



Arbitration Decision

November 7, 1991

Arbitration Case Number 1661

Plaintiff: Parrish and Heimbecker, Inc., Brown City, Mich.

Defendant: Agway, Inc., Syracuse, N.Y.

Cross-Defendant: Nabisco Brands, Inc., Parsippany, N.J.

Statement of the Case

In May and June, 1988, the cross-defendant, Nabisco Brands Inc., purchased 250,000 (two contracts, 150,000 and 100,000) bushels of soft white wheat from the defendant, Agway Inc., for September 1988 delivery to the Nabisco bakery at Niagra Falls, N.Y. Agway Inc. subsequently purchased the wheat from the plaintiff, Parrish and Heimbecker Inc. for delivery to the Nabisco bakery.

Nabisco's purchase contracts called for rail shipment with the option to switch to truck with first official grades and destination weights to apply. Both Agway's and Parrish and Heimbecker's purchase and sale contracts, respectively, called for rail shipment with option for trucks and destination weights and grades to govern.

Parrish and Heimbecker Inc. began delivery by truck on Sept. 1, 1988. Six truckloads were delivered on Sept. 1, 1988. On Sept. 2, 1988, Nabisco notified Agway to cease delivery because Nabisco had discovered a foreign substance (glass) in the production process. Agway subsequently notified Parrish and Heimbecker.

Nabisco received wheat from other origins on Sept. 1, 1988. However, all of the receipts were purchased from Agway, which in turn had purchased part of the delivered wheat from Parrish and Heimbecker. Of the Agway purchases from Parrish and Heimbecker that were delivered on Sept. 1, all were delivered by Frederick Transport and all originated from Norfolk Cooperative, Waterford, Ontario, Canada. Nabisco discovered the glass in its production process on Friday, Sept. 2, 1988 at approximately 1 a.m. and again at 4:45 a.m. Nabisco sampled each truckload with a standard six-foot probe and submitted the samples to the Buffalo Corn Exchange

for inspection. None of the inspection certificates issued by the Buffalo Corn Exchange indicated glass contamination.

Subsequent to the discovery of glass in its bakery production equipment, Nabisco on Friday, Sept. 2, 1988 shut down the production lines and cleaned the system, which included removing and disposing of the cooked wheat and placing a quarantine on the finished product. Nabisco advised Agway, which in turn advised Parrish and Heimbecker that no deliveries would be accepted until further notice. Production was not restarted after the cleanup on Sept. 2, 1988 because of the limited time prior to a scheduled closing for Labor Day weekend. The bakery began operation again on Monday evening, Sept. 5, 1988. Agway was advised—and it in turn notified Parrish and Heimbecker—that deliveries could be accepted.

According to Nabisco's bin records, the wheat from Norfolk Cooperative and transported by Frederick Transport was placed in four different bins (numbers 11, 24, 28, and 54), along with wheat from other origins.

On Wednesday, Sept. 7, 1988, at approximately 12:15 a.m., Nabisco personnel again discovered glass in the bakery production equipment. Later in the day, Parrish and Heimbecker delivered one load of wheat to the plant. The next day, Sept. 8, 1988, Parrish and Heimbecker, for the account of Agway, delivered eight loads to the bakery. Nabisco refused the wheat without sampling or unloading. Nabisco again notified Agway, which in turn notified Parrish and Heimbecker, that no deliveries would be accepted until further notice.

After the second glass discovery, Nabisco personnel ascertained that the wheat containing glass had come from bin number 28. In the four days preceding the first discovery of glass, Nabisco had put 978,620 pounds of wheat into bin number 28 and pulled a total of 1,222,020 pounds out. The Agway wheat purchased from Parrish and Heimbecker and delivered by Frederick from Norfolk Cooperative was the last wheat that went into the bin. Nabisco released the quarantine on all the suspect bins with the exception of bins 11, 24, 28, and 54, which were bins containing Frederick-transported wheat.

Beginning Sept. 9, 1988, a series of facsimile exchanges and phone conversations occurred between the three parties regarding resumption of deliveries, payment for the seven loads delivered by Parrish and Heimbecker for the account of Agway, and accountability for return freight on the eight loads Nabisco refused to accept on Sept. 8, 1988.

