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Commercial Law—Uniform Commercial Code—Applicability to Federal Public Contracts.—In the Matter of the Appeal of Reeves Soundcraft Corp.

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CASE NOTES

Commercial Law—Uniform Commercial Code—Applicability to Federal Public Contracts.—***In the Matter of the Appeal of Reeves Soundcraft Corp.***[1]—Reeves contracted with the Marine Corps to deliver fifty reels of magnetic tape. The tape was delivered but the Government refused to accept delivery, alleging that the goods did not meet the standard warranted by appellant. Reeves appeals from the default termination of the contract and the excess cost assessment levied when the Government purchased another brand of tape. The facts showed that one reel had been delivered *gratis* before the contract was let, and that the Government had made a superficial test of it. Appellant sought to rely on the Uniform Sales Act (USA),[2] while the Government submitted that both the USA and the Uniform Commercial Code (UCC) should be considered[3] in determining the appeal. The Armed Services Board of Contract Appeals found that though neither has been enacted into federal law, both should be considered in the disposition of the case. After discussing the lack of precedents, the Board found that "the Code governs as reflecting the best in modern decision and discussion and, in the implied warranty area, as reflecting a long-term trend toward expansion of implied warranties."[4] The Board concluded, however, that it made no difference whether the USA or the UCC controlled, since the decision reached would be the same under both. HELD: Any implied warranty for fitness was removed by the Government's prior examination which, if made carefully, should have revealed the inherent defects.

The instant case is one of many decisions which have attempted to prescribe the law governing contracts and other commercial transactions between private individuals and the federal government. Among the first was the leading case of *Swift v. Tyson*,[5] in which Mr. Justice Story set a long-lived standard which, as interpreted by Mr. Justice Brandeis, held that

federal courts exercising jurisdiction on the ground of diversity need

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[1] ASBCA Nos. 9030 & 9130 (1964) (mimeographed), 33 U.S.L. Week 2024 (June 30, 1964).

[2] Ibid.

[3] Brief for Appellee, p. 8, n.5.

[4] Reeves Soundcraft Corp., supra note 1, at 15. The relevant sections of the UCC are §§ 2-315 and 2-316(3)(b):

§ 2-315. Implied Warranty; Fitness for Particular Purpose.

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316(3)(b):

> (3) Notwithstanding subsection (2)
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> (a) . . . .
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> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. . . .

[5] 41 U.S. (16 Pet.) 1 (1842).

> not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; they are free to exercise an independent judgment as to what the law is—or should be.[6]

The importance of this reservation by Mr. Justice Story of commercial litigation in federal courts within the ambit of federal law has increased with the complexity of modern commerce.

The theory underlying the decisions emanating from *Swift*, however, was sharply assailed by *Erie R.R. Co. v. Tompkins*.[7] Mr. Justice Brandeis, speaking for a divided court, described the shortcomings that had become apparent from the use of the *Swift* doctrine, and stated:

> [E]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case [in the federal courts] is the law of the State. . . . *There is no federal general common law.* Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or "general," be they *commercial law* or a part of the law of torts. (Emphasis supplied.)[8]

Although this decision ended the rule of "federal common law" in diversity suits between private parties in the federal courts, Mr. Justice Brandeis explicitly excluded from the operation of the *Erie* rule litigation involving actions taken pursuant to the Constitution or Acts of Congress. Since any action taken by the federal government must arise out of powers derived from the Constitution or Acts of Congress, it is still federal law and not state law which applies when the government is a party. That *Erie* did not completely eliminate the application of the "federal law merchant" which derived from *Swift* was shown in *Clearfield Trust Co. v. United States*[9] which involved a suit for payment of a forged government check. There, the Court held that where the right asserted or to be protected arises under the powers of the federal government, having its origin in federal law, the "vagaries" of state law are too great and the "desirability of a uniform rule is plain."[10] Specifically, the Court held that "application of state law [to

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[6] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938). In the relevant part of Swift v. Tyson, supra note 5, at 19, Mr. Justice Story stated:

> [W]e have not now the slightest difficulty in holding, that this section [Sec. 34 of the Act of September 29, 1789, 1 Stat. 92, which relates to the effect of local and state law in federal courts], upon its true intendment and construction, is strictly limited to local statutes and local usages . . . and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence.

In essence, *Swift* stood for the existence of "federal common law," a concept repudiated by Erie R.R. Co. v. Tompkins.

[7] Erie R.R. Co. v. Tompkins, supra note 6.

[8] Id. at 78.

[9] 318 U.S. 363 (1943).

