

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

Date: July 29, 2020

DRC File #20568

PARTIES:

CLAIMANT:

West Leamington, ON, Canada

Vs.

RESPONDENT:

Saskatoon, SK, 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

According to the transportation entry/manifest and bill of lading dated 5-15-19, a shipment of 600 cases of beef tomatoes 25LB rounds, were sent from Mexico to Laredo TX. An invoice (#19005) dated May 15, 2019, indicates the shipment was sold by the Claimant to the Respondent. The tomatoes were to be picked up by the Respondent and the load was bonded to Canada. The invoice states the amount owed for the tomatoes was \$9,570.00 US. Billing terms were net 30 days, due June 14, 2019.

Statement of Claim

The claimant asserts that the Respondent picked up the load at the Claimant warehouse in Laredo TX. The invoice does not indicate any problems with the tomatoes during the pickup. The Respondent shipped the tomatoes to Calgary, Alberta. The truck arrived on 5/19/19.

The Claimant alleges that they were not paid for the invoice (#19005) in the amount of \$9,570.00 US. They also request reimbursement for the arbitration cost of \$678.00 US. In total they are looking for the Respondent to pay them \$10,248.00 US.

Statement of Defence to Statement of Claim

The Respondent purchased the tomatoes (invoice #19005) from the Claimant. The tomatoes were for "X". The load was picked up in Laredo TX on 5/16/2019 and shipped to Calgary, Alberta. The respondent runs all trucks with both limes and tomatoes at 48 degrees. It should be noted this temperature is cooler than the 52 degrees noted on the bill of lading. The file indicates the respondent could not download the temperature recorder so only temp on arrival is the receiving record which shows a "gun temperature" of 42.6 degrees on the limes in the trailer. That suggests very cool air was circulating in the trailer. The truck arrived in Calgary on 5/19/2019.

There is a receiving report from Calgary dated Sunday, 5-19-2019 and the load was processed at 7:18 a.m. A note on the receiving report states: "Needs grading for soft and colour sorting." The temperature was listed as 52.9 degrees Fahrenheit. No defects were noted, and the tomatoes were not listed as distressed. The next day, Monday May 20, 2019, was a regional holiday. There is no reference in the file for any action taken on the date of arrival to Calgary.

On Tuesday May 21, 2019, at 8:48 AM, the Respondent e-mailed the Claimant and stated: "The tomatoes aren't holding up and are very soft. We are calling an inspection on what we have."

The Canadian Food Inspection Agency did an inspection of the tomatoes at 10:30 AM on May 21, 2019 at the Respondent's warehouse. There was no marked grade on the product, listed on the report but at applicant's request, they were inspected to Canada NO. 1 grade. The inspection report description is as follows:

Defect	Avg./Moy.	Range/Variant		Defect Description
Firm Ripe	95%			
(C) Soft	6%			
(C) Decay	0%	0%	0%	
(C) Discoloration	4%	0%	10%	
(C) Soft areas	4%	0%	10%	
(P) Scars	2%	0%	5%	
(C) Sunken areas	2%	0%	5%	

The following day another inspection was done by the Canadian Food Inspection Agency. The second report notes a slight increase in softness and lists other variables not noted on the first report, but only 388 cartons were inspected.

The Respondent argues that the tomatoes did not meet their specifications and that the claim should be barred because it was not filed within the appropriate statute of limitations timeframe provided in the DRC rules.

The Respondent filed no counter complaint and, in its reply, does not ask for any relief.

Reply to Statement of Defence to Statement of Claim

The Claimant states that on 5-28-19 they responded to an e-mail from the Respondent regarding the tomatoes. The Claimant indicates that the inspection barely showed any soft tomatoes. The Claimant indicated that based on the inspection report, they would probably not issue any credit to the Respondent. The Claimant claims they had no indication that the invoice would not be paid.

