



National Grain and Feed Association

Arbitration Decision

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December 20, 2007

Arbitration Case Number 2164

Plaintiff: The Scoular Co., Minneapolis, Minn.

Defendant: FGDI LLC, Buford, Ga.

Statement of the Case

The Scoular Co. ("Scoular") sought payment from FGDI LLC ("FGDI") in the amount of \$108,220.91 for a total of 36,197.85 bushels of corn delivered to Sylvest Farms Inc. ("Sylvest") at Hope Hull, Ala. Scoular also sought payment from FGDI in the amount of \$2,121.96 for three partial truckloads of corn totaling 715.54 bushels on overfills for three separate contracts between Scoular and FGDI.

Scoular began selling corn directly to Sylvest, a poultry producer, in April 1998, and continued doing so through 2001, when it said it began experiencing slow payments by Sylvest. Scoular stated that while the timeliness of Sylvest's payments improved for a time, Scoular ultimately came to believe that Sylvest's financial situation was strained and it would have increasing difficulty in making payments to Scoular in a timely manner. Other than the recurring credit issues with Sylvest, Scoular stated it was reasonably satisfied with the business arrangement.

Republic Grain Services Inc. ("Republic"), which brokered the corn sales from Scoular to Sylvest, then informed Scoular that FGDI was continuing to sell corn and other commodities to Sylvest. An arrangement subsequently was reached whereby FGDI would purchase corn from Scoular for delivery to Sylvest. In arguments submitted to the arbitrators, Scoular described the arrangement as follows: "*Scoular chose security over maximizing its profit on each individual sale. FGDI took the credit risk of continued trades with Sylvest, and rightfully got a greater reward as a result.*" The parties indicated that the premium received by FGDI under the arrangement averaged about 3 cents per bushel.

Republic, the broker to all contracts between Scoular and FGDI under the arrangement, described the trading relationship in an affidavit as follows:

"In brokering the Contracts, I would normally match

a request for the purchase of corn from Sylvest with an offer to sell corn by Scoular and with an agreement from FGDI to 'flip' the corn through FGDI. Typically, FGDI would agree to purchase the grain from Scoular and 'flip' it to Sylvest on the same terms and conditions other than price. For their role in this transaction, FGDI would receive a premium.... In each of the Contracts I matched the Sylvest request with a Scoular offer to sell, and consulted with FGDI regarding their willingness to act as the intermediary."

Scoular's records showed that Republic brokered corn from Scoular to FGDI for delivery to Sylvest's feed mill from June 2003 through April 2006. In sum, 49 contracts totaling 3,461,058 bushels of corn were brokered through Republic, whereby Scoular sold corn to FGDI for delivery to Sylvest's mill. The last contract was dated April 7, 2006 for 50,000 bushels. All of the contracts and confirmations of Scoular, FGDI and Republic stated that National Grain and Feed Association (NGFA) rules governed the trades. Scoular submitted that over the course of these trades, 42 contracts (which included 587 truckloads of corn), were written and agreed upon between the parties after the corn had already been delivered without a prior written contract. FGDI confirmed that Scoular delivered corn to Sylvest on "many occasions" without any prior written contract with FGDI for the purchase of the corn.

FGDI countered that it decided on a case-by-case basis whether to purchase what it termed Scoular's "Deliveries Without Contract" only after FGDI had negotiated new contract specifications through Republic and was satisfied that Sylvest was able to pay for the "Deliveries Without Contract" within its credit limits. According to FGDI, Sylvest usually maintained its account with FGDI at a level that permitted purchase of the "Deliveries Without Contract." Further, FGDI said that on occasion it advised Republic that it would not purchase a "Delivery Without Contract" unless and until

Sylvest paid down its account with FGDI.

On April 18, 2006, Sylvest filed for bankruptcy protection. Republic notified Scoular of the bankruptcy, and according to Scoular, it promptly ceased further corn deliveries to Sylvest. No written contract or prior contract amendment existed between Scoular and FGDI for 36,197.85 bushels of corn that already had been delivered to Sylvest by Scoular. Scoular also notified FGDI (through Republic) that there was an “overfill” on corn delivered to Sylvest, which FGDI refused. Scoular invoiced FGDI for \$108,220.91. FGDI did not pay Scoular’s invoice.

Scoular argued that even though it and FGDI established a course of dealing in which execution and performance did not strictly follow NGFA’s Trade Rules – as stated in the preamble to the NGFA Grain Trade Rules, parties are free to “agree on any contractual provisions, which they deem appropriate” – it contended that the parties did just that, developing a course of dealing through Republic whereby Scoular delivered corn on a regular basis to Sylvest. And, when those deliveries were in excess of the quantities contracted between Scoular and FGDI, Scoular said the two parties applied the excess shipments to the next contract agreed to between them. According to Scoular, until Sylvest’s bankruptcy, “it was an arrangement that worked.” The arbitrators noted that Scoular did not provide written documentation showing that FGDI had at any time pre-agreed to purchase non-contracted corn that was delivered by Scoular to Sylvest.

