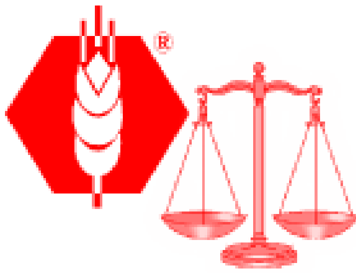

National Grain and Feed Associaton

Arbitration Decision

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November 19, 2009

Arbitration Case Number 2202

Plaintiff: Western Milling LLC, Goshen, Calif.

Defendant: Phoenix Bio Industries LLC, Los Angeles, Calif.

Statement of the Case

This case concerned a dispute between the parties as to whether a contractual obligation existed for Phoenix Bio Industries LLC ("PBI") to sell wet distillers grains ("WDG") to Western Milling LLC (Western), and whether there was a subsequent breach of contract when PBI allegedly discontinued selling WDG to Western.

The two parties had an original contractual relationship under which PBI agreed to operate its plant adjacent to, and buy all of its corn from, Western, and would sell all of its WDG to Western. In turn, Western was responsible for marketing the WDG, and entered into contracts with its dairy customers for the WDG. There was regular communication between the parties as to production volumes and marketing decisions.

PBI discontinued operations at its plant in December 2007. At that time, Western had substantial volumes of WDG under contract to dairy customers for the crop year ending Sept. 30, 2008. Soon thereafter, Western sought assurances of performance from PBI, and, on Jan. 10, 2008, Western gave notice of contract cancellation and bought in replacement product to fulfill its obligations to its dairy customers. Western claimed damages totaling $3,150,718.92.

PBI argued that it only had one obligation – to sell 100 percent of the WDG that it produced to Western. When PBI shut the plant down, it argued, there was no longer any WDG to sell and it had no remaining obligation to Western. PBI also argued that the plant was forced to shut down only after Western discontinued selling corn to PBI. There was much communication between the two parties regarding late or missed payments for corn, as well as WDG, leading up to the closing of the plant.

The Decision

The arbitrators closely considered the evidence and arguments submitted by both parties in this case. The arbitrators concluded that both parties entered into a contract for the sale and purchase of 133,125 tons of WDG for delivery between Oct. 1, 2007 and Sept. 30, 2008. This appeared to be consistent with past performance and the normal course of business between Western and PBI. Electronic emails confirming the transactions were presented and considered as binding confirmation under NGFA Feed Trade Rule 5 [Electronic Data Interchange and Email], which states:

> ***Rule 5. Electronic Data Interchange and Email***
>
> *(A) These rules may be applied to trades that include electronic transmission and receipt of data in agreed formats, e.g., Electronic Data Interchange (EDI), in substitution for conventional paper-based documents. A party to a trade may, in lieu of written documents, transmit or receive from the other party an electronic transmission in agreed formats to which the parties have given their prior consent.*
>
> *(B) These rules may be applied to trades that occur by email in substitution for conventional paper-based documents. A party to a trade may, in lieu of written documents, transmit or receive from the other party an email, and such email shall substitute for a written document provided that the parties have previously so agreed.*

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On Dec. 3, 2007, PBI ceased delivering WDG in accordance with contract agreements with Western. Western then, on Dec. 18, 2007, requested from PBI performance assurances on the outstanding contracts. PBI failed to respond to Western's request for adequate assurance of performance. On Jan. 7, 2008, Western notified PBI of default and cancelled the remaining contract balances of 106,180 tons of WDG under NGFA Feed Trade Rule 19 [Default on the Shipping Schedule and/or the Contract Shipping Period], which states:

> ***Rule 19. Default on the Shipping Schedule and/or the Contract Shipping Period***
>
> *(A)* ***Default by the Seller:*** *When the Seller finds that he is in default on the shipping schedule, and/or the contract shipping period, he shall notify the Buyer at once by telephone, facsimile, or wire.*
>
> *Upon receipt of such notice, the Buyer shall, within twenty-four (24) hours thereafter, advise the Seller by telephone, facsimile, or wire, which of the following options he elects to exercise:*
>
> *(1) agree to extend the shipping period; or*
> *(2) buy-in, for the Seller's account, the defaulted portion of the shipments; or*
> *(3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.*
>
> *If the Seller fails to notify the Buyer of his default, the liability remains in force until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted. The Buyer shall notify the Seller at once by telephone, facsimile, or wire which of the options (1) or (2) or (3) above he elects to exercise.*
>
> *If the Seller defaults on the contract, he is liable for all reasonable costs and expenses as shall have been incurred to and including the day the Buyer elects one of the three options.*

Although the contracts were for WDG, the arbitrators concluded that dried distillers grain was a reasonable and sufficient substitution for cancellations at fair market conversion for moisture content because of the inadequacy of regional supplies of WDG.

The arbitrators ruled that the obligation to supply WDG by PBI never was fulfilled, and as such, Western was within its rights to remedy the non-performance in an acceptable manner – in this case, by canceling the open contracts at fair market value.

The Award

The arbitrators awarded damages of $3,150,718.92 to Western Milling LLC. The arbitrators also awarded interest based upon the WDG purchase and sale agreement dated June 30, 2006 between Western and PBI that established an interest rate of 3 points above the Prime Rate (as published in the ***Wall Street Journal***) in the event of a default in dealings between the parties. The arbitrators consequently awarded interest in this case to accrue at 10.25 percent per annum from Jan. 10, 2008 until payment is made. The arbitrators declined to award attorneys' fees in this case.

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

Geoff Finch, *Chair*
Vice President/Chief Operating Officer
Wenger's Feed Mill Inc.
Rheems, Pa.

Mike Lemke
Vice President/Director of Marketing
Lansing Trade Group LLC
Overland Park, Kan.

Mark Heckman
Commodities Manager
Big River Resources LLC
West Burlington, Iowa