



National Grain and Feed Association

Arbitration Decision

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922

Phone: (202) 289-0873, FAX: (202) 289-5388, E-Mail: ngfa@ngfa.org, Web Site: www.ngfa.org

January 9, 2003

Arbitration Case Number 2019

Plaintiff: ConAgra Trade Group Inc., Omaha, Neb.

Defendant: Attebury Grain Inc., Amarillo, Texas

Statement of the Case

This case involved a contract dated Jan. 23, 2001, for the sale of sorghum by Attebury Grain Inc. (Attebury Grain) to ConAgra Trade Group Inc. (ConAgra) through MB Commodities Inc. (MBC), which operated as the broker.

The contract (#0101064MBC) specified 190,000 bushels of U.S. No. 2 or better sorghum with maximum 14 percent moisture at 77-cents-per-bushel over the March 2001 Chicago Board of Trade futures contract price. Delivery was set for Mid Bridge Nogales, Ariz., Feb. 15-25, 2001, in 54 cars, with seller's option to ship in two units. The parties did not dispute that the first shipment of 27 cars was duly delivered, invoiced and settled. But pertaining to the second shipment, the parties disputed each other's compliance with the provisions of NGFA Grain Trade Rules 17 and 28.

The provisions of NGFA Grain Trade Rules 17 and 28 pertinent to this case are as follows:

“Rule 17. Billing Instructions ...

(F) If Unit Trains are sold for other than loaded shipment, and the seller notifies the Buyer by 12 noon, Central Time, that the unit will be ready for billing within twenty-four (24) hours, the Buyer must furnish billing to a named destination by 4 p.m., Central Time that day.

If the Seller notifies the Buyer between 12 noon and 4 p.m., Central Time, the Buyer must furnish billing instructions to a named destination by 10 a.m., Central Time, the following day. Notices and billing instructions may not be given on Saturdays, Sundays and legal holidays, unless otherwise agreed.

If the Seller notifies the Buyer by 12 noon, Central Time, on a Friday or a day preceding a holiday that a unit will be ready for billing on a Saturday, Sunday or legal holiday within the shipment period, the Buyer

must furnish billing instructions to a named destination by 4 p.m., Central Time, the same day. The notification date need not be within the shipment period.

(G) If the Buyer fails to furnish billing instructions as specified in (A), (B), (C), (D), (E), or (F) above, the Seller shall have the right to either:

- (1) agree with the Buyer to extend the time allowed; or*
- (2) after having given notice, sell the affected portion of the contract for the account of the Buyer; or*
- (3) after having given notice, cancel the affected portion of the contract at fair market value.*

“Rule 28. Failure to Perform

(A) Seller's Non-performance. If the Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone and confirmed in writing. The Buyer shall then, at once elect either to:

- (1) agree with the Seller upon an extension of the contract, or*
- (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or*
- (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.*

If the Seller fails to notify the Buyer of his inability to complete his contract, as provided above, the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the

Seller has defaulted. In such case it shall then be the duty of the Buyer, after giving notice to the Seller to complete the contract, at once to:

(1) agree with the Seller upon an extension of the contract, or

(2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or

(3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.”

The arbitrators determined that the weight of the evidence presented established the following sequence of events:

- ▶ **Jan. 31, 2001:** Attebury Grain ordered two, 27-car unit trains from Union Pacific Railroad (UP) for want dates of Feb. 16 and 19, 2001, to be applied against the sale to ConAgra. (UP issued guaranteed pool orders SCO #50641, Pool #11271 for Feb. 16; and SCO #50648, Pool #11269 for Feb. 19).
- ▶ **Feb. 25:** Pursuant to NGFA Grain Trade Rule 28(A), Attebury Grain advised MBC to notify ConAgra that no railcars had been spotted under the UP guaranteed pool orders for movement to Nogales against the contract. Pursuant to NGFA Grain Trade Rule 28 (A)(1), ConAgra advised Attebury Grain to keep it informed so applications could be made when the cars were spotted.
- ▶ **Feb. 27:** The first 27 cars were spotted to Attebury Grain at Amarillo, Texas. In accordance with NGFA Grain Trade Rule 17(F), Attebury Grain contacted ConAgra to obtain loading and billing instructions. ConAgra forwarded instructions for loading and billing to Attebury Grain in accordance with the NGFA Grain Trade Rules. The 27 railcars subsequently were loaded, with billing issued on March 1. Attebury Grain invoiced ConAgra on March 5 and ConAgra wire-transferred funds to settle the transaction.
- ▶ **March 1-6:** Numerous conversations were held between Attebury Grain, MBC and ConAgra regarding the status of the remaining 27 carloads required to complete the contract.
- ▶ **March 5:** ConAgra sent notification by e-mail to Attebury Grain, with a copy to MBC, stating that the ultimate receiver of the grain may need to buy grain to feed its poultry. This notification specifically stated: “The customer in Mexico...may need to buy grain to feed their poultry. If that is the case, they will need to buy wheat, and the cost of that purchase will be for the account of Attebury Grain.” [*Emphasis added.*]
- ▶ **March 6, 10:15 a.m.:** Attebury Grain notified ConAgra by fax that UP would be spotting 27 rail cars at Attebury Grain’s facility and that billing instructions would be needed by 4 p.m. pursuant to NGFA Grain Trade Rule 17(F).

