

1 imposed upon it in responding to information concerning the unintended contamination of the
2 crop², the fact of the findings of contamination provided a legal basis fore Lipton to reject.

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4 II. Discussion.

5 A. Basic Facts.

6 Yamasaki Farms farms approximately 850 acres in the Tracy-Vernalis area of the Central
7 Valley of California in beans, tomatoes for processing and grains. During the 2000 growing
8 season, Yamasaki contacted to grow and sell 7,500 tons of processing tomatoes. 5,000 tons were
9 contracted to Hunts and 2,500 tons were contracted to Lipton under the agreements in issue in
10 this proceeding.³ The tomatoes were near ready for harvest in early September. In accordance
11 with the contracts and usual practice, Myron Yamasaki (“Yamasaki”) was in contact with
12 Lipton’s field representative, Chris Grupe (“Grupe”) on September 11 to discuss the harvest and
13 delivery schedule. It then appeared that the harvest and delivery would proceed on the pre-
14 determined schedule, but arrangements were made for communication during the next week. On
15 September 18 or 19, Grupe informed Yamasaki that the delivery start date would be September
16 25. In the meantime, on September 7, Grupe had been to the Yamasaki fields and taken samples
17 from a variety of locations in the fields to submit for pesticide sampling. Grupe had been at the

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19 ² Nothing in this decision should be construed as critical of Yamasaki’s agricultural practices or its handling of the
20 crisis presented by the revelation of the positive pesticide test results. Indeed, Yamasaki’s prompt and voluntary
21 notice to another canner with whom it had contracted, Hunts, evidences a commendable concern for the safety and
22 purity of its crop.

23 ³ These contracts, the “Master Agreement – 2000 Tomato purchases” between the California Tomato Growers
24 association, Inc., of which Yamasaki Farms is a member, and the “Tomato Contract” between Lipton and Yamasaki
25 Farms, individually, are discussed below.

1 fields 6 or so times that season. The sampling was routine⁴ and not done because of any
2 suspected contamination. The samples were submitted to National Food Laboratories for
3 organophosphate screening analysis. The samples were received on September 8 and tested on
4 September 12, though the first preliminary results of the testing were likely not available to be
5 reported to Lipton until September 14 or 15. The tests revealed the presence of "Acephate", an
6 insecticide used on various crops, but not approved for use on tomatoes.⁵ NFL reported these
7 "preliminary results to George Rickert, ("Rickert") Director of Field Operations for Tomatoes
8 for Lipton on September 14. The results were discussed with Grupe, but it was decided not to
9 discuss the matter with Yamasaki until the final results were received as the crop harvest and
10 delivery had already been delayed due to a problem of mold contamination at the plant.

11 The final test results were received by Lipton on September 20. Rickert consulted with
12 others at Lipton and determined not to accept any of the Yamasaki Farms tomatoes. Grupe was
13 directed to inform Yamasaki.

14 Grupe met with Yamasaki at the field on September 22. Yamasaki believes he was told
15 re-testing was pending as the first sample test results were inconclusive. In any event, it was
16 agreed that Yamasaki and Grupe would take additional samples from the field on September 25.
17 These "side-by-side" samples were submitted for testing to separate labs. The Lipton/NFL
18 results were again positive for Acephate at levels above .01 in samples from some parts of the
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20 ⁴ Such sampling was done regularly at other contractors fields and had been done in the past on Yamasaki farms
21 fields.

22 ⁵ To the extent there is a question whether some level of Acephate is "acceptable" on a processing tomato crop, it is
23 the finding of the Arbitrator that the presence of the substance at or above the minimum level of quantification, .01
24 ppm for Acephate is unlawful. The initial sampling submitted by Grupe to NFL had results at .04 ppm, above the
25 LOQ.

