ARBITRATION DECISION & AWARD

October 17, 2013
DRC File No. 19030

PARTIES: CLAIMANT AND RESPONDENT:

"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 mediation and arbitration rules as set forth by the DRC.

Both parties were members of the DRC at the time of the transaction, which binds them to these proceedings.

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 January 23, 2013, Claimant and Respondent entered into an agreement under which Claimant sold 1,035 cases of Canary Melons (5CT) and 336 cases of Canary Melons (6CT) (hereafter, "Melons") to Respondent at an agreed price of US$5.25[1] per case. The total invoice price was $7,221.25, itemized as $7,197.75 for the melons plus $23.50 for the temperature recorder.

2. The terms of sale were FOB shipping point. The sale was negotiated by Mr. L acting on behalf of Claimant and Mr. B on behalf of Respondent. The sale was brokered through Mr. G of X Brokers, acting as Claimant's broker.

3. On January 24, 2013, the load was shipped from loading point in Pompano Beach, Florida by truck. The Bill of Lading contains transportation temperature instructions to maintain a steady 50 degrees Fahrenheit throughout shipment. Respondent has submitted a copy of the Ryan temperature tape which, although difficult to read, appears to confirm that the load was carried at proper temperatures. Claimant has not challenged either the authenticity of the Ryan temperature tape or Respondent's assertion that the tape verifies that the load was carried at proper temperatures.

4. The melons were delivered to Respondent at the contracted destination point in Montreal on Saturday, January 26, 2013 at approximately 12:30 p.m.

---

[1] Unless stated otherwise, all funds referenced in this Award and Decision are U.S. dollars.

5. On Monday, January 28, 2013, at 6:24 a.m., the Respondent requested that IPIC International, a private inspection service, inspect the load of melons. At 8:12 a.m. that day, the melons were inspected by Mr. AB of IPIC International.

6. All cases were present and available for the inspection and samples were taken randomly from each pallet. Two Certificates of Inspection (one for 5CT and one for 6CT), No. U114B090C, were prepared, which documented the following conclusions.

    A. With respect to the 5CT melons: 22% surface discoloration and 4.5% bruising. "SURFACE DISCOLORATION: MEDIUM TO DARK BROWN SPOTS, GENERALLY SUNKEN, SERIOUSLY AFFECTING THE APPEARANCE. BRUISING: SOFT AREAS WITH THE UNDERLYING FLESH WATERY DISCOLORED."

    B. With respect to the 6CT melons: 18% surface discoloration and 5% bruising. "SURFACE DISCOLORATION: MEDIUM TO DARK BROWN SPOTS, GENERALLY SUNKEN, SERIOUSLY AFFECTING THE APPEARANCE. BRUISING: SOFT AREAS WITH THE UNDERLYING FLESH WATERY DISCOLORED."

    C. With respect to all melons, the pulp temperatures at the time of inspection ranged from a high of 50.3 degrees Fahrenheit to a low of 49.5 degrees Fahrenheit.

7. At 12:57 p.m. on January 28, 2013, Respondent emailed copies of the Certificates of Inspection described above to the broker, Mr. G, who in turn emailed copies of the Certificates of Inspection to Mr. L at 3:15 p.m. that same day. Along with the Certificates of Inspection, Mr. G sent the following message to Mr. L, which is set forth here verbatim: "hi Mr. L you have been sent the insp cust would like your'e ok to handle this load for Claimant acct pls ok tks."

8. At 3:56 p.m. on January 28, 2013, Mr. L responded to Mr. G's email inquiry as follows: "have them handle them! Thanks! Mr. L."

9. Between on or about January 29, 2013, and February 13, 2013, Respondent sold the melons for Claimant's account.

10. On February 18, 2013, Respondent provided an Account of Sales to Claimant reflecting gross sales of $5,109.80 and total expenses of $5,342.13, for a net loss of $232.33. The Account of Sales does not reflect the actual dates of sale; however, in its Statement of Defense, Respondent has provided copies of invoices which confirm that sales were made on January 29, 30 and 31, 2013 and on February 1, 2, 4, 6, 7, 8, 9, 11 and 13, 2013.

