

1979

Mallory Engineering, Inc v. Ted R. Brown & Associates, Inc and Valad Electric Heating Corp : Reply Brief of Appellant Valad

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. William J. Cayias and Quentin Alston; Attorneys for Respondent Mallory Engineering, Inc. Allen H. Tibbals; Attorney for Respondent and Appellant Ted R. Brown & Associates Godfrey P. Schmidt and Robert B. Sykes, attorneys for Appellant Valad Electric Heating Corp.

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IN THE SUPREME COURT OF THE STATE OF UTAH

MALLORY ENGINEERING, INC.,)

Plaintiff and Respondent,)

vs.)

TED R. BROWN & ASSOCIATES,)
INC.,)

Defendant, Crossclaimant,)
Respondent, Defendant to)
Valad's Counterclaim and)
Appellant,)

and)

VALAD ELECTRIC HEATING CORP.,).

Defendant, Cross-Defendant,)
Counterclaimant and)
Appellant.)

Supreme Court No. 15530

REPLY BRIEF OF APPELLANT VALAD

Appeal from the Judgment of the Third Judicial District
of Salt Lake County, the Honorable Hal Taylor, Judge

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REASON FOR REPLY BRIEF

Valad feels a strong need to respond to certain points in the briefs of both Mallory and Brown. If no response was made, certain arguments made in these briefs would work great mischief to the truth because of misconceptions created.

Mallory states in Point III of its brief that:

There is no question but that the heaters did not meet Mallory's required performance criteria. (Mallory's Brief pg. 17-18)

The brief then quotes the Plaintiff's President, Lee Farber, as claiming that the heaters were deficient in capacity and that the sheath temperature exceeded the allowable limit.

The brief also claims a major defect with thermostats:

If the thermostats were used to control sheath temperatures, and the testimony of Valad's witnesses and the arguments of Valad's counsel evidences that this was the case, then irrefutably and by its own admissions Valad's heaters did not meet the requirements specified by Mallory. (Brief of Mallory pg. 20)

The brief alleges that the interruption of the flow of current by the so-called "limit-stats" or thermostats prevents one from getting full "capacity" from the heaters.

An additional reason for this reply brief is found in Brown's Point II where Brown reiterates the allegations of Mallory regarding the thermostats:

It is thus established that the cause of the problem is that Valad misinterpreted the requirements submitted to it. (Brown's Brief pg. 24)

Additionally, Brown attempts to escape liability by casting all blame upon Valad in the following claim:

Despite the effort expended (by Valad), it was never shown that Brown ever did anything actually wrong which caused the problem (with the heaters), or was responsible for the deficiency in performance by Valad. (Brown's Brief pg. 24)

This Reply Brief will clearly show that these arguments completely ignore Mallory's duty to provide complete and accurate information to both Brown and Valad so that Valad could construct heaters in compliance with the contract.

Additionally, this Brief reveals Brown's omission of material information and changing of the Mallory purchase orders with respect to the function of thermostats, thus causing the entire problem.

By the arguments presented in this Reply Brief, Valad does not intend to in any way denigrate the argument presented in the main brief with respect to offer and

acceptance. The argument herein presented is merely supplementary; it applies regardless of whether the Court accepts or rejects the argument in the main Brief with respect to offer and acceptance (see Points II and V of Valad's Brief). However, for the sake of argument and discussion in this brief, it may be assumed that the various documents and purchase orders may have become part of the contract between Valad and Brown.

POINT I

MALLORY FAILED TO PROVIDE CRUCIAL INFORMATION REGARDING "DESIRED END RESULT" AND DESIGN TO VALAD (AND BROWN) THAT WAS NECESSARY IF VALAD WAS EXPECTED TO MANUFACTURE THE HEATERS TO ACHIEVE MALLORY'S PURPOSE. BECAUSE THE INFORMATION WAS NOT PROVIDED, VALAD HAD NO LEGAL DUTY TO MANUFACTURE THE HEATERS TO CONFORM TO MALLORY'S UNREVEALED END RESULT.

Basic Explanation of the Heaters and Their Purposes.

Valad never was informed of the ultimate purpose or intended use of the heaters. It knew only that they would be used to heat air and gas moving through metal ducts. Later at trial, it was discovered that the heaters were to be inserted in certain mobile "environmental chambers" (like tractor-trailer rigs seen on the highways), and that the chambers would be used for testing ammunition, weapons, etc. under extreme temperature variations. (T.66; See Exs. 1-3, 5-7, 9-11, 17-18 and 20) Fans would blow the air and gases past Valad's heater "sheaths" to which thin metal "fins" were attached at right angles for the purpose of heat dispersion.

