



Arbitration Decision

National Grain and Feed Association

July 2, 1997

Arbitration Case Number 1763

Plaintiff: The Andersons Inc., Maumee, Ohio

Defendant: Horton Farms Inc., Tekonsha, Mich.

Statement of the Case

This case involved nine separate contracts containing Flex™/Convertible™ Contract Terms for the purchase of corn by the plaintiff, The Andersons Inc., from the defendant, Horton Farms Inc.¹

The contracts provided that the corn was to be delivered by the defendant to the plaintiff's Albion, Mich., facility. Five of the contracts provided for December 1995 delivery [three of these contained a pricing formula, "with the basis set at \$.24 under the March 1996 reference price"] and four of the contracts provided for July 1996 delivery [two of these provided that, "the HTA reference price set at \$2.55 versus March 1996," while the other two provided that, "the HTA reference price set at \$2.71 versus the March, 1996"]. The plaintiff contended that the defendant refused to deliver on its December 1995 contractual obligations and, as a result, the plaintiff canceled its open contracts with the defendant. The plaintiff sought to collect the market difference and contract cancellation charges in the amount of \$211,400, plus interest at the rate of 18 percent per annum, costs of collection and attorney fees.

The defendant contended, among other things, that the delivery date in the contracts "was in most instances a mere matter of form, since delivery was not actually

required." The defendant also contended that the parties had an "oral agreement that these contracts could be repeatedly rolled forward, that delivery was not expected of me, and that I could easily get out of these agreements in the future, if necessary." In addition, the defendant contended that the plaintiff refused to give the defendant assurances that the plaintiff intended to make full payment for the delivery of the commodity. The defendant submitted a counterclaim for breach of contract in the amount of \$30,200, plus interest, for amounts previously deducted from payments to the defendant from the plaintiff.

While the parties disagreed on several factual matters, it was clear that the defendant failed to make delivery on those contracts providing for delivery in December 1995. It also was clear that the parties had a long history of trading and that the contracts expressly incorporated the NGFA® Trade Rules. Further, the arbitrators concluded that the plaintiff made reasonable efforts to contact the defendant prior to canceling the open contracts.

Specifically, the plaintiff communicated in writing to the defendant's attorney on Jan. 2, 1996, and offered to accept delivery beginning on Jan. 5, 1996. The defendant's attorney responded on Jan. 8 that "the principals of Horton Farms Inc. with whom I deal in connection with the company's transactions with Andersons have not been available to communicate for several days and are antici-

¹ This case was arbitrated pursuant to a court order issued in *The Andersons Inc. v. Horton Farms Inc.*, Case No. 1:96-CV-171, U.S. District Court, Western District of Michigan, Southern Division (Sept. 30, 1996). The court found that the contractual provisions in the parties' contracts providing for arbitration pursuant to National Grain and Feed Association rules were enforceable.

© Copyright 1997 by National Grain and Feed Association. All rights reserved. Federal copyright law prohibits unauthorized reproduction or transmission by any means, electronic or mechanical, without prior written permission from the publisher.

pated to be gone for another couple weeks (snowmobiling in northern Michigan and Wisconsin). Accordingly, my only authority is to tell you that the company's position remains the same as it has in the past." The plaintiff submitted evidence that one of its employees did reach the defendant's president at home on Jan. 15 and that the defendant's president communicated the defendant's position that delivery on the contracts would not be made. The plaintiff's employee also was told "to never call him [defendant's president] again." The plaintiff thereafter canceled the open contracts with the defendant at the close of the market on Jan. 16, 1996.

The Decision

The arbitrators thoroughly reviewed the arguments and documents submitted by both parties and took all of the submissions into consideration in reaching their decision in this case.

The arbitrators concluded that the plaintiff was justified in canceling all nine of the open contracts on Jan. 16, 1996. The five contracts with delivery dates of December 1995 clearly were in default. As for the four contracts with July 1996 delivery dates, the arbitrators concluded that the plaintiff was entitled to seek the defendant's assurance that it would perform on those contracts given the defendant's failure to deliver on the five contracts providing for December 1995 delivery.

The arbitrators also concluded that NGFA® Grain Trade Rule 43 was not applicable to the facts in this case. Grain Trade Rule 43, "Failure to Perform," provides that:

"Failure to perform in keeping with the terms and conditions of a contract shall be grounds for the refusal only of such shipment or shipments, and not for the rescission of the entire contract or any other contract between the Buyer and Seller."

