



Arbitration Decision

National Grain and Feed Association

February 27, 1997

Arbitration Case Number 1774

Plaintiff: Buckeye Cooperative Elevator Co., Buckeye, Iowa

Defendant: Farmland Industries Inc., Kansas City, Mo.

Statement of the Case

Buckeye Cooperative Elevator Co. ("Buckeye") entered into nine separate contracts at various times during a July 12, 1995 through Aug. 17, 1995 period in which it sold U.S. No. 2 yellow corn for rail shipment, f.o.b. Buckeye, Iowa, to Farmland Industries Inc. ("Farmland").

Each contract involved the sale of 175,000 bushels to be loaded in 50-car units. Each contract provided a specific delivery period for shipment. Buckeye sought damages and costs against Farmland in the amount of \$78,893.96 for lost interest, redrying of piled corn, extra labor, movement of grain to and from alternative space and rental of equipment due to Farmland's failure to perform in a timely fashion.

Farmland issued a "confirmation of purchase contract" for each transaction. Each Farmland confirmation provided, among other things, that "[t]his contract subject to the National Grain and Feed Association Grain Trade Rules and Arbitration Rules." There was no evidence that Buckeye issued a confirmation for any of the nine contracts.

Four of the Farmland confirmations referenced that Farmland was to supply transportation. Five of the confirmations were silent on the issue of transportation; but the conduct of the parties subsequent to the contract dates left no doubt that both parties understood that Farmland was to supply the transportation on those contracts, as well.

The uncontested evidence supplied by Farmland showed that three of the contracts were shipped within contract terms and a fourth partially was shipped within the delivery period set forth in the contract. Farmland's evidence also showed that its inability to perform during the stated delivery periods (i.e. provide rail cars) was caused solely

by carrier-performance problems. However, no evidence was provided that the carrier had a requirement to perform during those periods or that its performance was relevant to the facts in this case.

It also was clear that on Oct. 31, 1995, Farmland agreed to pay the sum of \$1,236,770 (90 percent of the value of three unshipped 50-car trains) to Buckeye in exchange for three Buckeye-issued warehouse receipts (each being for 175,000 bushels U.S. No. 2 yellow corn) to Farmland. The receipts were issued with a date of Oct. 31, 1995 and the money was wire-transferred by Farmland on Nov. 1, 1995.

No evidence was provided to indicate the parties agreed on Oct. 31, 1995 as to when the transportation was to be provided. Nevertheless, Farmland's uncontested evidence showed that the grain was shipped on Dec. 27, 1995, Jan. 20, 1996 and Jan. 25, 1996.

On Nov. 2, 1995, Buckeye faxed invoice number 5812 dated Nov. 1, 1995 to Farmland in the amount of \$60,294.04 to cover damages and costs now at issue in this case. Buckeye, in a cover letter, stated that the invoice was "to cover expenses to date due to F.O.B. Buckeye corn previously purchased by Farmland Grain and billed late or as the case currently, not at all, on three remaining 50's." The invoice disclosed that some of the product moved was soybeans. No evidence was submitted that tied this transaction directly to the contracts involved in this case. Nor was there any evidence to suggest Farmland had agreed to pay the invoiced charges.

Subsequent to Nov. 2, 1995, it appeared that Buckeye added \$18,599.92 to its claim against Farmland. While Buckeye submitted many invoices in support of its claim, no evidence was provided directly linking the invoiced

amounts to the actual contracts at issue. And, as with the original invoice, no evidence was submitted to show that Farmland previously had agreed to pay such costs.

Farmland contended, among other things, that provisions in its contracts excused any late performance on its part under the facts presented. Numbered paragraph 6 of Farmland's contracts expressly stated that "[b]uyer's performance under this contract is contingent upon conditions beyond Buyer's control such as...delay or non-performance of carriers." In addition, in the "Conditions of Purchase" section of Farmland's contracts, the following clause appeared: "We reserve the right to cancel, extend time of shipment, or to fill here or elsewhere, at our option, any contract not filled within contract time." In response, Buckeye argued that Farmland should not have the unilateral right to breach its own contract or unilaterally extend a shipment period at Buckeye's expense.

The Decision

Since Buckeye failed to issue confirmations for any of the contracts in dispute, the terms of Farmland's confirmations were binding upon both parties to this dispute as provided in NGFA Grain Trade Rule 6(c). The same result would occur under general principles of commercial law applying to merchants under state-enacted provisions of the Uniform Commercial Code. While Buckeye now may believe the terms of the contracts unfair, it nevertheless agreed to the terms by entering into the contracts.

Each of the contracts expressly provided that the provisions of the NGFA Grain Trade Rules were to apply¹. Notwithstanding the arguments made by the parties about carrier performance and differing interpretations of the other contract terms, the arbitrators concluded that NGFA Grain Trade Rule 10 resolved the issues in this case.

NGFA Grain Trade Rule 10, "Incomplete Shipment or Delivery," provides in relevant part as follows:

"Buyer's Conveyance: When grain is sold in Buyer's conveyance (truck or rail) and the Buyer fails to supply conveyance within contract period, it shall be the duty of the Seller, after having given the Buyer notice to complete the contract, to elect either to: (a) agree with the Buyer upon the extension of the contract; (b) sell-out, by the exercise of due diligence, the unshipped balance for the Buyer's account; or (c) cancel the defaulted portion of the contract at fair market value for the defaulted portion of the contract based on the close of market the next business day.

"The word 'notice,' as used in this rule shall mean verbal communication when possible, and in all cases by wire or other rapid written communication."

Buckeye, as the seller, appeared to have ignored the provisions of NGFA Grain Trade Rule 10. The provisions of the rule preclude a claim for damages unless negotiated as part of one of the three options specified therein. Thus, Buckeye's claim that it did not waive its rights to so-called incidental damages in consideration for prepayment of the grain by Farmland must be denied in the absence of evidence that payment of such damages was part of the agreement made between Buckeye and Farmland.

Buckeye had an obligation to exercise its contractual rights under the NGFA Grain Trade Rules by:

- agreeing with Farmland to extend the contracts under acceptable terms; or
- with due diligence, sell-out the unshipped balance of the contracts; or
- cancel the unshipped balance of the contracts at fair market value.

There was no evidence submitted that Buckeye issued any notice to Farmland, verbal or written, of its intent to initiate any of the aforementioned actions. Therefore, the arbitrators concluded that Buckeye's claims must be denied.

The Award

Buckeye Cooperative Elevator Co. submitted the only monetary claim in this case. Since Buckeye's claims were denied, no award was made to either party. Each party was directed to pay its own costs.

Submitted with the unanimous consent of the arbitration committee, whose names are listed below:

Gary Mills, Chairman
Vice President
Bartlett and Co.
Kansas City, Mo.

Sharon Mock
Ag Transportation Manager
The Andersons
Maumee, Ohio

Kyle Pattison
Vice President
Pattison Bros. Inc.
Clayton, Iowa

¹ NGFA Secretary's Note: While the NGFA Grain Trade Rules automatically apply to grain transactions between NGFA Active members, Buckeye was not a NGFA member at the time these contracts were entered into by the parties. Thus, Farmland's contractual provisions are what made the NGFA Grain Trade Rules applicable in this case.