

**PRODUCT:** 11 100-pound bags of flour at Fort Atkinson, Wis., in possession of Arndt's Tastee Bakery.

**NATURE OF CHARGE:** Adulteration, Section 402 (a) (3), the article consisted in whole or in part of a filthy substance by reason of the presence of rodent urine; and, Section 402 (a) (4), the article had been held under insanitary conditions whereby it may have become contaminated with filth. The article was adulterated while held for sale after shipment in interstate commerce.

**DISPOSITION:** March 11, 1954. Default decree of condemnation. The court ordered that the product be destroyed or that it be sold or otherwise disposed of for some purpose other than for human consumption.

### MACARONI AND NOODLE PRODUCTS

21463. Adulteration of egg noodles. U. S. v. Frank J. Steiner. Motion to suppress evidence denied in part. Plea of guilty. Fine, \$1,000. (F. D. C. No. 34320. Sample Nos. 36885-L to 36887-L, incl.)

**INFORMATION FILED:** April 20, 1953, against Frank J. Steiner, a partner in the partnership of Steiner & Co., New York, N. Y.

**ALLEGED SHIPMENT:** On or about September 11, 1952, from the State of New York into the State of New Jersey.

**NATURE OF CHARGE:** Adulteration, Section 402 (a) (3), the article consisted in part of a filthy substance by reason of the presence of insect fragments and rodent hairs; and, Section 402 (a) (4), the article was prepared, packed, and held under insanitary conditions whereby it may have become contaminated with filth.

**DISPOSITION:** The defendant filed a motion for a bill of particulars, which the court, on June 29, 1953, granted in part. Thereafter, the defendant filed a motion for an order to suppress certain evidence obtained by the Food and Drug Administration during inspections of the defendant's plant; and, on February 18, 1954, after consideration of the briefs and arguments of counsel, the court handed down the following opinion:

WEINFELD, *District Judge*: "Upon observation of the witnesses and their demeanor and a further careful review and analysis of the evidence upon the hearing, the conclusion is compelled that the defendant freely and knowingly consented to, and acquiesced in, the inspection of the premises and the taking of photographs on September 9th and September 23rd. The defendant's actions, conduct, and his assistance to Government agents during the course of the inspection fully establish such consent as if it had been formalized in a written document.

"Unless we are to interpret the inspection provision of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. § 374, to require that a ceremonial and formal request be made and that the consent be executed in like manner, the evidence overwhelmingly establishes that the requirements of the statute as to request and consent were fully met on both occasions when the defendant was present.<sup>1</sup> With respect to that part of the inspection on September 23rd, when the defendant was absent and when Exhibits 5A and 5B were taken, upon this record no authority has been shown in Weiner, an employee of the defendant, to grant consent on behalf of the defendant on that occasion, and none may be implied.

"The motion to quash is denied, except as to Exhibits 5A and 5B, and all evidence obtained during the inspection in the absence of Steiner, as to which it is granted."

<sup>1</sup> Cf. *United States v. Crescent-Kelvan Co.*, 3 Cir., 164 F. 2d 582; *Golden Grain Macaroni Company, Inc. v. United States*, 9 Cir., \* \* \* F. 2d \* \* \*, decided December 28th, 1953.

On July 22, 1954, following a plea of guilty by the defendant, the court fined him \$1,000.

**21464. Adulteration of macaroni, egg noodles, brownie mix, and cake mix.** U. S. v. 20 Cases, etc. (F. D. C. No. 36057. Sample Nos. 19846-L, 65377-L to 65380-L, incl., 65411-L.)

**LIBEL FILED:** October 23, 1953, Southern District of Iowa.

**ALLEGED SHIPMENT:** On or about June 9 and 20 and September 9, 1950, and May 17, August 24, and October 29, 1951, from Chicago, Ill.

**PRODUCT:** 20 cases, each containing 24 1-pound packages, of macaroni; 21 cases, each containing 24 12-ounce packages, of egg noodles; 6 cases, each containing 24 11-ounce packages, and 15 cases, each containing 24 12-ounce packages, of brownie mix; and 11 cases, each containing 24 16-ounce packages, of cake mix at Muscatine, Iowa.

**NATURE OF CHARGE:** Adulteration, Section 402 (a) (3), the articles consisted in whole or in part of filthy substances by reason of the presence of insects. The articles were adulterated while held for sale after shipment in interstate commerce.

**DISPOSITION:** On November 19, 1953, A. Russo & Co., Chicago, Ill., filed an exception to the libel, and on January 2, 1954, the court handed down the following ruling on the exception:

*RILEY, District Judge:* "A. Russo & Company, shipper of the 20 cases of macaroni and 21 cases of egg noodles described in the caption of this cause, has excepted to the legal sufficiency of the libel action herein on the ground that the material allegation of the information, to wit:

5. That the aforesaid articles are adulterated while held for sale after shipment in interstate commerce within the meaning of 21 U. S. C. 342 [402] (a) (3). . . .

does not charge such a violation of the Federal Food, Drug & Cosmetic Act (21 U. S. Code, 301 et seq.) as to warrant their condemnation by these proceedings. The exception was submitted upon the written statements of counsel which have been studied and considered.

"The contention of the shipper is mainly that since the interstate commerce shipment by A. Russo & Co. from Chicago to Chas. L. Mull & Sons, Muscatine, Iowa, in whose possession this libel is based, occurred in 1950, and no infestation by insects was shown to have existed at that time, the government should not be permitted to condemn by reason of deterioration (or adulteration) occurring long after the interstate shipment.

"Sec. 334 (a), Title 21, U. S. Code, as presently worded, of the Federal Food, Drug & Cosmetic Act, and the interpretation thereof contained in *United States v. Sullivan*, 332 U. S. 689, is relied upon by the government to support its action for condemnation, at any time after shipment and prior to its purchase by the ultimate consumer. The objector relied upon *United States v. Phelps Dodge Mercantile Co.*, 157 F. 2d 453. That decision was before the recent amendments to the Federal Food, Drug & Cosmetic Act whereby the provisions of the Act were enlarged to permit a seizure as in this instance. By a supplemental brief just furnished, counsel for A. Russo & Co. concede the authority of *U. S. v. Sullivan* and have thus abandoned their resistance to this action. However, they do suggest that in view of the food becoming infested with insects while in the hands of a third party dealer after the interstate movement, the violation is a minor one and that a warning and a direction to destroy the goods pursuant to Sec. 336, Title 21, U. S. Code, would suffice. That course is something for the administrative officers to consider and not to be decided by the court on an exception to the sufficiency of the libel.