

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

Date: April 25, 2014

DRC File No.: 19197

CLAIMANT: Salinas, CA. vs. **RESPONDENT:** Montreal, QC, CA

ARBITRATION APPOINTMENT

Having been duly selected and confirmed by the Fruit and Vegetable Dispute 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 the 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

The arbitrator wishes to state that as both parties have given opposing details regarding certain facts in this case, he has had to make note of these discrepancies.

A shipment of 910 cartons of Romaine Liner lettuce size 24's and 168 cartons of Green Leaf 24's Green Giant, was sent to the Respondent. According to the Claimants Statement of Claim (SOC) the FOB shipment was sent on April 19 2013. However the Straight Bill of Lading states that loading was not completed until the next day, April 20, 2013 at 04:28. In the Respondents Statement of Defense the date is given as April 30.

The arbitrator assumes the date on the Bill of Lading (BOL) to be correct.

The invoiced price (Invoice #311545) was:

910 cartons Romaine	unit price US\$6.45	total US\$5,869.50
168 cartons Green Leaf	unit price US\$5.45	total US\$915.60
1 carton TempTale	unit price US\$23.50	total US\$23.50
	TOTAL	US\$6,808.60

According to the Respondent the shipment arrived at their premises on April 23, 2013 and an in-house inspection “served to evidence serious condition problems regarding the Romaine Liner 24’s.”

The Respondent stamped the BOL as “RECEIVED UNDER PROTEST” and at 13.34 requested a CFIA inspection.

The inspection of 500 cartons, actual count, commenced the next morning April 24 at 07:35 with a finding of 22% Marginal Browning and 3% Tip Burn. CFIA certificate #S5-000040000010849.

The Respondent delivered 491 cartons of the Romaine to various customers “with the view of minimizing as best it could the damages”. However, these were returned to the Respondent, who, in turn, issued a credit note to these customers.

The Respondent claims that, as a result, they incurred a net loss on the deal and that the Claimant acknowledged this loss. Therefore, the Respondent deducted a sum from a payment of invoice 310061 and sent a check to the Claimant.

The Claimant states that as of the filing of the Statement of Claim the Respondent has made no payments for this shipment.

The basic argument of the Claimant is that the results of the CFIA inspection are not to be accepted because the whole shipment was not inspected, as only 500 cartons were available to the inspector and that the remaining 410 cartons must be assumed as defect free and when this is calculated, the shipment “meets contract specifications”.

The Claimant is claiming payment of the invoiced US\$6,808.60 plus 18% per annum interest and reimbursement of the US\$600.00 filing fee.

The Respondent states that the Claimant was provided with a copy of the Certificate of Inspection “in a timely fashion and acknowledged there were condition problems”.

Therefore, the Respondent deducted the loss from a payment owing for invoice 310061, which pertained to another shipment of entirely different produce that had been shipped and invoiced by the Claimant almost one month earlier. The Respondent has provided the Arbitrator with considerable documentation regarding the attempted sales of the produce.

In the response to the Statement of Defense to the Statement of Claim the Claimant completely ignores the issues mentioned by the Respondent in the Defense and concentrates upon his arguments that the results of the inspection are invalid because only part of the load was inspected.

DISCUSSION

It is not in dispute that the product was shipped from California and arrived in Montreal, nor the amount of the product.

Once the product arrived and the Respondent noticed a problem with the Romaine he stamped the BOL with RECEIVED UNDER PROTEST and requested a CFIA inspection. These were the correct procedures under the circumstances

Although no copies of faxes or emails were produced, once the inspection was complete, according to the Respondent, he notified the Claimant of the results as he was required to do so. The Claimant does not dispute he received this notification.

However when the Inspector arrived only 500 cartons, by actual count, out of 910 received, were available for inspection. The Respondent never gives a satisfactory explanation for this discrepancy.

He provides substantial evidence that he tried to sell 419 cartons but gives no indication whether this was before or after the inspection.

Some of it was most definitely after the inspection as 419 cartons deducted from the original 910 leaves 491. Therefore if 500 were inspected at least 9 cartons were sent out after the inspection took place.

The Claimant is correct in that the percentages of defects as listed on the Inspection certificate cannot be considered as representative of the entire shipment.

It is well established in the produce industry and through numerous DRC, PACA and court decisions that any portion of a commercial shipment that is not inspected shall be averaged into the damage calculations as having zero defects. This means that the shipment as a whole would have made good delivery.

The Respondent acted correctly in attempting to sell the product as soon as possible as per DRC Trading Standards, Section 10, 2b(iii). However, he should have had the entire shipment inspected first. The arbitrator will acknowledge that it is at times acceptable for a buyer to sell a percentage of a load (usually no more than 25%) prior to inspection when that sale serves to minimize the loss. However in this case there is no evidence provided as to the date/time that the sales were attempted and no evidence that they were before or after the inspection.

In this case the sales did not serve to minimize the loss. Also he did not provide a representative sample of the load. The buyer must bear the consequences of his decision.

The Respondent apparently did dispose of the product and states that the receipts did not cover the costs of transportation, customs, inspection fee, etc and he suffered a net loss. The amount of his loss is recorded in his Account of Sales as US\$2,103.64.