Again, it must be emphasized that Valad was uncontestedly not privy to any of the information with respect to Mallory's governmental contracts; the ultimate use or purpose of the heaters; or their place within the trailer systems. (T. 6-7, 10, 13) Brown was also, in all likelihood, not privy to the detailed information, but there is some possibility that it may have known about some aspects of Mallory's governmental contracts. (T. 6, 194-5)

The Trial Court's Fundamental Error

The trial court's fundamental error, which is dispositive of this case, is the conclusion in the Findings of Fact (Nos. 2, 3, 4 and 22) that Valad violated a contract that could not have existed. The Court made this fundamental error because it: (1) Misinterpreted documents that it had a duty to interpret correctly based on the evidence; and (2) Incorrectly cast upon Valad a legal duty totally unsubstantiated by the evidence.

The trial court found that:

. . . Mallory had certain contract commitments to manufacture for and deliver to the United States Government some specifically designed environmental units which required as part of their essential components some electrical heaters of precise and exacting specifications. (Findings of Fact No. 2) (emphasis added)

Brown transmitted the Mallory purchase orders along with its own to Valad. (Findings Nos. 6, 8, and 9) Findings No. 22 specifies Valad's alleged breach, i.e., that the

heaters were defective and "did not meet the specifications set forth in Mallory's P. O.s . . ."

Herein lies a crucial error: By these findings, the Court implies a duty to Valad to manufacture the heaters to be "an essential component" of Mallory's environmental units. The implication is clear: Valad was supposed to manufacture according to "precise and exacting specifications", which are precise and exacting because they are necessary in order for the heaters to fit in the units as "an essential component", and achieve the "end result".

This is what Mallory wanted. What it wanted is what would meet the governmental specifications; i. e., it wanted heaters that would achieve the "end result" (as per the government contracts) of its system. That end result was: To put so many B.T.U.s of heat in the air to raise the temperature from a certain point to another point within a given time. (T. 65-6, lns. 26-28; 1-17; 123, lns. 2-4; 184, lns. 19-21, 185, lns. 15-20)

There is no question but that the Court perceived the whole context of the contractual obligations in this case in terms of whether Mallory "got what it wanted". The Court stated in response to Valad's Motion to Dismiss:

But there is (sic.), some of the documents, which in the mind of the court, are not subject to interpretation. While I am not going to make the complete decision on this, I am going to deny your motion to dismiss, and for this reason. Mallory didn't get what they thought they were going to get. . . the

thermostats . . . were put in there in such a manner that there was going to be an interrupted flow of current and not continuous . . . the court is convinced that by the preponderance of the evidence of all the witnesses, that Valad was required, and that by all the evidence involved, to furnish a heater which would operate at continuous full voltage . . . which they did not do. (emphasis added) (T. 620)

Mallory had a legal duty to communicate enough information to Brown and/or Valad to enable the heaters to be constructed to meet Mallory's end result. All of the documents whereby any of this information was communicated to Valad by either Mallory or Brown are Exhibits. (See Exs. 9, 10, 11, 12-15, 17-18, and 20) If these Exhibits communicated enough information to enable Valad to manufacture the heaters to achieve Mallory's "end result" in conformance with the government specifications, then there is perhaps some support for the conclusion of Valad's liability. If, however, Mallory failed in its duty to provide the information, Valad has no liability.

The Court had a duty to make determination that the above referenced exhibits accurately conveyed to Valad the information it needed to manufacture heaters to achieve the "end result". Mallory's Farber testified that he derived the "end result" from the government specifications. The government specifications were in evidence (Exs. 1-3, 5-7) although properly limited because they were never provided to either Brown or Valad. (T. 7, 9, 10)

The Court failed in its critical duty because it misinterpreted the documents:

A. The Court repeatedly let Mallory's Farber state conclusions that he ordered the heaters to comply to the Government's specifications (never furnished to either Valad or Brown), but the actual documents sent to Valad omitted all of the crucial information to which oral testimony was given.

B. Neither Brown nor Mallory ever transmitted either the government specifications or other information about the end result to Valad.

The information presented in this Reply Brief will prove that Mallory:

A. Expected to get heaters to conform to the government specifications and produce an end result; but

B. Failed to provide the critical information that would have allowed a manufacturer like Valad to produce conforming heaters.

