

**ARBITRATION DECISION & AWARD
UNDER THE DISPUTE RESOLUTION RULES OF THE
FRUIT AND VEGETABLE DISPUTE RESOLUTION CORPORATION (DRC)**

Date: September 22, 2020

DRC File # 20579

CLAIMANT:

McAllen, Texas, United States.

RESPONDENT:

Toronto Ontario, Canada

Arbitration Appointment

I, having been duly selected and confirmed by the Fruit and Vegetable Dispute Resolution Corporation (DRC) as Arbitrator in the above referenced case, hereby render the following Decision and Award. This Decision is rendered under the Dispute Resolution Rules as set forth by the DRC.

Both parties were members of the DRC at the time the dispute arose, which binds them to these proceedings. According to article 46 of the Dispute Resolution Rules, the place (seat) of arbitration for this procedure is Ottawa, Ontario, Canada.

Both parties have been provided with exact copies of all correspondence in this arbitration proceeding and therefore the documents exchanged between the parties will not be quoted in complete detail.

Statement of Facts

1. On or about March 3, 2020, Claimant sold to Respondent one truckload of limes comprised of 60 cartons of 175-count limes, product of Mexico, at US\$21.00 per carton, or US\$1,260.00, and 300 cartons of 200-count limes, product of Mexico, at US\$22.00 per carton, or US\$6,600.00, for a total f.o.b. contract price of US\$7,860.00.
2. The limes were shipped on March 3, 2020, from loading point in McAllen, Texas, to Respondent, in Toronto, Ontario, Canada, where the shipment arrived on March 8, 2020.
3. On March 9, 2020, Respondent requested a Canadian Food Inspection Agency (CFIA) inspection of 300 cartons of 200-count limes received from Claimant. The inspection, which was performed at 10:00 a.m. the same day, disclosed 42 percent average defects, including 17 percent permanent defects (12 percent blanching, 2 percent oil spots, 3 percent scars) and 25 percent condition defects (4 percent decay, 17 percent yellow color, 4 percent skin breakdown). Pulp temperatures at the time of the inspection ranged from 10.8 to 11 degrees Celsius (approximately 51 degrees Fahrenheit). The inspector also noted that

nearly all the decay was accompanied by mold.

4. Respondent reported reselling 50 cartons of the 200-count limes at CD\$21.00 per carton, and 250 cartons of the 200-count limes at CD\$22.00 per carton.
5. Respondent issued check number 59147 dated March 26, 2020 and made payable to Claimant in the amount of US\$3,705.00, which amount included payment at the contract price of US\$21.00 per carton for the 60 cartons of 175-count limes and payment at US\$8.15 per carton for the 300 cartons of 200-count limes. Claimant did not accept this check and returned it to Respondent.
6. Claimant issued a revised invoice billing Respondent for 60 cartons of 175-count limes, product of Mexico, at US\$21.00 per carton, or US\$1,260.00, and 300 cartons of 200-count limes, product of Mexico, at US\$18.00 per carton, or US\$5,400.00, for a total f.o.b. invoice price of US\$6,660.00.

Statement of Claim

Claimant states it understands it is “at breach on the limes 200s” based on the results of the CFIA inspection, and for this reason Claimant states it offered a US\$4.00 per carton reduction in the price of the 200-count limes, and that it revised its invoice to reflect this deduction. Claimant also states, however, that it is in doubt as to whether the inspection covers only the limes from the shipment in question. Claimant states it has reason to believe that limes from a previous shipment sent to Respondent were mixed with the limes from the subject shipment and presented to the inspector for inspection. On this basis, Claimant seeks payment in full of the revised invoice price of US\$6,660.00 for the limes.

Statement of Defence to Statement of Claim

Respondent states the timely inspection showing 42 percent average defects shows the limes failed to “pass Good Delivery Standards” and denies that the inspection was “tampered with.” Respondent states the limes that failed inspection were handled price after sale (PAS) resulting in a return to Claimant of US\$8.15 per carton, and that it had no issues with the 175-count limes and attempted to pay Claimant the full purchase price of US\$21.00 per carton for those limes.

Reply to Statement of Defence to Statement of Claim

Claimant denies stating that the inspection itself was tampered with and reasserts that it has reason to believe that Respondent made an error and placed two-week old limes alongside the newly arrived shipment and presented the mixed lot to the inspector for inspection. Claimant also asserts both parties would need to agree to the price after sale term, which Claimant never did.