[10] Id. at 367. Note that though *Clearfield* dealt only with commercial paper, United States v. County of Allegheny, 322 U.S. 174 (1944), extended this to all litigation involving contracts with the United States. In Bank of America v. Parnell, 352 U.S. 29 (1956), the inapplicability of state law was limited to situations where the

commercial paper issued by the government] . . . would subject the rights and duties of the United States to exceptional uncertainty."[11]

Clearfield, then, while a modification of *Swift*'s scope, calls for the application of general federal law to avoid the vagaries of state law. This general federal law was also sought in *Swift*, where Mr. Justice Story found his definition of that law chiefly in English decisions.[12] Mr. Justice Catron, however, also writing in *Swift*, perhaps presaged the modern view when he questioned the majority's use of the English rule in the face of an apparently uniform trend in the high courts of the states.[13] Today, in the words of the instant case, citing *Padbloc v. United States*, it would seem that "the federal law to be applied should take account of the best in modern decisions and discussion,"[14] whatever its source. The court in *Padbloc* referred to the long-term trend in contract law as supporting its decision. This law is to be found in the reports of the federal courts and state courts, and in the work of competent legal writers. The instant case contends that the best guidelines for the law to be used today, where federal law is to be applied to commercial transactions, are found in the uniform state laws, *e.g.*, the Uniform Negotiable Instruments Act, the Uniform Sales Act, and the Uniform Commercial Code, which provide the federal courts with a synthesis of the best modern decisions and trends in the law. The First Circuit recognized this in *Whitin Machine Works v. United States*,[15] where it applied, by way of dictum, the Uniform Sales Act.[16] Though the federal government has not adopted these laws, it is conceivable that more and more cases involving federal commercial transactions will rely upon them.[17]

Returning to the instant case, the Board found that it did not matter whether the USA, the UCC, or "federal law merchant" applied, for, in any case, the appellant was correct. In reaching its decision, however, the Board closely analyzed the various positions under these three theories and their applicability. Relying mainly on the acceptance the Code has found in several states,[18] the Board contended in a strongly worded dictum that the Code "governs as reflecting the best in modern decision and discussion."[19] As

government was a party. But see American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961), which held that federal law applies to actions between a prime contractor for the federal government and a subcontractor. The court noted however, at 644, that the "development of the law in this area, . . . is still uncertain and unclear."

[11] Clearfield Trust Co. v. United States, supra note 9, at 367.

[12] Swift v. Tyson, supra note 5, at 20.

[13] Id. at 21–2.

[14] Reeves Soundcraft Corp., supra note 1, at 14, citing Padbloc v. United States, No. 523-57 (Ct. Cls. 1963).

[15] 175 F.2d 504 (1st Cir. 1949).

[16] "[T]here is no reason to suppose that . . . federal common law would imply any warranties more extensive than those spelled out in the Uniform Sales Act. Id. at 507. . . . [T]he applicable law in the case at bar is the . . . Uniform Sales Act . . . ."

[17] Note, however, that there is a question of how uniform these acts are in light of the amendments attached to them when enacted into the statutes of the various states. See Uniform Laws Ann., I U.C.C. ix. (1962).

[18] It had been adopted in twenty-eight states and the District of Columbia, at the time of the decision.

[19] Reeves Soundcraft Corp., supra note 1, at 15.

noted,[20] however, if the courts are to apply the Code they must look at it not only as originally written, but also as adopted and enforced in the various states.

In summary, the decision in the instant case raises the question of the future applicability of the UCC in federal courts deciding cases affecting the rights of the United States. While this decision does not stand for the proposition that the Code must govern, it hopefully indicates that the federal courts will, in the future, make more use of the UCC.

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Labor Law—Secondary Boycotts—Permissibility of Consumer Picketing—Labor-Management Reporting and Disclosure Act of 1959, § 8(b)(4)(ii).—*NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760.*[1]—This action was begun on a complaint issued by the Tree Fruits Labor Relations Committee, Inc. (hereafter referred to as Tree Fruits), on charges that a strike caused by a dispute over the terms of the renewal of a collective bargaining agreement with Teamsters, Local 760, constituted such conduct as would violate Section 8(b)(4), subsections (i) and (ii) of the National Labor Relations Act (hereafter referred to as the NLRA) as amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act).[2]

The case was submitted directly to the National Labor Relations Board on a stipulation of facts, namely, that Local 760 had called a strike against the members of Tree Fruits and in support of said strike had instituted a consumer boycott against the struck product. Local 760 had placed pickets at the customer entrances of Safeway Retail Stores, distributors of the produce of the struck firms. The pickets, by placards and handbills, appealed to Safeway customers, and the public generally, to refrain from purchasing such struck produce. Care was taken to emphasize that the strike was not

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[20] Supra note 17.

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[1] 377 U.S. 58 (1964).

[2] 61 Stat. 136 (1947), 29 U.S.C. § 141 (1958), as amended by § 704(a) of the Labor-Management Reporting & Disclosure Act of 1959, 73 Stat. 542 (1959), 28 U.S.C. § 158 (1961 Supp.) reads in part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> . . . .
>
> (4)(i) . . . to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal . . . to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is—
>
> . . . .
>
> (B) forcing or requiring any person . . . to cease doing business with any other person
>
> . . . .
>
> *Provided further*, That . . . nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public. . . .