ARBITRATION DECISION & AWARD UNDER
THE DISPUTE RESOLUTION RULESOF
THE FRUIT AND VEGETABLE RESOLUTION CORPORATION (DRC)
August 20, 2015

DRC File No. 19346
CLAIMANT: Brooks, OR, U.S.A. **vs. RESPONDENT:** Holland Landing, ON, Canada,

ARBITRATION APPOINTMENT

I, have 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 the dispute arose, which binds them to these proceedings. The parties did not request an oral hearing, and so the dispute was determined on the papers submitted.

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.

CLAIMANT'S CLAIM

Claimant claims that it sold seven lots of medium #1 quality onions to Respondent represented by invoice numbers 132943 ($6,847.50), 132945 ($6,847.50), 132946 ($6,847.50), 133078 ($6,927.50), 133080 ($6,927.50), 133115 ($6,862.50), and 133116 ($6,847.50), and that it is owed $48,107.50 for the onions plus DRC fees and other costs for a total owed of $61,581.06. Respondent defends by claiming that all seven lots were defective with decay and had variable sizing and greening. Each of the lots will be considered below.

DISCUSSION

Respondent acknowledges that it purchased and received all seven lots of onions. (Statement of Defence, paragraph "1"). Under well-established law, Respondent owes Claimant the full agreed upon purchase prices for each lot less any provable damages. Respondent has the burden of proof to show a breach of the contract to ship US#1 medium onions, and to establish the amount of its damages.

Invoice Numbers 132943, 132945, 132946, 133080

Respondent provides no evidence to establish a breach of contract with respect to the lots referenced by invoice numbers 132943, 132945, 132946, and 133080. There are no trouble reports, and, most importantly, there are no inspections showing of the quality and condition of the subject onions on arrival. Respondent's repack reports are insufficient evidence to show a breach of contract since they do not show the condition of the onions at the time of arrival. Without such evidence, Respondent cannot carry its burden of proof. Thus, Claimant is owed

the full amount of the agreed upon prices for these four invoices.

Invoice Numbers 133078, 133115, and 133116
Respondent reported trouble to Claimant on the three lots referenced by invoices numbers 133078 (PO #9764), 133115 (PO #9773), and 133116 (PO #9772), and Claimant responded by generating a "Trouble Notification" for each lot that said: "Onions Received with decay, variable sizing and greening. Customer will work through product and advise on returns." (Exhibit "H").

The following email exchange took place between Respondent's Mr. A and Claimant's Mr. M over the next few days:

7/16/14:

Email from Mr. A to Mr. M #133078 [PO #9764]
"J. Load received will require regarding and reworked in order to meet #1 grade required to pack and ship., we will rework the load and advise as to all necessary costs. Please acknowledge. Thank you."

Email from Mr. M to Mr. A
"This is what I was afraid of. Could you **please send an in-house inspection so I have it for my grower. Once I have that documentation, we can grant full protection."** (Exhibit "L"). [Emphasis supplied].

7/22/14

Email from Mr. A to Mr. M

"Subject: File #9773 [Invoice #133115] and 9772 [Invoice #133116]

J both of the attached files have arrived with the same problems. We will endeavor to repack regrade and hopefully bring the Onions to a #1 grade to sell. We will handle for your account. Please acknowledge." (Exhibit "A").

Email from Mr. M to Mr. A
"Re: File #9773 and 9772

Can you please send a in-house inspection and pictures? **I never received a in-house inspection on the last order you asked for protection on either.** (Exhibit "M"). [Emphasis supplied].

Email from Mr. A to Mr. M
"Subject: **Onions loads inspections**

Label "YYY"
Date receive: 07/19/2014 #1: 50.
#2: 32.

#3: 53.
#4: 42.
#5: 58.
#6: 70
#7: 91.

Total: 396 bad ones out of 7 units.
Average: 56.5/unit
Inspected 7 – 50lbs bgs.
56.5% defects
Further inspections to follow
Sent from my iPhone"

Fruit flies are all over

The above emails make clear that the parties agreed to amend their original FOB contracts on these three lots to become "full protection" contracts, but that was expressly contingent upon Respondent providing "in-house inspections." Claimant said that the reason he needed the in-house inspections: "so I have it for my grower."

