

A shop owner faxed the following signed message to his long-time widget supplier: "Urgently need blue widgets. Ship immediately three gross at your current list price of \$600." Upon receipt of the fax, the supplier shipped three gross of red widgets to the shop owner and faxed to him the following message: "Temporarily out of blue. In case red will help, am shipping three gross at the same price. Hope you can use them."

Upon the shop owner's timely receipt of both the shipment and the supplier's fax, which of the following best describes the rights and duties of the shop owner and the supplier?

- A. The shop owner may accept the shipment, in which case he must pay the supplier the list price, less any damages sustained because of the nonconforming shipment, or he may reject the shipment and recover from the supplier for total breach of contract, subject to the supplier's right to cure.
- B. The shop owner may accept the shipment, in which case he must pay the supplier the list price, less any damages sustained because of the nonconforming shipment, or he may reject the shipment provided that he promptly covers by obtaining conforming widgets from another supplier.
- C. The shop owner may accept the shipment, in which case he must pay the supplier the list price, or he may reject the shipment, in which case he has no further rights against the supplier.
- D. The shop owner may accept the shipment, in which case he must pay the supplier the list price, or he must reject the shipment and recover from the supplier for total breach of contract.

Explanation:

Seller's reply to buyer's offer

(UCC § 2-206)

Reply		Effect
Promise to ship		Acceptance
Shipment of conforming goods		Acceptance & performance
Shipment of nonconforming goods	With notice of accommodation	Rejection & counteroffer
	With no notice	Acceptance & breach

UCC = Uniform Commercial Code

Article 2 of the Uniform Commercial Code (UCC) governs contracts for the sale of goods. The **UCC** allows a seller to accept an **offer to buy goods** for **prompt or immediate shipment** by promising to ship or actually shipping goods that conform to the offer. But a **shipment of nonconforming goods** serves as both a **rejection and a counteroffer** if the seller:

made **no prior promise** to ship conforming goods *and*

notifies the buyer that the nonconforming shipment is merely an **accommodation**—ie, an offer of similar goods for the buyer to consider.

In that case, the buyer may **accept** the shipment (creating a contract for the nonconforming goods) OR **reject** the shipment (creating no contract).

Here, the shop owner offered to buy *blue* widgets for immediate shipment, but the supplier rejected that offer by shipping *red* widgets with a notice of accommodation ("[i]n case red will help"). Since the shop owner's offer was rejected—ie, no contract for blue widgets was formed—she did not sustain any damages (**Choices A & B**). However, the shop owner can still accept the shipment, thereby creating a contract for red widgets at the list price.

Alternatively, the shop owner may reject the shipment. There would then be no contract for blue *or* red widgets, and the shop owner would have no further rights against the supplier. This also means that:

the shop owner could not recover for breach of contract (**Choice D**)

the supplier would have no right to cure (ie, fix a breach by shipping conforming goods) **(Choice A)** and

the shop owner would not be required to cover (ie, purchase substitute goods to mitigate the damages after a breach) **(Choice B)**.

Educational objective:

Under the UCC, a seller can accept an offer to buy goods for prompt or immediate shipment by promising to ship or actually shipping conforming goods. However, shipping nonconforming goods serves as both a rejection and counteroffer if the seller notifies the buyer that the shipment was merely an accommodation.

References

U.C.C. § 2-206 (Am. Law Inst. & Unif. Law Comm'n 2020) (explaining that a shipment of nonconforming goods is not an acceptance if the seller notifies the buyer that the shipment was merely an accommodation).

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