



National Grain and Feed Association Arbitration Decision

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September 14, 2006

Arbitration Case Number 2119

Plaintiff: Gemperle Enterprises, Turlock, Calif.
Defendant: Clarkson Soy Products LLC, Cerro Gordo, Ill.

Arbitration Case Number 2119-B

Third-Party Plaintiff: Clarkson Soy Products LLC, Cerro Gordo, Ill.
Third-Party Defendant: American Natural Soy Processors, LLC, Cherokee, Iowa

Statement of the Case

The plaintiff, Gemperle Enterprises (“Gemperle”), raises laying hens and sells the eggs produced. In this arbitration case, Gemperle claimed extensive damage inflicted upon its organic layer flocks as a result of eating organic soy meal sold by the defendant, Clarkson Soy Products LLC (“Clarkson”), that allegedly contained exorbitantly high levels of the anti-nutrient, trypsin inhibitor.

Gemperle claimed \$776,761 in past and future losses as damages.

Clarkson denied Gemperle’s allegations and claimed that Clarkson complied with the contractual terms between it and Gemperle. Clarkson further argued that Gemperle’s arbitration complaint was untimely. Clarkson also stated that if the arbitrators decided in Gemperle’s favor, then the third-party defendant, American Natural Soy Processors LLC, which allegedly manufactured the soy meal, should be required to indemnify Clarkson for any damages awarded to Gemperle.

The Decision

The arbitrators unanimously decided in favor of the defendant and third-party defendant on two specific rulings:

- ▶ **Ruling Number 1:** The complaint by Gemperle was not filed with the National Secretary within 12 months after the claim arose, or within 12 months after the expiration date for performance of the contract; and
- ▶ **Ruling Number 2:** The evidence presented did not prove that Clarkson organic soybean meal was the cause of the decreased flock production or increased mortality rate. Nor

did any evidence establish that Clarkson intentionally or unintentionally deliver tainted products to Gemperle. Therefore, it was decided that all damages claimed by Gemperle would be denied in this case.

Ruling Number 1

The arbitrators ruled that National Grain and Feed Association (NGFA) Arbitration Rules apply, as confirmed by contracts signed by both parties that contained the clause, “Buyer and Seller agree that any disputes regarding this contract are to be resolved between

the parties or, failing that, through arbitration by the NGFA.” The committee further ruled that since the parties agreed to arbitration by the NGFA, that NGFA Arbitration Rules are implied in the arbitration process, and thusly apply to these contracts, as well. In addition, the arbitrators ruled that NGFA Trade Rules also are applicable, as they reflect the general customs and practices of the trade.

Clarkson is a member of the NGFA. Although Gemperle is not a NGFA member, it is a member of the California Grain & Feed Association (CGFA) and according to testimony, CGFA has expressly adopted the NGFA Trade Rules as the rules for use in the settlement of disputes in California if no other trade rules are specified, and that it is regularly expected that NGFA Trade Rules will apply unless another set of trade rules are expressly referenced in the parties’ contractual documents. In addition, it was noted in the same testimony that a mere reference in the contract to state law, such as the references in the contracts between the parties to “laws of Illinois,” would not change the expectation that the NGFA Trade Rules would apply.

It is important to note that the NGFA Feed Trade Rules, in particular Rule 16, “*Default on Quality*,” and Rule 18, “*Conditions Guaranteed Upon Arrival*,” are applicable to this decision. Rule 16 states: “*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.*” Rule 16, Item (B) goes on to state: “*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...*” Gemperle did not send Clarkson any such notice.

Rule 18 states: “*(A) Shipment on contracts shall be guaranteed by the Seller to arrive at final destination, cool, sound and sweet, and free of objectionable extraneous material, ... (B) It shall be the duty of the Buyer to ascertain by inspection or other means and 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.*”

Gemperle determined through its own quality-control procedures that there was no sign of quality deterioration and did not send Clarkson any notification. Gemperle’s assertion that consumers of soy meal for feed purposes have come to rely on the processing industry’s quality-assurance programs did not relieve Gemperle of its own responsibility and/or opportunity to measure, assess, accept or reject its inputs. Both parties agreed that there was undercooked meal in the marketplace. Gemperle stated: “The most problematic anti-nutritional factor is trypsin inhibitor, and that element is recognized as a natural toxin for poultry.” In a marketplace where a known quality-deficient supply of an input exists and there is a readily available test to measure for that deficiency, it would seem prudent to regularly and routinely test for that deficiency at the destination.

Both Gemperle and Clarkson agreed in their arguments that the organic soybean meal in question was delivered to Gemperle in late

December 2003. The arbitrators thus ruled that late December 2003 was the expiration date for performance of the contracts, and that any complaint must have been filed within 12 months, or late December 2004, to be considered for NGFA Arbitration.

