



National Grain and Feed Association

Arbitration Decision

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August 8, 2002

Arbitration Case Number 2004

Plaintiff: Western Hay Co., Salt Lake City, Utah

Defendant: Furst-McNess Ltd., Saginaw, Mich.

Statement of the Case

This case involved the sale of 5,000 tons of bulk alfalfa cubes by Furst-McNess, Ltd. (“Furst-McNess”) to Western Hay Co. (“Western Hay”).

In late summer 2000, Furst-McNess contacted Western Hay to inquire whether Western Hay was interested in buying alfalfa cubes. Western Hay declined. After further telephone discussions, James Petteys, president of Western Hay, flew to Michigan where he visited an alfalfa processing facility operated by Michigan Alfalfa Processors Cooperative (“MAPCO”), with which Furst-McNess had a marketing agreement. He also toured several local farms and inspected baled hay.

Furst-McNess and Western Hay reached an agreement on Sept. 19, 2000, for the purchase of 5,000 short tons of sun-cured alfalfa cubes at a price of \$45 per ton, F.O.B. Akron, Mich., for October through December 2000 shipment. Furst-McNess issued a confirmation to Western Hay, which provided that the cubes were to be loaded on railroad cars supplied by Western Hay. The quality specifications were as follows: “Bulk – No Protein Guarantee, no mold, no offensive odor, cubes do not need to be green but cannot be entirely brown.” Petteys made and initialed handwritten changes to the contract. After the previously noted specifications, he added the words “must be acceptable for cattle feed.” He also added “89%” for minimum dry matter and “(LOADED ON CAR)” next to the price on the contract. The amended and signed confirmation was returned to Furst-McNess, which did not object to the changes.

During October 2000, approximately 2,000 tons of alfalfa cubes were loaded onto Western Hay’s railroad cars in Akron, Mich., and shipped to Western Hay’s facility in Valdosta, Ga., in partial fulfillment of the contract. Furst-McNess invoiced Western Hay and Western Hay paid in full for the cubes that were shipped.

In November and December 2000, Furst-McNess’s supplier in Akron, Mich. – MAPCO – experienced operational and financial difficulties, which prevented it from loading the cubes onto railcars that Western Hay had placed in Akron. Furst-McNess offered to – and subsequently did – pay demurrage charges on those cars, as confirmed by an e-mail from Furst-McNess to Western Hay on Dec. 17, 2000.

By the end of December 2000, no further shipments had been made on the contract and Western Hay had the cars moved from Akron.

On Jan. 2, 2001, Western Hay notified Furst-McNess in writing that Western Hay considered Furst-McNess to be in default on the contract, and asked Furst-McNess to confirm its default. Furst-McNess did not respond to the Jan. 2 letter. Western Hay followed up with a letter on Jan. 3 declaring that Furst-McNess was in default and stating that Western Hay elected to cancel the defaulted portion of shipments at fair market value under Old NGFA Feed Trade Rule 14(A) [current Feed Trade Rule 19(A)], which provided as follows:

*“(A) **Default by the Seller:** When the Seller finds that he is in default on the shipping schedule, and/or the contract shipping period, he shall notify the Buyer at once by telephone, facsimile, or wire.*

Upon receipt of such notice, the Buyer shall, within twenty-four (24) hours thereafter, advise the Seller by telephone, facsimile, or wire, which of the following options he elects to exercise:

- (1) agree to extend the shipping period; or*
- (2) buy-in, for the Seller’s account, the defaulted portion of the shipments; or*
- (3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.’*

In its letter, Western Hay further stated that it was in the process of determining fair market value for the cubes.

Furst-McNess responded with an e-mail on Jan. 5, 2001 that described telephone conversations that had occurred in November and December 2000, in which Furst-McNess notified Western Hay that Furst-McNess did not expect to be able to complete the commitment by Dec. 31, 2000. Furst-McNess said it was its understanding that Western Hay would be willing to accept shipment beyond the end of December.

On or about Jan. 9, 2001, telephone communications occurred between Western Hay and Furst-McNess. Western Hay wrote another letter dated Jan. 10, 2001, confirming the telephone conversations and stating that it had revoked its election to cancel the defaulted portion and agreed to extend the shipping period to Jan. 29, 2001, pursuant to Old Feed Trade Rule 14(A). Further, Western Hay stated: "...if there are any additional costs to Western Hay by reason of this accommodation, we expect Furst-McNess to pay those, just as we would credit you with any savings on shipping expenses there might be, depending on when and where you deliver the product."

By Jan. 29, 2001, no more alfalfa cubes had been shipped by Furst-McNess to Western Hay. On Jan. 30, 2001, Western Hay's attorney sent a letter to Furst-McNess declaring that it considered Furst-McNess to be in default of the contract. Western Hay again canceled the defaulted portion at fair market value, under Old Feed Trade Rule 14(A). In the process, Western Hay obtained bids from several other suppliers for alfalfa cubes to be delivered to Valdosta, Ga. By Western Hay's calculation, the least expensive of these bids resulted in a difference of \$69.05 per ton additional cost to Western Hay on a shortage of 2,939.05 tons.

