ARBITRATION DECISION & AWARD
October 23, 2009

DRC File No. 18587

CLAIMANT: United States

RESPONDENT: Canada

Having been selected and confirmed by the Fruit and Vegetable Dispute Resolution Corporation (FVDRC) as Arbitrator for this case between the above parties, I render the following decision. This decision is rendered under the rules and regulations for Expedited Arbitration as set forth by the FVDRC. Both parties were members of the FVDRC at the time of the transaction, which binds both of them to these proceedings. Claimant submitted a Statement of Claim, Respondent filed a Statement of Defence, and Claimant filed a Reply to the Statement of Defence.

Introduction:

The matter in dispute involves two truck shipments of red onions which were shipped by Claimant from Hatch, New Mexico to Respondent at the agreed destination of Montreal, Quebec on June 22 and 23, 2009.

Claimant's Invoice #9309

Claimant sold to Respondent 1,680 25 lb. bags of Jumbo Red Onions @ $7.50 FOB plus "Temp" @$8.00, Inspection Fees of $110.00 and 21 pallets @$6.00 for an invoice total of $12,844.00. Claimant shipped the onions to Respondent's customer in Montreal on June 22, 2009, on an unrefrigerated truck. The Bill of Lading reads, in part, "Tarp onions, but roll tarp up on both ends (front and back). Keep onions dry and well ventilated. Keep free of rain and smoke".

This shipment apparently arrived sometime on Friday, June 26, 2009. Respondent filed a request for inspection shortly after 8 AM on Saturday, June 27. A CFIA inspection was made on Monday, June 29, 2009, and revealed that the onions contained an average of 9% decay, with a range of 4-18%. The pulp temperature of the onions was reported as 12° C (54° F).

On July 6, 2009, Respondent forwarded to Claimant an accounting of sales and expenses prepared by Respondent's customer. The accounting reads as follows:

800 bags sold at $8.00 cd	$6,400.00 cd
400 bags sold at $7.50 cd	3,000.00 cd
480 bags sold at $6.50 cd	3,120.00 cd
Total Sales	$12,520.00 cd
Exchange 1.19%	$10,521.00 us

Expenses:

Freight (1680 X $3.50 us)	$5,880.00 us
Inspection	252.00 us
Commissions (10% of sales)	1,052.00 us
Total Expenses	$7,184.00 us

Due Shipper: ($10,521.00 – 7,184.00) $3,337.00 us

Claimant's Invoice #9310

Claimant sold to Respondent 1,680 25 lb. bags of Jumbo Red Onions @ $7.50 FOB plus Inspection Fees of $110.00 and 21 pallets @$6.00 for an invoice total of $12,836.00, and shipped them to Respondent's customer in Montreal on June 23, 2009, on an unrefrigerated truck. The Bill of Lading reads, in part, "Tarp onions, but roll tarp up on both ends (front and back). Keep onions dry and well ventilated. Keep free of rain and smoke".

This shipment apparently arrived sometime early on Saturday, June 27, 2009. Respondent filed a request for inspection shortly after 8 AM on Monday, June 29. A CFIA inspection was made immediately, and revealed that the onions contained an average of 19% decay, with a range of 11-29%. Pulp temperatures ranged from 24° C (75° F) to 26° C (79° F). The temperature in the warehouse was recorded as 22° C (72° F).

On July 6, 2009, Respondent forwarded to Claimant an accounting of sales and expenses prepared by Respondent's customer. The accounting reads as follows:

400 bags sold at $3.50 cd	$1,400.00 cd
640 bags sold at $3.00 cd	1,920.00 cd
600 bags sold at $2.50 cd	1,500.00 cd
Total Sales	$4,820.00 cd
Exchange 1.19%	$4,050.00 us

Expenses:

Freight (1680 X $3.50 us)	$5,880.00 us
Inspection	252.00 us
Commissions (10% of sales)	405.00 us
Total Expenses	$6,537.00 us

Due Receiver: ($4,050.00 – 6,537.00) = Loss: ($2,487.00) us

Claimant seeks a net total of $22,278.00 for the two shipments, after an allowance of $3,402.00 for decay.

Discussion:

As the dispute involves two distinct loads of onions, they will be discussed separately.

Claimant's Invoice #9309

The parties are in agreement regarding the terms of sale and shipment up to the time the load arrived at destination in Montreal. Although the file reflects that discussions took place between representatives of the two parties regarding the disposition of the load after it arrived, there is no evidence offered that establishes a clear rejection of the product by the Respondent.

The parties differ as to whether Claimant agreed to move the product to another receiver, but as the party making the claim, Respondent had the burden of proving this assertion. Again, there is no clear evidence that Claimant agreed to void the contract and move the onions elsewhere. In addition, at the time the CFIA inspector arrived, the onions had been unloaded into Respondent's customer's warehouse, an act of acceptance by Respondent. I therefore find that Respondent received and accepted the onions, and is responsible for payment of the invoice amount, less any damages suffered as a result of Claimant's breach of contract.

It is clear that Claimant did, in fact, ship onions that failed to meet the FOB no-grade contract terms. The onions arrived at destination showing 9% decay, with a range of 4-18%. For FOB shipments such as this one, the DRC Good Arrival Guidelines establish a maximum tolerance for decay at destination of 4%. There is nothing that would establish carrier mishandling, and Respondent is therefore entitled to recover the damages it suffered as a result of Claimant's breach.

