

Vegetable egg noodles, 403(a)—when shipped, the label statements “Equivalent to 37% fresh vegetables” and “contain the concentrate of fresh vegetables” were false and misleading since the article contained dehydrated vegetables; and the label statement “You’ll love being slim” and the vignette of a slim woman were false and misleading as applied to a product which was not capable of causing weight reduction or for maintaining slimness; 403(f)—the net weight statement, statement of ingredients, and information pertaining to the special dietary properties of the article required by the regulations to appear on the label were not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices in the labeling) as to render them likely to be read and understood by the ordinary individual under customary conditions of purchase and use; and 403(g)—the article purported to be and was represented as vegetable egg noodles, a food for which a definition and standard of identity has been prescribed and it failed to conform to such definition and standard in that enrichment and wheat germ had been added to the article and in that its label failed to bear the name of the food specified in the definition and standard.

DISPOSITION: 6-27-60. Default—delivered to a Federal institution for consumption by the inmates.

MISCELLANEOUS CEREALS AND CEREAL PRODUCTS*

26756. Barley, unpopped popcorn, piecrust mix, hot roll mix, corn muffin mix, egg noodles, and macaroni. (F.D.C. No. 42433. S. Nos. 7-063 P, 8-016/20 P, 8-161 P.)

INFORMATION FILED: 3-11-59, Dist. Conn., against New London Paper & Supply Co., Inc., New London, Conn., and Nathan N. Rosen, secretary and general manager of the corporation.

ALLEGED VIOLATION: (Counts 1 to 6 of the information.) On 9-11-58 and 9-12-58, the defendants caused quantities of barley, popcorn, piecrust mix, hot roll mix, corn muffin mix, and egg noodles, while held for sale after shipment in interstate commerce, to be held in a building accessible to insects and to be exposed to contamination by insects, which acts resulted in the articles being adulterated; and (count 7) on 9-25-58, the defendants caused to be introduced into interstate commerce at New London, Conn., for delivery to Westerly, R.I., a quantity of macaroni which was adulterated.

CHARGE: 402(a)(3)—the articles contained insects; and 402(a)(4)—the articles had been held under insanitary conditions.

PLEA: Not guilty.

DISPOSITION: The case came on for trial before the court without a jury. At the conclusion of the testimony, the case was taken under advisement by the court and on 6-4-59, the court found the defendants not guilty on counts 5 and 6 relating to the corn muffin mix and egg noodles, and guilty on the other counts of the information, and in connection therewith it handed down the following findings of fact and memorandum of decision:

*See also No. 26754.

SMITH, District Judge:

FINDINGS OF FACT

"1. Defendants, at all times mentioned herein, operated a wholesale food and grocery warehouse at New London in the District of Connecticut.

"2. On or about March 21, 1958 defendants received at the warehouse a number of packages of barley, a food which had been shipped in interstate commerce.

"3. Thereafter and prior to September 12, 1958 while said food was being held for sale after shipment in interstate commerce the food was caused by defendants to be held in the warehouse on the third floor near insect-infested food packages as a result of which said food became adulterated by the presence therein of insects, saw-toothed grain beetles.

"4. On or about May 1, 1958 to June 30, 1958 defendants received at the warehouse a number of bags of pie crust mix, a food which had been shipped in interstate commerce.

"5. Thereafter and prior to September 12, 1958 while said food was being held for sale after shipment in interstate commerce the food was caused by defendants to be held in the warehouse on the third floor near insect-infested food packages as a result of which said food became adulterated by the presence therein of insects, saw-toothed grain beetles.

"6. On or about May 1, 1958 to July 5, 1958 defendants received at the warehouse a number of bags of hot roll mix, a food which had been shipped in interstate commerce.

"7. Thereafter and prior to September 12, 1958, while said food was being held for sale after shipment in interstate commerce, the food was caused by defendants to be held in the warehouse on the third floor near insect-infested food packages as a result of which said food became adulterated by the presence therein of insects, saw-toothed grain beetles.

"8. On or about May 16, 1958 and July 16, 1958 defendants received at the warehouse a number of bags of popcorn, a food which had been shipped in interstate commerce.

"9. Thereafter and prior to September 11, 1958 while said food was being held for sale after shipment in interstate commerce, the food was caused by defendants to be held in the warehouse on the first floor near insect-infested food packages as a result of which said food became adulterated by the presence therein of insects, saw-toothed grain beetles.

"10. On or about August 21, 1958 defendants received at the warehouse a number of packages of Ronzoni macaroni, a food which had been shipped in interstate commerce.

"11. While in defendants' warehouse, a carton of 1 lb. packages of Ronzoni #115 macaroni, from the shipment referred to in Para. 10, became contaminated by the presence of saw-toothed grain beetles.

"12. Thereafter, on or about September 25, 1958, defendants shipped the carton of Ronzoni #115 referred to in Paras. 10 and 11 to Charles Ligouri at the Hobart Street Market, Westerly, Rhode Island, while so contaminated.

"The court finds the defendants New London Paper and Supply Co. Inc. and Nathan Rosen guilty as charged in counts 1, 2, 3, 4 and 7 of the information, not guilty on counts 5 and 6 thereof.