Respondent's email dated 7/22/14 is apparently in response to Claimant's request for in-house inspections on the three lots. The purported inspection, though, is problematic for several reasons. First, and as Claimant argues, it is difficult to determine which of the three lots it matches up with. It references "Date receive: 07/19/2014", but that does not necessary signify the arrival date at the Respondent, and there is no evidence of arrival dates of the three lots. The high level of defects (56.6%) suggests that it may match up with the high level of defects on Respondent's repack report for the lot that is the subject of invoice #133078 (68%), and so it is found that the inspection matches up with that lot. Ultimately, it makes little monetary difference which of the three lots it is matched up with. A second problem with the in-house inspection is that it was not based on a representative sample of bags (only "7" out of about 850 bags were inspected), and it does not describe the type of defects or indicate any percentages of defects (such as "3% decay"). Despite the infirmities with the in-house inspection, Claimant did not object to its form, and so Claimant is found to have waived any objection to it. Thus the condition for full protection occurred with respect to this lot.[1] While the parties did not define what they meant by "full protection," in the produce industry it customarily means that the shipper will save the receiver harmless from any loss which may result from the defective condition of the merchandise. The protected party still has the potential to make a profit if it is able to sell for more than its purchase price but is not entitled to make a profit if its sales prices are below its purchase price. Respondent provided a repack report showing that it lost 68.5% of the lot, and it provided an accounting on Claimant's invoice that essentially shows the following formula: $6,800 for the onions x. 32.5% = $2,142. Thus, the Respondent is found to owe Claimant $2,142.00 for the lot that is the subject of invoice #133078.

With respect to the lots reflected by invoices #133115 and #133116, Respondent did not provide any in-house inspections, and so the contingency did not occur, and so the parties are

[1] Mr. M response to the trouble reported on 7/16/14 that "This is what I was afraid of," and his being quick to grant full protection provided there was an in-house inspection, suggests that he had reason to believe there may have been trouble with that lot.

back to their original FOB contracts regarding those lots. Once again, in a FOB sale a receiver who accepts possession of product has the burden of proof to show that its shipper breached its contractual obligations, and the amount of its damages. Without an inspection, Claimant cannot prove a breach of contract. While Respondent sent some pictures of onions to Claimant, the pictures suffer from the same infirmities as the so-called in-house inspection: uncertain identity, not a representative sample, and no description of the type and amount of defects. The identity problem is compounded by the fact that some of the pictures sent by Respondent are on a bag with a label of "XXX" and not the shipped label of "YYY." While this may have been an innocent mistake, it undermines the Respondent's ability to show that the photographed onions are the same onions as those that were shipped. Respondent's repack reports are not a substitute for a proper inspection. Since Respondent has not proved that there was a breach, it owes payment in full of these two lots.

Even if Claimant would have been found to have breached its contractual obligations to Respondent with respect to these two lots, Claimant did not provide Respondent with a proper accounting that shows the dates of sales of the repacked onions, the amounts sold, and the prices, and so would be found to have not proven its damages.

Claimant requests an award of interest, and for reimbursement for the DRC administrative fee and arbitrator's fees in the amount of $2,700. The Arbitrator has the discretion whether to award such a request. Here, there is *some* evidence that Claimant may have breached its contractual obligations regarding the lots that are subject of invoices #133115 and #133116, particularly the repacking reports. Respondent, though, is being required to pay those invoices in full due to a lack of sufficient documentation, particularly a lack of inspections. This creates the possibility that Claimant is receiving more than it would have if Respondent had properly documented matters. For that reason, the request for interest is denied. The request for reimbursement of the DRC fees, which is an out-of-pocket expense for Claimant, is granted in the amount of $2,700.

Respondent is found to owe Claimant the following amounts:

	Invoice Number:	Amount Owed:
1	132943	$6,847.50
2	132945	$6,847.50
3	132946	$6,847.50
4	133078	$2,142.00
5	133080	$6,927.50
6	133115	$6,862.50
7	133116	$6,847.50
	SUBTOTAL:	**$43,322.00**
	DRC Fee	$2,700.00
	TOTAL:	**$46,022.00**

Respondent requests a setoff for the claims made by Company C and Company S There are multiple problems with this claim, including a lack of inspections, and the lack of showing that the onions from lot that the subject of invoice #133078 are the ones objected by those receivers.

This, the request for a setoff is denied.

If Claimant breached its contractual obligations regarding one or more of the six lots for which full price is found to be owed, then this will be a harsh result. Respondent should know that it becomes vital to obtain a proper inspection to show the condition and quality of perishable produce on arrival, or alternatively, to enter into an amended agreement and comply with that agreement. The most reliable inspections are done by trained third parties. While parties can agree to use an "in-house inspection," a receiver needs to be sure that such an inspection comes close to applying the standards used in an inspection performed by the Canadian Food Inspection Agency.

DECISION & 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:

Claimant., shall recover from Respondent., the sum of US$46,022.00. Respondent is hereby ordered to pay the Claimant US$46,022.00 no later than thirty (30) days from the date of this decision.