



National Grain and Feed Association

Arbitration Decision

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November 6, 2008

Arbitration Case Number 2177

Plaintiff: Simmons Feed & Supply Co., d/b/a Simmons Grain Co., Salem, Ohio

Defendant: Della Natura Commodities, Bayside, N.Y.

Statement of the Case

This case concerned an alleged May 2006 contract between Simmons Feed & Supply Co. (Simmons) and Della Natura Commodities (Della Natura) for delivery of 1,000 metric tons of certified organic soybeans during May-September 2007. The soybeans, which were of South American origin, were to be shipped via containers.

This dispute arose from Della Natura's alleged failure to fully deliver under this contract and Simmons' alleged withholding of payment for soybeans shipped previously under a separate contract between the two parties. Simmons claimed \$118,000 in damages. Della Natura claimed \$289,550 in damages.

The arbitrators cited the following chronology of events presented by the parties as being of particular significance in the resolution of this dispute:

May 2006

- ◆ **May 16:** Della Natura sent to Simmons an email offering to sell 1,000 metric tons of certified organic soybeans [*copy of email, Item 1, Simmons Argument*].
- ◆ **May 18:** Simmons sent to Della Natura a written confirmation [*designated Simmons contract number 1657*]. Della Natura confirmed receipt of contract 1657, but stated that it neither signed nor returned this confirmation to Simmons.
- ◆ **May 26:** Della Natura sent to Simmons a written confirmation dated May 26 [*designated Della Natura contract number S7530*]. Simmons claimed that it signed and returned contract S7530 on May 26, but Della Natura disputed this claim.

January 2007

The parties entered into a separate contract for soybeans calling for shipments to begin immediately and ultimately to occur through June 2007 [*designated Della Natura contract number S7615*].

April 2007

- ◆ **April 1:** A telephone conversation occurred between representatives of Simmons and Della Natura, during which Della Natura allegedly stated that it might not be able to deliver under contract S7530 because of problems it was experiencing with the grower of the soybeans, as well as weather conditions.
- ◆ **April 2:** Simmons purchased 500 metric tons of soybeans from an alternative supplier [*copy of sales contracts, Items 5-6, Simmons Argument*].
- ◆ **April 10:** Della Natura stated in an email to Simmons, "As I mentioned over the phone the situation in Argentina is a little bit uncertain as far as new crop soybean availability ... However, we have a contract and I will try to deliver as much soybeans as we can. ..." Della Natura's email further indicated it would have 300 metric tons – not 1,000 metric tons – available for sale and delivery to Simmons, and that the per-ton price would be \$40 more because of increased freight expenses [*copy of email, Item 7, Simmons Argument*].
- ◆ **April 27:** Della Natura invoiced Simmons for the balance on contract S7615 [*copy of invoice, Item 14, Simmons Argument*].

May 2007

- ◆ **May 1:** Start of the specified delivery period for the first 200 metric tons under Della Natura contract S7530.
- ◆ Simmons agreed to pay a \$20 per-ton freight increase to Della Natura. Simmons also purchased 300 metric tons of soybeans from an alternative supplier [copy of sales contract, Item 10, Simmons Argument].
- ◆ **May 14:** Della Natura stated by email that it would ship 200 metric tons of soybeans for the month of May [copy of email, Item 11b, Simmons Argument]. Simmons purchased another 272 tons from an alternative supplier [copy of sales contract, Item 11a, Simmons Argument].
- ◆ **May 31:** End of the specified delivery period for the first 200 metric tons under contract S7530/1657.

June 2007

- ◆ **June 5:** Simmons received the last shipment from Della Natura under contract S7615.
- ◆ **June 11:** Della Natura sent to Simmons a contract [designated Della Natura contract number 7530B] that included the \$20 increase in freight charges [Items 10 and 12, Della Natura Argument].
- ◆ **June 18:** Della Natura sent an email to Simmons stating

that no further soybeans would be shipped under other contracts because of the outstanding balance on contract S7615. Della Natura's email stated that, "*Speculation on your part on fulfillment of the other contracts which [Della Natura's representative] stated she was going to fulfill, does not justify your lack of payment.*" [copy of email, Item 13, Simmons Argument].

- ◆ **June 25:** Simmons invoiced Della Natura for a buyout on contract S7530 [copy of invoice, Item 15, Simmons Argument].
- ◆ **June 27:** Della Natura stated its position by email to Simmons that the contract for May through September 2007 delivery (S7530) had never been agreed upon because it was neither signed nor accepted by the parties. In its email, Della Natura also referenced an "Act of God" clause in the contract [copy of email, Item 11, Della Natura Argument]. Della Natura further referenced a June 23, 2006 email to Simmons indicating that, "*We both need to sign the contract for the 1,000 metric tons we have committed*" [copy of email, Item 5, Della Natura Argument].

Della Natura claimed that it did not receive a signed version of contract S7530 from Simmons until June 2007. Simmons claimed that it did not receive a copy of Della Natura's June 23, 2006 email until these arbitration proceedings.

- ◆ **June 29:** Simmons invoiced Della Natura for June buyout [copy of invoice, Item 17, Simmons Argument].

The Decision

The arbitrators determined that the central issues in this case were: 1) whether there was a contract between Simmons and Della Natura for May through September 2007 delivery (*i.e.* contract S7530); 2) whether Simmons was justified in withholding payment under contract S7615; 3) whether the invoice for the last shipment under contract S7615 was due before the delivery period under contract S7530; 4) whether Della Natura's invoice number 7424 indicated whether payment was due 15 days after the invoice date or the arrival date; and 5) when the soybeans actually arrived at the destination.

