Examining

Inspector who testified at the hearing that the remedy was to empty them out and then clean and repair. Substantial skimming was done, and when the wheat was transferred to the circular bins, admittedly clean, the wheat was then sampled by licensed inspectors of the Department of Agriculture under the supervision of a government employee of that department. The problem before the defendants was a complicated one and not the one comparable to emptying out the sugar from the sugar container in the pantry and then cleaning it out. The Food and Drug Inspector, and I found him courteous and competent on the witness stand, knew that the wheat was so being transferred and also being shipped out and loaded on ships. There was not the slightest remonstrance or objection on his part although he was aware at all times by official certificates shown to him that the wheat was being transferred and loaded on ships. This lawsuit was a long delayed one, and it seems important to me that with all the weapons at command for seizure and condemnation the Food and Drug Administration did nothing to prevent several million bushels of alleged adulterated wheat to be transferred internally and loaded illegally in ships for export. As stated in *U.S.* v. *Grant*, 345 U.S. 629, 634, the postponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendants'. There is also convincing proof that the wheat met government standards that are similar to, if not identical with the standards of the Food and Drug Administration. If I were to accept the contentions advanced in this respect, it would be a serious indictment of the grading responsibilities and standards of the Department of Agriculture, because it would be seriously arguable that its standards allowed a filthy and adulterated product to enter the stream of commerce.

"It is my judgment that the attitude of the government here is mainly pure legalism based upon a commingling of various statutes unsupported by fact. It seems that each contention advanced is sought to be lifted by the bootstraps of the other and none have sufficient quality for logical factual support. The reasonably probable or possible hypothesis that the wheat must be contaminated or adulterated is fiction when disproved by actual, experienced, substantial testing that it is not. Supposition, speculation, and surmise are always weak support for fact-finding directly or by inference. There is also the legal question that the wheat was exempt and properly exportable under 21 U.S.C.A. 381(d). (*U.S.* v. *Catz American Co.*, 53 F. 2d 425). The only answer to a query along this line by the Inspector to the employees of Cargill was his offhand, curbstone opinion that he did not consider the wheat in the proper status for exemption.

"Finally, however, the important reason for the denial of the injunction is there is no showing of existent danger or the probability of future violations. (*Swift & Co.* v. *U.S.*, 276 U.S. 311, 326). This is a cardinal and elemental principle in the exercise of discretion by a Court. In *U.S.* v. *Grant*, *supra*, pg. 629, such principle was plainly enunciated:

"x x But the moving party must satisfy the Court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. x x x To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." (pg. 633).

"There is no need shown for injunction, and the safeguards promised to the government by Cargill, Inc., in the future to alleviate and insure against undesirable conditions of storage at the Port of Albany are commendable and persuasive in the record. The last report of sampling made by the government evidenced by letter dated April 11, 1963 was not introduced in evidence during the hearing but the letter photostat is attached to the Reply Brief of Cargill which I shall file with the Clerk. Such letter indicates that the remaining wheat in the unchallenged circular bins are well within the proper standards for grain of the Food and Drug Administration. The government has gained its goal and the public health interest and pocketbook have been efficiently protected. Common sense often makes good law. (*Peak* v. *U.S.*, 353 U.S. 43, 46).

"The motion is denied and it is

"So Ordered."

On 6-12-63, pursuant to stipulation between the parties, the court ordered the plaintiff's complaint dismissed upon the merits without costs to any party against the other.

29323. Wheat. (F.D.C. No. 48998. S. No. 34-361 X.)

QUANTITY: 100,800 lbs. at Minneapolis, Minn.

SHIPPED: 5-27-63, from Corinth, N. Dak., by Corinth Farmers Elevator Co.

LIBELED: 6-7-63, Dist. Minn.

CHARGE: 402(a)(3)—contained rodent pellets when shipped.

DISPOSITION: 7-3-63. Consent—claimed by Corinth Farmers Elevator Co., and denatured.

29324. Wheat. (F.D.C. No. 49030. S. No. 34-696 X.)

QUANTITY: 105,600 lbs. at Duluth, Minn.

SHIPPED: 6-14-63, from Watford City, N. Dak., by Farmers Cooperative Elevator Co.

LIBELED: 7-8-63, Dist. Minn.

CHARGE: 402(a)(3)—contained rodent excreta pellets when shipped.

DISPOSITION: 7-29-63. Consent—claimed by Farmers Cooperative Elevator Co., and denatured.

29325. Wheat. (F.D.C. No. 49055. S. No. 34-293 X.)

QUANTITY: 94,200 lbs. at Minneapolis, Minn.

SHIPPED: 7-7-63, from Eureka, S. Dak., by Eureka Equity Exchange.

LIBELED: 7-25-63, Dist. Minn.

CHARGE: 402(a)(3)—contained rodent excreta pellets when shipped.

DISPOSITION: 8-1-63. Consent—claimed by Eureka Equity Exchange and denatured.

29326. Wheat. (F.D.C. No. 49053. S. Nos. 33-261 X, 33-702 X.)

QUANTITY: 189,000 lbs. at St. Paul, Minn.

SHIPPED: 7-2-63, from Maddock, N. Dak., by Farmers Union Grain Terminal Association.

LIBELED: 7-23-63, Dist. Minn.

CHARGE: 402(a)(3)—contained rodent excreta pellets when shipped.

DISPOSITION: 8-2-63. Consent—claimed by Farmers Union Grain Terminal Association and denatured.

29327. Wheat. (F.D.C. No. 49293. S. No. 34-644 X.)

QUANTITY: 10,000 lbs. in a railroad car at Minneapolis, Minn.

SHIPPED: 8-7-63, from Munster, N. Dak., by Munster Equity Elevator.

RESULTS OF INVESTIGATION: Examination showed that the article contained dockage, straw, chaff, weed seeds, and other foreign material concealed beneath the surface in various sections of the car.

LIBELED: 9-5-63, Dist. Minn.

CHARGE: 402(b)(2)—when shipped, dockage, straw, chaff, weed seeds, and other foreign material had been substituted in whole or in part for wheat; 402(b)(4)—dockage, straw, chaff, weed seeds, and other foreign material had