The Court Failed to Apply the Proper Legal Standard in Viewing the Documents

Mallory and Brown issued all of the written documents claimed to be a contract to Valad and are attempting to invoke the terms of these documents against Valad. These documents are somewhat ambiguous on their face, especially with respect to the meaning of the critical language ". . . when operating a continuous full voltage

. . .", and whether a thermostat can be used to control the sheath temperature. In Wells Fargo Bank vs. Midwest Realty and Finance Company, Inc., 544 P. 2d. 882 (Utah 1975), a party agreed to guarantee payment in writing and later attempted to cancel the guarantee with an enigmatic letter to the party who lent the money. In referring to this writing, the Court stated the following:

. . . after trying to analyze and reconcile the evidence and contentions of the respective parties as to what they think it meant, it is obvious that it falls short of being a clear and definite communication to others. In dealing with a document which is ambiguous or uncertain, the general rule is that it should be construed strictly against the party who wrote it (Midwest) and favorably to the other party against whom it was invoked (Wells Fargo). (emphasis added) Id. at 885. See also Wagstaff v. Remco Inc., 540 P.2d 931 (Utah 1975).

The trial court failed in its duty to strictly construe the purchase orders against Mallory and Brown and ignored substantial evidence as to the meaning and ambiguity of these terms.

The Critical Language: ". . . When Operating a Continuous Full Voltage . . ."

The entire decision in this case turned upon the meaning of the language found in Mallory's P.O. 4016 regarding the operation of the heaters. The manufacturer was to certify:

. . . that sheath temperature will not exceed +250° F when operating a continuous full voltage.(Ex.9)

This was a requirement for the 15 and 21 KW heaters.

(Exs. 9-11). The Court found that the heaters did not meet these specifications insofar as the sheath temperatures were allegedly too high* and the capacities too low.

*The allegedly excessive sheath temperatures are not important for this discussion. It was established at trial that Mallory's tests as to sheath temperatures were done after the heaters had been welded into the air ducts. No one ever revealed to Valad that the heaters themselves would be welded into the ducts. Only the mounting flange was to be welded, and the heater screwed on to that flange. (See Exhibit 20 and the diagram attached thereto with Mallory's writing thereon). Also, Farber testified that he wasn't really sure whether or not his sheath temperature tests were conducted with the "limit-stats" being bypassed. (T. 51, lns. 13-17, 18-21). Furthermore, it was uncontested that the temperature of the weld would be between 2,800° and 3,000° and that it took place within one and a half inches from the thermostat capillaries, which were not removed prior to the welding. (T. 177) It was further uncontested that the thermostats would have cut the temperature off at 250° had they not been damaged and had they been properly installed. (T. 508-9) It was also uncontested that a temperature of 500° would cause the calibration on the thermostat to "go wild" and another 50° would permanently distort the diaphragm and make the thermostat switch inoperable. (T. 518) It was uncontested that Valad had conducted accurate tests with properly calibrated instruments at its factory prior to shipping the heaters and that the thermostats worked properly. (T. 510-11; Ex. 86) The sheath temperature never exceeded 250°. (Ex. 86) Therefore, it was literally impossible for all three thermostats to have failed in the absence of some malfunction caused by Mallory's installation.

However, this point is not important since Mallory's Farber testified that even if Valad had not installed these thermostats, he would have done the same himself. (T. 107; 41-3); hence, whether Valad's thermostats worked or were damaged by Mallory is immaterial. The main bone of contention is simply whether the heaters were designed to regulate sheath temperature by use of the thermostats or not.

(Finding No. 22). "Capacity" refers to the amount of heat produced.

Mallory's position at trial was that the disputed language quoted above contemplated a constantly operating and continuously energized heater, the sheath temperature of which by design, regardless of whether or not there were thermostats present, would never exceed +250° F (for both 15 and 21 KW Heaters). (T. 169) Their government specifications required this. (T. 184, lns. 19-27; 185)

The disputed language is capable of two interpretations. Valad read the language to mean (mostly because of Brown's modifications) that when the heater was energized (current flowing through) or operating, the sheath temperature would not exceed 250° because the thermostat would cut it off. (T. 533-5) The presence of thermostats, to Valad, in this kind of apparatus, means the intermittent energizing of the heaters. (T. 518-9, 479) The thermostats installed were "automatic hi-limit thermostats", which would automatically re-set and re-energize the heaters after the sheath had cooled. (T. 371, 406, 410, 551-2)