STATEMENT OF CONTENTIONS

On August 14, 2013, Claimant filed its Statement of Claim seeking recovery of $7,221.25 for its sale of the melons to Respondent, plus reimbursement of $208.83 deducted by Respondent from Respondent's check no. 54412 (which was issued as payment for another invoice unrelated to the subject invoice) plus the $600.00 DRC filing fee. In support of its Statement of Claim, Claimant alleges:

A. That the Certificates of Inspection must be entirely disregarded because IPIC International is a private inspection service and that Claimant never agreed to allow IPIC International to inspect the melons. Claimant also questions the qualifications of the Inspector and the inspection procedures used by the Inspector.

B. The Account of Sales submitted by Respondent is inadequate because it fails to include adequate detail, particularly a breakdown by price and the dates of sale. Claimant also questions certain of the expenses claimed by Respondent on the Account of Sales.

C. That prior to filing the Statement of Claim, Claimant and Respondent agreed to resolve this dispute "according to the results of DRC file #19002, which is a previously filed dispute between Claimant and Respondent. According to Claimant, because the issues in DRC #19002 are so similar to the issues in DRC #19030, the parties agreed to apply the reasoning stated in the Decision and Award issued in DRC #19002 to this arbitration.

11. In its Statement of Defense, Respondent requests that the Statement of Claim be dismissed and in support thereof alleges:

A. The Certificates of Inspection should be recognized as credible evidence of the arrival condition because Claimant in fact accepted the IPIC International inspection as conclusive evidence of the decayed condition of the melons and, moreover, the inspection was timely, was performed by a qualified inspector and complies with DRC inspection guidelines.

B. That Claimant expressly agreed in writing to modify the terms of sale for this load of melons from FOB shipping point to an agreement whereby Respondent would act as Claimant's agent to sell the melons when Claimant agreed to allow Respondent to handle the load for Claimant's account.

C. The Account of Sales is adequate, particularly as supplemented by copies of actual sales invoices that Respondent provided as part of its Statement of Defense and which verify the dates and amounts of each sale.

D. That Respondent did not agree to resolve this dispute "according to the results of DRC file #19002.

DISCUSSION

I. What is the value, if anything, of the results of DRC File #19002 to the determination of this case?

I will take the above points out of order and will address the simplest issue first. While both DRC #19002 and #19030 share some common facts, including that IPIC International (a private inspection company) provided the inspection services in both cases, one critically important factual distinction exists between these two cases which renders the results of DRC #19002 inapplicable to the present case. Specifically, while perhaps not agreeing *in advance* to allow the inspection to be conducted by a private inspection service, evidence exists in this case to conclude that Claimant did in fact agree by acquiescence to the use of the private inspection service. By comparison, no such evidence exists in DRC File #19002.

The undisputed evidence on this issue is clear. Specifically, at 3:15 p.m. on January 28, 2013, Claimant's broker, Tom Guilano, emailed a copy of the Certificates of Inspection to Mr. L along with a message asking for Claimant's agreement to allow Respondent to handle the melons for Claimant's account. Thereafter, at 3:56 p.m. on January 28, 2013, *after* receiving and presumably reviewing the Certificates of Inspection, Mr. L responded to Mr. G's email by agreeing to allow Respondent to handle the melons for Claimant's account. Notably, Mr. L' email contains no objection to the Certificates of Inspection or that the inspection was provided by a private inspection service. If Claimant intended to object to the credibility of the Certificates of Inspection on the grounds that Claimant did not agree to use a private inspection service, the time to have raised that objection was when the Certificates of Inspection was first received by Mr. L, not after he relied on those certificates to justify his consent to allow Respondent to sell the melons on Claimant's account.

I conclude that Mr. L' written consent to modify the terms of sale based upon the IPIC International inspection, coupled with his failure to raise a *timely* objection to the Certificates of Inspection on the grounds that IPIC International is a private inspection service, is an act of acquiescence by which Claimant has agreed to the use of a private inspection service.

Claimant also asserts that the results of DRC File #19002 should be followed in this case because the parties in fact agreed to resolve DRC #19030 according to the results of DRC File #19002. To support this assertion, Claimant points to an April 19, 2013 Memorandum from the DRC. However, this memorandum does not confirm the existence of any such agreement but instead merely acknowledges that DRC File #19030 will be put on hold pending the results of DRC File #19002 and that in the event no resolution was reached, DRC #19030 would proceed to arbitration.

