



National Grain and Feed Association

Arbitration Decision

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January 28, 2010

Arbitration Case Number 2338

Plaintiff: Central Ohio Farmers Co-Op Inc., Marion, Ohio

Defendant: Thomas W. Kruger, Mt. Gilead, Ohio

Statement of the Case

This case involved claims asserted by Central Ohio Farmers Co-Op Inc. (COFC), the plaintiff-buyer, arising from three cash grain contracts with the defendant-seller, Thomas W. Kruger (Kruger).

At dispute was a corn contract for 10,000 bushels (contract number 011513) on which COFC argued that delivery was required by March 31, 2008. Kruger argued that he had no recollection of having entered into the corn contract and that, therefore, it did not exist. No bushels were delivered, and on April 8, 2008, COFC canceled the contract and assessed damages of \$3.09 per bushel for a total charge to Kruger of \$30,900.

Also in dispute were two wheat contracts totaling 20,000 bushels (10,000 bushels on contract number 012646 and 10,000

bushels on contract number 012647) on which COFC argued that delivery was required by Aug. 31, 2008. Kruger did not dispute the existence of the wheat contracts, but did dispute the required delivery period, arguing that the agreed delivery period was February 2009, not August 2008. No deliveries were made, and on Sept. 3, 2008, COFC cancelled the contracts and assessed damages of \$1.5975 and \$0.8375 per bushel, respectively, for a total charge to Kruger of \$24,350.

All contracts in question did include in item 9 of the contract terms the following language: “*Contract disputes subject to arbitration pursuant to National Grain and Feed Association rules, and shall be final and binding.*”

The Decision

The arbitrators reached the following decisions on the three contracts:

Corn Contract Number 011513

The arbitrators considered the corn contract and specifically whether or not there was sufficient evidence to demonstrate the existence of the contract. Although signed confirmations are preferred as evidence of a contract, based on the arbitrators’ experience, it is not uncommon for a contract confirmation to go unsigned by the recipient. NGFA Grain Trade Rule 3 provides for the buyer and seller to send to each other a confirmation of the trade, and states that if only one party sends a confirmation and it is not disputed, “the confirmation sent by the other party will be binding upon both parties.” Further, the arbitrators

noted that it was not uncommon for Kruger to specifically contract for the sale of grain to COFC in the past without signing the confirmations sent by COFC.

The existence of contract number 011513 was further evidenced by its identifying contract number, which puts it in the numeric sequence of other contracts entered into by Kruger with COFC on or about Jan. 30, 2006. These other contracts between Kruger and COFC are identified as contract numbers 011510 and 011512. The arbitrators also relied upon an affidavit provided by COFC to ascertain the existence of contract number 011513.

Having determined that corn contract number 011513 did in fact exist, the arbitrators considered what damages, if any, were due to COFC, given Kruger’s failure to perform on the contract. The

arbitrators determined that corn contract 011513 was a Hedge-To-Arrive contract, with initial terms of 10,000 bushels of corn at a futures reference price of \$2.64 Chicago December 2007 futures. It was not clear in COFC's affidavit that there was a mutual agreement with Kruger to roll the futures reference month from December 2007 to March 2008. What appeared to be the first correspondence with Kruger on the roll from December 2007 to March 2008 was a confirming contract sent by COFC on March 10, 2008. Under customary trade practice, the contract would have had to have been rolled from December 2007 to March 2008 prior to first December futures notice day of December 1, 2007. In any case, it would have had to have been rolled before the December 2007 futures expired in mid-December.

On these grounds, the arbitrators determined that the corn contract was a Hedge-To-Arrive contract based on \$2.64 Chicago December 2007 futures, and because the arbitrators were not provided evidence showing that the contract was rolled with mutual agreement from December 2007 to March 2008, they concluded that delivery should have occurred in the initial delivery period of Sept. 15, 2007 to Nov. 30, 2007.

Because no corn was delivered by Kruger during the contracted delivery period, the arbitrators determined that the contract was in default as of Dec. 1, 2007 – not as of April 1, 2008 as argued by COFC. The arbitrators referred to NGFA Grain Trade Rule 28 in determining the damages due COFC as a result of Kruger's default. Rule 28 states in part that "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."

Since the arbitrators concluded the default occurred because of Kruger's failure to deliver by Nov. 30, 2007, the actual date and price for calculating damages was the closing market price as of Dec. 1, 2007, or \$3.86 per bushel, resulting in total damages of \$13,200. The arbitrators took into consideration that COFC's normal cancellation charge of 10 cents per bushel should be factored in as a part of the total damages awarded to COFC, resulting in total damages of \$13,200. $(\$3.86 \text{ CZ} + \$0.10 - \$2.64) = \$1.32 \times 10,000 \text{ bushels}$.

