

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA) Criminal No. 3-95CR-294-R
)
 v.) Filed: 1/30/96
)
 MRS. BAIRD'S BAKERIES, INC. and) Violation: 15 U.S.C. § 1
 FLOYD CARROLL BAIRD,)
)
 Defendants.)

GOVERNMENT'S RESPONSE TO DEFENDANTS'
JOINT MOTION IN LIMINE AND BRIEF IN SUPPORT

The government hereby responds to Defendants' Joint Motion in Limine and Brief in Support. Defendants have asked this Court to restrict the government's proof in nine separate areas. The government responds to each numbered request in order.

Response to Paragraph 1:

Defendants' request that the government be prohibited from presenting evidence of the Defendants' sales activities or pricing activities in any markets outside of the state of Texas, and specifically Shreveport, Louisiana and the surrounding vicinity. They claim that, by including Shreveport, Louisiana in the definition of East Texas, the government has improperly expanded the scope of the Indictment. The allegation is unfounded.

Count 1 of the Indictment charges that the Defendants violated § 1 of the Sherman Act by engaging in an unlawful conspiracy to suppress and restrain competition in the sale of bread and bread products in East Texas. The government voluntarily provided the Defendants with a Bill of Particulars ("Bill") which further defined East Texas as "that area east of the Dallas-Fort Worth metroplex where both the Mrs. Baird's Dallas bakery and the Flowers' Tyler bakery

distributed bread and bread products. This area can generally be described as running from the eastern edge of the Dallas-Fort Worth metroplex eastward to and including Shreveport, Louisiana, and from the Red River in the north to Crockett in the south." Bill,

¶ 5.

The Defendants argue that the description of East Texas provided in the Bill has either constructively amended the Indictment or created a potentially fatal variance between the allegations in the Indictment and the proof that will be adduced at trial. First, the Defendants' argument assumes that "East Texas" has a static and standard definition. On the contrary, East Texas as described in the Bill is the government's best attempt to define the otherwise imprecise and fluid distribution area affected by the price fixing conspiracy charged in Count 1. Simply put, the market area described in the Bill includes Shreveport because the Defendants' price fixing activities affected the prices charged in that area.

A constructive amendment occurs only when a jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. United States v. Young, 730 F.2d 221, 223 (5th Cir. 1984). Such an amendment is prohibited in order to prevent a conviction based on a charge or facts not presented to the grand jury. Here, the grand jury heard evidence that the Defendants extended its broader agreement affecting prices in East Texas to include Shreveport. As demonstrated to the grand jury, Mrs. Baird's extended their price fixing agreements with Flowers' to include Shreveport, in addition to other areas in East Texas, in 1987 when Mrs. Baird's expanded its East Texas distribution to Shreveport.

This is not a case where the Defendants are charged with one conspiracy, but face the prospect of conviction for committing a separate or different conspiracy. See, e.g., United States

v. Johnson, 68 F.3d 899, 903-04 (5th Cir. 1995)(finding no constructive amendment). There simply is no danger that the Defendants will be convicted of committing an offense separate or different from the offense charged in the Indictment. See Young, 730 F.2d at 224. The Indictment charged, and the Government will prove, one conspiracy.

It is axiomatic that the evidence adduced at trial must correspond to the allegations in the indictment. However, variance between proof and allegations is not fatal unless the variance prejudiced the defendant's substantial rights. Johnson, 68 F.3d at 904. The defendant's substantial rights are not affected unless "the defendant is surprised at trial or placed at risk of double jeopardy." Id.

Here, there is no prejudice to the Defendants' substantial rights because there is neither surprise nor any double jeopardy risk. The Government voluntarily sent the Bill to the Defendants, informing them of the definition of East Texas, on November 14, 1995, therefore, the Defendants cannot claim surprise. In addition, the allegations and proof show one integrated conspiracy affecting an area extending from east of the Dallas-Fort Worth metroplex into Shreveport. Therefore, the Defendants' double jeopardy fears are unfounded.