DISCUSSION

"Contamination at the warehouse was established beyond a reasonable doubt as to counts 1, 2, 3, 4 and 7, by the dates of receipt, the stage of development of the infestation, and the expert opinion of the source and time of the contamination. On counts 5 and 6 infestation at the warehouse was not shown with sufficient certainty in view of the expert testimony on cross examination that the infestation in the packages may have existed a sufficient length of time to antedate the delivery to the warehouse. On count 7, infestation prior to shipment in interstate commerce by defendants is shown.

"Defendants argue that the defense of good faith is a bar to conviction here. However, this defense is not available for the first 6 counts. Even if it were, the notice of insect infestation at the July 29-30 inspection would make its application here doubtful. So far as the 7th count is concerned, the

notice of September 12, 1958, following that of July 30, negates the good faith defense.

"The pertinent section of the statutes are as follows: *Federal Food, Drug, and Cosmetic Act*.

Section 201, 21 U.S.C. 321. For the purpose of this Act—

(f) The term 'food' means (1) articles used for food or drink for man or other animals, * * * (3) articles used for components of any such article.

Section 301, 21 U.S.C. 331. The following acts and the causing thereof are hereby prohibited:

(k) * * * the doing of any * * * act with respect to, a food * * *, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated * * *.

Section 303, 21 U.S.C. 333.

(a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; * * *.

Section 305, 21 U.S.C. 335.

Before any violation of this chapter is reported by the Secretary to any United States Attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

Section 402, 21 U.S.C. 342. A food shall be deemed to be adulterated—

(a) * * *

(3) If it consists in whole or in part of any filthy, putrid, or decomposed substance; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth * * *.

Section 704, 21 U.S.C. 374.

(a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein, * * *.

(b) Upon completion of any such inspection of a factory, warehouse, or other establishment, and prior to leaving the premises, the officer or employee making the inspection shall give to the owner, operator, or agent in charge a report in writing setting forth any conditions or practices observed by him which, in his judgment, indicate that any food, drug, device, or cosmetic in such establishment (1) consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. A copy of such report shall be sent promptly to the Secretary.

(c) If the officer or employee making any such inspection of a factory, warehouse, or other establishment has obtained any sample in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained.

(d) Whenever in the course of any such inspection of a factory or other establishment where food is manufactured, processed, or packed the officer or employee making the inspection obtains a sample of any such food, and an analysis is made of such sample for the purpose of ascertaining whether such food consists in whole or in part of any filthy, putrid, or

decomposed substance, or is otherwise unit for food, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

"Notice under 21 U.S.C. 335 is not a prerequisite for prosecution. U.S. *Dotterweich*, 320 U.S. 277 (1943). Nor need copies of analyses be furnished under 21 U.S.C. 374(d). This provision applies only to those who manufacture, process, or pack, undoubtedly so that allegedly faulty formulae and procedures may be checked and analyzed by the manufacturer, processor or packer.

"Defendants' principal contention is that the 'Act' proscribed by the statute involves something more affirmative than a mere holding in a place where without the knowledge of defendants insects exist.

"The legislative history cited by the government, House Report 807, 80th Congress, 1st Session, indicates that holding food where it might become contaminated was contemplated by the framers of the act as an offense. In an effort to protect the public health, the warehouseman is required at his peril to see that foodstuffs moving in interstate commerce or held for sale after such movement are not exposed to contamination. Here more effective inspection, fumigation or rotation of food products susceptible to insect contamination is called for by the conditions revealed by this case.

"A finding of guilty as to both defendants may be entered on counts 1, 2, 3, 4 and 7. The case may be continued for sentence on completion of the presentence report as to the individual defendant."

On 7-27-59, the court fined each defendant \$200.

26757. Malting barley. (F.D.C. No. 44058. S. No. 96-426 P.)

QUANTITY: 61,495 lbs. at Jefferson Junction, Wis.

SHIPPED: 12-21-59, from Glenfield, N. Dak., by Peavey Elevators.

LIBELED: 2-10-60, W. Dist. Wis.

CHARGE: 402(a)(2)—when shipped, the article was a raw agricultural commodity and contained a pesticide chemical, namely, a mercurial compound, which is unsafe within the meaning of 408 since no tolerance or exemption from the requirement of a tolerance for such pesticide chemical on barley has been prescribed by regulations.

DISPOSITION: 3-23-60. Consent—claimed by F. H. Peavey & Co., Minneapolis, Minn. The product was denatured for use as seed.

26758. Rice and pinto beans. (F.D.C. No. 43078. S. Nos. 5-204/7 P, 5-209 P.)

INFORMATION FILED: 6-16-59, E. Dist. N.C. against John B. Singletary, president of G. V. Singletary & Sons, a corporation, Whiteville, N.C., and James Howard Singletary, secretary-treasurer.

ALLEGED VIOLATION: Between 10-6-58 and 12-3-58, while quantities of rice and pinto beans were being held for sale after shipment in interstate commerce, the defendants caused the articles to be held in a building that was accessible to rodents and to be exposed to contamination by rodents, which acts resulted in the articles being adulterated.

CHARGE: 402(a)(3)—the rice contained rodent urine, rodent excreta, and rodent hairs; and 402(a)(4)—the rice and pinto beans were held under insanitary conditions.

PLEA: Guilty.

DISPOSITION: 7-28-60. Each defendant fined \$500.

26759. Wheat. (F.D.C. No. 44518. S. No. 27-323 R.)

QUANTITY: 48,700 lbs. at New Prague, Minn.

SHIPPED: 7-5-60, from Strasburg, N. Dak., by Farmers Elevator Co.