The Claimant argues that they never received any accounting of Sale, until the arbitration proceeding was filed. Further the Respondent didn't provide any invoices associated with the sale of reworked product. There is no documentation as to final disposition of the tomatoes. There is no documentation as to dumping claims or sales revenues.

Discussion

First question/issue:

Is the arbitration claim barred under the DRC rules?

According to the DRC rules:

Article 4 Limitation of Claims.

- 1) Unless the parties otherwise specifically agree in writing, no Claim may be brought under these Rules by one member against another unless the Claim is notified to the DRC by filing a Notice of Dispute within nine (9) months of when the Claim arose or within nine (9) months of when the claimant ought reasonably to have known of its existence. Failure to file the Notice of Dispute with the DRC within this time is deemed an abandonment of the Claim and shall prevent recovery against another member.

The record is devoid of communication efforts after May 28, 2019. Neither party submitted further communication evidence.

The Respondent argues that the Statute of Limitations began running on 5-21-19, because they ordered an inspection on that date. Just because someone orders an inspection, doesn't mean there won't be some type of resolution on the file. There is no evidence that the invoice would not be paid. How long should a company try to collect on an invoice before they reasonably know it is not going to be paid? It is reasonable in this industry that resolution could take months.

The actual due date for the invoice would have been June 14, 2019. The statute would have started running after June 14, 2019.

The Claimant filled its complaint with the DRC on March 9, 2020, within the 9-month time period. The complaint was filed within the Statutory time limit and the arbitration will go forward.

Second question/issue

Does the Claimant present a case against the Respondent for recoverable damages?

The complaint states that the Respondent purchased the tomatoes from the Claimant. The Respondent sent the product to Calgary Alberta. On arrival, the Respondent's receiving report indicated the product arrived at 7:18 AM on Sunday May 19, 2019. The report indicated the tomatoes needed grading for soft and colour sorting. Other than that notation, there is no other evidence of a problem with the load of tomatoes. If the tomatoes were deteriorating, an inspection could have been requested on Sunday, the day of their arrival.

Two days later, the Respondent contacts the Claimant and tells them there is a problem with the tomatoes. They have an inspection done that day and another inspection the day after. The first inspection report shows 18% total defects.

In Canada, in absence of an agreement on grade, DRC uses the "Good Arrival Guidelines."

DRC Good Arrival Guidelines
Tomatoes
15 - total allowable defects
10 - total allowable permanent defects
05 - total allowable same permanent defect
10 - total allowable same single defect
05 - total allowable decay

Three days after arrival, the tomatoes fail to meet DRC Good Arrival Guidelines but only by 2% (permanent defects such as "scars" do not count on no grade contracts). Could this product have met DRC Good Arrival Guidelines if inspected upon arrival?

The record is devoid of further communication between the parties regarding the transaction or payment thereon.

Further, even though the Respondent claims the product was defective, and didn't meet specs, they produce no documentation regarding the disposition of the product. They claim part of the load was dumped, with no documentation to support their claim. What happened to the remaining tomatoes? There is no documentation to support their limited accounting.

Clearly, the Respondent purchased the tomatoes from the Claimant. The invoice has not been disputed. Regardless of other issues, the Respondent failed to prove its case. No evidence of transit temperatures in this FOB sale were provided, an inspection 2 days after arrival is only marginally out of spec and is completely different than the QC report on arrival. And finally, as already stated the disposition of the tomatoes is not properly documented.

Regarding "X" involvement, there may have been a separate agreement for the purchase. However, their participation was not well explained and not a major factor in the decision. The Respondent stated they were "told" to purchase the tomatoes.

This transaction is a buy/sell between the Claimant and the Respondent.

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:

Award in favor of claimant, the Claimant in the amount of \$10,248.00 US (\$9,570.00 US plus arbitration fee of \$678.00 US)

The Award should be paid to the Claimant within the next 30 days.

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

Arbitrator

Dated: July 29, 2020