Mallory's Major Complaint

Due to the fact that a thermostat was used as a sheath control device (as opposed to a fail-safe, or safety device), Mallory claims that the capacity of the heaters was greatly reduced (T. 41-2), since a continuous flow of electricity was required in order to produce enough heat fast enough to achieve Mallory's intended end result. (T. 163-4, 185, 127)

Mallory's Duty to Provide Information

There are only two ways in which Mallory could expect heaters constructed to achieve its "end result":

1. Mallory Designs: Mallory Engineering, with its knowledge of the total system it wanted to create and the end result, could itself design each heater and furnish Valad the parameters, diagrams, and construction blue-prints. It would simply instruct Valad to build exactly to Mallory's diagrams and specifications and Valad would require no knowledge of the overall system. This was not the course followed since Valad submitted the diagrams and Farber claimed that Mallory had no knowledge of heater design. (T. 104 lns. 10-14; 116).

2. Valad Designs: If Valad was expected to design heaters to achieve Mallory's "end result" as Farber testified (T. 169; 65-6), Mallory certainly then had a duty to provide Valad specifications in detail of the overall system in to which Mallory expected the heaters to fit, including the desired end result. Valad could not manufacture to accomplish an end result without the background of the whole system!

Incredibly, the Court made no finding with respect to whose duty it was to design the heaters! More importantly, neither Mallory nor Brown provided the information which would allow Valad to either design the heaters to achieve an end result, or to construct them according to detailed specifications.

Mallory's Failure to Furnish Government Specifications

Mallory's main complaint was the fact that the thermostats (often called "limit-stats", or "hi-limit stats" or "limits") functioned to disconnect the power to the heaters so that the heaters were not energized long enough to achieve its end result as per the government specifications. (T. 185, lns. 1-5; 169, lns. 18-23) This is clearly contrary to the weight of the evidence since both Mallory and Brown withheld the critical government specifications containing this vital information. (T. 6-7, 10, 13)

These specifications were absolutely critical for three reasons:

1. They constituted the only viable means whereby Valad could design heaters to achieve the end result Mallory wanted;
2. Without the government specifications, Valad could have no clue that its method of construction was supposedly faulty; and
3. The government specifications clearly showed that proper sheath control was not by thermostat.

Critical Nature of Omitted Information

The importance of the government specifications is best explained by Mallory's own President, Lee Farber:

Uninterrupted Flow Needed

Q: (Godfrey Schmidt): You say if the thermostat or limitstat is actuated something is wrong? Why should that be?

A: All right. So the heaters to meet the specifications requirement that we had contracted to meet with the United States Government and that Mallory had stipulated in purchase order no. 4016, we have to have the capacity -- the capability of applying continuous full voltage to those heaters so that when the chamber doors were closed and the heaters were energized, full boiler power could be applied on an uninterrupted basis until the chamber temperature came to whatever it started at up to 200°. And if the heaters were -- if the voltage was ever interrupted or the flow on current to those heaters was ever interrupted at any time, it was a malfunction. Something went wrong. Because as soon as those limitstats interrupted the flow we no longer could get full capacity out of the heaters. To get full capacity out of the heaters you have to not have interrupted flow. (T. 184-5)

Q: If inevitably you had intermittent flow because of the thermostats, I don't understand why something is wrong if the thermostat does what it's supposed to do.

A: Because if the limit thermostat functions, then I don't have the power I need to meet the Government specifications. (emphasis added) (T. 185)

Government Specifications Provided for Other Methods of Sheath and Temperature Control

A: (Farber) The function of that sheath stat is for that specific purpose as a fail safe. Now, in our system designing we cannot depend on a limitstat to regulate the sheath temperature because as

soon as you interrupt the flow of current to the heater you then reduce the capacity and when you reduce the capacity you can't put the number of BTU's into the air that the original specifications require that we provide. (emphasis added) (T. 122-3)

Q: (Alston) Why do you say (that the Valad thermostats were) for a fail safe operation only?

A: All right. In our control circuit, by design we provide a primary recorder-controller or programmer. This is the primary instrument that we purchase so that the government can set this controller to achieve the desired operating temperature they are after. Now, in addition to this we provide what we call a fail-safe high-low controller. This high-low limit controller is a front-of-the-panel mounted device so that the operator can twist the knobs and set the maximum temperature and the minimum temperature by operation, and as described by our various operating exhibits . . . now, in addition to this is a tertiary control, a third level of control. We provide limitstats. Now in this case, if Valad would not have provided the limitstats on the sheath temperature, Mallory would have added them to fit. . . (emphasis added) (T. 51-4)

The Government Specifications Themselves Examined

Examination of Exhibits 1 (Government Contract) and 5 (Operating and Maintenance Instructions) for the 15 and 21 KW heaters quickly reveals the seriousness of Mallory's failure to provide them.