The arbitrators decided that the arrival notice, submitted as *Item 4* with Della Natura's argument, indicated that notice was sent "*May 22, 2007 – Cleveland Ohio.*" The arbitrators noted that invoice number 7424, submitted as *Item 2* with Della Natura's argument, indicated that the arrival date was May 27 (the actual delivery dates were from May 23 through May 29 [Items 2-6 in Simmons' argument]). Della Natura's June 27, 2007 email stated that Simmons was past due for a "*last shipment that was delivered on June 5, 2007.*"

The arbitrators then reached the following conclusions:

1. The parties had reached a contract (S7530) based upon the confirmations and emails between them.
2. Contract S7530 called for shipment of 10 containers in May 2007, and then 10 additional containers for each subsequent month from June through September.
3. In May 2007, Della Natura was in violation of this contract. Della Natura did not provide proper notice of its failure to perform under the contract in accordance with the NGFA Trade Rules. In May 2007, Simmons was not late on payment for the final invoice of the contract providing for the earlier shipments (S7615).
4. As of June 07, Simmons was overdue on payment to Della Natura for contract S7615.

5. Simmons' refusal to pay Della Natura under contract S7615 properly was considered to be a counter claim.
6. Simmons agreed to pay the increased freight costs by virtue of signing contract S7530. Simmons failed to dispute the clause in the remarks section pertaining to increased freight costs at the time of signing. The parties also agreed separately to some containers at a \$20-per ton freight increase and to Della's freight increase quotes. Simmons consequently was obliged to pay an increased freight cost of \$20 per metric ton.
7. Della Natura was obliged to pay for the buyout cost of contract S7530, subject to the following conditions:
 - The contract value was amended to include a \$20-per-metric-ton freight increase.
 - Simmons' soybeans purchase from alternative suppliers provided the replacement cost as a real cash value, which was lower than the replacement costs quoted by Della Natura.

The Award

In computing damages, the arbitrators relied upon the following assessments:

Amount Simmons owed to Della Natura (based upon contract S7615)

	Amount Owed	Offset Amount	Interest*	Total
May 2007	\$112,400.00	19,907.18	\$0.00	\$92,492.82
June	\$92,492.82	20,384.84	\$635.89	\$72,743.86
July	\$72,743.86	19,356.03	\$500.11	\$53,887.94
Aug	\$53,887.94	18,327.22	\$370.48	\$35,931.20
Sept	\$35,931.20	20,164.39	\$247.03	\$16,013.84
Oct	\$16,013.84		\$110.10	\$16,123.94
Nov	\$16,123.94		\$110.85	\$16,234.79
Dec	\$16,234.79		\$111.61	\$16,346.41
Jan 2008	\$16,346.41		\$112.38	\$16,458.79
Feb	\$16,458.79		\$113.15	\$16,571.94
Mar	\$16,571.94		\$113.93	\$16,685.87
April	\$16,685.87		\$114.72	\$16,800.59
May	\$16,800.59		\$115.50	\$16,916.09
June 2008	\$16,916.09		\$116.30	\$17,032.39
July	\$17,032.39		\$117.10	\$17,149.49
August	\$17,149.49		\$117.90	\$17,267.39

* Interest rate = 8.25% annual rate / 0.6875% per month (compounded monthly)

Buy-in calculations for contract S7530 (based upon contracts with alternative suppliers)

	Contract Number	Reference (Simmons Argument)	Metric Tons	Price-per-bushel	Price-per-metric ton	Average Price
May 2007	118784	Item 5	100	\$17.15	\$630.15	\$632.54
	118955	Item 6	100	\$17.28	\$634.92	
June	118955	Item 6	200	\$17.28	\$634.92	\$634.92
	118955	Item 6	100	\$17.28	\$634.92	\$629.78
August	SS1435129	Item 10	100	\$17	\$624.64	\$624.64
	SS1435129	Item 10	200	\$17	\$624.64	
Sept	840	Item 11A	200	\$17.25	\$633.82	\$633.82

Offset Amount Calculations

	Original Contract	Amended Contract	Buy in Price	Spread	Metric tons	\$.-Value
May 07	513	533	\$632.54	\$99.54	200	\$19,907.18
June	513	533	\$634.92	\$101.92	200	\$20,384.84
July	513	533	\$629.78	\$96.78	200	\$19,356.03
August	513	533	\$624.64	\$91.64	200	\$18,327.22
Sept	513	533	\$633.82	\$100.82	200	\$20,164.39

Based upon these calculations, the arbitrators determined that Simmons owed \$17,267.39 to Della Natura (including interest at the rate of 8.25% per annum as of August 2008). Therefore, Simmons was ordered to pay \$17,267.39 to Della Natura, plus interest to accrue at 8.25% per annum until the judgement is paid.

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

John Graverson, *Chair*
Merchandising Manager
Ray-Carroll Grain Growers Inc.
Richmond, Mo.

Robert Bryson
Director of Eastern Canadian Grain Operations
Parrish & Heimbecker Ltd.
Mississauga, Ontario, Canada

Russ Leuck
Manager of Northern Iowa Group
CGB Enterprises Inc.
Fayette, Iowa