



National Grain and Feed Association

Arbitration Decision

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December 20, 2007

Arbitration Case Number 2161

Plaintiff: MGM Marketing Inc., Olathe, Kan.

Defendant: Frederick Sales LLC, Kansas City, Mo.

Statement of the Case

The arbitrators determined that this case involved two railcar loads of distressed product – “Sodium Sesquicarbonate” – that the buyer, Frederick Sales LLC, purchased “as is” from the seller, MGM Marketing Inc.

Two separate sale contracts were written for the two railcar loads on Aug. 7 and 17, 2006 (designated by contract numbers 20098 and 20124, respectively). Under the contracts, the two railcar loads were to be delivered to two different locations – Delphos, Ohio and Hereford, Texas. The terms and conditions

of the contracts were set forth by the seller, and subsequently were agreed to by the buyer when it signed and noted its purchase order numbers on the contracts and returned them to the seller. The seller and buyer subsequently agreed to a change of destination for the second car – from Hereford to Roy, Texas – subject to no additional changes or charges. The seller faxed a copy of the contract confirming this change, and the buyer noted it on the sales confirmation it then returned to the seller.

The Decision

The arbitrators concluded that the railcars arrived at their respective destinations: Delphos, Ohio, on Sept. 9 and Roy, Texas on Sept. 11, 2006. The first car that arrived on Sept. 9 was partially unloaded, and there was evidence provided of an attempt to unload the second car that arrived on Sept. 11.

The consignee rejected the first carload back to the buyer on Sept. 12. The buyer claimed likewise to have rejected the car back to the seller via telephone on Sept. 12, but the arbitrators determined that this conversation was not established by the evidence. In this regard, the arbitrators noted that NGFA Feed Trade Rule 28(C)(3) states: “*When a rule refers to telephone or voice communication, confirmation, or notification, such communication must be confirmed in writing.*” The arbitrators determined that the buyer consequently failed to provide sufficient proof of the alleged telephone notification, which the seller denied receiving.

The arbitrators concluded that the first hard proof of the buyer attempting to reject the carloads occurred on Sept. 26, 2006, when the buyer notified the seller by telephone that it had stopped payment on the check for the shipment. The seller sought clarification from the buyer on Sept. 26. The seller then

received written notice by email from the buyer on Sept. 28, stating: “*Payment stopped and contract voided because: 1. Unable to unload material off of PD railcars. 2. Product not acceptable as represented.*”

The arbitrators decided that an attempt to unload or reject the second car in Roy, Texas was made on Sept. 26, 15 days after it was placed by the railroad. The seller responded on Sept. 28 that it did not accept the rejection, and sought clarification why the buyer believed the product did not meet the contract specifications.

The arbitrators noted that both parties in their arguments referenced a “Technical Data Sheet” that the seller faxed to the buyer prior to the trade. From Sept. 23 until Nov. 15, 2006, there was an exchange of correspondence and denials of responsibility between the parties, during which the seller continued to query the buyer for an answer on how to proceed with disposition of the railcars. On Nov. 15, the seller notified the buyer of its intention to dispose of the cars in question by shipping the Ohio carload’s contents to a landfill and the Texas carload to a destination in Idaho. On Nov. 29, the seller sold the contents of the Texas car to a customer in Buhl, Idaho. The

seller was responsible for transferring the contents from the railcar onto totes or super sacks for this delivery. The car was shipped from Texas to Idaho on Dec. 13, and was said to have transferred on or about Jan. 26, 2007. The car in Delphos, Ohio, was repositioned on or about Oct. 18, 2006 to Hanna, Ind., and this load was disposed by way of three separate trips to a landfill on Dec. 27, 2006, and Jan. 15 and 16, 2007.

In considering this case, the arbitrators determined that a binding contract was formed between the parties in accordance with the NGFA Trade Rules, including NGFA Feed Trade Rule 4, which governs how a contract is to be altered or amended. The arbitrators recognized that the seller had conveyed to the buyer that the product at issue in this case was similar to product previously traded between the parties, but that the product was not identical to that previously traded. The seller faxed a Technical Data Sheet to the buyer prior to the sale on Aug. 2. According to the Technical Data Sheet, the product to be traded was manufactured by a company different than the manufacturer of previous shipments. Both the buyer and the seller acknowledged the exchange of the Technical Data Sheet, and the buyer admitted that it did not pay much attention to the document's details. The arbitrators also found it ironic that neither party appeared to pay much attention to the Material Safety Data Sheet that was issued for the product traded until after the dispute arose, whereupon both parties attempted to rely upon it in their arguments.