Based on the above, because the results of DRC #19002 were based on different facts that DRC #19030, those results are of no value to the determination of DRC #19030.

II. Did the Parties Agree to Modify the Term of Sale from 'F.O.B. Shipping Point' to Either 'Consignment' or 'Open?'

As the party asserting that the original FOB sale transaction was modified to either 'consignment' or 'open,'[2] Respondent has the burden to prove any such modification. *United Packing Co., v. D.L. Pizza Co.*, 18 Agric. Dec. 161 (1959).[3]

In order to establish that the parties agreed to modify an FOB sale to a consignment transaction, evidence must exist to prove that the seller has consented to the load being handled on the seller's behalf with the seller relinquishing its claim for the price. It is well settled in the produce industry that use of such words as "work out the load," or "handle the load" or "do the best you can," or "handle to best advantage," are insufficient to establish a consignment because such comments by a shipper do not establish the clear intent that the shipper agreed to allow the receiver to handle the produce for the shipper's account and that the seller is relinquishing its rights to the sales price less any provable damages.

Here, Respondent has submitted copies of email communications between Claimant and Claimant's broker which expressly state Claimant's agreement that Respondent was to handle the Melons "for Claimant's account." Specifically, on January 28, 2013, Mr. G sent an email to Mr. L which expressly requested Mr. L' consent to allow Respondent to handle the Melons "for Claimant's account." Within minutes, Mr. L replied to that email by stating "have them handle them! Thanks! Mr. L."

Based on Mr. L' written consent to Mr. G's request, I conclude that Claimant expressly authorized Respondent to resell the Melons for Claimant's account; however, I also find that Mr. L' statements do not conclusively evidence his intent to relinquish Claimant's claim for the price less any provable damages. Therefore, Respondent has met its burden of proof to establish that the parties expressly agreed to modify the sale from FOB to 'open' but not to 'consignment.'

III. What credibility, if any, should be accorded to Certificates of Inspection No. U114B090C?

In support of its Statement of Defense, Respondent has alleged that Claimant has breached the warranty of suitable shipping conditions and has submitted the above described IPIC International Certificates of Inspection No. U114B090C in support of that allegation. As discussed above, by relying on the IPIC International Certificates of Inspection to modify the terms of sale from FOB to open, I conclude that Claimant has acquiesced to the use of this private inspection service in this case.

---

[2] Although Respondent does not expressly use either term "consignment" or "open" in its Statement of Defense, Respondent very clearly asserts that the original FOB sales terms was modified to an agreement whereby Respondent would "act as Claimant's agent" and resell the Melons "for the account of Claimant." [Statement of Defense, ¶7.] This alleged agency relationship, if established, would create either an open sale or a consignment sale.

[3] DRC Trading Standards are based upon the regulations and standards established by the Perishable Agricultural Commodities Act ("PACA"), case decisions interpreting PACA and the Canadian Food Inspection Agency ("CFIA"). Because PACA case decisions directly responsive to the issues raised in this claim are readily available, those decisions have been incorporated into the following discussion as reference points and support for the logic used in reaching a decision, which is based upon DRC Trading Standards.

Even so, DRC Good Inspection Guidelines state that private (non-government) inspections being submitted as evidence will not be accepted as prima facie evidence of their contents and the burden of proof regarding the credibility and impartiality of the that inspection will rest with the party submitting the inspection. DRC Inspection Policy governing recognition of inspections state:

> "The Corporation will recognize inspections performed by independent private commercial inspection services or individuals which have demonstrated capacity to perform inspections of fresh fruits and vegetables according to the Inspection Standards of the corporation, (see attached), but the burden of proving the credibility of that inspection will rest with the party submitting that inspection." [*DRC Good Arrival Guidelines; Inspection Policy; Part 1: Recognition*].

Accepted DRC Inspection Standards for inspection services are:

1. Dependability of the service when called.
2. Reliability and accuracy of the results of the inspection, through the use of uniform terminology and forms.
3. Timeliness of the inspection and the provision of its results.
4. Professionalism in how the results are presented and subsequently explained.
5. The overall credibility and trust that the service attains from delivering the service ethically, consistently and impartially, reinforced through the uniform interpretation and application of grade standards and inspection procedures.
6. Need for established protocols for training of inspectors; accrediting of inspectors; auditing of inspectors; and, certification of inspectors.