How the Respondent disposed of the Product is not disclosed. In the Defense to the SOC paragraph 5 (d) it claims that there is an "invoice of RCI Environment Inc related to the dumping." No such invoice has been made available to the arbitrator. If the Respondent did dump the product, it should have complied with the DRC Trading Standards, Section 10, 2b(iv) that states that a dump certificate should have been obtained and a copy forwarded to the Claimant.

Also in its own Account of Sales the Respondent shows \$0.00 for the Dumping fee.

Therefore in the absence of such documentation the Arbitrator must assume that the Respondent did sell the product. The June 11, 2013 Respondent's Account of Sales sent to attention of Mr. Y at the Claimants shows an income of US\$6,396.36.

Much of the Respondent's Defense to the Statement of Claim is given over to explanations of how he has deducted this loss from payments already owing to the Claimants for invoice 310061 shipped about one month previously and (other than a TempTale) for an entirely different product.

For one party to deny payment on another invoice is highly improper as this is actually changing a contract. This can only be done when both parties agree to the change. The Claimant has not made mention of this in either of its submissions and apparently accepted the check sent by the Respondent for US\$7814.61 carefully marked "Full and Final Payment" as the payment of invoice 310061.

The Arbitrator accepts that the check is marked as full and final payment, and there is a bona fide dispute on invoice 31145. There however is no dispute on invoice 310061. Because there is no dispute on this unrelated invoice the creditor cannot be "held hostage" by the "full and final" notation contained on the check covering two different transactions.

The Respondent has attempted to explain how the Claimant did accept the payment in paragraphs 5 & 6 of its Defense. It is highly confusing. Two different totals are given, along with the statement "that Respondent did acknowledge owing to the Respondent!!"

The Respondent makes reference to the Claimants Review Report. Both parties submitted this interesting document so there can be no denying its authenticity even if it gives the arrival date November 12, 2006.

This document contains a line "(tpolk 7/9/2013 03:27:40 pm): "The product arrived with 3% edge burn and 22% marginal darkening. The customer handled it discreetly. A lower payment is accepted."

The Respondent interprets this as "an admission on the part of Mr. Y that all of the Romaine Liner 24s arrived showing serious condition problems and that therefore the Respondent was authorized to handle said produce."

Claimant however states the opposite. The Statement of Claim states, “based on the results of this CFIA inspection certificate the Respondent was immediately put on notice that full payment would be anticipated on this FOB sale.”

The same exact phrase is repeated in the Claimants Response to the Respondents Statement of Defense to Statement of Claim.

Unfortunately, the Claimant has submitted no evidence whatsoever to verify that this “notice” was ever given or on what date. Furthermore, the Claimant, even though submitting a copy of the Claim Review Report themselves never once comments on it. Not even in its final Reply after the Respondent has brought it to the Arbitrator’s attention.

The Claimant does not comment on the phrase “Accept short payment” in its own Claim Review Report.

The Respondent acknowledges that it owed the Claimant for the 168 cartons of Green Leaf 24s for US\$950.68. Where this number comes from is not explained. Both parties forwarded copies of the Claimants original Invoice 311545 for US\$915.60.

The Respondent also acknowledges that it owed US\$23.50 for the TempTale.

The Claimant asserts that none of this has been paid.

DECISION

I, as Arbitrator, have reviewed the documents submitted by both parties and with due respect for both, and without prejudice I submit my decision as follows.

The Claimant has made his case regarding not being paid for the shipment covered by Invoice #311545.

The Respondent’s arguments regarding payments or deductions for a previous shipment under a different invoice are irrelevant as they are not part of this claim as set forth in the Statement of Claim.

The Arbitrator can only rule on the Claim set before him.

The Arbitrator accepts the CFIA Certificate that there were defects in the 500 cartons inspected and that the Respondent acted correctly in promptly obtaining the inspection and notifying the Claimant of the results.

The Arbitrator accepts completely that the 410 cartons not inspected must be considered free of defects.

Therefore, the Arbitrator rules that the Claimant should be paid in full for the 410 cartons.

The Claimant should also be paid for the 500 cartons found with defects, and which the Respondent sold. However the price he receives for these must reflect the results of the CFIA inspection. This should be US\$5.17 which the Claimant had previously been prepared to accept, according to its own Claim Review Report.

By his own admission, the Respondent owed the Claimant for the 168 cartons of Green Leaf 24s and also for the TempTale.

The Claimant who had received zero payments for this invoice must be reimbursed for the filing fee.

The Claimant has had to wait one whole year for payment and is therefore entitled to interest payments on those amounts not in dispute, the Green Leaf and the TempTale.

AWARD

	<u>Unit Price</u> <u>US\$</u>	<u>Total</u> <u>US\$</u>
410 cartons Romaine 24s (not inspected)	\$6.45	\$2,644.50
500 cartons Romaine 24s (inspected)	\$5.17	\$2,585.00
168 cartons Green Leaf 24s	\$5.45	\$915.60
1 TempTale	\$23.50	\$23.50
US\$915.60	18% APR	\$164.80
US\$23.5	18% APR	\$4.23
DRC Filing Fee.		\$600.00
		=====
	<u>TOTAL</u>	<u>US\$6,937.63</u>

Payment is to be made by the Respondent to the Claimant within thirty (30) days of the date of this award.

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