



National Grain and Feed Association

Arbitration Decision

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July 6, 2006

Arbitration Case Number 2128

Plaintiff: James R. Mikkelsen, Webster, N. D.

Defendant: ConAgra Foods Inc., d/b/a Peavey Grain, Devils Lake, N. D.

Statement of the Case

This arbitration case involved 109,634.63 bushels of a total of 117,624.85 bushels of U.S. No. 1 Northern Spring wheat delivered to Peavey Grain's facility in Devils Lake, N.D., for storage from August 2002 through September 2002 by James R. Mikkelsen (Mikkelsen), a farmer operating near Webster, N.D.

On Oct. 31, 2002, Peavey Grain issued a written confirmation of the purchase contract (contract number DP05001) for the 109,634.63 bushels of wheat. Both Mikkelsen and the purchaser for Peavey Grain signed the contract. As the "Price or Basis" term, the contract stated, "SEE ATTACHED ADDENDUM." The contract further provided Oct. 31, 2002 as the shipment date, and "Devils Lake" as the "Delivery Basis." The contract also included the following provision: "THIS CONTRACT IS NOT PROTECTED BY NORTH DAKOTA STATUTORY WAREHOUSEMAN'S BOND COVERAGE IN THE EVENT OF THE BUYER'S INSOLVENCY."

Peavey Grain subsequently made the following payments on the contract (totaling \$340,747.47):

- \$254,022.01 on check number 224697 (dated Oct. 31, 2002) payable to Commodity Credit Corp., Devils Lake for marketing assistance loan number 1490.
- \$28,750.92 on check number 224698 (dated Oct. 31, 2002) payable to Commodity Credit Corp., Devils Lake for marketing assistance loan number 1489.
- \$57,974.54 on check number 224720 (dated Nov. 6, 2002) payable to Jim Mikkelsen and the Ramsey National Bank in Webster, N. D.

The settlement sheets associated with the payments provided the following details:

- For the \$254,022.01 payment, the settlement sheet was dated Oct. 31, 2002. It referenced contract number DP05001, a price per bushel of \$3.09, and an "Advance Given" of \$254,022.01.
- For the \$28,750.92 payment, the settlement sheet was entitled "Advance Purchase Settlement" and was dated March 25, 2003. It referenced contract number DP05001, a price per bushel of \$4.20, and an "Advance Settlement Amount" of \$28,750.92. It also showed moisture discounts of \$611.25 and damage discounts of \$3,751.43.
- For the \$57,974.54 payment, the settlement sheet was entitled "Advance Purchase Settlement" and was dated Nov. 6, 2002. It referenced contract number DP05001, a price per bushel of \$4.20, and an "Advance Settlement Amount" of \$57,974.54. It also showed moisture discounts of \$611.25 and damage discounts of \$3,751.43.

On July 2, 2003, Peavey Grain issued a Confirmation of Pricing and/or Original Contract Amendment for contract number DP05001. Under "Confirmation or Type of Amendment" the amendment confirmation provided the following terms: "pricing of NPE Contract." The amendment confirmation also provided a price per bushel of \$3.09 and a delivery date of Oct. 31, 2002. Only Peavey Grain's purchaser signed the amendment confirmation.

Mikkelsen claimed that he sold the 109,634.63 bushels of Northern Spring wheat to Peavey Grain on Oct. 31, 2002 at the Devils Lake posted price of \$4.28 per-bushel, for a total of \$469,236.21. Mikkelsen further argued that the contract was a cash sale contract under which full payment should have been made by no later than Nov. 10, 2002.

Peavey Grain countered by claiming that the transaction was a deferred-pricing contract. Peavey Grain further argued that Mikkelsen contacted Peavey Grain's Devils Lake facility manager about available marketing options that would allow him to obtain some funds in advance and to price his wheat at a later date so that he could take advantage of any price rally. On Oct. 31, 2002, Peavey Grain's Devils Lake manager arranged for Mikkelsen to talk to Peavey Grain's senior merchandiser at its Omaha, Neb., office about Mikkelsen's options. According to Peavey Grain, its senior merchandiser then stated to Mikkelsen that he had two options: 1) sell the wheat at Peavey Grain's current posted price; or 2) enter into a deferred-pricing contract, with Peavey Grain advancing a percentage of the estimated value of the grain based upon the current market pending final pricing and settlement for the grain. Peavey Grain claimed it advised Mikkelsen that he could set the price for the contract at a later time, thereby allowing him to realize any increase in market prices, but that if the market decreased and the value exceeded the advance to him at settlement, Mikkelsen would owe Peavey Grain the difference between the settlement price and the advance payment.