Both parties interpret the wording of NGFA Arbitration Rules Section 3(d), in particular the “after the claim arises” language, as fundamental to their positions regarding whether this arbitration case can proceed. The arbitrators unanimously agreed that these terms do not extend the start of the limitations period in this case. Gemperle had the responsibility and opportunity to measure, assess, accept or reject its inputs, and the failure of Gemperle to do so did not extend the start of the limitations period. With this in mind, the arbitrators agreed that the contracts between the parties were not meant to be open-ended contracts, and that “date of discovery” did not extend the start of the limitations period in this case.

The arbitrators found that: 1) Gemperle had an obligation to test the soybean meal immediately upon arrival; 2) by 12 noon of the second business date after arrival at final destination was the expiration date for performance of the contract; and 3) 12 months from that date was ample time to file any claim for NGFA Arbitration.

Gemperle’s complaint was filed for NGFA Arbitration on Feb. 3, 2005, more than 30 days beyond the 12-month allowable time to file. Thus, the complaint was not filed in a timely manner.

Ruling Number 2

Link of Trypsin Inhibitor (TI) to Mortality

In Gemperle’s opening statements, it was stated that Dr. Cutler was able to rule out disease and other environmental concerns as the causative factor in the flocks’ poor performance. Dr. Cutler’s own statement (Exhibit B of Stephen Gemperle declaration) confirmed that the mortality from the flocks was examined and tissue and blood collected. To rule out any disease, a veterinarian must conduct a thorough necropsy of the dead or euthanized birds that are exhibiting morbidity. Thus, the arbitrators can only assume that Dr. Cutler did a thorough necropsy to come to his conclusion that disease was not a causative factor.

If birds had consumed meal with extremely high TI, these birds would have had an enlarged pancreas, a condition that would have been evident to an experienced veterinarian. Dr. Cutler’s report made no mention of this condition. An enlarged pancreas has been reported as a characteristic of TI consumption in laying hens in peer-reviewed literature as discussed by Dr. Carl Parsons in his testimony for ANSP. The arbitrators concluded that, since the mortality was examined, the birds did not have an enlarged pancreas and therefore had not consumed high amounts of TI. Further, Dr. Cutler’s report left open the question that fowl cholera was a contributing factor in the cause of the mortality by the statement, “The problem was indeed picking, causing more Fowl Cholera not the reverse.” Therefore, the arbitrators cannot rule out this disease as a factor in the flock’s performance.

Examination of Production and Mortality Records

The conclusion that something other than Clarkson's soy meal caused Gemperle's problems is supported by the egg production and mortality patterns of Gemperle's flocks that are detailed in Exhibits F-I in the Declaration of Barry Marcus. Some of the damaged flocks in question started experiencing elevated mortality from October to mid-December 2003, a period before the Clarkson meal was fed, which according to Stephen Gemperle was sometime shortly after the delivery in late December. As shown in Exhibit G, the mortality of Harding 3 - HYB - Flock 103 began increasing in early to mid-December. The egg production started a negative trend during this same period. Mortality in Harding 5 -HYB -Flock 115 (Exhibit H) escalated during October and November. Mortality was already at the peak level in the flock by late December, before the flocks started consuming the Clarkson meal.

This flock's egg production started a steep negative trend during the month of December, but was stable from late December through late February. In Exhibit I, Harding 2-HYB-Flock 92 experienced significant elevated mortality during the months of October and November 2003; well before the Clarkson meal was delivered. This flock's egg production was never close to production standards

following the onset of laying in October 2003, and experienced a steep decline during the month of December. Egg production in this flock actually showed an improving trend from early January through late February, which is the period when the Clarkson meal was fed.

In these three flocks, the arbitrators found no correlation between the time the Clarkson meal was fed and the onset of mortality and production issues. Indeed, the problems appeared before the Clarkson meal was fed. Only the production and mortality issues from Harding 1 -HYB - Flock 121 (Exhibit F) correlated at all with the timing of the Clarkson meal. However, it appeared that the production and mortality issues in this flock were similar to problems being experienced in other flocks, which obviously were not caused by the meal because of the timing of when the meal was fed. Therefore, the arbitrators could not conclude that the issues in the later flock were directly associated with feeding the Clarkson meal.

Conclusion

The arbitrators therefore concluded that: 1) Gemperle's complaint was not filed in a timely manner; and 2) Clarkson soybean meal cannot be conclusively proven to be the cause of the flock problems.

The Award

The arbitrators ruled in favor of both defendant, Clarkson Soy Products LLC, and third-party defendant, American Natural Soy Processors LLC, and denied any damages or punitive damages to Gemperle Enterprises. The arbitrators further ruled that each party involved in the case was responsible for its own arbitration costs or attorney's fees.

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

Jim Mendlik, Chair
Vice President of Operations
Hanson-Mueller Co.
Omaha, Neb.

Bart Brummer
Director of Flour Mill Markets Division
The Scoular Co.
Indianola, Iowa

Randolph D. Mitchell, Ph.D.
Nutrition Research Manager
Perdue Farms Inc.
Salisbury, Md.

[Note: This decision may have been edited for publishing with the approval of the arbitrators.]