



National Grain and Feed Association

Arbitration Decision

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January 28, 2010

Arbitration Case Number 2337

Plaintiff: Edward P. Appenzeller Jr., Millington, Md.

Defendant: Perdue Farms Inc., Perdue Grain and Oilseed LLC and
Perdue Agribusiness Inc., Salisbury, Md.

Statement of the Case

This case was brought by Edward P. Appenzeller Jr. (plaintiff) pursuant to a court order resulting from an initial lawsuit he filed against Perdue Farms Inc., Perdue Grain and Oilseed LLC and Perdue Agribusiness Inc. (defendants, collectively "Perdue") in Maryland state court. The case centered on the complaint by Appenzeller that Perdue wrongly withheld funds for soybeans with a contracted value of \$51,924.08 delivered by Appenzeller to Perdue's Sudlersville, Md., facility.

Appenzeller's claim, filed with the National Grain and Feed Association (NGFA), began with a statement of facts detailing a previous dispute with Perdue over corn contracts that resulted in Perdue withholding funds from soybean payments due Appenzeller. In the opening statement of facts, Appenzeller asserted that Perdue had defaulted on the corn contracts, by a breach of contract terms, namely the changing of delivery location. Appenzeller also claimed that the corn contract dispute leading to the withholding of soybean funds was a separate issue and should not be considered in the case. In addition, Appenzeller argued that Perdue did not bring an arbitration claim related to the corn contract dispute within the 12 month timeline required by the NGFA Arbitration Rules.

In that dispute, between December 2005 and March 2006, four separate contracts were entered into between Appenzeller and Perdue for delivery of corn, each with a delivery period beginning Sept. 1, 2006 and ending Nov. 30, 2006. The contracts involved: 1) Perdue purchase contract number 961 for 10,000 bushels at a price of \$2.46 per bushel dated Dec. 20, 2005; 2) Perdue purchase contract number 996 for 15,000 bushels at a price of \$2.53 per bushel dated Jan. 25, 2006; 3) Perdue purchase contract number 1021 for 10,000 bushels at a price of \$2.60 per bushel dated Feb. 3, 2006; and 4) Perdue purchase contract number 1094 for 10,000 bushels at a price of \$2.50 per bushel dated March 27, 2006. The contracts were written with "delivery basis/FOB point" of Sudlersville, Md. All contracts were signed by both parties.

On or about June 2006, Perdue informed Appenzeller that delivery would need to be made to either its Lynch or Roberts, Md., facilities, at a transportation premium of 3 to 5 cents per bushel, because the company no longer was accepting corn deliveries at its Sudlersville, Md. facility. In his initial claim, Appenzeller asserted that he verbally objected to both of the proposed delivery points and informed Perdue that he believed it to be in breach of the contracts.

In response, Perdue contended that Appenzeller initially agreed to deliver to its Lynch, Md., facility. On or about Sept. 2006, Perdue sent notice by mail to Appenzeller reflecting the delivery location of Lynch, Md., and a price premium of 5 cents per bushel added to the original contract values. Appenzeller's claim acknowledged that new contracts were sent showing these changes. Appenzeller did not sign and return the new confirmations, and asserted that he again notified Perdue of his view that it was in breach of the contract.

By Nov. 30, 2006, Appenzeller had not delivered on any of the corn contracts. The next documented communication between the parties occurred on Dec. 11, 2006, when Appenzeller communicated verbally in person to Perdue during an office visit that he considered the corn contracts void and that he had sold his corn to a competing grain firm. In response, Perdue expressed to Appenzeller a desire to review the situation and possibly draft a plan to resolve the issue. In its rebuttal, Perdue claimed that negotiations concerning delivery of the corn continued with Appenzeller beyond the office visit on Dec. 11, 2006. That discussions continued is confirmed by Appenzeller's claim that during a farm visit by Perdue on Jan. 2, 2007, he again notified Perdue verbally that he had not delivered because of what he termed Perdue's default based upon a change in delivery location. On April 3, 2007, Perdue liquidated the contracts at \$3.57 per bushel and sent notice to Appenzeller, claiming a loss of \$1 per bushel and \$45,000 in damages.