- ▶ **March 6, 2:30 p.m.:** The 27 cars were spotted at Attebury Grain’s facility and it subsequently began loading.
- ▶ **March 6, 4:23 p.m.:** Attebury Grain, which had not received loading and billing instructions from ConAgra, sent notification to MBC stating that it was attempting to apply rail cars to the contract and had not received billing instructions yet from ConAgra.
- ▶ **March 6, 6 p.m.:** Attebury Grain made contact by phone and again requested billing instructions from ConAgra. ConAgra verbally declined to provide billing instructions and stated that it was buying-in soft wheat for Attebury Grain’s account.
- ▶ **March 6, 7:21 p.m.:** Attebury Grain received an e-mail from ConAgra stating that it was going to buy-in soft wheat for the account of Attebury Grain, pursuant to NGFA Grain Trade Rule 28(A)(3).
- ▶ **March 6, 7:30 p.m.:** ConAgra provided billing instructions to Attebury Grain for the 27-car sorghum train, but ConAgra applied the shipment against a separate contract (#1020150MBC) between Attebury Grain and ConAgra for a different shipping period. At ConAgra’s request, Attebury Grain agreed to apply the train on contract #1020150MBC and billed the cars at 10:59 p.m. The arbitrators particularly noted that the grain applied to contract #1021050MBC was shipped to the same Mexican buyer for whom ConAgra stated it was buying-in the soft wheat.
- ▶ **March 6, 10:41 p.m. (approximate):** Attebury Grain faxed a letter to MBC and ConAgra stating that the original contract remained open because of ConAgra’s refusal to accept the application of 27 cars offered by Attebury Grain. ConAgra did not respond to the fax.
- ▶ **March 9, 10 a.m.:** Attebury Grain notified ConAgra that it would have 26 cars of grain sorghum (a third train) loaded and ready for billing the same day for shipment to Nogales, Ariz., and that it still considered contract #0101064MBC open since ConAgra did not accept application on March 6. ConAgra verbally informed Attebury Grain that it would not be providing billing instructions. Attebury Grain then applied the train to a different buyer on an unrelated contract and notified ConAgra that, in accordance with NGFA Grain Trade Rule 17(G)(3), Attebury Grain was electing to cancel the balance of the contract at fair market value.

ConAgra instituted this arbitration against Attebury Grain, claiming that Attebury Grain failed to perform under NGFA Grain Trade Rule 28. ConAgra sought damages of \$46,148.20 (the costs of replacing the 27 cars), plus arbitration costs and interest from the date of the invoice. Attebury Grain counter-claimed against ConAgra, claiming that ConAgra failed to perform under NGFA Grain Trade Rule 17(F). It sought \$712.50 (the costs of cancellation of the balance of the contract), plus interest and arbitration costs.

The Decision

The arbitrators determined that the core issue in this dispute involved several questions:

- ◆ Did Attebury Grain properly notify ConAgra that it would not be able to complete the contract within the specified shipping period, as required by NGFA Grain Trade Rule 28(A)?
- ◆ Did ConAgra agree to an extension of the contract, as provided under NGFA Grain Trade Rule 28(A)(1)?
- ◆ Was ConAgra justified in not providing loading and billing information to Attebury Grain on March 6, or was it in violation of NGFA Grain Trade Rule 17(F)?

The arbitrators concluded that Attebury Grain properly informed ConAgra that it could not complete the contract under the specified shipping terms as provided under NGFA Grain Trade Rule 28(A). Once receiving such notification, ConAgra then had three options under NGFA Grain Trade Rule 28(A). Specifically, it could: “1) agree with the Seller upon an extension of the contract; 2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or 3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.”

Instead, ConAgra responded that Attebury Grain should keep ConAgra informed as to the status of the remaining cars to be shipped. Because ConAgra simply advised Attebury Grain to keep it informed of the status of the cars and did not advise that it was going to buy-in the contract or cancel the defaulted portion, the arbitrators found that ConAgra, in effect, agreed to an extension.

On March 5, ConAgra sent an e-mail to MBC and Attebury Grain stating that there may be a need to buy grain to fill the contract. The arbitrators determined that this notice did not satisfy NGFA Grain Trade Rule 28 because it merely stated that ConAgra might need to buy grain, and that if that became necessary, ConAgra would deem Attebury Grain to be in default of the contract. The arbitrators noted that in its first argument, ConAgra admitted that its letter of March 5 was merely “a potential default reminder.”

On March 6, Attebury Grain notified ConAgra of 27 car initials and numbers, and that it was going to load the balance of the contract. This notice was provided before noon on March 6, as required under NGFA Grain Trade Rule 17. Because Attebury Grain notified ConAgra of a train that would be ready for billing within 24 hours and because this notice was provided prior to noon on March 6, ConAgra was obligated to provide Attebury Grain with billing instructions prior to 4 p.m. on March 6.

The arbitrators further concluded that ConAgra did not exercise its rights under NGFA Grain Trade Rule 28(A)(3) until 7:21 p.m. on March 6, approximately nine hours after Attebury Grain had requested billing on the train.

The Award

Based upon the evidence presented, the arbitrators denied ConAgra’s claims and found in favor of Attebury Grain’s counter-claim. ConAgra hereby is ordered to pay to Attebury Grain \$712.50 (the cost of canceling the balance of the Contract), plus 6 percent interest from March 6, 2001 until the date payment is made. ConAgra also is ordered to pay Attebury Grain its arbitration costs of \$730.75.

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

Darrell Wallace, *Chairman*
Vice President, Transportation
Bunge North America Inc.
St. Louis, Mo.

Steve Campbell
Trading Manager
Louis Dreyfus Corp.
Kansas City, Mo.

Mike Mahoney
President
Wheeler Brothers Grain Co.
Watonga, Okla.