1 field. "Positive" results were also obtained in testing of Myron Yamasaki's samples submitted to
2 Environmental Microanalysis, Inc.. On September 27, Grupe informed Yamasaki of the positive
3 test results and of the final decision by Lipton that none of the 2500 tons of tomatoes would be
4 accepted due to the Acephate contamination.⁶

5 The apparent cause of the presence of the Acephate is overspray from aerial application
6 of the substance on bean crops adjacent to the Yamasaki Farms tomato fields. Believing that the
7 contamination did not affect the entire crop, and that safe tomatoes could be delivered to Lipton,
8 Yamasaki sought assistance from counsel. Arrangements were also made for sampling of the
9 field by John Bahme, an agricultural consultant. Bahme sampled the field on October 5, using
10 appropriate scientific technique and segregating the samples by specific areas of the fields in
11 question. These samples show that the contamination was limited to the southeast quadrant of
12 the field, adjacent to bean fields which had been sprayed with Acephate on September 18.⁷

13 Bahme's results were communicated to Lipton. Lipton persisted in its position however,
14 and declined to accept any of Yamasaki Farms' tomatoes. The Lipton cannery was closed
15 October 9 as the low volume of tomatoes made further operations uneconomical.

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17 B. The Tomato Contracts.

18 As noted above, two agreements govern the issues here, the "Master Agreement - 2000
19 Tomato purchases" between the California Tomato Growers Association, Inc., of which
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22 ⁶ It was at this point that Myron Yamasaki contacted Hunt's, whose tomatoes were then being harvested and
23 delivered, and informed Hunts of the problem. Mr. Yamasaki's forthrightness is commendable.

24 ⁷ Earlier sprayings ha occurred on August 11 and August 16 and are a likely explanation for the positive results of
25 Grupe's September 7 sampling. However, Grupe's samples were aggregated fro testing so the results from
particular areas can not be known with certainty.

1 Yamasaki Farms is a member, and the individual "Tomato Contract" between Lipton and
2 Yamasaki Farms, individually. The two agreements are harmonized in Paragraph 6 of the Master
3 Agreement which provides, inter alia, that the provisions of the Master Agreement are to be
4 incorporated into all individual grower agreements and that any provision of an individual
5 grower agreement contrary to the terms of the Master Agreement is void.

6 There are substantive provisions of both contracts potentially applicable to the
7 circumstances here. Paragraph 17 of the Master agreement, "Reject Standards", limits Lipton's
8 ability to reject tomatoes to specific loads of tomatoes meeting specified reject standards. Sub-
9 paragraph (b) permits rejection where inspection shows chemical residue or improper use of
10 agricultural chemicals exceeding the standards of the individual Tomato Contract and which
11 "prevent canner [Lipton] from processing an acceptable finished product in compliance with ...
12 law ...".

13 Paragraph 19 of the Master Agreement provides that, "No rejection ... may be made by
14 Canner on the tomatoes subject to a tomato contract .. other than those expressly set forth in this
15 [Master] agreement."

16 Paragraph 5 of the Tomato Contract contains a warranty by the grower that "no tomatoes
17 sold hereunder have been, or will be, treated with a pesticide other than those in the agreed
18 pesticide schedule. That provision of the contract provides that, "Should seller breach any of
19 these provisions (which is conclusively presumed if residues exceed tolerances set forth in the
20 Pesticide Schedule) then, in addition to, any other remedies, Buyer may refuse to accept delivery
21 of any portion or all of the crop." Paragraph 19 of the Tomato Contract, while structured
22 similarly to paragraph 17 of the Master Agreement, allows rejection of "tomatoes", without
23 specification of a load by load or other reference, for a number of listed defects not pertinent
24 here.

1 Yamasaki contends that paragraphs 17 and 19 of the Master agreement, when read
2 together, limit Lipton's right to reject tomatoes to those specific loads determined to be within
3 the reject standards of the Master Agreement alone. Accordingly, Yamasaki argues, Lipton's
4 actions in the matter both prevented Yamasaki from taking steps to demonstrate that loads
5 subject to acceptance could be delivered and resulted in the rejection of loads that did not meet
6 rejection criteria. It is suggested, moreover, that this conduct was motivated by the precipitous
7 drop in the open market price for tomatoes with the bankruptcy of Tri-Valley Growers such that
8 Lipton could obtain alternate tomato supplies at substantially less than contract process.