Wheat Contracts

COFC and Kruger did not dispute the existence of the two wheat contracts, nor the contracted price. Instead, the dispute was over the required delivery period. COFC argued that delivery was required between July 1, 2008 and Aug. 31, 2008; Kruger argued that delivery was due in February or March 2009.

The wheat contracts in dispute clearly stated the delivery period of July 1 – Aug. 31, 2008. In handwritten notation on the contracts, all included the phrase "Basis must be set by February 26, 09 Del by Aug 29, 08." When the defendant returned the signed contracts, the portion of the handwritten terms stating "Del by Aug 29, 08" was struck and initialed "TWK." No change was made to the printed delivery period of July 1 – Aug. 31, 2008. In Kruger's affidavit dated Jan. 12, 2009, he stated that, "[s]ince the handwritten delivery language differed from my discussions with [COFC], I crossed out and initialed the language regarding "Del by Aug 29, 08." No other action by Kruger on the disputed delivery period was noted.

In their decision, the arbitrators considered NGFA Grain Trade Rule 3 which states that Buyer and/or Seller are to send a written confirmation of the trade and "upon finding any material differences, shall immediately notify the other party to the contract, by telephone and confirm by written communication." Because no other action was taken by Kruger to clarify or correct any disagreement of the material difference in the delivery period, the NGFA trade rules governing the contract mean that the delivery period stated on the contract was binding upon both parties.

Lacking further evidence to the contrary, the arbitrators concluded that Kruger was obligated to deliver the 20,000 bushels of wheat under the two contracts during the time period of July 1 and Aug. 31, 2008, the delivery period printed on the contracts. No wheat was delivered.

Because of Kruger's failure to perform by delivering by Aug. 31, 2008, the arbitrators considered NGFA Grain Trade Rule 28 in determining the damages associated with Kruger'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. No evidence existed that Kruger made such a notification. Rule 28 further states that if Seller fails to notify Buyer that "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."

Although it was not exactly clear to the arbitrators how or when COFC notified Kruger of the default, it was determined that COFC took the proper action by promptly canceling the contracts at fair market value, mitigating any further damages to Kruger.

Since the arbitrators concluded that the default occurred because of Kruger's failure to deliver by Aug. 31, 2008, the price for calculating damages should have been the closing market for Chicago March 2009 wheat futures as of Sept. 1, 2008, which was \$5.88 per bushel. The arbitrators took into consideration that

COFC's normal cancellation charge of 10 cents per bushel should be factored in as a part of the total damages awarded to the COFC, resulting in total damages in the amount of \$15,975 (\$5.88 WU + \$0.10 cancellation fee - \$4.3825 contract price) =

\$1.5975 x 10,000 bushels for contract number 0124646 and damages in the amount of \$8,375 (\$5.88 WU + \$0.10 cancellation fee - \$5.1425 contract price) = \$0.8375 x 10,000 bushels for contract number 012647.

The Award

After having determined the proper date for cancelling the contracts by COFC, the arbitrators verified the closing Chicago Board of Trade futures prices for those dates and calculated the damages as follows:

- ◆ Corn Contract Number 01151: Chicago December 2007 corn futures closing price on Dec. 1, 2007 was \$3.86 per bushel, less the contract price of \$2.64 = \$1.22 + \$0.10 cancellation fee = \$1.32 per bushel damages x 10,000 bushels for total award of \$13,200.
- ◆ Wheat Contract Number 012646: Chicago March 2009 wheat futures closing price on Sept. 1, 2008 was \$5.88 per bushel, less the contract price of \$4.3825 = \$1.4975 + \$0.10 cancellation fee = \$1.5975 x 10,000 bushels for total award of \$15,975.

- ◆ Wheat Contract Number 012647: Chicago March 2009 wheat futures closing price on Sept. 1, 2008 was \$5.88, less the contract price of \$5.1425 = \$0.7375 + \$0.10 cancellation fee = \$0.8375 x 10,000 bushels for total award of \$8,375.

The arbitrators also considered COFC's request for \$2,000 to cover its legal fees, plus arbitration costs. The contracts included language stating that COFC was entitled to legal fees in the event of a contract breach. The arbitrators determined that COFC's requested reimbursement of the \$2,000 in legal fees, plus the arbitration fees paid to the NGFA (\$952.50), incurred as a result of these contract defaults was reasonable, and awarded these sums to COFC.

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