The main complaint against Perdue arose when Appenzeller's soybean funds were withheld by Perdue in attempt to offset (deduct) \$45,000 from the proceeds as payment for damages suffered for the cancellation of the corn contracts, which Perdue claimed Appenzeller to be in breach of. Appenzeller claimed it was Perdue

that breached the corn contracts because of its attempt to change delivery to an alternate Perdue facility location. Appenzeller further claimed that any dispute arising from the corn contracts should be considered a separate matter unrelated to the claim that Perdue failed to pay Appenzeller for the soybeans.

The Decision

The arbitrators found themselves faced with several questions to be answered before they could make a decision in the case. Those questions were:

- ▶ Should the dispute over the unpaid soybeans and the dispute over the undelivered corn contracts be considered as one single dispute between Appenzeller and Perdue? Or are they separate, unrelated disputes?
- ▶ If the arbitrators determined that it was in fact a single dispute, were the corn contracts defaulted on by Perdue, as Appenzeller claimed? Or was it Appenzeller who defaulted, as claimed by Perdue?
- ▶ If it were found that one or the other party defaulted on the corn contracts, what were the appropriate damages to be awarded to the non-defaulting party?

In determining an answer to the first question – whether or not the dispute should be tried as one single case or two separate cases – the arbitrators relied on two material items. First, the arbitrators relied on the fact that Appenzeller had previously filed a lawsuit in Maryland state court, and while the arbitrators were not provided with a copy of the actual court documents, it was clearly established by both parties' arbitration pleadings that the court issued an order compelling arbitration. The arbitrators also relied on NGFA Arbitration Rules Section 2, which states:

"The term dispute as used, herein, shall be deemed to cover the original complaint as filed, and also any cross complaint, counterclaim, or offset as set forth by the defendant, but in no case shall the matters submitted by the defendant be any other than those directly related to the transaction on which the original complaint is made."

Relying upon the existence of the court order compelling arbitration and the NGFA Arbitration Rules, the arbitrators determined that the case was indeed a single, albeit complex, dispute between Perdue and Appenzeller.

The arbitrators further relied upon the fact that, by cancelling the corn contracts on April 2, 2007 and notifying Appenzeller of the damages of \$45,000, the dispute over the corn contracts still existed, and was brought to a head when Perdue collected its claimed damages from the soybean proceeds.

Once the arbitrators determined that the corn contracts were within the scope of the overall dispute, and since it was clear that no corn was delivered by Appenzeller, the next decision was to determine which party had defaulted on the corn contracts.

The primary dispute on the corn contracts was a result of Perdue's decision to no longer accept corn at its Sudlersville, Md., location. The contracts in question were priced contracts for September-October-November 2006 delivery, with contract terms of "Del. Basis/FOB Point" of Sudlersville, Md. No other delivery location designations were noted on either the forward or reverse side of the contracts. Perdue argued that the term "Del. Basis/FOB Point" was not the specific contracted delivery point, but rather the delivery point on which the price was based. When Perdue decided to no longer accept corn at its Sudlersville, Md., location, it requested that Appenzeller deliver the contracted corn to an alternate Perdue location, offering a freight premium to do so. Appenzeller argued that the requested change of delivery from Sudlersville to an alternate Perdue location was an alteration of the contract to which he did not consent.

The arbitrators relied upon the fact that the contracts did not have a specified "delivery location," but rather referred to the "Del. Basis/FOB Point." Although the arbitrators noted that the more common approach, in particular in trade with farmers, is to have a specific delivery point but that it is a normal trade practice to buy grain based upon a "rate basing point" with adjustments in price depending upon the actual delivery point once known. NGFA Grain Trade Rule 1(H)(3) specifies "point of origin or delivery or rate basing point" as a contract requirement.

In addition, the arbitrators relied upon the Declaration of John Ade #8, that Appenzeller accepted a freight premium to make the delivery on the soybean contracts to Perdue's Lynch, Md., facility rather than Sudlersville. As such, the arbitrators determined that it was reasonable for Perdue to request the delivery to be made to an alternate location with a freight premium to be paid obligating Appenzeller to perform on the contracts as originally agreed.

