



National Grain and Feed Association

Arbitration Decision

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April 4, 2005

Arbitration Case Number 2099

Plaintiff: R.F. Cunningham & Co. Inc., Smithtown, N.Y.

Defendant: The Scoular Co., Minneapolis, Minn.

Statement of the Case

The plaintiff, R.F. Cunningham & Co. Inc. ("Cunningham"), requested judgment against the defendant, The Scoular Co. ("Scoular"), for \$22,091.84, plus interest.

Cunningham claimed damages as a result of two rail cars of corn shipped by Scoular that were rejected because fumonisin levels allegedly exceeded 5 parts per billion (p.p.b.). At issue in this case was whether the presence of fumonisins clearly was understood to be a quality factor in the transaction between the parties.

The Decision

The arbitrators determined that the parties did not establish a "meeting of the minds" on other than the basic terms of the contract, namely that Cunningham was purchasing a total of 15 rail cars of corn from Scoular f.o.b. Chicago at an agreed-upon price.

Scoular submitted a contract to Cunningham (Scoular sale contract number SC1309190), which Cunningham signed and returned to Scoular. The arbitrators determined that this contract was silent regarding fumonisin. Under "REMARKS" the contract provided "SE SCALES OF DISCOUNTS AND TERMS AT TIME OF SHIPMENT TO APPLY." The arbitrators concluded, however, that according to trade practice and custom, no standard toxin discounts applied, with the exception of a maximum of 20 p.p.b. for aflatoxins. Further, the arbitrators noted that the Food and Drug Administration thus far has issued only draft guidance¹ – not regulatory limits or action levels – for fumonisins.

The arbitrators noted that the Scoular contract expressly provided as follows:

"THERE ARE NO WARRANTIES EXPRESS OR IMPLIED WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF. Seller warrants ONLY that the goods sold are of merchantable quality and Buyer expressly waives all other warranties whether provided by law or otherwise. Seller shall in no event be liable for consequential damages and Seller's total liability shall not exceed the purchase price of the goods upon which claim is made."

The arbitrators further observed that NGFA Grain Trade Rule 3 [Confirmation of Contracts] provides in paragraph (A):

"Upon receipt of said confirmation, the parties shall carefully check all specifications therein and, upon find-

¹ FDA on June 6, 2000 issued a "draft guidance for industry" document containing various recommended maximum levels of fumonisins in corn (ranging from 2 p.p.m. to 100 p.p.m., depending upon species) "that FDA considers adequate to protect human and animal health, and that are achievable in human foods and animal feeds with the use of good agricultural and good manufacturing practices." FDA said it was issuing the draft guidance as a "prudent public health measure" while it further studies the potential human or animal health risks that may be associated with fumonisins and develops a long-term risk-management policy and program for controlling fumonisins in human food and animal feeds.

ing any material differences, shall immediately notify the other party to the contract, by telephone and confirm by written communication. In the case of minor differences, notification may be by either telephone or written communication.”

The arbitrators determined that Cunningham did not provide notice of “*any material differences*” or other issues with the Scoular contract under NGFA Grain Trade Rule 3(A). Instead, by signing and returning the contract unchanged to Scoular, the arbitrators concluded that Cunningham expressly agreed to its terms.

The arbitrators also considered Cunningham’s purchase confirmation [number P-53760], which stated under “*Special Terms & Conditions*” that “*Origin fumonisin test include in price, must be <5 ppb.*” Importantly, based upon the documentation provided by the parties, the arbitrators determined that Scoular did not receive this contract confirmation until Sept. 15, 2003, whereas the cars in dispute were shipped on Sept. 11. The arbitrators also determined that Cunningham did not request fumonisin tests before it provided billing instructions to Scoular.

With respect to the various conversations between the parties, the arbitrators observed that the first documented conversation referencing fumonisin relating to the shipment involved in this dispute did not occur until Sept. 29, 2003 – when the cars were tested and subsequently rejected at destination because fumonisin levels exceeded 5 p.p.b. The arbitrators also determined that this testing and subsequent notification to Scoular were not conducted in a timely manner. The arbitrators noted that even after Scoular’s representative asked for clarification of the tests that Cunningham had requested, Cunningham’s employee responded via e-mail: “*My mistake I meant Aflotoxin [sic] test.*” The arbitrators

further determined that Cunningham paid for the carloads on Sept. 9, 2003, based upon the grades provided by Scoular – again with no mention of the absence of fumonisin tests or related documentation.

The arbitrators concluded that if Cunningham had intended that the terms related to fumonisin applied, it did not convey those terms adequately despite numerous opportunities to do so. Further, Cunningham signed and returned a copy of Scoular’s contract, which was silent on fumonisin, without taking any exception to the terms therein. Therefore, the arbitrators concluded that Scoular complied with the terms of that contract.

The Award

The arbitrators denied Cunningham’s claim of \$22,091.84 and declined to grant any award.

Submitted with the unanimous consent of the arbitrators, whose names appear below:

Vickie Kennedy, Chair
President and General Manager
Lewis Commodities Inc.
Lewis, Kan.

Ian McCormick
Manager of Commodity Analysis
ConAgra Food Ingredients Inc.
Omaha, Neb.

Dave Ragan
Vice President
Archer Daniels Midland Co.
Decatur, Ill.