Exhibit 1* shows the following critical information which was omitted from the purchase orders:

Omitted
Information

a. "Heating systems shall be capable of raising the temperature of the chamber from 0°F. to 160°F. in six hours while simultaneously providing 40,000 BTU per hour to heat the test item(s)." (Specifications Item 1, V.A. (2), p. 8) (Emphasis added)

Amount of heat required and how fast.

b. "Electric Heaters. Shall be of the sheathed type of stainless steel construction. The heaters shall be connected in multiple circuits to provide manual selection of heat input to balance load requirement." (Specifications Item 1, C., p. 10) (Emphasis added)

Manual control of heat input, and not automatic thermostat.

* The quoted portions are from Exhibit 1, Item 1, of Job 281, pages 1-15, which refer to the 15 KW heaters. Also a part of Exhibit 1 are the Specifications for "Item 2" which refer to the 21 KW heaters and contain similar language. See Item 2 Specifications, pages 11 (6b., c.), 12 d. (1) and 15 c. (2). Similar language would be found for all of the other heaters in Exhibits 2 and 3.

Omitted
Information

c. "Safety devices shall be provided to insure fail-safe operation. The fail-safe hi-low controller, Alnor Model N-35, or equal, manual reset type, which would de-energize both the heating and cooling systems when either the high or low set point is exceeded . . . de-energizing the heating system shall be accomplished by a means other than the heater control mag controlled by the temperature recorder-controller." (Specifications Item 1, F. (1), p. 11) (Emphasis added)

Thermostat was fail-safe device, not means of operational control.

d. "G. INSTRUMENTATION-TEMPERATURE CONTROLLER-RECORDER: The temperature-recorder is intended to control and record temperatures of the conditioning chamber . . ." (Emphasis added) (Specifications, Item 1, p. 12, G.)

Temperature control by means other than thermostat.

The Operating and Maintenance Instructions

Mallory prepared both blue-print drawings and "Operating and Maintenance Instructions" for Job 281 (15 and 21 KW heaters) prior to the manufacture of the heaters. (Ex. 5) These documents (never given to Valad) also provide much significant information about the use and design of the system which is absolutely critical if the manufacturer is to design heaters to conform to the system. For example, Exhibit 5 provides the following (emphasis added):

Omitted From
Purchase Orders

"The trailers have been designed to provide automatic temperature control over a range of -100°F. to +200°F. by . . . use of low-watt density electrical heaters for heating . . . The semi-trailer heating system is capable of raising the chamber temperature from 0°F. to 160°F. within six hours while simultaneously providing 40,000 BTU's/HR for test item heating, all at 15°F. ambient temperature." (Op. and Maint. Instr. ¶1.1, p. 1-2)

Low watt density;
amount of heat
and how fast.

Omitted From
Purchase Orders

"1.2 System Description:" (a detailed description of all the controls showing which switches de-energize the power to the "chamber control circuit", "fail-safe controller", and "recorder-controller"). (pgs. 2-3)

Obvious that thermostat would not control sheath temperature.

"B. Fail-Safe Controller." This instrument is a dual set point, manual reset-type controller which functions to de-energize both chamber heating and cooling functions whenever an over or under temperature condition exists." (Op. and Maint. Instr. Pg. 3)

Thermostat was fail-safe variety (manual reset) not automatic as designed by Valad.

Blue Print Drawings

Mallory made blue-print diagrams of great significance. (Ex. 5) These diagrams show the following critical information:

Drawing No. M-4: The position of the Valad heaters (Item 22), the existence of a fail-safe controller (Item 18) and the existence of a programmer-recorder-controller, to control the amount of heat put out by the heaters.

Multiple temperature controls indicating improbriety of automatic re-set thermostat.

Drawing E-2: The presence of the heating units, the presence of switches to energize and de-energize them, the presence of a programmer-recorder-controller, the presence of a fail-safe contactor for the 21 KW heaters, the presence of a fail-safe controller, and the presence of a "fused disconnect" relative to the heaters.

(Same as above)

In summary, without the government specifications, the operating manual and the blue-print drawings, Valad was not aware of the following critical information (omitted from purchase orders):

- A. How much heat was needed, how fast, and for what purpose;
- B. The presence of two other methods of heat control, with Valad's sheath-stat for fail-safe operation only;
- C. Fact that heating elements would not be de-energized under normal operation by sheath stats;
- D. Sheath stats to be manual, not automatic re-set;
- E. Requirement of low-density heaters and reasons why; and
- F. Complete system description.