Peavey Grain alleged that Mikkelsen over the next nine months spoke with Peavey Grain's Devils Lake manager on a regular basis regarding the price of wheat to determine when he would price the 109,634.63 bushels. Subsequently, at about the end of June 2003, Peavey Grain's manager allegedly called Mikkelsen to advise that the contract was approaching a

negative position and that Peavey Grain would require him to price it if it went into a negative position. Peavey Grain asserted that Mikkelsen called the contract on July 2, 2003, and set the price on the 109,634.63 bushels. In addition, according to Peavey Grain, Mr. Mikkelsen sold the 7,990.22 bushels of wheat remaining in storage. The price for both was \$3.09 per bushel (\$3.3425-per-bushel board price minus \$0.2325-per-bushel basis). Peavey Grain then allegedly sent Mikkelsen the amendment confirmation, as well as a confirmation for purchase of the remaining 7,990.22 bushels (contract number S002751).

Mikkelsen stated that he did not receive the amendment confirmation until Dec. 19, 2003, when he inquired as to why Peavey Grain had failed to pay him the full price that he believed was due. In addition, Mikkelsen claimed that he did not receive the settlement sheet for S002751 (which detailed the settlement for a combined 117,624.85 bushels and showed a net amount due and owing by Mikkelsen to Peavey Grain of \$34,554.89), or an invoice for the alleged amount due of \$34,554.89. Mikkelsen stated that on Oct. 16, 2003, Peavey Grain provided him with a calculator tape showing \$34,554.89 minus \$29,406.22 for a total of \$5,148.67. He also stated that Peavey Grain had advised that the "entire so-called storage charge" was written off.

Mikkelsen requested an award of \$128,488.74, plus interest from Oct. 31, 2002. Peavey Grain requested \$34,554.89, plus interest from July 7, 2003, plus costs and attorney fees.

The Decision

The arbitrators thoroughly examined and assessed all the documents and arguments presented by the parties. The unanimous decision was based upon the following conclusions that were specific to the circumstances in this case.

The arbitrators determined that the first question to address was whether contract number DP05001 was a valid contract, and if so, the applicable terms. In reaching their decision, the arbitrators relied upon NGFA Grain Trade Rules 1 and 3, which provide as follows:

NGFA Grain Trade Rules

Rule 1. Trade

Both the Buyer and the Seller shall include in their original articles of trade, whether entered into orally or in writing the following specifications, if applicable:

- (A) *Date of contract*
- (B) *Quantity*
- (C) *Kind and grade of grain including type, class and quality characteristics (if any)*
- (D) *Price or pricing method*
- (E) *Type of inspection*
- (F) *Type of weights*

- (G) *Applicable Trade Rules*
- (H) *Transportation specifications ...*
- (I) *Payment terms*
- (J) *Other Terms*
- ...

Rule 3. Confirmation of Contracts

- (A) *Both the Buyer and Seller shall send a written confirmation, each to the other, not later than the close of the business day following the date of trade, or an agreed amendment, setting forth the specifications as agreed upon in the original articles of trade, or an agreed amendment. Upon receipt of said confirmation, the parties shall carefully check all specifications therein and, upon finding any material differences, shall immediately notify the other party to the contract, by telephone and confirm by written communication. In the case of minor differences, notification may be by either telephone or written communication.*
- (B) *If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be the binding upon both parties, unless*

the confirming party has been immediately notified by the non-confirming party, as described in Rule 3(A), of any disagreement with the confirmation received.

The arbitrators determined that the documents provided by the parties in this case indicated that from August 2002 through September 2002, Mikkelsen placed his wheat in storage, thereby allowing him to either keep it or place it under a marketing assistance loan with the Commodity Credit Corp. Then, on Oct. 31, 2002, the parties entered into a contract for the sale of the wheat from Mikkelsen to Peavey Grain.

While the parties disputed the extent to which they discussed and agreed upon “*price and pricing methods* [NGFA Grain Trade Rule 1(D)]” and “*payment terms* [NGFA Grain Trade Rule 1(I)],” and the contract merely referred to “*SEE ATTACHED ADDENDUM*,” the arbitrators concluded that the parties had agreed to the sale of the grain on Oct. 31, 2002 in accordance with NGFA Grain Trade Rule 1.

The arbitrators decided that with respect to confirmation of the terms of the articles for this trade, Peavey Grain provided a written confirmation of the contract to Mikkelsen in accordance with NGFA Grain Trade Rule 3. Mikkelsen did not issue his own written confirmation. Further, the arbitrators determined that Mikkelsen signed the contract, which clearly did not provide for a price of \$4.28 per bushel. While Mikkelsen contended that \$4.28 per bushel was the agreed-upon price, the arbitrators noted that he did not correct the price prior to signing the confirmation. Nor did he promptly notify Peavey Grain of the difference between his understanding of the articles of the trade and the articles as set forth in the contract. NGFA Grain Trade Rule 3 explicitly requires a party to notify the other party of any differences. This leaves the parties with a valid contract with an unclear purchase term.