In reaching their decision, the arbitrators referred to the following additional NGFA Trade Rules:

NGFA Feed Trade Rule 6 [Passing of Title as Well as Risk of Loss and/or Damage]: *Title as well as risk of loss and/or damage passes to the Buyer as follows: ... (B) On delivered contracts: (1) By rail, when the conveyance is constructively placed or otherwise made available at the Buyer's original destination.*

NGFA Feed Trade Rule 16 [Default on Quality]: *It is the responsibility of both Seller and Buyer to verify that the feedstuff complies with an Association of American Feed Control Officials (AAFCO) definition, a mutually acceptable industry standard, or a specific quality description. ... (B) If the Buyer, by*

exercise of due diligence, verifies that the shipment does not comply with contract terms, he shall notify the Seller by telephone, facsimile or wire not later than 12 noon Central Time the next business day. ...

The arbitrators concluded that the buyer had the opportunity to define the product with tighter restrictions and terms than those received from the seller, yet the buyer chose to accept the seller's definitions and terms. The arbitrators determined that NGFA Feed Trade Rule 16(B) defined the buyer's obligations if it sought to reject the product back to the seller, including that the buyer was to have served notice by noon Central Time on the day after noting that the shipment did not comply with contract terms.

The arbitrators further referred to NGFA Feed Trade Rule 18(A) [Condition Guaranteed Upon Arrival], which states that "*Shipment on contracts shall be guaranteed by the Seller to arrive at final destination, cool, sound and sweet and free of all objectionable extraneous material....*" The arbitrators determined that although the seller attempted to limit its liability and obligations in this respect by the terms of the contract, the seller still had an obligation to provide a "sound" product.

The arbitrators then referred to NGFA Feed Trade Rule 18(B), which provides:

It shall be the duty of the Buyer to ascertain by inspection or other measured report the condition of the shipment not later than 12 noon of the second business day after arrival at final destination, otherwise the Seller's liability ceases at the expiration of such time. (See Rule 28(J) for 'Definition of Rail and Truck Arrival').

The arbitrators decided that under Feed Trade Rule 28(J)(1) [Rail and Truck Arrival] – Sept. 11, 2006 was the date of arrival for both railcars. The arbitrators ruled that in this regard the buyer was fully negligent in that it failed to convey notice that it was rejecting the carloads until Sept. 26 – 13 days after the window to reject the product had expired. Therefore, the arbitrators decided that the buyer, Frederick Sales, was fully responsible for the product, notwithstanding whether or not it was "sound" under Feed Trade Rule 18(A).

The Award

Therefore, the arbitrators awarded to the seller, MGM Marketing, all costs for the product as well as the cost of disposing the content of the cars, plus interest since Sept. 12, 2006. The arbitrators denied MGM Marketing's claims for demurrage and expenses charged to sell out the product.

The arbitrators consequently awarded damages to MGM Marketing as follows:

Railcar #ACFX 45746 shipped on contract no. 20124 to Roy, Texas

Amount due to MGM Marketing based upon original sale:	\$7,155.00
Net loss (after freight, handling and materials expense):	\$2,104.00
Expenses paid by MGM Marketing for incidentals:	\$ 116.00

Railcar #ACFX 45693 shipped on contract no. 20098 to Delphos, Ohio

Amount due to MGM Marketing based upon original sale:	\$10,472.00
Expense paid to railroad for rail freight (Item LL):	\$ 416.00
Expense paid to unload car and haul product to local landfill:	\$ 3,000.00
Expense paid to local landfill:	\$ 2,042.21
Expenses paid by MGM Marketing for incidentals:	<u>\$ 30.00</u>

Total Monies Awarded \$25,335.21

The arbitrators also awarded interest to accrue at 8.25% per annum from Sept. 12, 2006, until payment is made to MGM Marketing.

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

David S. Reiff, Chair

President
Reiff Grain & Feed Inc.
Fairfield, Iowa

Mike Meyers

Director of Wheat By-Products
APEX
Hamburg, N.Y.

Patti Murphy

Product Manager, Mineral and Feed Additives
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