Without this critical information, which Mallory could easily have provided but did not (T. 6-7, 10, 13), Valad could not be expected to either design or manufacture heaters to achieve Mallory's desired end result.

Both Mallory and Brown Failed To
Provide Valad With Density

Heat "density" refers to the number of kilowatts of heat per square inch of heating sheaths. (T. 213) The total amount of heat produced can be figured by multiplying the density per square inch times the total number of square inches per lineal inch of sheath to get the total number of kilowatts to be produced by a given heater. (T. 213-15) If the amount of current is constant, a small heater will have a higher density and consequently a higher sheath temperature than a larger heater, since the heat and power is more concentrated on a smaller surface. (T. 214-15)

Density Absolutely Necessary For
Proper Heater Manufacture

In order to achieve any end result, it is absolutely necessary for the manufacturer to be provided with watt density. Neither Mallory nor Brown provided said density to Valad. Farber testified as follows:

Q: (Mr. Schmidt): Oh. You never provided any parameter per watts per square inch at any time; is that it?

- A: No. No, we don't have that capability on the cartridge heaters.
- Q: I see. But it is an essential parameter for manufacture and for design of heater?
- A: Absolutely essential.
- Q: And it is not -- it does not appear on your purchase order, does it?
- A: No, it does not.
- Q: Even though it is essential, as you say?
- A: Yes. (T. 157)

Mallory's Government Specifications
Required Low Density Heaters

Mallory objected to the high density of Valad's heaters. (T. 215, 197, lns. 6-7) Farber attributed this to the fact that the heaters were "too small" (i.e., not enough sheath and fin surface area), which caused the sheath temperatures to rise too high. (T. 215) The government specifications by Farber's own testimony required a low heat density. (T. 213; Ex. 5, pg. 1, ¶1.1, ln. 4) Low watt density required a larger heater with more elements because Mallory's end purpose was to raise the temperature of the air from -100°F. to +200°F. within a relatively short period of time.

Both Mallory and Brown knew that low density was required. (T. 197, 373, 214-15) This is shown by the purchase orders for Mallory's replacement heaters which specified low heat densities of 8.0 and 5.58 (Ex. 41) as compared with the watt density specified by Brown to Mallory on the Valad heaters of 14.6 and 16.4. (Ex. 4)

Exhibit 4 is the only relevant document that specifies density, and that document was never sent to Valad. (T. 156-7, 197)

Summary on Point I

Valad was not furnished with the government specifications which would have enabled it to see that the end result desired out of these heaters was impossible to obtain by thermostat control. Neither Mallory nor Brown provided the government specifications. Mallory had a duty to provide these specifications if it wanted to achieve its end result.

Density was a crucial factor and absolutely necessary if Mallory wanted to achieve its end result, but neither Mallory nor Brown provided this critical factor to Valad.

POINT II

BROWN MADE MAJOR CHANGES IN
MALLORY'S PURCHASE ORDERS AND
CAUSED VALAD TO MANUFACTURE THE
HEATERS WITH THE THERMOSTAT
CONTROLLING SHEATH TEMPERATURE.

Brown is Solely Liable Because It Made Substantive Changes in the Mallory Purchase Orders

Brown must assume sole and full liability for any damage caused to Mallory if its purchase orders to Valad caused the problem with the heaters. In fact, Brown's purchase orders required that the sheath temperature be controlled by the thermostat and the Court completely ignored the massive evidence of this factor.

Since Brown was Valad's only customer, Valad was legally bound to manufacture the heaters according to Brown's purchase orders. Mallory cannot claim that Valad is liable to it on a third party beneficiary theory or based on the "Certificates of Certification" (Exs. 22 and 23) if Valad contracted with Brown to provide something different than Mallory ordered from Brown.

Mallory Relied Solely on Brown and Not
At All on Valad in Supplying Information
About the Heaters

Mallory's Farber testified that the sole basis of his evaluation of the heaters was written data supplied by Brown, because he had no contact with the manufacturer, Valad. (T. 102-3) All representations were made by Carl Nyman, Brown's representative. (T. 103)

Brown Was Responsible For Associating
Sheath Temperature Control With Thermostats

Mallory's Farber testified emphatically that he never at any time in any of his purchase orders or communications with Brown said anything about thermostats. (T. 107, 118-9) A comparison of Mallory's communications to Brown, and Brown's to Valad, bear out the truthfulness of this statement. It is Brown that continually provides that "thermostats can be pre-set at +250°F to protect against over temperature." (Ex. 11) Schedule I emphasizes this point clearly.