Mikkelsen asserted that the trade was a cash sale contract under which full payment should have been made no later than Nov. 10, 2002. But the arbitrators determined that his course of conduct was not consistent with this assertion. For instance, he did not inquire as to why Peavey Grain’s settlement sheets referred to advances. More importantly, Mikkelsen did not make a claim against Peavey Grain for the \$128,488.74 that he alleged Peavey Grain owed to him. The arbitrators concluded that Mikkelsen should have demanded payment immediately and

not waited until Dec. 19, 2003 – more than 13 months after the claimed due date.

Rather, the arbitrators decided that Peavey Grain’s conduct in this case was consistent with its assertion that the trade was a deferred-pricing contract. The settlement sheets indicated that percentages of the full purchase price were advanced to the recipients of the three checks. The arbitrators also noted that Peavey Grain issued the July 2, 2003 amendment confirmation and ultimately settled the contract on the basis of the \$3.09-per-bushel price set forth in this document.

Based upon the foregoing facts, the arbitrators concluded that the parties entered into a valid deferred-pricing contract, and that the price for contract number DP05001 was \$3.09 per bushel. The total purchase price to be paid by Peavey Grain under DP05001 was \$338,771.01 (109,634.63 bushels at \$3.09 per bushel), minus an adjustment for the moisture discounts, damage discounts and a grain assessment fee that totaled \$4,430. Peavey Grain previously paid \$340,747.47 on this contract, leaving a net overpayment of \$6,406.46.

The arbitrators determined that no evidence was provided regarding the amount or appropriateness of storage charges. The arbitrators also noted that based upon the shipment period set forth in both the contract and the amendment confirmation, title to the grain passed from Mr. Mikkelsen to Peavey Grain on Oct. 31, 2002. So even if there had been evidence of the amount or appropriateness of storage charges, no storage would have been charged after that date. The arbitrators considered the possibility that the reference to storage charges in the combined settlement sheet was intended to be a reference to deferred pricing charges. But the arbitrators noted that even if Peavey Grain’s computer system simply referred to deferred-pricing charges as storage charges in the preparation of settlement sheets, neither the contract nor the subsequent amendment confirmation referred to deferred-pricing charges. The arbitrators determined that, indeed, the space for the NPE charge on the amendment confirmation was left blank. Finally, the arbitrators noted that no other evidence was provided with respect to the amount or appropriateness of deferred-pricing charges. Accordingly, the arbitrators concluded that no storage charges or deferred-pricing charges should be awarded to Peavey Grain.

The Award

The arbitrators ruled in favor of Peavey Grain, with an award of \$6,406.46 that represents the difference between the advances made (\$340,747.47) and the purchase price, minus the moisture discounts, damage discounts and grain assessment (\$338,771.01 minus \$4,430), as indicated below:

Item	Settlement 109,634.63 bushels
Gross Sale @ \$3.09 per bushel	\$338,771.01
Advances	-\$340,747.47
Moisture Discounts	-\$611.25
Damage Discounts	-\$3,751.43
Grain Assessment	-\$67.32
Storage Charge	\$0.00
Deferred Pricing Charge	\$0.00
Total	<\$6,406.46>

The arbitrators did not award any storage or deferred-pricing charges to Peavey Grain. But the arbitrators did award the grain-assessment charge on the 109,634.34 bushels at a rate of \$0.000614 per-bushel – equating to \$67.32.

Further, the arbitrators determined that no interest, costs or attorneys fees were owed by either party to the other. In this regard, the arbitrators concluded that Peavey Grain potentially could have prevented some of the confusion in this matter if it had: 1) attached the referenced addendum to its deferred-pricing contract; 2) ensured the addendum clearly set forth all the terms of the purchase; 3) separately settled DP05001 and S002751; and 4) provided further evidence supporting its claim for storage or deferred-pricing charges.

Similarly, the arbitrators believed Mikkelsen could have eliminated the confusion presented by this matter if he had notified Peavey Grain immediately of the claimed error and corrected the price in the confirmation before signing it.

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

Dean A. Killion, Chair
Manager Grain Merchandising
Grand Prairie Co-op Inc.
Tolono, Ill.

Harry Bormann
Grain Merchandiser
Max Yield Cooperative
West Bend, Iowa

Jann Eichlersmith
Assistant General Counsel
The Scouler Co.
Minneapolis, Minn.