



National Grain and Feed Association Arbitration Decision

www.ngfa.org | www.ngfa.org/decisions

1250 I (Eye) Street, N.W., Suite 1003
Washington, DC 20005-3922

P: (202) 289-0873
F: (202) 289-5388

July 24, 2015

CASE NUMBER 2651

PLAINTIFF: AURORA COOPERATIVE ELEVATOR COMPANY, AURORA, NEB.

**DEFENDANTS: AVENTINE RENEWABLE ENERGY HOLDINGS, INC., PEKIN, ILL.
AVENTINE RENEWABLE ENERGY, INC., PEKIN, ILL.
AVENTINE RENEWABLE ENERGY-AURORA WEST, LLC, DALLAS, TEX.**

STATEMENT OF THE CASE

This dispute involved various transactions between the plaintiff, Aurora Cooperative Elevator Company (“Aurora”), and the defendants, Aventine Renewable Energy Holdings, Inc., Aventine Renewable Energy, Inc. and Aventine Renewable Energy - Aurora West, LLC (collectively, “Aventine”).

The relationship between Aurora and Aventine has a lengthy history that includes numerous business arrangements and court litigation, which were not at issue in this arbitration case. Of significance in this case was the Grain Supply Agreement between the parties, dated August 1, 2006 (“Supply Agreement”). Neither party disputed that this agreement was valid, applicable and controlling in this case. Under the basic terms of the Supply Agreement, Aurora intended to operate a grain handling facility at the Aurora West Industrial Site, and Aventine intended to operate an ethanol production facility at that same site. The agreement provided that Aventine intended to acquire all of the grain to operate the plant exclusively from Aurora, and Aurora was willing to supply it subject to the terms of the agreement.

Aurora stated that beginning in May and continuing in June of 2012, representatives of both Aurora and Aventine were in frequent communication concerning procurement of an adequate supply of grain for the anticipated startup of the Aurora West ethanol plant. On June 6, 2012, the parties priced 10,000 bushels of U.S. No. 2 yellow corn under the terms of the Supply Agreement at \$6.3356-per bushel. This transaction was confirmed by “Pricing Confirmation Sales Contract” number 15489. There was no dispute between the parties concerning this contract as the grain was fully paid for and delivered.

On or about June 14, 2012, the parties priced an additional 300,000 bushels at \$6.71-per bushel. This transaction was confirmed by “Pricing Confirmation Sales Contract” number 15499. Aventine paid Aurora in advance for 80,163.75 bushels under this contract, and Aurora delivered those bushels. There was no dispute between the parties concerning the validity of contract 15499.

According to Aurora, throughout this same period in June 2012, it acquired an additional 1,735,644 bushels on Aventine’s behalf and pursuant to Aventine’s instructions. On July 3, 2012, Aventine advised Aurora that it would not be operating the Aurora West plant for an indefinite period of time and that it did not have the need for additional corn. Consequently, at issue in this case were the undelivered

229,836 bushels of corn under contract 15499, and the 1,735,644 bushels that Aurora claimed it had already acquired on Aventine's behalf.

With respect to contract 15499, Aventine admitted that it failed to perform and provided notice of its failure to perform under this contract on July 3. Aurora ultimately sold the 229,836 bushels remaining under contract 15499 at a net gain of \$282,721.57. Aurora acknowledged that it owed this sum to Aventine pursuant to the specific terms of the Supply Agreement. The parties noted that the NGFA Trade Rules do not generally provide for a non-performing buyer or seller to be entitled to payment under a contract, but that the agreement in this case superseded the Trade Rules on this issue. The Supply Agreement in paragraph 13 specifically provided:

If Aventine and Aurora Co-op agree that previously contracted and or acquired Grain should be sold, and if such Grain is sold at a loss, Aventine agrees to pay Aurora Co-op any market related losses incurred by Aurora Co-op as result of such sale ... If such Grain is sold at a profit, Aurora Co-op agrees to pay to Aventine any such profit, less additional Handling and Carry costs associated therewith.

With respect to the remaining quantity of 1,735,644 bushels, Aurora argued that it had acquired those bushels on Aventine's behalf based upon email exchanges and communications between the parties. According to Aurora, after discussions concerning the outstanding corn obligations and Aventine's ultimate failure to provide appropriate directions, Aurora converted those bushels under "Cash Grain Contract" number 15548 at a price of \$8.89280-per bushel on July 16, 2012. Aurora claimed a loss of \$2,116,817.82 in the "commercially reasonable resale" of those bushels.

