



**United States
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Agricultural
Marketing
Service

Fruit and Vegetable Programs-PACA Branch

**“Perishable Agricultural Commodities Act (PACA) -
Facilitating fair trade practices in the fruit and vegetable industry through education,
mediation, arbitration, licensing and enforcement”**

PACA Administrative Newsletter

Volume 1, Issue 3

July 1, 2005

DRC Marks Fifth Year!

Special points of interest found on PACA Web Page:

- PACA Violator Search Feature
- PACA License Search Engine
- Protecting Your Trust Rights
- PACA Internet Training Program
- PACA Publications

This year marks the Ottawa-based Fruit & Vegetable Dispute Resolution Corporation’s (DRC) fifth year in operation. What is the DRC? For those of you who may be unfamiliar with the DRC, it is a non-profit organization that was established in February 2000. Modeled after the USDA’s PACA program, the DRC has a similar purpose in that it strives to provide the produce industry with a fair, efficient, affordable, and timely means by which produce businesses can resolve their disputes.



The DRC initially offered membership to companies whose place of business was in Canada, Mexico, or the United States. The DRC has now extended its services to companies outside of these three countries when they were dealing with DRC members in North America. The DRC now has 1,350 members, including firms in Chile, Brazil, and Holland.

By encouraging and enforcing fair trading practices across the three countries, the DRC

complements the mission of the PACA program. Both organizations focus their efforts on prevention and early settlement of disputes by providing education, training, and information about rights and obligations, and by encouraging the parties to negotiate in good faith to resolve their dispute. However, if voluntary avenues do not result in resolution of the dispute, mediation and formal arbitration options are available. These formal procedures can generate binding and enforceable decisions.

Types of disputes handled by both the DRC and the PACA are product condition, contract terms, and payment issues. An example of a kind of dispute that can be handled by the DRC would be a complaint for non-payment of a produce transaction between a DRC member in Canada and a DRC member in Mexico. The PACA program would not have jurisdiction over these foreign entities. Similarly, if the members were

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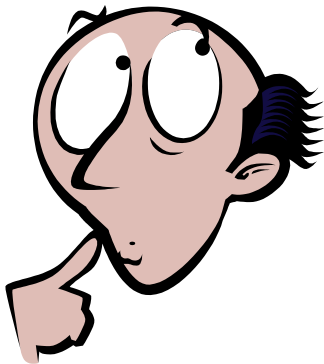
What Kind of Inspection Should I Get?

A load of produce you ordered has just arrived. After looking it over, however, you are not satisfied that it lives up to the agreement that you negotiated with the shipper. You know you need to call the U.S. Department of Agriculture’s Fruit and Vegetable Inspection Service to get a timely inspection because it will play a key role in helping you resolve a possible dispute with the shipper under the PACA. So do you know what kind of inspection you need when the inspector shows up at your dock?

The two most common types of inspection are for “grade and condition” or “condition only.” If your agreement calls for a specific grade, you should request a “grade and condition” inspection, which reflects both the quality (permanent) and condition (progressive) defects affecting the commodity you purchased. If your agreement does not specify a grade, a “condition only” inspection may be sufficient, unless you feel that the permanent defects (scarring,

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What Kind of Inspection Should I Get?



“...an unrestricted inspection is more representative of the entire load...”

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misshapen, mechanical damage, etc...) would make the product almost impossible to sell at any price.

Once you decide on the type of inspection you need, you may request that the inspection be unrestricted to the entire load or restricted to part of the load that is accessible to the inspector without unloading the shipment. Restricted inspections take place while the product is still on the truck or rail car and are limited to the part of the load that the inspector can easily access. In many of these cases the product that usually gets inspected is in containers located nearest the door and in the top layers of the load. While the results of a restricted inspection are routinely used to determine a breach of contract, an unrestricted inspection is more representative of the entire load and may carry more weight if a dispute arises. If you want an unrestricted inspection, you will likely be asked to unload enough product so that the inspector can take adequate samples.

Although unloading a shipment is ordinarily an act of acceptance and you would lose your right to reject the product if it fails to meet the terms of your agreement, you may unload product so that an unrestricted inspection can be performed without acceptance if you immediately place the unloaded product back

onto the truck.

If you feel that the inspector overlooked or misidentified certain defects, you can request an appeal inspection. To get an appeal inspection you must be able to positively identify that the product is the same as the product that was previously inspected. You can help the inspection service identify the load by tracking the trailer license, car or van number or approved Federal or Federal-State positive lot identification number. Keep in mind, if too much time has passed since the first inspection or if the condition of the product has changed due to mishandling or because the product is highly perishable, the inspection service may decline to perform an appeal inspection.

When faced with the question about what type of inspection to get, refer to the terms of your agreement or call us here at PACA. We will be glad to talk about it. Requesting the proper type of inspection will make it easier for you to determine whether or not the product meets your agreed-upon specifications.

For more information about the inspection service and the PACA program, you can visit the USDA fresh inspection service's Web site at <http://www.ams.usda.gov/fv/fvstand.htm>, and the PACA Branch Web site at <http://www.ams.usda.gov/fv/paca.htm>.

