



National Grain and Feed Association

Arbitration Decision

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March 24, 2011

Arbitration Case Number 2484

Plaintiff: Swenson Brothers, Woonsocket, S.D.

Defendant: Fremar LLC, Marion, S.D

Statement of the Case

This case involved a question of agency. In February 2008, Swenson Brothers Partnership ("Swenson") contacted Tyler Woitzel of Fremar LLC ("Fremar") to inquire about selling corn for future delivery in the fall of 2009 and 2010. The parties discussed Swenson delivering the corn directly to US Bio Marion LLC ("USBio-Marion"), a subsidiary of VeraSun Energy Corp. ("VeraSun"). Swenson subsequently entered into the following four corn sales contracts:

Contract No.	Bushels	Delivery	Price/Bu.
100-0023240	100,000	December 2009	\$4.90
100-0023241	100,000	January 2010	\$4.96
100-0023242	100,000	February 2010	\$4.96
100-0023243	300,000	December 2010	\$4.81

Each of the contracts had "USBio-MARIONLLC" printed at the top and listed the buyer as "USBio-MARIONLLC, PO BOX 357, MARION, SD 57043, 605-648-3941" and the seller as "SWENSON BROS. PARTNERSHIP 39476-234TH STREET, ATTN: DARREN SWENSEN, WOONSOCKET, SD 57385." The contracts called for delivery to "USBio-Marion LLC," which operated its ethanol plant less than one mile from Fremar's elevator location. Fremar was not identified anywhere on the contract forms.

On Feb. 19, 2008, Tyler Woitzel of Fremar signed the contracts as "Our Representative" under USBio-Marion's signature line. The contracts then were sent to Swenson. Each contract was signed by Darren Swenson on Feb. 20, 2008 and returned to USBio-Marion. No corrections or amendments were made to the contract confirmations by Swenson.

On Oct. 31, 2008, before Swenson delivered any corn pursuant to the contracts, VeraSun and all of its subsidiaries, including USBio-Marion, filed Chapter 11 bankruptcy petitions. The four Swenson contracts were listed on USBio-Marion's bankruptcy schedule, which identified the executory contracts in the bankruptcy proceeding for VeraSun and its subsidiaries.

In November 2008, Swenson contacted Fremar contending that Fremar was obligated to perform on the contracts. Fremar's counsel subsequently wrote Swenson advising that Fremar was "acting as the purchasing agent for USBio-Marion, LLC" and that "Fremar is not a party to the contracts and is not responsible for performing the contracts."

Swenson contended that the contracts were between Swenson and Fremar, and that Fremar was the principal under the contracts, with USBio-Marion simply being the agreed upon delivery location. Swenson alleged that Fremar breached the contracts and that Swenson later covered the contract at lower prices, resulting in a loss to Swenson of \$930,375, which Swenson sought to recover in this arbitration proceeding.

Fremar denied the claim and contended that USBio-Marion was the principal buyer, and that Fremar's agency status was disclosed to Swenson before the parties entered into the contracts. Affidavits submitted by Swenson and Fremar conflicted on whether Fremar's supposed agency status was disclosed verbally to Swenson before the contracts were signed.

The Decision

The arbitrators denied Swenson's claim for damages based upon the interpretation of contractual terms between the parties as presented and evidenced by the parties.

The contracts clearly identified USBio-Marion as the buyer, and the contracts were signed and confirmed by Swenson with no corrections or amendments. The only connection to Fremar on the contracts was that Tyler Woitzel, an employee of Fremar, had signed the contracts on behalf of USBio-Marion as "Our Representative."

While there are inconsistencies in the affidavits concerning what verbal disclosures were made or discussions were had before the contracts were signed, the arbitrators concluded that Fremar's status as a purchasing agent, which was not acting as the principal buyer, was apparent from the contracts themselves before Swenson signed them. As such, it was incumbent upon Swenson to object in a timely manner to the identity of the principal buyer on the contracts before signing

them if Swenson did not believe that USBio-Marion was the buyer.

Under NGFA Grain Trade Rule 3 (A) and (B), with respect to a direct contract between a buyer and seller (as must be contended by Swenson in this case), or Grain Trade Rule 3(C), with respect to when a trade is made through a broker – a party is required to carefully check all specifications upon receiving a written confirmation, and to immediately give notice to the other party if there are any differences. Otherwise, the terms and specifications contained in the confirmation govern the contract and are binding upon both parties.

Because Swenson failed to immediately give notice of any disagreement with the terms of the contracts, and instead signed and returned them as written, the evidence supported and the arbitrators found that USBio-Marion was the principal buyer under the contracts, and that Fremar was acting as an agent.¹

The Award

As a result of the denial of the claim, no damages were awarded. Each party shall be responsible for paying its own expenses associated with this proceeding.

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

Dean Kohlmeyer, *Chair*
Grain Department Manager
StateLine Cooperative
Burt, Iowa

Jay Kroese
Senior Attorney
Cargill Incorporated
Minneapolis, Minn.

Todd Lafferty
Vice President and General Counsel
Wheeler Brothers Grain Co.
Watonga, Okla.

¹ The arbitrators noted that Fremar also presented evidence that it was to be paid a commission on a per bushel basis for corn it procured for USBio-Marion, which is indicative of an agency relationship.