Aventine disputed Aurora's claims related to the 1,735,644 bushels and the validity of contract 15548. Aventine denied that it directed acquisition of those bushels. Aventine argued that Aurora failed to sufficiently identify, support and document those trades in dispute and the damages it claimed. Aventine also argued that Aurora failed to issue written confirmations in conformity with the terms of the Supply Agreement and the NGFA Trade Rules with respect to these transactions.

The Supply Agreement provided that Aventine intended to acquire all of the grain to operate the plant exclusively from Aurora, and Aurora was willing to supply all of the grain to operate the plant "in each case upon and subject to the terms and conditions in this Agreement." The provisions of the Supply Agreement of significance on the disputed contract 15548 were as follows:

4. GRAIN CONTRACTS. All Grain purchased by Aventine from Aurora Co-op pursuant to this Agreement shall be purchased pursuant to written contracts which are in the form set forth in Exhibit A (the "Grain Contracts"). All Grain Contracts between Aurora Co-op and Aventine shall be subject to the trade rules of the National Grain and Feed Association (the "NGFA").

10. PAYMENT.C. Payment for Cash Positions. All cash positions held by Aurora Co-op for the benefit of Aventine shall be converted to cash Grain Contracts on the 1st and the 15th of each month. ...

13. AVENTINE OBLIGATION TO TAKE DELIVERY OF GRAIN. Each month Aventine shall provide Aurora Co-op with a twenty-four (24) month rolling forecast of its Grain requirements. Aventine is required to take delivery of any contracted Grain and any other Grain acquired by Aurora Co-op on behalf of Aventine pursuant to such rolling forecasts. ...

Aventine claimed that it did not provide a 24-month forecast because of the market volatility that existed at the time. Aventine argued that had a forecast been made, it would have been written down and shared

between the two parties. Aventine further stated that had Aurora issued confirmations on May 15, June 1, June 15 or July 1, pursuant to the terms of the Supply Agreement, in lieu of not providing a written confirmation until July 16, Aventine could have clarified its position and mitigated any damages. Aventine also argued that Aurora failed to abide by NGFA Grain Trade Rule 3 “Confirmation of Contracts.”

Aventine also stated in its counterclaim that Aurora wrongfully refused to remit payment of \$134,943.92 for the sale of wet distillers grains under a separate marketing agreement, dated Aug. 1, 2006. In its rebuttal argument, Aurora admitted that it owed this sum to Aventine. Aurora stated that it applied the proceeds from the sale of the distillers grains – in addition to the sum of \$282,721.57 due to Aventine under contract 15499 – to its claim for damages under contract 15548. Consequently, Aurora claimed damages of \$1,699,152.33, including the offset of \$417,665.49 due to Aventine. Aurora also claimed interest at the rate of 8.25% pursuant to the Supply Agreement as well as reimbursement of arbitration fees.

THE DECISION

The arbitrators determined that the case came down to the validity of contract confirmation number 15548 for the sale and immediate delivery of 1,735,664 bushels of U.S. No. 2 yellow corn at the price of \$8.89-per bushel. In their review and decision in this case, the arbitrators reached the following conclusions:

- Contract confirmation 15548 was written and issued by Aurora on July 16, 2012. Aurora issued this confirmation after Aventine had informed it on July 3, that Aventine would not be operating the facility due to low margins and would not need any corn that Aurora had accumulated.
- Aurora had failed on previous opportunities to issue contracts on portions of the bushels in dispute that Aurora claimed it had accumulated “for the benefit of Aventine” on May 15, June 1, June 15 and July 1. If Aurora was, in fact, accumulating corn for the benefit of Aventine, Aurora could have at those times issued contracts plus charged a deferred delivery charge adjustment fee pursuant to the Supply Agreement.
- When Aventine specifically sought to buy corn for a particular purpose in the past, the parties generated cash contracts. Contract 15489 was issued on June 6, 2012 for 10,000 bushels for June 6 – July 30, 2012 delivery at \$6.3356-per bushel; contract 15499 was issued on June 14, 2012 for 300,000 bushels for June 14 – July 30, 2012 delivery at \$6.71-per bushel. There was no dispute between the parties over the validity of these two contracts.
- When Aurora issued contract confirmation 15548 on July 16, 2012, Aventine’s CEO promptly (on the following day) disclaimed the contract in an email to Aurora’s CEO. The communication from Aventine was in conformity with NGFA Grain Trade Rule 3, which provides a procedure for objecting to a contract confirmation.
- It was peculiar that although Aurora claimed it had been accumulating corn “for the benefit of Aventine” prior to the June 14, 2012 sale of 300,000 bushels, Aurora went to the reseller market to procure those 300,000 bushels for Aventine’s account.