Nyman claims to have picked this information up from Valad's price quotations. (Exhibits 46, 47, 53-4) That is immaterial, however, since Valad only dealt with Brown at this period of time. Any information that Valad

SCHEDULE I

Comparison of Documents with Respect to Sheath Temperature and Thermostat Control

Mallory to Brown

1. Mallory's P.O. 4016 (15 and 21 KW heaters):

"Fabricator shall also submit written certification that sheath temperature will not exceed +250°F. when operating at continuous full voltage ..."
(Ex. 9)
2. P.O. 4017 (12 KW heaters):

"...protected for max. sheath temp. of 280°F." (Ex. 12)
3. P.O. 4241 (36 KW heaters):

"Max. sheath temp. 280°F. ..."
(Ex. 14)

Brown to Valad

1. P.O. 6730 and letter of 12/20/72 (15 and 21 KW heaters):

"Sheath temperatures (of both the 15 and 21 KW heaters) must not exceed +250°F. Thermostats can be pre-set at +250°F. to protect against over-temperature." (paran-
thetical and emphasis added)
(Ex. 11)
2. P.O. 6754 (12KW heaters):

"...and 280°F. max. sheath temp. ...
high-limit (thermostat) to prevent high sheath temperature." (Ex. 13) (Emp.
added)
3. P.O. 7269 (36 KW heaters):

"Each row of heaters to be pro-
tected from high sheath temperature
over 280°F. by high-limit thermo-
stats." (Ex. 15) (Emphasis added)

SCHEDULE I, Continued

Mallory to Brown

4. Exhibit No. 4, Electrical heater criteria:

"Heater to be designed for a max. sheath temperature of +250°F. when operating a continuous full voltage."

Brown to Valad

4. No corresponding document. Brown did not relay this Exhibit to Valad.

used for these quotations would have only come from Brown! In addition, the quotations simply show that Brown had notice at an earlier date that Valad intended to construct the heaters with thermostat control of sheaths. This is discussed further in Point III.

Farber Thought Nyman Had Changed the Purchase Orders

Farber testified that he had not seen the Brown purchase orders prior to trial. (T. 21) He also testified that he did not originally think that Nyman was going to engineer or design the heaters:

But I am not so sure now after I
have seen the purchase orders that
he issued to Valad. (T. 97)

Farber went on to examine the purchase orders (Exhibits 10, 11) closely, and point out some of the important differences:

- A. Many stipulations in Brown's purchase order to Valad that he had no knowledge of and no ability to evaluate. (T. 108)
- B. Arrangement and configuration of heater assemblies. (T. 108)
- C. Criteria that did not originate with Mallory Engineering. (T. 108)
- D. In Exhibit 11, the thermostats were preset to 250° "to protect against over temperature". (T. 138)
- E. Brown's P.O. provides for a flat plate mounting and welding to the duct whereas

Mallory's required a removable flange ring.

(T. 138-9)

Brown's Subsequent Communications With Valad Confirmed
That Brown Was In Fact Ordering That the Sheath
Temperatures Be Controlled by Thermostats

After receiving Brown's purchase orders, Valad prepared and submitted construction drawings and mailed them to Brown. These drawings were approved by both Brown and Mallory. (T. 124-5; 180-1; Point II in main brief)

Brown then accepted Valad's offer in the form of a letter dated January 26, 1973, to which were attached drawings marked "approved for construction" by Carl Nyman. (Exhibits 20, 83) This letter provided in pertinent part as follows:

The drawings 73-119 (21 KW heaters) and 73-120 (15 KW heaters) . . . have been reviewed by Mallory Engineering and approved subject to the following: Since each insert (heater) will have three steps, three thermostats are required for each, or a total of nine per each set. This is as detailed in your December 22, 1972 letter. These thermostats must be set as high as possible and not exceed the specified sheath temperature. (Ex. 20)

Attached to the letter was drawing number 73-120, which bore the inscription (lower left hand corner) the hand of Brown's Nyman, the following:

3 thermostats each insert, to limit to 250°F. sheath Temp., since have three steps.

Drawing No. 73-119 bears this inscription on the lower left hand corner, circled in red by Nyman on Exhibit 20:

S/B 3 T stats per insert, due to three steps. 9 total on 3 inserts, per 12/22 letter. 250° max. sheath temp.