The preferred method for calculating damages from a breach of contract is to compare the market value of product meeting contract requirements against the actual sales price obtained from the sale of the damaged goods. In this case, there are no market quotes available for New Mexico red onions on the Montreal market at the time the onions were being sold, so we must seek an alternative measure of the value of goods meeting contract terms.

The first preferred alternative is to compare the delivered value of the product to the actual sales price obtained from the prompt and proper sale of the damaged goods. The accounting was issued seven days after inspection, and there is nothing that would establish improper handling of the sales on the part of Respondent's customer. In this instance, we have information regarding the freight charge, which appears on Respondent's customer's accounting, which, in the absence of a freight bill is accepted as a reasonable amount. The calculation of damages is as follows:

Market Value

1680 X $7.50 FOB	$12,600.00
Origination Inspection Fee	110.00
Pallets	126.00
Freight	5,880.00
Total Market Value	$18,716.00*

Less Gross Sales	(10,521.00)
Basic Damages	$8,195.00
Plus Destination Inspection	252.00
Total Damages	$8,447.00

Claimant's invoice total was $12,836.00*. Subtracting Respondent's damages of $8,447.00 leaves a balance of $4,389.00 due and unpaid.

* There is an $8.00 charge on Claimant's invoice for "Temp". This was apparently for a temperature recorder. Respondent states that there was no recorder on the load, and that none was called for on this non-refrigerated load. I agree, and have eliminated this charge from the delivered value of the shipment and from the invoice total.

Claimant's Invoice #9310

The parties are in agreement regarding the terms of sale and shipment up to the time the load arrived at destination in Montreal. The file reflects that discussions took place between representatives of the two parties regarding the disposition of the load, but there is no evidence offered that establishes a clear rejection of the product by the Respondent.

The parties differ as to whether Claimant agreed to move the product to another receiver, but as the party making the claim, Respondent had the burden of proving this assertion. Again, there is no clear evidence in the record that Claimant was willing to void the contract and move the onions elsewhere. In addition, at the time the CFIA inspector arrived, the onions had been unloaded into Respondent's customer's warehouse, an act of acceptance by Respondent. I therefore find that Respondent received and accepted the onions, and is responsible for payment of the invoice amount, less any damages suffered as a result of Claimant's breach of contract.

It is clear that Claimant did, in fact, ship onions that failed to meet the FOB no-grade contract terms. The onions arrived at destination showing 19% decay, with a range of 11-29%. For FOB shipments such as this one, the DRC Good Arrival Guidelines establish a maximum tolerance for decay at destination of 4%. There is nothing to prove mishandling by the carrier, and Respondent is therefore entitled to recover the damages it suffered as a result of Claimant's breach.

Claimant notes that the pulp temperatures appearing on the inspection are considerably higher than those of the previous load. While this is true, the shipment was in Respondent's customer's warehouse one day less than the first load, and the fact that the load was shipped in an open truck from New Mexico to Quebec at the end of June indicates that Claimant did not consider the onions to be particularly temperature sensitive. In addition, given the extremely high degree of decay found in the onions, it is likely that the decay process itself elevated the pulp temperatures somewhat.

As in the case of the first load, the preferred method for calculating damages from a breach of contract is to compare the market value of good condition product against the actual sales price obtained from the prompt and proper sale of the damaged goods. The accounting was issued seven days after inspection, and there is nothing that would establish improper handling of the sales on the part of Respondent's customer. Since the extent of decay in the onions was nearly five times the allowable tolerance, it is not unusual that the sales value of the onions would be drastically lower than might have been expected for product meeting contract. Again, there are no market quotes available for New Mexico red onions on the Montreal market at the time the onions were being sold so we must seek an alternative measure of the value of goods meeting contract terms.

As before, the first alternative is to compare the delivered value of the product to the actual sales. Again, we have information regarding the freight charge, which appears on Respondent's customer's accounting, which, in the absence of a freight bill is accepted as a reasonable amount. The calculation of damages is as follows:

Market Value

1680 X $7.50 FOB	$12,600.00
Inspection Fee	110.00
Pallets	126.00
Freight	5,880.00
Total Market Value	$18,716.00
Less Gross Sales	(4,050.00)
Basic Damages	$14,666.00
Plus Destination Inspection	252.00
Total Damages	$14,918.00

Claimant's invoice total was $12,836.00. Subtracting Respondent's damages of $14,918.00 leaves a loss of $2,082.00, for which Claimant is liable to Respondent.

AWARD

Claimant's Invoice #9309

Respondent is hereby found liable to Complainant in the amount of $4,389.00.

Claimant's Invoice #9310

Claimant is hereby found liable to Respondent in the amount of $2,082.00.

In the interest of efficiency, Respondent is therefore ordered to pay the balance of $2,307.00 within 30 days of the date of this order. This amount is only $1,457.00 more than initially offered by Respondent. Since Respondent has effectively prevailed in this matter, there will be no award for Claimant's filing fees.

I certify that this Decision and Award has been sent by fax and mail to the parties.

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Arbitrator