Terms of Sale: “F.O.B. Acceptance” and “F.O.B. Acceptance Final”



F.O.B. Acceptance means that the buyer accepts the produce at shipping point and has no right to reject the product. The buyer has recourse against the seller if the product is not in suitable shipping condition or for a breach of contract related to size, variety, label, etc., providing the shipment is not rejected.

F.O.B. Acceptance Final has the same meaning as “F.O.B. Acceptance” except that suitable shipping condition is inapplicable and the buyer's only recourse is for a material breach of contract. Use of this term must be clearly established given the harshness of the condition it imposes.

Where there is a dispute between the parties as to the trade terms, and for example, the seller seeks to prove that the terms were “f.o.b. acceptance final” and the buyer seeks to prove that the terms were “f.o.b.” and neither party succeeds in proving its allegations, f.o.b. terms are assumed.

Frequently Asked Questions: PACA Trust Provisions

What is the PACA trust provision?

The PACA trust provision was established to protect sellers of perishable agricultural commodities. In the case of a business failure, the debtor's produce-related assets are not available for general distribution to creditors other than PACA creditors until all valid produce trust claims have been satisfied. Because of this, suppliers that file for trust protection have a far greater chance of recovering the money owed them when a buyer goes out of business.

How do I preserve my rights under the trust provisions under the PACA?

You must notify the buyer (the debtor) within 30 days of the date that payment was due or notification was received that a payment instrument was dishonored.

A PACA licensee can fulfill this notification requirement by adding the following exact wording to its usual invoice or billing statement:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

Other produce sellers, like unlicensed growers, must provide the debtor with a separate, specific written notice of their intent to preserve trust benefits under the PACA within 30 days from the date that payment was past due or notification was received that a payment instrument was dishonored. The notice should include sufficient detail to identify the transaction, e.g., name of buyer and seller, date, commodity, and amount unpaid.



My company electronically invoices our customers. How can I preserve my trust benefits?

If a licensee's usual invoice or billing statement is in electronic format, you must still place the buyer on notice within 30 days of the payment due date of your intent to preserve trust benefits. You may include the wording set forth above on your invoice or billing statement.

I have preserved my trust rights but am getting nothing but excuses from the buyer. How can the PACA trust help me get paid?

After you preserve your rights under the PACA trust provisions, the buyer is required to hold its inventory and receivables 'in trust' until trust claimants are paid. You can file an action in U.S. District Court seeking to enforce payment under the trust. Trust assets include any produce inventory, products derived from that produce, as well as cash or accounts receivable generated from the resale of produce.

It is common for a trust enforcement action to seek a temporary restraining order from the U.S. District Court freezing the bank accounts of a buyer until the trust creditor is paid. Many produce sellers have found this an effective tool to recover payment for produce. It is appropriate to seek legal counsel if you have a trust claim. Attorneys that specialize in agricultural law, such as the PACA, advertise in produce industry publications. Sellers may also seek attorney referral through industry trade groups as well as their local bar association.

I just heard that a buyer who owes me for several shipments of produce has filed for bankruptcy. Can the trust provisions of PACA help me?

Having first preserved your PACA trust rights, you should notify the bankruptcy court that you are a creditor under the PACA trust provisions (7 U.S.C. 499e(c)). Trust creditor status should be indicated on the "Proof of Claim" submitted to the clerk of the bankruptcy court. Money held in trust to pay PACA trust claims is not part of the bankruptcy estate.

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a U.S. seller that sold to a Canadian firm, the dispute could be handled by the DRC, but not by the PACA.

In contrast however, when a company outside the U.S. such as Mexico or Canada sells product to a company in the U.S. that is licensed under the PACA, the dispute is most likely handled by the PACA. Likewise, the PACA handles the vast majority of disputes between firms located within the U.S., even if the firms

are DRC members.

Both the DRC and PACA provide cost-effective alternatives to pursuing complaints through litigation for the value of the product. The majority of cases are settled informally without the need for formal proceedings.

For more information about the DRC, including trading standards, mediation and arbitration rules, arbitration decisions, and membership, visit its Web site at <http://www.fvdrc.com>.



OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

Fruit and Vegetable Programs-PACA Branch

Our Web Address:
www.ams.usda.gov/fv/paca.htm

PACA Branch Office Directory

National Toll-Free Number:
800-495-7222

PACA On-Line Features

- PACA Violator Search Engine
 - Search for violators, including persons under employment and licensing restrictions, by business name(s) or individuals
- PACA License Search Engine
 - Search for licensees by business name(s), principal(s), or branch/trade name
- Perishable Agricultural Commodities Act and Regulations
- F.O.B. Good Delivery Guidelines
- Internet Training Program

Coming Industry Training Seminars

Training seminars are held to inform you of your rights and responsibilities under the PACA at the USDA Fresh Products Branch National Inspector's Development and Training Center in Fredericksburg, VA, in conjunction with courses in introductory and advanced produce inspection.

Here are the next scheduled dates:

- August 22-26, 2005
- September 26-30, 2005

For more information, call United Fresh Fruit & Vegetable Association at 202-303-3400, or visit their Web site www.uffva.org.

Past issues of the "PACA Administrative Newsletter" may be found at:
www.ams.usda.gov/fv/paca.htm

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