- There were multiple references throughout both parties' written arguments that indicated the basis risk/opportunity for the corn accumulated by Aurora had not transferred to Aventine. Aurora was forthcoming on the quantities it was buying and the basis levels it was paying, but at no time did it attempt to define the basis to which Aventine was entitled until contract confirmation 15548 was issued on July 16. Further, Aurora did not provide details on the methodology used to establish the basis for contract 15548.

Aventine may have misled Aurora on several occasions by stating that once operations began at the ethanol plant, Aventine would need about 100,000 bushels per day. However, these statements did not represent the "24 month rolling bushel forecast" and the mechanism contained in paragraph 13 of the Supply Agreement was never triggered to create a purchase obligation for Aventine with respect to Aurora's cash positions. Aurora's claim that an email from 2008 constituted a 24-month rolling average forecast for May 2012 was not a valid argument.

THE AWARD

The arbitrators denied Aurora's claim for damages for the aforementioned reasons. The arbitrators awarded \$417,665.49 in damages to Aventine as submitted in Aventine's counterclaim and not disputed by Aurora. Interest shall accrue on the award at the rate of 8.25% per annum pursuant to the terms of the Supply Agreement from the date of this decision until the judgment is paid. The arbitrators declined to award legal fees or arbitration costs to either party.

Decided: March 19, 2014

Submitted with the unanimous consent of the arbitrators, whose names appear below:

Mike Irmen, *Chair*
Vice President,
Commodities and Risk
Ethanol Group
The Andersons Inc.
Maumee, OH

Raymond E. Defenbaugh
President, CEO and
Chairman
Big River Resources LLC
West Burlington, IA

Craig Haugaard
Grain Division Manager
North Central Farmers
Elevator
Ipswich, SD



July 24, 2015

APPEAL CASE NUMBER 2651

PLAINTIFF/APPELLANT: AURORA COOPERATIVE ELEVATOR COMPANY, AURORA, NE

DEFENDANTS/APPELLEES: AVENTINE RENEWABLE ENERGY HOLDINGS INC., PEKIN, IL
AVENTINE RENEWABLE ENERGY INC., PEKIN, IL
AVENTINE RENEWABLE ENERGY – AURORA WEST, LLC, DALLAS, TX

An oral hearing was conducted in the appeal of this case during which both parties presented arguments and evidence.

MAJORITY DECISION

The NGFA Arbitration process directs the arbitrators to, first and foremost, interpret the contracts in question. The majority of the members of this Appeals Committee interpreted the terms of the agreement between the parties in this case – the Grain Supply Agreement, dated August 1, 2006 (“Supply Agreement”) – and determined that the appellees/defendants (collectively, “Aventine”) performed under the terms of the contract; the plaintiff/appellant (“Aurora”) did not.

The original Arbitration Committee rightly concluded that the crux of this case came down to the validity of “Cash Grain Contract” confirmation number 15548. The most definitive action taken by either party related to this issue was when this contract confirmation was immediately disclaimed by Aventine’s chief executive officer in conformity with NGFA Grain Trade Rule 3. Aurora sought to connect a prior contract between it and another entity owned by Aventine to the situation at hand. However, the majority of the Appeals Committee concluded that neither that contract (nor performance of the parties under that contract) was germane to this case.

The original Arbitration Committee also correctly referred to Aurora’s failure to provide sufficient evidence in support of its claims for damages. Aurora claimed that the daily e-mail exchanges had become the accepted means of communication between the parties notwithstanding the communication procedures required in the Supply Agreement. If the e-mail communications had become “basis contracts” as Aurora claimed, Aurora should have issued grain sale confirmations on June 1, June 15 and July 1, 2012 – in lieu of contract confirmation number 15548, which was issued on July 16, 2012. Because Aurora failed to issue grain sale confirmations pursuant to the Supply Agreement, the arbitrators were unable to determine whether or not Aurora originated the grain in dispute for Aventine or at what price this origination had occurred. Nor was there documentation of the actual sale of the grain so damages could be properly calculated. Aurora’s inability to provide documentation of the actual sale of the remaining 1,735,664 bushels of U.S. No. 2 yellow corn under contract confirmation

number 15548, or the methodology used to establish the basis price of \$8.89280 per bushel, rendered it impossible for an arbitration committee to verify that Aurora's claimed loss of \$2,116,817.82 in the resale of those bushels was commercially reasonable and valid. Aurora could not reasonably claim to have utilized NGFA Grain Trade Rule 28 to determine its market losses without documentation of the actual sale of the grain or evidence of the methodology used to establish the basis price. Also, Aurora failed to produce such records upon demand by Aventine under paragraph 14 of the Supply Agreement, which provided Aventine the right to inspect Aurora's books and records upon request. Therefore, even if the arbitrators would otherwise have been inclined to rule in favor of Aurora, Aurora failed to adequately support its claims for damages.