Summary

Brown's changes or additions to the Mallory purchase orders caused Valad to manufacture the heaters with sheath temperature controlled by thermostats. Valad cannot be held liable under any legal theory to either Mallory to Brown since Valad complied with the purchase orders set forth by Brown.

POINT III

VALAD GAVE BOTH MALLORY AND BROWN AMPLE AND CONTINUAL NOTICE THAT IT INTENDED TO CONSTRUCT THE HEATERS WITH THERMOSTATS CONTROLLING THE SHEATH TEMPERATURE. MALLORY AND BROWN ARE THUS ESTOPPED TO CLAIM BREACH

Principle of a Estoppel

The evidence presented without objection at trial clearly shows that Valad served notice in writing prior to manufacture, to both Mallory and Brown that it was going to construct the heaters with sheath temperature control by thermostat. These notices were given in clear unmistakable language. Regardless of what the Mallory contract called for, it would be unjust to allow Valad to be held liable when Brown and Mallory had notice of the "error", and failed to come forward.

Documents Constitute Notice

The following documents constituted notice of Valad's intention to manufacture the heaters with sheath temperature controlled by thermostats:

A. The Valad quotation for the 15 KW heaters (Ex. 46) of early December, 1972, which provided as follows:

Temperature on heating element
cannot run above 250°F . . . 3 ea.
automatic thermostats pre-set at
225°F. to prevent sheath to get
hotter than 250°F., 36-48 inches
capillary length. (Emphasis added)

B. The Valad quotation of December, 1972, for the 21 KW heaters (Ex. 53) which provided the following:

Temperature of heating element
sheath cannot raise above 225°F.
. . . 10 capillary automatic high-
limit thermostat pre-set at 200°F.

C. On December 22, 1972, Valad's Cecchini sent Brown's Nyman a letter confirming the presence of the thermostats (T. 393-6; Exs. 47, 72) The letter provided as follows:

Nine high-limit thermostats, 3 ea.
per insert assy. Pre-set at 200°F.
(Ex. 47)

D. Valad's Cecchini testified that he orally informed Nyman that "automatic re-set thermostats" would be employed to control sheath temperature. (T. 371, 382-3, 406-7, 474)

E. Valad submitted shop drawings which showed the presence of the thermostats and capillaries strung through the sheaths. (Exs. 20 (83), and Drawings 73-119 and 73-120) These drawings were approved by Mallory and

Brown. (T. 109, 119-20, 139) Both drawings referred to thermostats as controlling sheath temperature. For example, Drawing 73-120 provided:

3 thermostats ea. insert, to limit to 250°F. sheath temps., since have three steps. (Exs. 20 and 83)

F. Brown's speed letter of 1/26/73 acknowledged the use of thermostats to control sheath temperature. It provided in pertinent part as follows:

Since each insert (heater) will have three steps, three thermostats are required for each--these thermostats must be set as high as possible and not exceed the specified sheath temperature. (Exs. 20 and 83)

G. The "Certificates of Certification", which were mailed by Valad to Mallory and Brown prior to manufacture or shipment of the heaters on about March 13, 1973, provided:

. . . that sheath temperature will not exceed +250°F. when operating at continuous full voltage . . . Three safety hi-limit thermostats are pre-set at 225°F. to maintain sheath temperature at 250°F. (Emphasis added) (Exs. 22 and 23)

It is readily apparent from the above that Valad gave both Mallory and Brown ample notice of its intended mode of construction. These communications took place over a three to four month period prior to construction of the heaters. Mallory and Brown were certainly put on notice that Valad intended to use thermostats, and should now be estopped from claiming breach.

CONCLUSION


Mallory's position in this action is inconsistent. It does not want the responsibility of conveying complete and accurate information, but wants the fruits thereof, namely, the imposition of liability on Valad. It must bear the ultimate responsibility for not providing either Brown or Valad with the complete information needed to construct the heaters to meet Mallory's end result.

Secondary responsibility must be borne by Brown. For reasons known only to itself, it changed the Mallory purchase orders by introducing the element of thermostats. It probably misunderstood them since Mallory did not provide all the information necessary.

Finally, regardless of who was at fault, Valad has no liability if it gave clear and consistent notice of its intended method of manufacture to both Brown and Mallory, and they took no action to notify Valad that it was proceeding allegedly incorrectly.

The judgment as to Valad, at least, should be reversed, or a new trial should be given.

Respectively submitted this 11th day of May,
1979.



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