On Sept. 15, 1988, Nabisco notified Agway, which in turn notified Parrish and Heimbecker, that the bakery would again accept deliveries but would exclude wheat transported by Frederick or originating at Norfolk Cooperative, Waterford, Ontario, Canada.

Again, several oral and written exchanges occurred regarding the contract obligations and delivery schedules.

To prove conclusively that the glass came from the suspected Frederick deliveries, Nabisco sought discovery of Frederick Transport records. Frederick refused the request but was subsequently so ordered by a New York

state court. Frederick's records, according to Nabisco's evidence, only pertained to the lead trailer when pulled in tandem.

Nabisco retained a consulting firm specializing in ultramicroanalysis, microscopy and small-particle problems to perform tests on samples of the glass found in the bakery. The consulting firm concluded that the majority of the glass in the sample was modern float glass, such as the type used in automobile glass. Nabisco's evidence showed that Frederick Transport regularly hauled glass cullet for an automobile manufacturer but did not determine conclusively that a load of glass cullet immediately preceded the wheat delivered to the bakery.

On Oct. 29, 1988, Agway demanded payment for the seven loads of wheat delivered on Sept. 1, 1988 (6) and Sept. 7, 1988 (1). Nabisco refused payment because of its conclusion that the loads contained glass. Parrish and Heimbecker sent an invoice to Agway dated Nov. 12, 1988 demanding payment for the wheat. From October 1988 through the Spring of 1989, several communications occurred between the parties regarding the disposal of the wheat in the four quarantined bins previously referenced and other compensatory issues.

Parrish and Heimbecker had the wheat purchased from the Canadian Wheat Board originating at several locations with a contract specification that the wheat had to be exported. Parrish and Heimbecker had arranged for Frederick to haul approximately half of the 250,000 bushels. The disruption in the delivery schedule, plus the restriction excluding conveyance by Frederick Transport, caused Parrish and Heimbecker to revamp its entire plan of wheat origination and contract applications.

The Decision

On July 17, 1989, Parrish and Heimbecker commenced arbitration proceedings against Agway for a total of \$122,481.81, which included \$17,213.35 for wheat not paid for; \$3,547.22 in return freight on rejected loads; \$21,373.14 for interest; \$16,698.76 for storage; \$8,533.76 for elevation; and \$55,115.58 for market difference.

The basis of the Parrish and Heimbecker claim was that Agway had violated NGFA Grain Trade Rule 3. Parrish and Heimbecker contended that since the disputed wheat was accepted by Nabisco and the grade certificates issued by the Buffalo Corn Exchange did not indicate contamination, that title, as well as risk of loss and damage, had transferred to Nabisco.

Agway filed a cross-claim against Nabisco for payment of the seven loads of wheat plus finance charges totaling \$20,682.90. Agway cited violations of NGFA Grain Trade Rules 16, 17 and 21 by Nabisco. Agway also contended that Nabisco should be responsible for any consequential damages due Parrish and Heimbecker by indemnifying Agway.

Nabisco denied the Agway cross-claim for damages and claimed damages of \$1,475,026.00 including \$1,240,844.00 lost profits, \$93,471.00 in costs associated with raw material, \$98,348.00 in disposal costs and \$42,363.00 in labor cost. Nabisco also sought reimbursement for all legal expenses.

Agway asserted that Parrish and Heimbecker must hold harmless and indemnify Agway against any and all Nabisco claims for damages, citing the common-law principal of indemnity.

Parrish and Heimbecker asserted that Nabisco violated the timely filing of pleadings for its claim and that Agway should have filed a formal cross-complaint against Parrish and Heimbecker versus a position of indemnification against any and all potentially valid Nabisco claims for damages.

Concerning Nabisco's failure to file arbitration pleadings consistent with the schedule established by the NGFA Secretary, the committee denied Parrish and Heimbecker's claim. The issue of late filing was between Agway and Nabisco and was for Agway to raise, which did not occur. Furthermore, Arbitration Rule 7(h), as it then existed, gave the NGFA Secretary discretion to allow late filing regardless of when the request was made. Under the circumstances, the NGFA Secretary did not abuse his discretion in permitting the papers to be filed. Therefore, Parrish and Heimbecker's request that Nabisco be found in default was denied.