After a careful review of Certificates of Inspection No. U114B090C, and the Curriculum Vitae of the inspector (Alexandre Ben Amor), I conclude that the inspection services provided in this case satisfy the DRC Inspection Policy and Inspection Standards. First, evidence submitted in the form of Mr. BA's Curriculum Vitae demonstrates his capacity to perform this inspection according to the DRC's Inspection Standards, particularly because of his five years of service as an Inspector with the Canadian Food Inspection Agency and his 2 years as Supervisor of the Inspection Service at Destination for Quebec Region of Ottawa and the Maritime Provinces Canadian Food Inspection Agency. Based on this experience, I am satisfied that Mr. BA is able to perform inspections of fresh fruits and vegetables according to the Inspection Standards.

Second, reviewing the Certificates of Inspection themselves confirms that the inspection was conducted in compliance with items 1 through 5, above. With respect to item 6, I am satisfied that given Mr. BA's background and training with CFIA the Corporation's protocol for training, accreditation, auditing and certifications standards for inspectors has been satisfied. The Certificates further confirm that the inspection was conducted in a reliable manner through the use of uniform terminology and forms. According to the Certificates, all cases of melons were available to the inspector, adequate random sampling was taken from every pallet, and pulp temperatures were recorded.

For these reasons, I conclude that the Certificates of Inspection constitute credible evidence of the condition of the melons upon arrival.

IV. Did Claimant Breach the Warranty of Suitable Shipping Condition by Shipping Melons That Failed to Make Good Arrival?

The suitable shipping condition provisions of DRC Trading Standards Sec. 18, paragraph 24 require that the commodity, at the time of shipment, be in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties. Under DRC Good Arrival Guidelines for melons the maximum tolerances for melons are 15% total damage, including not more than 8% serious damage, including not more than 3% decay.

Here, Certificates of Inspection No. U114B090C confirm that the melons arrived at destination with an average of 23% damage (for the 6CT melons) and 26.5% damage (for the 5CT melons), which exceeds applicable suitable shipping condition guidelines. Moreover, Respondent has submitted credible evidence that transportation service and conditions, particularly transportation temperatures, were normal. For these reasons, I conclude that Claimant has breached the warranty of suitable shipping condition by shipping melons that failed to make good arrival at destination.

V. Has Respondent Provided a Proper Account of Sales Evidencing Prompt and Proper Resale of the Melons?

Having determined that Respondent was handling the melons for Claimant's account, Respondent is obligated to exercise reasonable care and diligence in disposing of the melons promptly and in a fair and reasonable manner and for a fair price. If Respondent elects to establish damages by way of an Account of Sale, Respondent is further obligated to prepare and submit to Claimant an accurate and itemized report of sales and expenses to be charged against the shipment.

When handling produce as an agent for the shipper, DRC Trading Standards require that Respondent render a true and correct statement showing the following: (1) the date of receipt and date of final sale; (2) the quantities sold at each price; (3) if not sold, any other disposition of the produce; (4) the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof. *[DRC Trading Standards, Section 19, paragraph 25(1)].*

Respondent's Account of Sale was dated February 18, 2013 and was delivered to Claimant on that date by fax. [*Exhibit D – Statement of Defense*] Claimant has challenged The Account of Sales submitted by Respondent is inadequate because (1) it fails to include a breakdown by price and the dates of sale; (2) warehousing charges are improper; and, (3) other charges, particularly the freight charges, are unsupported. Claimant has therefore requested copies of supporting documentation for these charges and copies of the sales invoices confirming the dates and amounts of each sale. [*Statement of Claim*].

A review of the Account of Sale confirms that Claimant is correct that the February 18, 2013 Account of Sale fails to provide the dates of sale, which is a required component under DRC Trading Standards. Claimant is incorrect, however, that the Account of Sale fails to include a breakdown by price. That breakdown is set forth on the Account of Sale by commodity description, size, quantity and price.

Regardless, in its Statement of Defense, Respondent has submitted copies of each document requested by Claimant, in particular, copies of each invoice confirming the dates and amounts of sale having taken place on January 29, 30 and 31, 2013 and on February 1, 2, 4, 6, 7, 8, 9, 11 and 13, 2013. Further, Respondent has submitted copies of checks supporting the expenses and charges claimed in the Account of Sale, including a copy of Respondent's check no. 54318 confirming payment of the $3,700 freight charge. [*Exhibit D – Statement of Defense*].