9 The provisions of Paragraph 17 of the Master Agreement are not in conflict with the
10 provisions of Paragraph 5 of the Tomato Contract. First, Paragraph 17(b) deals primarily with
11 residue or use of approved chemicals exceeding the standards of the Tomato Contract pesticide
12 list. Sub-paragraph (a) also deals with a variety of reject bases which likely do not affect an
13 entire tomato crop. Reading paragraph 17 as a whole leads to the conclusion that its focus is on
14 circumstances affecting individual loads and not relating to overall farming or pesticide
15 practices. Paragraph 5 of the Tomato Contract, on the other hand, deals with application of
16 economic poisons other than those listed, not only with excess use or residue from those that are
17 listed. The provisions of Paragraph 5, accordingly, deal not with a more general problem of
18 grower conduct, application of any unlisted pesticide. Accordingly, Paragraph 5 is a general
19 warranty by the grower, the breach of which may be deemed a breach of the growers entire
20 contractual obligation. Accordingly, it is the determination of the Arbitrator that there is no
21 irreconcilable conflict between Paragraph 17 of the Master Agreement and Paragraph 5 of the
22 Tomato Contract such that Paragraph 5 cannot be given effect. There remain, however, two
23 questions: 1) whether Master Agreement Paragraph 19 voids Tomato contract paragraph 5 and,
24 2) whether the inadvertent overspray of an adjoining field resulting in the presence of a non-
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1 scheduled pesticide means the tomatoes have been "treated" within the meaning of paragraph 5
2 itself.

3 Paragraph 19 does not void paragraph 5. A fair reading of the terms of paragraph 19,
4 which follows the specified bases for rejection, deduction, and price reduction of tomato loads in
5 paragraphs 17 and 18, is that it means only to limit the rejection or price adjustment of individual
6 loads to the bases set forth in the preceding two paragraphs and is not applicable to other
7 provisions of the Tomato contract which define general breaches of the grower's obligation.

8 It is the conclusion of the Arbitrator that even the inadvertent accumulation of overspray
9 by a non-listed pesticide is "treatment" within the meaning of paragraph 5. It is reasonable to
10 conclude that, since the crop is in the control of the grower, it is the grower who bears the risk of
11 such an unintended event, whether done by the grower or, as here, a third party. While the
12 canner would still have the load by load rejection remedy of Paragraph 17, such would impose a
13 cumbersome burden under circumstances where, in the face of the potential of a product tainted
14 with potentially harmful, or at least non-approved, pesticides, it is reasonable to allow rejection
15 of the entire crop where the requisite proof of contamination is shown.

16 For these reasons, it is the determination of the Arbitrator that Lipton's rejection of the
17 entire Yamasaki Farm's crop was not a violation of the contracts between the parties.

18 Moreover, the evidence does not establish that the stated basis for rejecting the entire
19 crop was a subterfuge by which Lipton sought to take advantage of lower open market prices.
20 The initial field inspection and testing were in accordance with the agreements and with past
21 practice applicable to both Yamasaki Farms and others. The delay in reporting the test results to
22 Yamasaki has been reasonably explained. The evidence shows, finally, that Lipton purchased
23 approximately 97% of its 2000 contracted tonnage and did not make inordinate open market
24 surplus purchases from non-contracted growers.

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1 III. Conclusion.

2 For the reasons set forth above, it is the finding and determination of the Arbitrator that
3 Lipton did not breach the agreements with Yamasaki Farms. The parties were faced with
4 difficult circumstances. Nonetheless, Lipton acted reasonably and within its contractual rights in
5 rejecting the entire contracted tomato crop.

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8 Dated: November 30, 2001

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13 Richard L. Gilbert
Arbitrator

PROOF OF SERVICE BY MAIL

(CCP SECTION 1013 (a) (3))

The undersigned declares:

I am over 18 years of age and not a party to this action. My business address is 2630 J Street, Sacramento, CA 95816.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited that same day in the ordinary course of business.

On the date indicated below, a true copy of the below listed document(s) were placed for deposit in the United States Postal Service in a sealed envelope with postage fully prepaid, addressed to the person(s) listed below, and the envelope(s) so addressed were placed for collection and mailing on the date below following ordinary business practices.

DOCUMENT(S): Decision and Award After Arbitration

ADDRESSEES(S): Ms. Constance McNeil, Esquire
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I declare under penalty of perjury that the foregoing is true and correct and that the mailing was made and this declaration was executed on November 30, 2001, at Sacramento, California.


DIERDRE PERROTTA