Discussion

The issue before us for determination is whether the CFIA inspection, in light of the product identity issues raised by Claimant, establishes that the 200-count limes in the subject shipment did not comply with the contract requirements, thereby entitling

Respondent to damages.

With respect to the contract requirements, Respondent makes the assertion, which is refuted by Claimant, that the limes were sold as U.S. No. 1 green color. While there is no mention of a U.S. grade specification in any of the documents prepared by the parties in connection with the sale of the limes, Claimant acknowledges selling the limes as U.S. No. 1 mixed color. As the limes were sold f.o.b., this means that Claimant warranted that the limes, at shipping point, met the requirements in the U.S. grade standards for U.S. No. 1 mixed color.

Claimant states that when the load of limes in question arrived at Respondent's warehouse on Sunday, March 8, 2020, Respondent advised that the limes were in poor condition and sent photos of the limes to Claimant. The photos, according to Claimant, showed limes from a previous order that was shipped to Respondent on February 20, 2020. When questioned about the photos, Claimant states Respondent insisted the photos were of the limes that just arrived even though the date tags showed otherwise. In order to resolve the issue, Claimant states Respondent was asked to secure a CFIA inspection of the subject load of limes.

Respondent agrees that following arrival of the shipment and its discovery that the limes were in poor condition, photos of the limes were sent to Claimant per Claimant's request. Respondent states a single photo of 175-count limes was sent to Claimant as a result of a technological error, which was immediately rectified by contacting Claimant by email and telephone. Respondent states Claimant acknowledged the new pictures but continued to deny their validity.

Respondent submitted a copy of the photo of the 175-count limes which bears a label with the handwritten date "02-20-20." The file contains a number of other photos, some of which are the digital photos taken by the CFIA inspector, and some are the photos taken by Respondent. There are photos showing just the limes inside the cartons, as well as photos showing the outside of the cartons and photos showing two pallets with dozens of cartons stacked upon each.

One photo in particular show the two pallets with the straps cut and the cartons noticeably moved around. The pallet on the right side of the photo has one carton with a label that bears the number "HB533" and another that bears the number "HB094." Other photos in the record reveal that "HB533" is associated with PO #87564, the purchase order number for the limes at issue in this dispute. The purchase order number associated with "HB094" cannot be determined from the documents submitted.

The file also contains a photo of a carton labeled with a QR code and the number "TRO023024021," which is the same number the CFIA inspector included on the inspection certificate under the heading "Marks on Packages." Another photo shows a carton of limes labeled HB533 strapped to a carton of limes with a QR code and a number that is not entirely legible but appears to read "TRO047057013." That number, even if not entirely accurate, is certainly different from "TRO023024021." This shows

the number that the CFIA inspector put on the inspection certificate under the “Marks on Packages” heading is different from the number found on a carton that was strapped to a carton of limes from the shipment in question. This would appear to support Claimant’s contention that some of the cartons made available to the CFIA inspector for inspection were from a different shipment of limes.

The CFIA inspection certificate itself shows defect percentages ranging from 0 to 10 percent for decay, 0 to 8 percent for skin breakdown, and 2 to 34 percent for yellow color. The presence of sample cartons showing little, or no presence of a defect combined with those showing a significant percentage of the same defect may also be indicative of a non-homogenous load.

Based on the items just noted, it would appear that the integrity of the load was compromised prior to the CFIA inspection, such that it is impossible to ascertain with reasonable certainty that all 300 cartons of 200-count limes covered by the inspection were from the March 3, 2020, shipment herein in dispute. Consequently, the inspection cannot be used to determine whether the 300 cartons of 200-count limes in question complied with the contract requirements. As there is no other evidence in the file showing that Claimant breached the contract by shipping limes that failed to meet the contract requirements, Respondent is liable to Claimant for the limes it accepted at the adjusted invoice price of US\$6,660.00.

Claimant also requests, and is entitled to recover, the US\$600.00 arbitration commencement fee.

Decision and Award

I, as arbitrator, have reviewed the documents submitted by both parties and with due respect to both, and without prejudice I submit my decision as follows:

The Respondent is hereby ordered to pay the Claimant the sum of US\$6,660.00, plus the US\$600.00 filing fee, within 30 days from the date of this Decision and Award.

This decision has been faxed and mailed to the Claimant, Respondent and the DRC.

[Sign here]

Arbitrator

Dated: September 22, 2020