After a thorough review of those documents, I conclude that the Account of Sale provided by Respondent on February 18, 2013, as supplemented by the additional documents provided in the Statement of Defense, complies with DRC Trading Standards and confirms that Respondent promptly and properly resold the melons.

VI. Has Claimant Met Its Burden of Proof Regarding Damages?

Having agreed to modify the term of sale to open, Claimant is entitled to recover a "reasonable price" based on the fair market value of the produce at the time of delivery less allowable costs and expenses incurred in connection with selling the product. Where the parties are unable to reach an agreement as to a reasonable price, the results of a prompt and proper resale of the produce is typically used as the best evidence of the reasonable value at the time of delivery. *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990). This is particularly true where, as here, Claimant has not provided relevant market quotations.

As already determined, Respondent's Account of Sale, as supplemented by Respondent's Statement of Defense, complies with DRC Trading Standards and confirms that Respondent promptly and properly resold the melons. Moreover, Respondent's Account of Sale confirms that Respondent sold the Melons for gross returns of $5,109.80, which is approximately 71% of the initial invoice price of $7,221.25. *Notably, these gross returns are entirely consistent with the percentages of damages confirmed by the Certificates of Inspection*. For these reasons, I conclude that Claimant has not met its burden of proof of damages, at least with respect to the gross sales returns generated by Respondent's sale of the Melons.

Turning to the expenses and other charges deducted by Respondent, DRC Trading Standards allow Respondent to deduct "the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling" of the produce. Here, there is no evidence that the parties entered into any agreement concerning what charges or expenses could be deducted from the gross sales proceeds. According to the Account of Sales, Respondent has deducted $274.51 for the inspection fee, $23.50 for the temperature recorder fee and $3,700.00 for transportation fees incurred in connection with selling the Melons. These charges are adequately documented in the pleadings. I find that these charges and expenses are proper and

usual and were incurred in connection with handling of the Melons. Therefore, I conclude that these expenses were properly deducted from the gross sales receipts.

On the other hand, Respondent has also deducted the sum of $1,344.12 for warehousing fees. Because warehouse fees (which are essentially storage charges) are charges which would have been incurred regardless of whether the Melons met or failed condition requirements, the warehouse charges will be denied. [In accord, *DRC File #18729*].

Based on the above, I conclude that Respondent is entitled to deduct the sum of $3,998.01, leaving a net sum returnable to Claimant of $1,111.79. Because this decision results in a net recovery to Claimant and not a net loss as originally reported on the Account of Sale, I further conclude that Respondent was not entitled to offset the initially reported $232.33 loss against another transaction and therefore must reimburse this amount to Claimant. This will calculate to a gross return to Claimant of $1,344.12.

Article 48(1)(i) authorizes the arbitrator to make an award ordering an equitable remedy when deemed appropriate by the arbitrator. Here, based on my conclusion that Respondent promptly and properly sold the Melons, Respondent is entitled to reasonable compensation for doing so. Respondent's Account of Sale does not reflect that Respondent deducted any commission from the gross sales proceeds. Even though Respondent has not requested an order allowing it to retain a fair commission, I conclude that in the interest of equity, such an order is appropriate under the circumstances of this case. A commission rate of 10% of the gross sales proceeds is ordinary and customary in the produce industry and is appropriate in this case.

Article 53(1)(c) of the DRC Mediation and Arbitration Rules allows the arbitrator to apportion liability for costs. As I have concluded that net sales proceeds are due to Claimant, I find that Respondent is responsible for half of Claimant's costs, or $300.00.

Based upon the above, I find that the net sum of $1,133.32 is due to Claimant from Respondent, calculated as follows:

Gross sales proceeds:	$5,109.80
10% commission:	- $510.80
Allowable expenses:	-$3,998.01
	$600.99
Reimbursement of offset:	$232.33
Contribution toward filing fee:	$300.00

DECISION AND AWARD

For each of these reasons, Respondent shall pay to the Claimant the sum of $1,133.32, associated with this Arbitration.

This Award becomes final thirty (30) days from the date of this Decision.

Decided this 17th day of October 2013.