As the original Arbitration Committee noted, there were multiple references throughout both parties' written arguments that indicated the basis risk/opportunity for the corn accumulated by Aurora had not transferred to Aventine. The absence of grain sale confirmations and subsequent resale information on the disputed 1,735,664 bushels supports Aventine's position that ownership of this grain did not transfer between the parties.

AWARD

Therefore, by decision of the majority of the Arbitration Appeals Committee the award of the original Arbitration Committee stands.

THE MAJORITY DECISION WAS SUBMITTED BY THE ARBITRATORS, WHOSE NAMES AND SIGNATURES APPEAR BELOW:

Sharon Clark
Sr. VP, Transportation &
Regulatory Affairs
Perdue AgriBusiness LLC
Salisbury, MD

Jeff Edwards
Vice President
J & J Commodities.
Greenville, NC

Matt Gibson
VP, Sales & Tech Services
LifeLine Foods LLC
St. Joseph, MO

DISSENTING OPINION

The parties in this dispute are the signatories of the Aventine Grain Supply Agreement (Supply Agreement). Both parties agree that this 20-plus page document was the governing contact for this dispute.

One of the components of this agreement stipulated that Aurora would be the exclusive seller of grain to Aventine for the facility and attempted to define a form of cost-plus pricing, whereby Aurora would purchase grain from the market and then add the allowable fees/freight adjustments to determine a basis price at which the sales would transpire. However, the Supply Agreement was incomplete as it did not detail the specific mechanics involved to accomplish this pricing method. Exhibits that were referenced in the Supply Agreement were not even included in the final draft of the agreement.

The parties also had an ongoing relationship prior to the contracts in question. They had been utilizing a similar Supply Agreement for another plant, and intended this agreement to follow suit. Testimony in the record indicated that the parties had through past course of dealings deviated from some of the terms of the previous written Supply Agreement.

The dispute in this matter was which party was to bear the cost of the long corn basis position that was being accumulated (prior to the expected plant startup). As the long position was accumulated, Aurora sent daily spreadsheets to Aventine detailing the quantities and values being purchased by Aurora along with the applicable fees and freight charges. Aventine's buyer and Aurora's merchandiser also had ongoing telephone and text communications about the positions taken.

Aventine ultimately relied on the terms in the Supply Agreement that required the cash "Grain Contracts" to be written on the 1st and 15th of the month. When this dispute arose, Aventine argued that since the accumulated positions had not been reduced to "Grain Contracts" at the appropriate time, they should not be for the account of Aventine.

Aurora argued, however, that the parties had a practice of utilizing the spreadsheet to convey the long positions taken, and had only been issuing "Grain Contracts" after they were "priced" (after CBOT futures levels were set). This past practice and course of dealing between the parties (while in conflict with the written Supply Agreement) demonstrated their true and ongoing relationship and agreement. Since Aventine was not drawing any corn due to its delayed opening, the spreadsheet relayed the relevant positions, and the cash grain contracts were not written until they were priced to facilitate invoicing.

Aurora included in the record for this case, transcripts of recorded conversations and texts between Aurora's merchandiser and Aventine's buyer. These transcripts showed Aventine's buyer behaving in a manner consistent with having the basis risk of the position, including expressing regret over missed opportunities and even giving directions to Aurora's merchandiser regarding rolling positions from one CBOT contract month to a deferred month. Although Aventine argued that the conversations were just exchanges of information, the transcripts showed that Aventine's buyer believed and acted as if the accumulated position was for Aventine's account in support of Aurora's argument in this case.

While written supply agreements and grain contracts are the best expression of an agreement, they are not the only form. When ongoing practices between the parties continue to run counter to the terms of written agreements, at some point the practices override the written agreement when they are not objected to in a timely manner. This appears to be the case in this dispute. Past practices and the actions of the Aventine buyer and the Aurora merchandiser lead to the conclusion that both parties in this dispute believed that the positions being accumulated were for the account of Aventine.

THE DISSENTING OPINION WAS SUBMITTED BY THE ARBITRATORS, WHOSE NAMES AND SIGNATURES APPEAR BELOW:

Roger Krueger, *Chair*
Senior Vice President, Grain
South Dakota Wheat Growers Association
Aberdeen, SD

Dean O'Harris
Director of Western Trade
Parrish & Heimbecker, Inc.
Buckeye, AZ

Decided: July 2, 2015