Furst-McNess forwarded the Jan. 30, 2001 letter to its attorney, who responded with a letter on Feb. 9, 2001. That letter stated that the contract was a "specialty order" and that "it was clearly an assumption of both parties that MAPCO would, as the exclusive manufacturer of these cubes, produce the cubes in conformity with the Furst-McNess contract." Furst-McNess argued that MAPCO's difficulties made it impossible to deliver the balance of the contract and, thus, Furst-McNess was excused from performance of the contract under the Uniform Commercial Code. Further, Furst-McNess argued that the following contract provision also excused it from performance:

"If the performance by Seller in Seller's usual and normal business routine is delayed by governmental action of any kind; by acts of God, such as but not limited to floods and fires; or by other causes not within the control of the Seller, such as but not limited to labor disputes or disturbances (whether among employees of Seller or others) wherever they may occur, plant breakdowns, unusually severe weather, unavailability of material or rail car shortages embargoes, the Seller shall be relieved of future performance of this Contract, or at the Seller's option, such performance may be suspended for a period of time equal to the delay not to exceed a reasonable time."

Both parties agreed to an oral hearing pursuant to the NGFA Arbitration Rules, which was conducted on Jan. 22, 2002. Western Hay requested damages in the amount of \$202,932.86, plus interest, expenses, attorneys' fees and costs. Furst-McNess argued that it was excused from the contract and asked that no damages be awarded.

The Decision

The arbitrators determined that a valid contract had been entered into between Furst-McNess and Western Hay. The parties orally agreed to terms and Furst-McNess issued its form "Confirmation of Sale." In the confirmation, Furst-McNess represented itself as the seller, not as a broker, and the confirmation failed to mention MAPCO or that Furst-McNess's obligations were contingent on MAPCO's ability to supply the alfalfa cubes. Further, the confirmation stated the following:

"There are no oral agreements or warranties collateral to or affecting contracts....No modification or amendment of this Contract of Purchase shall be valid or binding unless agreed to by both parties and confirmed in writing."

Furst-McNess sent the confirmation to Western Hay, which made some handwritten changes. The confirmation was signed and returned to Furst-McNess, which did not object or make other changes of its own.

The arbitrators determined that the confirmation, including the handwritten changes, embodied the terms of the contract between the parties. Thus, Furst-McNess' performance under the agreement was not made contingent upon MAPCO's capability to manufacture the alfalfa cubes.

In addition, the arbitrators determined that the alfalfa cubes were not a specialty item; nor was MAPCO the only source of such a product. The commodity involved was identified as sun-cured alfalfa cubes, which was further characterized by some general quality specifications. No industry or government quality standards were referenced in the contract; in fact, it was not clear to the arbitrators whether any such standards existed for alfalfa cubes. The shipments that were made by Furst-McNess either met or exceeded the general quality specifications set forth in the contract.

Further, Furst-McNess did not indicate in writing its position that it was excused from performance on the contract until

more than a week after the second declaration of default. In the opinion of the arbitrators, such late notice was inexcusable.

Despite the problems experienced by Furst-McNess's planned supplier (MAPCO), the arbitrators found that Furst-McNess was bound under the contract to satisfy its obligations, even if that required the purchase of alfalfa cubes in the marketplace that met or exceeded the quality specifications set forth in the contract. The contract provision excusing the Seller from performance as a result of "plant breakdowns, severe weather, unavailability of materials..." did not excuse Furst-McNess from performance in this instance. Even though some of those conditions may have occurred, they affected MAPCO, not Furst-McNess.

Finally, Furst-McNess argued that Western Hay suffered no damages because Western Hay did not actually purchase the cubes for which it obtained bids at the time it declared Furst-McNess to be in default and because Western Hay had not arranged nor contracted for the sale of the cubes in question. However, the arbitrators determined that Western Hay was not required to take such actions to be entitled to damages and, in fact, suffered a lost opportunity to profit from any increase in value of the cubes above their purchase price.

As further evidence that Western Hay had suffered no damages, Furst-McNess referenced the fact that Western Hay rejected Furst-McNess's offer to purchase higher-quality cubes at the MAPCO bankruptcy auction in March 2001, and that Western Hay ultimately purchased the cubes itself at the MAPCO bankruptcy auction for \$30 per ton, \$15 per ton less than the

contract price. However, the arbitrators determined that the bids obtained by Western Hay accurately reflected the value of alfalfa cubes at the time of Furst-McNess' default at the end of January 2001¹ and the price of the higher-quality cubes at the bankruptcy auction was not obtained until March 2001.

The Award

Therefore, it is ordered that Furst-McNess pay Western Hay the amount of \$202,932.86 (\$69.05 per ton over the contract price multiplied by the 2,939.05 tons of undelivered alfalfa cubes).

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

Sonia Meehl, Chair
General Manager
Crete Grain Co.
Crete, N.D.

Brian Hawkins
Midwest Feed Manufacturing Manager
Murphy-Brown LLC
Algona, Iowa

Larry Neumann
President – Marketing
Benson-Quinn Co.
Minneapolis, Minn.

¹ This was based upon the bids that were solicited by Western Hay. While a source of cubes may have been available closer to the final destination, which could have resulted in a lower fair-market value, NGFA Arbitration Rule 6(a)(1) clearly states that "...the National Secretary and the Arbitration panel are not responsible for undertaking fact-finding searches or discovery." In the absence of an alternative calculation of the value of the alfalfa cubes, the arbitrators were compelled to accept Western Hay's calculations.