On Sept. 6, 2006, Perdue issued contracts replacing the originals with the new "Del. Basis/FOB Point" of Lynch, Md., including a price adjustment increasing the price by 5 cents per bushel for the freight rate differential between Sudlersville and Lynch, Md. In an April 6, 2007 letter to Perdue, Appenzeller acknowledged that he received the replacement contracts. The arbitrators relied on NGFA Grain Trade Rule 3, which requires that, upon receipt of trade confirmation, "the

parties shall carefully check all specifications therein and, upon finding any material differences, shall immediately notify the other party to the contract, by telephone and confirm by written communication.” In the documentation provided to the arbitrators, there was no evidence of a written communication by Appenzeller disputing that the contracts were made. Based upon this information, the arbitrators determined that Appenzeller was obligated to deliver the corn to Perdue during the September-October-November 2006 timeframe. No grain was delivered.

In an internal e-mail submitted by Perdue describing the meeting with Appenzeller on Dec. 11, 2006, a Perdue representative recapped that: “Appenzeller came into the office this morning and stated that based on his lawyer’s advice, the contracts he sold for Lynch are void since he had not delivered anything on them and they were not the original contracts he had sold into Sudlersville. He has picked all his corn and has sold his stored corn to Mountaire for pickup in January 2007.” Based on that recap, it was the arbitrators’ determination that at that point it was or should have been known to Perdue that Appenzeller had defaulted on the contracts.

Because of Appenzeller’s failure to perform by delivering by Nov. 30, 2006, the arbitrators considered NGFA Grain Trade Rule 28 to determine the proper course of action as a result of Appenzeller’s default. That rule states that it is the Seller’s duty to notify the Buyer of its inability to complete the contracts within the contract specifications. Rule 28 further states that if Seller fails to notify Buyer that it shall become the duty of the Buyer, after giving notice to the Seller to complete the contracts, to at once: “(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.”

Based upon these NGFA rules, it was determined by the arbitrators that the actual damages caused by Appenzeller’s failure to deliver should be based on the closing market for Chicago December 2006 corn futures as of Dec. 1, 2006 – \$3.74 per bushel.

After having determined that Dec. 1, 2006 was the proper date on which Perdue should have canceled the contracts, the arbitrators verified the closing Chicago Board of Trade prices for those days and calculated Perdue’s damages as follows:

- ▶ Corn Contract Number 961: Chicago December 2006 corn futures closing price on Dec. 1, 2006 at \$3.74, less contract price of \$2.46 = \$1.28 per bushel damages multiplied by 10,000 bushels for total award of \$12,800.
- ▶ Corn Contract Number 996: Chicago December 2006 corn futures closing price on Dec. 1, 2006 at \$3.74, less contract price of \$2.53 = \$1.21 per bushel damages multiplied by 15,000 bushels for total award of \$18,150.
- ▶ Corn Contract Number 1021: Chicago December 2006 corn futures closing price on December 1, 2006 at \$3.74, less contract price of \$2.60 = \$1.14 per bushel damages multiplied by 10,000 bushels for total award of \$11,400.
- ▶ Corn Contract Number 1094: Chicago December 2006 corn futures closing price on December 1, 2006 at \$3.74, less contract price of \$2.50 = \$1.24 per bushel damages multiplied by 10,000 bushels for total award of \$12,400.

Based upon the arbitrators’ calculations, the total damages assessed would have been \$54,750 had Perdue cancelled the contracts when it first was aware of the default by Appenzeller.

The Award

Based upon the determination that Appenzeller breached the corn contracts, resulting in damages to Perdue, the arbitrators found in favor of Perdue and denied Appenzeller’s claims. Although the arbitrators calculated the damages to be as much as \$54,750, because Perdue cancelled the contracts at a time that only resulted in damages of \$45,000 to it, no further award was given to Perdue.

In Perdue’s response, it requested reimbursement of its arbitration costs and reasonable attorney fees. After careful consideration of the merits of the case, the arbitrators denied this request.

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

Dennis Inman, Chair
Vice President
Cargill AgHorizons
Minneapolis, Minn.

Thomas M. Rush
Senior Grain Merchandiser
MFA Incorporated
Columbia, Mo.

Mark R. Walter
Grain Manager
NEW Cooperative Inc.
Fort Dodge, Iowa