On the issue of whether Agway lost its claim against Parrish and Heimbecker by failure to file a formal cross-complaint, the arbitrators found in favor of Agway. In response to cross-defendant Nabisco's counter-claim, Agway submitted what it called a "reply brief" in which it, among other things, requested indemnification from Parrish and Heimbecker for the claims made by Nabisco. Regardless of the title of the document, it effectively provided notice to Parrish and Heimbecker that a claim was being asserted against it; therefore, it could be considered as a cross-claim.

The committee wished to note that certain procedural formalities were handled rather loosely in this case. The panel believed that certain amendments to rules and procedures governing arbitration subsequently implemented would have prevented some of the problems in this case.

The boilerplate language in the cross-defendant's — Nabisco's — purchase contracts (which were signed by Agway) contained numerous warranties, including, in

part, reference to the federal Food Drug and Cosmetic Act, delivery to be made in clean trucks suitable for transportation, protection of the integrity of its contents and that the commodity be merchantable.

The defendant's—Agway—contracts were very informal, handwritten and included no "terms and conditions" other than the specifics of the transactions. However, Agway executed both the Parrish and Heimbecker sales contracts and the Nabisco purchase contract and therefore, became obligated to the terms contained in those written contracts.

Parrish and Heimbecker's contracts contained numerous boilerplate provisions. One referenced that the commodity furnished would be "of merchantable quality." Another stated that the contract "shall be governed by the U.S. Grain Standards Act." A third stated that the contract "shall be governed by the law effective in the State of Michigan."

All of the contracts incorporated by reference the NGFA Trade Rules. In addition, each contract expressly or by implication was governed by the Uniform Commercial Code, the federal Food, Drug and Cosmetic Act, and the U.S. Grain Standards Act.

The cross-defendant—Nabisco—did not clearly and conclusively provide evidence that the glass-contaminated wheat was delivered by Frederick Transport and originated at Norfolk Cooperative, Waterford, Ontario. The arbitration committee, however, after thorough review of the written and oral testimony, concluded that the cross-defendant's investigation of the sequence of grain deliveries, bin records and movement of wheat into the cleaning and bakery process did, by preponderance of the evidence, show that the glass-contaminated wheat was transported by Frederick and was deposited in bin number 28.

The arbitrators after reviewing all the submitted evidence and conducting an oral hearing at the request of the disputants, unanimously agreed to find in favor of the cross-defendant, Nabisco, with revisions in the requested claim for damages. Parrish and Heimbecker's claim against Agway and Agway's cross-claim against Nabisco were denied.

The Award

The cross-defendant, Nabisco, asserted that lost sales of bakery products (product produced but destroyed plus forgone production caused by down time) resulted in a forgone profit of \$1,240,844.00.

The arbitration committee unanimously awarded the cross-defendant the following claims for damage against the defendant, Agway:

(1) cooked wheat destroyed:	\$26,455.00
(2) cleaned wheat destroyed:	\$18,726.00
(3) uncleaned wheat sold: (net of proceeds)	\$26,153.00
(4) freight and fumigation charges on wheat sold:	\$22,137.00
(5) labor (hourly):	\$29,921.00
(6) disposal costs of screenings and cooked wheat:	\$38,061.00
(7) loading railroad cars including lease excluding demurrage costs:	\$22,408.00
(8) freight to recall finished product:	\$1,010.00
(9) disposal of finished goods:	\$19,426.00
<hr/>	<hr/>
Total Award:	\$204,297.00

The arbitration committee unanimously agreed that the cross-defendant, Nabisco, did not present sufficient evidence to support a claim for lost profits. Therefore the claim was denied. Also, the cross-defendant's claim for legal expenses was denied.

The arbitration committee also unanimously agreed to award the defendant, Agway, the same amount (\$204,297.00) in its cross-claim against the plaintiff, Parrish and Heimbecker.

No interest was awarded to the cross-defendant from the defendant nor to the defendant from the plaintiff.

Submitted with the consent and approval of the arbitration committee whose names appear below:

Thomas D. Couch, Chairman
Demeter Inc., Fowler, Ind.

Jerold A. Gilbert
ConAgra Grain Companies, Minneapolis, Minn.

Anthony J. Flagg
Pendleton Flour Mills Inc., Pendleton, Ore.