



National Grain and Feed Association

# Arbitration Decision

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July 11, 2002

## Arbitration Case Number 2002

**Plaintiff: Tommy Farms Inc., Frankfurt, Ind.**

**Defendant: A.E. Staley Manufacturing Co., Lafayette, Ind.**

### Statement of the Case

This case involved the breach of a contract to grow a specialty-type of corn in exchange for a premium above the price for regular dent corn.

On Nov. 11, 1997, Tommy Farms Inc. ("Tommy Farms") entered into a "Premium Waxy Corn Agreement" ("Grower Agreement") with A.E. Staley Manufacturing Co. ("Staley"). Under the Grower Agreement, Tommy Farms agreed to deliver to Staley the yield from approximately 1,000 acres of waxy corn, or approximately 140,000 bushels.

The Grower Agreement also required Tommy Farms to use waxy seed corn produced and marketed by Pioneer Hi-Bred International Inc. ("Pioneer"). In January 1998, Tommy Farms placed an order with Pioneer and prepaid for the seed called for by the Grower Agreement. In late February 1998, the Pioneer seed dealer informed Tommy Farms that the variety of Pioneer seed that it had ordered and paid for was not available. Tommy Farms then contacted David Baker, the Staley employee with whom Tommy Farms had contracted. Baker first contacted Pioneer to determine if he could secure the seed for Tommy Farms. When that failed, Baker said he informed his supervisor of the situation and said he reported that Tommy Farms had proposed fulfilling its obligation to Staley by planting waxy corn seed produced by DeKalb. Baker then contacted Tommy Farms and agreed to the change.

The Grower Agreement provided a 25-cent-per-bushel premium over the price for dent corn for delivery to Staley's facility in Lafayette, Ind., and entitled Tommy Farms to choose when and how much of the total amount it wished to price. During the life of the contract, Tommy Farms twice elected to price certain quantities of the corn. On Jan. 15, 1998, Tommy Farms priced 10,000 bushels for January 1999 delivery. Pursuant to the Grower Agreement, Staley issued a sales confirmation (con-

tract number 01456). Again, on Oct. 6, 1998, Tommy Farms priced another 20,000 bushels for October 1998 delivery and Staley issued another sales confirmation (contract number 4050213).

The arbitrators also noted that Staley's sales confirmation form and discount schedule (such as the one attached to the Grower Agreement) did not expressly provide for waxy corn produced from Pioneer seed. Further evidence showed that up to 25 percent of Staley's waxy corn purchases were not made pursuant to contracts such as the Grower Agreement, and were acceptable to Staley if the grain ultimately met Staley's specifications set forth in its discount schedule.

In September 1998, Baker resigned from Staley; so the second pricing arrangement, entered into on Oct. 6, 1998, was done after Baker's departure. Tommy Farms proceeded to deliver about 8,000 bushels of waxy corn to Staley under that arrangement. However, on Oct. 20, 1998, Staley canceled the Grower Agreement with Tommy Farms on grounds that Tommy Farms had not used Pioneer seed, in violation of the Grower Agreement. Staley then made a final accounting of what remained owing to Tommy Farms for the deliveries, minus the premium, and issued payment in that amount to Tommy Farms.

Tommy Farms disputed Staley's action. After failing to settle the dispute, Tommy Farms filed suit against both Staley and Pioneer in the Superior Court of Tippecanoe County, Ind. Pioneer, which ultimately was joined by Staley, successfully petitioned the court to remove the action to federal court. Upon transfer to federal court, Staley and Pioneer immediately sought and obtained an order compelling the parties to arbitrate this dispute with the National Grain and Feed Association (NGFA®) in accordance with the arbitration provision in the Grower Agreement.