The facts in this case showed that the defendant not only breached the first five contracts, but also communicated an intent to breach all of the contracts prior to the cancellation of the contracts by the plaintiff on Jan. 16,

1996. Thus, in this case, NGFA® Grain Trade Rule 43 was inapplicable and the plaintiff's action in canceling all of the open contracts complied with the provisions of NGFA® Grain Trade Rule 10.²

Moreover, the plaintiff's cancellation on Jan. 16 of the contracts with July delivery dates actually benefited the defendant in this case, given the defendant's advance breach of the contracts. The arbitrators found that the corn market moved up between Jan. 17 and July 1, when it closed at \$5.38 ½. The plaintiff's damage claim against the defendant would have been much greater had the plaintiff not canceled the open July contracts when it did. Therefore, the arbitrators concluded that the plaintiff's actions were justified and reasonable at the time, and resulted in mitigating the damages in this case.

The defendant contended that it did not understand nor agree with the cancellation charges involved in the various amendments to the contracts. However, the long history of doing business between the two parties suggested otherwise. The evidence submitted in this case showed that both parties were willing participants in the workings of these types of contracts. Further, the signature of the defendant's president on the contracts, along with the detailed updates of profits and losses on the contracts and amendments, showed that the parties clearly understood their rights and obligations when entering into the contracts and amendments.

The standard terms in each of the contracts provided that, "[f]ailure to fulfill this contract will result in minimum contract cancellation charges to the Seller, the total of which will be the difference between the contract price and the replacement cost at the time of cancellation, plus the cancellation charge in effect. Seller shall also be liable for The Andersons' attorney fees, costs of collection, plus interest." [Emphasis added.] The defendant, therefore, was obligated contractually to pay cancellation charges assessed by the plaintiff pursuant to its normal cancellation charges then in effect. The defendant also was obligated contractually to pay the plaintiff's attorney fees, costs of collection, plus interest, if the contracts were not fulfilled.

² [Editor's Note: The relevant portion of Grain Trade Rule 10, "Incomplete Shipment or Delivery," provides as follows: "... **If the Seller fails to notify the Buyer of his inability to complete his contract, as above provided, the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted.** If so, the Buyer shall immediately (a) agree with the Seller upon an extension of the contract to cover the deficit; (b) after having given notice to the Seller to complete the contract, the Buyer, by the exercise of due diligence, will buy-in for the account of the Seller the defaulted portion of the contracts; or (c) **after having given notice to the Seller to complete the contract, the Buyer will cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.**" (Emphasis added.)]

The Award

For the aforementioned reasons, the arbitrators found in favor of the plaintiff, The Andersons Inc., and against the defendant, Horton Farms Inc., as follows:

- ▶ Damages of \$211,400 were awarded to the plaintiff. This amount included a 10-cent-per-bushel cancellation fee on 300,000 bushels of undelivered corn;
- ▶ Attorney fees and costs of \$29,000 were awarded to the plaintiff to compensate for the costs it incurred in connection with the court case to compel enforcement of the arbitration provisions in the parties' contracts³. These costs were incurred as a result of the defendant's failure to submit the dispute to arbitration pursuant to the parties' contractual agreement;
- ▶ Interest on the contract damages of \$211,400 was awarded from Jan. 16, 1996 until paid at the rate of 9 percent per annum; and
- ▶ Interest on the attorney fees and costs of \$29,000 was awarded at the rate of 9 percent per annum from the date the plaintiff paid each invoice or court charge until reimbursed by the defendant. The arbitrators

directed the plaintiff to submit its paid invoices and interest rate calculations to the NGFA secretary, who shall review and approve the calculations prior to submission to the defendant. The decision of the NGFA secretary shall be final and enforceable.

The arbitrators denied the counterclaim submitted by the defendant, Horton Farms Inc., against the plaintiff, The Andersons Inc.

Submitted with the unanimous agreement and consent of the arbitrators, whose names are listed below:

Steve Norris, Chairman
Manager, Grain Merchandising
Southern States Cooperative Inc.
Richmond, Va.

David Gordon
General Manager
Walla Walla Grain Growers Inc.
Walla Walla, Wash.

Sonia M. Buttino
Grain Manager
Agway Grain Marketing
Syracuse, N.Y.

³ While parties ordinarily pay their own attorney fees in NGFA arbitration cases, the amounts in this case are awarded for the fees and costs incurred by the plaintiff in bringing this matter to arbitration. The plaintiff first submitted this matter for arbitration to the NGFA secretary by letter dated Jan. 17, 1996. The defendant's attorney by letter dated Jan. 30, 1996 communicated that the defendant "is not agreeable to the terms of the NGFA contract for arbitration." Subsequently, the plaintiff sought and obtained a court order compelling the defendant to submit the dispute to arbitration before the National Grain and Feed Association.