FGDI countered that, “FGDI’s real position is that the

course of dealing between itself and Scoular does not provide a basis for an agreement by FGDI to purchase the Corn in Dispute....” FGDI argued that Scoular’s contention of an alleged “agreement” would have constituted FGDI agreeing “to buy however much grain Scoular might deliver to Sylvest, regardless of Sylvest’s ability to pay for such deliveries.” FGDI further stated:

“The mere fact that FGDI has purchased grain in the past from a customer does not mean that FGDI is required to purchase grain from that customer in the future. There must be a ‘meeting of the minds’ of both the buyer and seller before there is a binding transaction. In this case, there was no such ‘meeting of minds.’”

FGDI also stated that it had not received payment for any of the corn involved in this dispute and had not been enriched by Scoular’s delivery of said corn.

The arbitrators noted that none of the documents submitted by either party showed that FGDI had at any time requested that Scoular deliver corn to Sylvest prior to a contract being agreed upon between the parties.

In addition to the aforementioned 36,197.85 bushels of corn, Scoular sought to collect \$2,121.96 for 715.54 bushels of corn resulting from three partial truck overfills on three previous existing contracts sold by Scoular to FGDI for delivery to Sylvest. The arbitrators observed that FGDI’s arguments were silent on this claim.

The Decision

Since FGDI did not specifically dispute Scoular’s claim for 715.54 bushels of corn from overfills on three partial loads delivered in fulfillment of three prior contracts between Scoular and FGDI, the arbitrators unanimously decided that FGDI owed Scoular for those overfill bushels in accordance with NFGA Grain Trade Rule 23(A).

Concerning the larger claim by Scoular involving the 36,197.85 bushels of corn delivered to Sylvest by Scoular without the existence of a written contract between Scoular and FGDI, the arbitrators concluded that they needed to determine whether an agreement or contractual obligation existed between Scoular and FGDI that would require FGDI to purchase said bushels of corn.

The arbitrators determined that while the preamble to the NGFA Grain Trade Rules provides the freedom for parties “to agree on any contractual provisions,” it does not override the requirements of NGFA Grain Trade Rule 1, which states that both buyers and sellers must include and detail in their original

articles of trade – whether entered into orally or in writing – the applicable specifications as listed in the rule as well as “other terms.” The arbitrators found that an alleged agreement or contractual arrangement falling under “other terms” still must meet the requirements of being specific and included in the contract. Upon examination of the contract preceding the dispute in question, the arbitrators determined that neither Scoular’s nor FGDI’s contracts nor Republic’s confirmations contained “other terms” that would extend overfill delivery rights by Scoular beyond NGFA Grain Trade Rule 23(A), which restricts overfill amounts on truck-delivered grain to the “balance of the load that fills the contract.”

The arbitrators concluded that no statements received from either FGDI or Republic supported Scoular’s contention that an agreement or way of dealing or “other terms” existed that required FGDI to purchase corn delivered to Sylvest under any conditions other than by contract. In rebuttal, FGDI’s and Republic’s statements indicated that FGDI purchased corn on a case-by-case basis after FGDI first satisfied itself of the

worthiness of the transaction. For a contract to exist, written or oral, both parties must agree to the terms and conditions. In this case, the arbitrators found that such an agreement did not exist regarding the 36,197.85 bushels at the heart of Scoular's claim. Nor did the arbitrators agree with the contention that the circumstances of some prior trades created a forward requirement on FGDI to repeat the conditions and terms of previous trades.

Without the existence of a verifiable agreement, the arbitrators unanimously agreed that no obligation existed for FGDI to purchase the 36,197.85 bushels delivered by Scoular to Sylvest. The arbitrators ruled that in delivering corn to Sylvest without a contract pertaining to the specific bushels involved, Scoular assumed the risk that FGDI might not agree to purchase the corn.

The Award

The arbitrators unanimously decided in favor of the plaintiff, Scoular, in the matter of payment due on 715.54 bushels representing overfills of corn against three prior contracts, and ordered that the defendant, FGDI, pay \$2,121.96, plus interest, which shall accrue at 8 percent per annum beginning April 13, 2006 until payment is made by FGDI to Scoular.

The arbitrators unanimously decided in favor of the defendant, FGDI, and against the plaintiff, Scoular, in the matter of Scoular's claim for \$108,220.91 in payment against the delivery of 36,197.85 bushels of corn delivered by Scoular to Sylvest's mill.

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

Roger Caffrey, Chair
Director of Grain Operations
MFA Inc.
Columbia, Mo.

Chris Boerm
Senior Merchandising Manager
Archer Daniels Midland Co.
Decatur, Ill.

Michael Donnelly
President
Donnelly Commodities Inc.
Smithton, N. Y.