Tommy Farms then filed this case with the NGFA against Staley and Pioneer.<sup>1</sup> Tommy Farms sought damages from Staley totaling \$79,560.26, itemized as follows:

- ▶ \$56,700 for losses resulting from the sale of 95,000 bushels of waxy corn that were sold as dent corn;
- ▶ \$1,600 in restitution for payment to Tommy Farms' landlords for the loss of the waxy corn premium;
- ▶ \$1,010.26 in losses as a result of a 25-cent-per-bushel deduction taken by Staley on all deliveries by Tommy Farms;
- ▶ \$750 for extra transportation costs;
- ▶ \$2,500 for additional electricity to store the canceled portion of grain;
- ▶ \$2,000 for additional labor to store and deliver the canceled portion of grain; and
- ▶ \$15,000 interest on funds not received.

Total Damages Claimed: \$79,560.26

The plaintiff also claimed treble damages in the amount of \$281,880.78, plus reimbursement for a \$100 filing fee in the state court proceeding, and reasonable attorneys fees.

## The Decision

The arbitrators determined that this dispute was subject to "Old NGFA Grain Trade Rule 41" [current Grain Trade Rule 4] – "Alteration of Contract" – in effect at the time of the dispute. This rule provides that a contract can be altered by the express consent of the parties. After considering all of the depositions and affidavits submitted by the parties as proof in this case, the arbitrators concluded that the most credible testimony was that of David Baker, who was the only person to give a deposition, at which time Staley had an opportunity to cross-examine him. Other evidence was provided by affidavits submitted by two other Staley employees. But neither of these witnesses was subject to cross-examination by Tommy Farms.

The arbitrators concluded that both parties expressly consented to the use by Tommy Farms of DeKalb waxy corn seed in place of Pioneer seed. Tommy Farms notified Staley by phone in February 1998 and advised Baker that it could not secure the Pioneer waxy corn seed required under the Grower Agreement. Baker's deposition revealed that he contacted both his supervisor and the Pioneer sales representative, and that they were fully aware of the situation regarding Tommy

Farms. The deposition also showed that Baker authorized Tommy Farms to plant the DeKalb seed in place of Pioneer.

Although Tommy Farms did not issue a written confirmation of the contract change as required under "Old Grain Trade Rule 41" [current Grain Trade Rule 4], the arbitrators determined that it was the custom of the trade that producers do not write contracts or contract amendments, but only receive and sign written confirmations sent by grain companies. In addition, the arbitrators found evidence that Staley did not intend to issue a confirmation so as to maintain the confidentiality of the amendment made in this case. The arbitrators also were influenced by the fact that up to 25 percent of Staley's waxy corn purchases were not made pursuant to contracts such as the Grower Agreement, and that these purchases from non-contract growers were acceptable to Staley if the grain ultimately met Staley's specifications set forth in its discount schedule. Further, Staley's sales confirmation and discount schedule did not expressly provide for waxy corn produced from Pioneer seed.

Therefore, the arbitrators found in favor of Tommy Farms.

## The Award

As a result of the arbitrators' finding, Staley is ordered to pay \$24,760.26 plus interest accruing at a rate of 8 percent from Oct. 20, 1998 until paid. This amount represents the lost premium for the waxy corn (25 cents per bushel) multiplied by the quantity produced by Tommy Farms under the Grower Agreement (approximately 99,000 bushels). It is further ordered that the award and interest be paid within 15 days of notification of this decision, as specified in NGFA Arbitration Rule 8(k). If the award is unpaid after 15 days, interest will increase to 12 percent **from that effective date** until paid.

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

**David M. Remley**, *Chairman*  
Manager  
Keynes Bros. Inc.  
Circleville, Ohio

**Todd Gerdes**  
Specialty Grains Marketing Manager  
Aurora Cooperative Elevator Co.  
Aurora, Neb.

**Chris Miller**  
Manager  
Badger Farmers Co-op  
Badger, S.D.

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<sup>1</sup> By letters dated March 7 and March 26, 2001, attorneys for both Tommy Farms and Pioneer, respectively, indicated that the parties had settled their claims. Consequently, Pioneer was dismissed as a defendant in this case.