The Government has provided the Defendants with information sufficient to prepare for, and avoid surprise at, trial. The Government has provided a definition of the offense that provides the Defendants with sufficient protection from a second prosecution. Therefore, the Defendants' Motion should be denied.

Response to Paragraph 2:

Defendants' request that the government be prohibited from introducing any reference, statements, or evidence of any crimes, wrongs, or acts of the Defendants not charged in the Indictment. The admissibility of other crimes, wrongs, or acts of the Defendants are governed by the provisions of Rules 404(b), 608(b) and 609, Federal Rules of Evidence. The government will comply with the requirements of these rules and, therefore, no Motion in Limine is necessary.

Response to Paragraph 3:

Defendants ask that the government be prohibited from making any statement or reference to the effect that the investigation of the bread industry in Texas is continuing at this time. In support of this request, the Defendants alleged that no such investigation exists. The Defendants' allegation is untrue. The federal grand jury investigation which resulted in the instant Indictment has not been closed, and is continuing. However, the government does not intend to introduce any evidence concerning the continuing nature of the investigation unless the Defendants present any argument, evidence or testimony to the contrary. Specifically, if the Defendants present evidence, argument or testimony that any company or individual engaged in the manufacture or distribution of bread in the state of Texas has either been cleared of any allegation of price fixing or is no longer the subject of the grand jury's investigation, the government will be compelled to prove otherwise.

Response to Paragraph 4:

Defendants request that the government be prohibited from making any reference or statement concerning the Defendants' failure or refusal to stipulate to the admissibility of any

evidence, documents or facts which may have been proposed by government counsel. The government does not intend to make any reference to Defendants' unwillingness to stipulate. However, if the defendants raise the issue of any parties' willingness or failure to stipulate, the government will be compelled to respond.

Response to Paragraph 5:

Defendants request an order excluding any evidence or testimony from any witness engaged in any activities with the Defendants in violation of the Sherman Act unless such witness has been designated as an unindicted co-conspirators. The government intends to present witnesses whose testimony is admissible under the Federal Rules of Evidence, whether designated as unindicted co-conspirators or not. Because the admissibility of this testimony is governed by the Federal Rules of Evidence, no motion in limine is necessary.

Response to Paragraph 6:

Defendants request that the government not make any reference to, or offer of evidence, that the Defendants engaged in bid-rigging activities with any entity other than those designated in the Government's Voluntary Bill of Particulars. Again, the government will present all legally admissible evidence against the Defendants, and, therefore, opposes this request.

Response to Paragraph 7:

Defendants asked that the government be prevented from offering evidence or making any reference to conduct in violation of the Sherman Act on behalf of the Defendants outside of the market areas defined as East Texas and West Texas. The government does not intend to introduce evidence of the Defendants' pricing practices in areas other than East Texas or West Texas, unless the Defendants raise the issue. For example, if the Defendants introduce evidence

of their pricing patterns or decisions in areas other than East Texas or West Texas and contend that the prices charged in those areas were not fixed, or the subject of prior communications with competitors, then the government will be compelled to present any contrary evidence in its possession. In addition, if the Defendants introduce evidence of their pricing practices and decisions in areas other than East Texas and West Texas in order to show that it did not engage in the price-fixing conspiracies charged in the Indictment, it may be necessary for the government to introduce any evidence it has that the prices charged in other areas were themselves affected by collusion. Simply put, the government does not believe that prices charged by the Defendant, or others, in any area other than East or West Texas are relevant. However, if the Defendants attempt to make the prices charged in other areas an issue, the government may be compelled to respond with contradictory evidence.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Government's Response to Defendants' Motion in Limine and Memorandum in Support and Order were mailed via Federal Express on the 30th day of January 1996, to:

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA)	Criminal No. 3-95CR-294-R
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MRS. BAIRD'S BAKERIES, INC. and)	Violation: 15 U.S.C. § 1
FLOYD CARROLL BAIRD,)	
)	
Defendants.)	

ORDER

The Court, having considered the Defendants' Joint Motion in Limine and Brief in Support and the Government's Response hereby finds that the motion should be denied.

IT IS SO ORDERED this ____ day of _____, 1996.

JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT