

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

Date: December 12, 2013

DRC File # [REDACTED]

CLAIMANT:

[REDACTED]

**CLAIMANT'S
REPRESENTATIVE:**

Mr. Tom Oliveri, Director Trade Practices and Commodity Services-WESTERN GROWERS ASSOCIATION. P.O. Box 2130, Newport Beach, CA, United States 92658. Tel: 949-260-6632 Fax: 949-863-9028

RESPONDENT:

[REDACTED]

Arbitration Appointment

I, [REDACTED], 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

On or about March 1, 2013, Claimant sold one full truckload of cauliflower to Respondent under four different purchase order numbers:

PO#: [REDACTED]: 112 cartons of cauliflower wrap 12's [REDACTED] at \$11.85 per carton, or \$1,327.20, plus \$5.00 for Temptale [REDACTED], for a total of \$1,332.20 billed on Claimant's invoice number [REDACTED], destined for Respondent in [REDACTED], Canada.

PO#: [REDACTED]: 560 cartons of cauliflower wrap 12's [REDACTED] at \$11.85 per carton, or \$6,636.00, plus \$5.00 for Temptale [REDACTED], for a total of \$6,641.00 billed on Claimant's invoice number [REDACTED], destined for Respondent in [REDACTED], Canada.

PO#: [REDACTED]: 560 cartons of cauliflower wrap 12's [REDACTED] at \$11.85 per carton, or \$6,636.00, plus \$5.00 for Temptale [REDACTED], for a total of \$6,641.00 billed on Claimant's invoice number [REDACTED], destined for Respondent in [REDACTED], Canada.

PO#: [REDACTED]: 224 cartons of cauliflower wrap 12's [REDACTED] at \$11.85 per carton, or \$2,654.40, plus \$5.00 for Temptale [REDACTED], for a total of \$2,659.40 billed on Claimant's invoice number [REDACTED], destined for Respondent in [REDACTED], Canada.

The total purchase price for the truckload of cauliflower in question is \$17,273.60.

Statement of Claim

Claimant states (1) the cauliflower was tendered at shipping point in exceptional condition and was properly precooled; (2) upon delivery Respondent advised that the cauliflower had high temperatures but no condition or quality issues; (3) Respondent initially identified the problem as a truck claim but subsequently reversed this and asserted a shipper claim; (4) Respondent without participation from Claimant moved the cauliflower to [REDACTED]; and (4) Claimant thereafter moved the cauliflower to [REDACTED] for handling in order to mitigate damages.

Claimant reports proceeds from the sale of the cauliflower by [REDACTED] of \$8,736.00, which when applied to the contract price of the cauliflower of \$17,273.60, reduces the unpaid balance to \$8,537.60. Claimant asserts Respondent also took an unauthorized deduction of \$873.60 from an unrelated purchase, which it seeks to recover through this claim, thereby bringing the total amount alleged as due to \$9,411.20. Claimant also seeks to recover the filing fee of \$600.00 paid to the DRC to institute this proceeding.

Statement of Defence to Statement of Claim

Respondent states it deemed this as a vendor claim because the core temperatures of the product were higher than the temperatures recorded by the TempTale recorders, thereby indicating that the cauliflower was not properly precooled at shipping point.

Reply to Statement of Defence to Statement of Claim

Claimant states the carrier acknowledged that the cauliflower was pulping at 36°F at shipping point, and asserts that there were abnormal transportation conditions as evidenced by the carrier's failure to set the refrigeration unit at continuous mode, in breach of Respondent's specifications.

Discussion

There are essentially two questions that must be answered to determine what, if any, liability remains with Respondent for the truckload of cauliflower that it purchased from Claimant:

1. Did Respondent reject the cauliflower to Claimant?
2. Was there a breach of contract by Claimant?

In answer to the first question, Respondent acknowledges unloading the cauliflower following arrival. Section 19 of the DRC Trading Standards defines "acceptance" as "any act by the consignee signifying acceptance of the shipment, including diversion or *unloading*, except for the purposes of inspection under the supervision of a recognized inspector" (emphasis supplied).

Respondent's "FOB Rejection Form" shows the cauliflower was pulped by its Quality Assurance (QA) Specialist [REDACTED] following unloading. This plainly does not constitute inspection under the supervision of a recognized inspector. (See "recognized inspector" definition under section 19 of the DRC Trading Standards.) Moreover, the documents submitted by the parties also show that Respondent reloaded the cauliflower and redirected the load to [REDACTED]. Claimant asserts it had no involvement in the decision to move the load, and Respondent does not address this assertion. It therefore appears Respondent diverted the subject load of cauliflower, which is also an act of acceptance.

For the reasons just stated, it is clear that Respondent accepted the cauliflower. A rejection following acceptance is considered a rejection without reasonable cause according to section 19 of the DRC Trading Standards, and is also considered unfair conduct under Section 1, General Rules of Conduct, of the same standards. Moreover, section 2-607 of the Uniform Commercial Code (UCC) precludes rejection of accepted goods. UCC § 2-607 further states a buyer who has accepted shall pay the contract price for the goods accepted less any damages resulting from a breach of contract by the seller.

This leads to the second question referenced above: Was there a breach of contract by Claimant?

The cauliflower was sold under f.o.b. terms. The term "f.o.b." is defined in section 20 of the DRC Trading Standards as meaning, "that the produce quoted or sold is to be

placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition..., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.” The term “suitable shipping condition” is defined in section 19 of the DRC Trading Standards as meaning “that the commodity, at time of shipment, is 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.”

Respondent reported that the cauliflower arrived with elevated pulp temperatures. While Respondent initially indicated to Claimant that the issue was a truck claim, Respondent subsequently advised that it considered the matter a shipper claim. At that time, Claimant received an e-mail message from [REDACTED], Respondent’s QA Specialist, wherein [REDACTED] reported pulp temperatures taken from the top, middle, bottom, and core of the pallets. In two of three instances, the core temperatures were slightly higher than the temperatures taken at the top, middle and bottom of the pallet. On this basis, Respondent contends that the cauliflower was not properly precooled prior to shipment.

Claimant refutes Respondent’s contention that the cauliflower was not properly precooled and asserts that the cauliflower was pulping at 36°F at the time of shipment, as affirmed by the carrier’s signature on the bills of lading for each of the four purchase orders in question. Respondent nevertheless maintains that the 36°F temperature on the bills of lading is pre-printed, which, according to Respondent, is indication that such temperature was “not fully verified by taking pulp temperatures.” The carrier did not, however, indicate that the temperature declaration was solely that of the shipper. In the absence of such a declaration, it is presumed that the carrier confirmed that the pulp temperatures were as stated. Notably, the documents submitted by the parties also include pick tickets whereon the 36°F temperature is handwritten and affirmed by the signature of the carrier. The preponderance of the evidence therefore supports the conclusion that the cauliflower was properly precooled to a temperature of 36°F prior to loading.

Claimant argues the elevated temperatures at the time of arrival resulted from abnormal transit conditions. Specifically, Claimant states the download from the Thermo King refrigeration unit shows the unit was set on “Cycle-Sentry” mode. According to the Thermo King documents Claimant submitted, the Cycle-Sentry mode allows the unit engine to shut down when the return air temperature reaches the setpoint, thereby saving fuel, increasing the life of the component and reducing maintenance costs. The Cycle-Sentry mode is used for frozen products and products packed in airtight containers; however, Thermo King does not recommend using the Cycle-Sentry mode for products that require constant airflow like fresh produce. Rather, Thermo King advises “continuous setting must be used for produce loads.”

Based on the download from the Thermo King unit, it appears the cauliflower was loaded at approximately 3:10 p.m. on March 1, 2013. At that time the unit was running

on Cycle-Sentry mode. The unit continued to run in this mode until 3:40 p.m. on March 5, 2013, when it was changed to continuous mode. This is less than an hour before the end of the download, so the change was made at or just prior to delivery.

Respondent's "Cold Chain & Shipping Requirements" state that the carrier "shall set the reefer to run at continuous mode." The Thermo King download shows the unit ran on the Cycle-Sentry mode, rather than the continuous mode, during the four-day period that the cauliflower was in transit. The carrier's failure to transport the cauliflower according to Respondent's instructions establishes that the transportation conditions were not normal.¹

The warranty of suitable shipping condition is, by definition, only applicable where the transportation service and conditions are normal. In the instant case, the transportation conditions were not normal, so the warranty of suitable shipping condition is void. Respondent has, therefore, failed to establish that Claimant breached the contract by shipping cauliflower that was not in suitable shipping condition.

It should be noted that even if the suitable shipping condition warranty remained in effect, Respondent did not submit any evidence of the quality or condition of the cauliflower at the time of arrival to establish a breach of contract by Claimant. Claimant submitted a copy of a Canada Food Inspection Agency (CFIA) inspection performed on the cauliflower on March 11, 2013, at [REDACTED]. This inspection, which disclosed 43 percent average brown discoloration, is too remote from the time of arrival to establish that the cauliflower was received in poor condition.

Absent a breach, Respondent is liable to Claimant for the cauliflower it accepted at the contract price of \$17,273.60, less the \$8,736.00 proceeds that Claimant collected from the salvage sale of the cauliflower, or a balance of \$8,537.60. While Claimant also seeks recovery of an additional \$873.60, which Claimant states is an unauthorized deduction taken by Respondent on an unrelated purchase, Claimant did not submit any evidence to substantiate this contention. The request for this additional sum must therefore be denied.

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:

The Respondent is hereby ordered to pay the Claimant the sum of US\$8,537.60, plus the US\$600.00 filing fee, within 30 days from the date of this Decision and Award.

¹ This conclusion is further supported by the copies of the TempTale recordings Claimant submitted, which show wide fluctuations in temperature, generally in the range of 37 to 50°F, between 4:39 p.m. on March 1, 2013, and 8:49 a.m., on March 5, 2013.

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

██████████, Arbitrator
Dated: December 12, 2013