



National Grain and Feed Association

Arbitration Decision

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November 19, 2009

Arbitration Case Number 2230

Plaintiff: The Andersons Inc., Maumee, Ohio

Defendant: Fall Grain Inc., Danville, Ill.

Statement of the Case

This case concerned six cash grain contracts for wheat between The Andersons Inc. (Andersons) as buyer and Fall Grain Inc. (Fall Grain) as seller.

Andersons submitted an arbitration complaint dated March 19, 2008 to the National Grain and Feed Association (NGFA). The complaint alleged that Fall Grain failed to perform on six cash grain wheat contracts (contract numbers 48894, 48895, 48896, 48897, 48898, 48899) for a total of 300,000 bushels. Each of the contracts contained the following provision under "PURCHASE CONTRACT TERMS":

5. Both parties agree: (A) THIS CONTRACT IS MADE IN ACCORDANCE WITH THE APPLICABLE GRAIN TRADE RULES OF THE NATIONAL GRAIN AND FEED ASSOCIATION (A COPY WILL BE PROVIDED UPON REQUEST) EXCEPT AS MODIFIED HEREIN, AND THE PARTIES WILL BE BOUND THEREBY; AND (B) ANY DISPUTES OR CONTROVERSIES ARISING OUT OF THIS CONTRACT SHALL BE ARBITRATED BY THE NATIONAL GRAIN AND FEED ASSOCIATION, PURSUANT TO ITS ARBITRATION RULES. THE DECISION AND AWARD DETERMINED THROUGH SUCH ARBITRATION SHALL BE FINAL AND BINDING UPON THE BUYER AND SELLER. JUDGEMENT UPON THE ARBITRATION AWARD MAY BE ENTERED AND ENFORCED IN ANY COURT HAVING JURISDICTION THEREOF.

During the summer of 2007, Andersons said it became concerned that Fall Grain would not be able to deliver on the six wheat contracts, along with other contracts between the parties. Andersons said Fall Grain had failed to deliver on all of its corn contracts with Andersons the previous year, which Andersons subsequently had rolled to the next year. Fall Grain had failed to fully perform on those corn contracts the following year, and Andersons was awarded a default judgment for damages on those contracts in a separate arbitration case.

Given the trends in the market at that time and Fall Grain's failure to deliver on previous contracts, Andersons requested and obtained financial records and personal guarantees from all of the principals of Fall Grain. Andersons also requested that the principals of Fall Grain sign a release so that Andersons could obtain additional information regarding Fall Grain's open contracts with other parties. All of the principals of Fall Grain signed releases, and Andersons received confirmation that Fall Grain had open contracts with another company, one of which was for delivery of 500,000 bushels of red winter wheat. According to Andersons, during a Feb. 26, 2008 conversation between representatives of Andersons and Fall Grain, the representative of Fall Grain allegedly admitted that Fall Grain had only planted 6,000 acres of wheat. Based upon this planted-acreage figure, Andersons estimated that the amount of grain that Fall Grain had contracted to sell was far greater than the amount of grain it could produce and deliver. Therefore, Andersons said it concluded that Fall Grain had breached the contracts by failing to provide adequate assurance of delivery.

Andersons sent a letter (by regular mail and e-mail) to Fall Grain on March 3, 2008 requesting adequate assurance of Fall Grain's intention to perform on the wheat contracts. If Andersons did not receive adequate assurance from Fall Grain by 5 p.m. on March 7, 2008, Andersons stated that it would cancel the contracts at current market price on March 10, 2008. On March 10, 2008, Andersons said one of its representatives had a conversation with a Fall Grain representative, during which Fall Grain allegedly instructed Andersons to proceed with cancellation of the contracts. The Andersons then informed Fall Grain the contracts would be cancelled that day at the open of the market.

Fall Grain denied ever giving such instructions to Andersons. Fall Grain argued that Andersons breached the contracts by unilaterally refusing to roll them forward, and by cancelling the contracts before July 2008, the end of the contractually specified initial shipment

period. Fall Grain also contended that Andersons was not justified in demanding adequate assurance, and that any dispute regarding open corn contracts should have no bearing on the status of open wheat contracts. Moreover, Fall Grain argued that Andersons had a history of rolling contracts from year-to-year with the other company with which it had open wheat contracts. Fall Grain alleged it could have fulfilled the six contracts with Andersons with the quantity of wheat it had planted that year, and rolled the contract

with the other company to the next year. On these grounds, Fall Grain contended that this other contract should not have been a factor in determining whether it could deliver the wheat contracted with the Andersons.

Andersons claimed a total of \$1,836,750 as market difference, cancellation fees, interest fees and administration fees. Andersons also claimed \$49,265.73 in outside legal counsel fees and court costs for the related litigation.

The Decision

The arbitrators determined that in this case, Andersons, as the buyer, sent written confirmations to Fall Grain, as the seller, for each of the contracts at issue in this dispute, pursuant to NGFA Grain Trade Rule 3 [Confirmation of Contracts]. A representative of Fall Grain then signed and returned the contracts. On this basis, the arbitrators concluded that the contract terms for these transactions, as provided in the purchase contract terms for contract numbers 48894, 48895, 48896, 48897, 48898 and 48899, governed this dispute, along with the applicable portions of the NGFA Grain Trade Rules.

The arbitrators then considered Andersons' cancellation of the contracts in relation to NGFA Grain Trade Rule 28 (A), which provides in pertinent part as follows:

Rule 28. Failure to Perform

(A) Seller's Non-Performance

...

If the Seller fails to notify the Buyer of his inability to complete his contract, as provided above, the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted. In such case it shall then be the duty of the Buyer, after giving notice to the Seller to complete the contract, at once to:

(1) agree with the Seller upon an extension of the

contract; or

(2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or

(3) cancel the defaulted portion of the contract as fair market value based on the close of the market on the next business day.

The arbitrators determined that Andersons followed the provisions of NGFA Grain Trade Rule 28 in attempting to resolve its dispute with Fall Grain concerning the wheat contracts. Fall Grain failed to heed its contractual obligation to Andersons when it did not provide any adequate assurances of its intent and capacity to deliver wheat to Andersons.

The arbitrators further noted that Item 9 of the purchase contract terms on the reverse side of each contract provided that the following damages were payable to Andersons in the event Fall Grain failed to honor its agreed-upon contractual obligations:

9. Seller's failure to perform on this Contract will result in contract cancellation charges to Seller, the total of which will be the difference between the Contract price and the replacement cost at the time of cancellation, plus a minimum cancellation charge of ten cents (10c) per bushel. Seller shall also be liable for Buyer's attorney fees, costs of collection, plus interest.

The Award

The arbitrators consequently awarded to Andersons judgment against Fall Grain for \$1,791,930. This award included a market difference of \$1,755,750, cancellation fees of \$30,000, and attorney fees of \$6,180. The arbitrators noted that Andersons originally requested \$49,265.73 in attorney fees, but the lesser amount was awarded based upon subsequent submissions by the parties. The arbitrators further ordered that Fall Grain pay interest on the judgment, which shall accrue from the date of this decision until the award is paid in full at the rate of 5.25 percent per annum [per NGFA Arbitration Rule 8(m)].

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

Brian Mehrmann, *Chair*
Regional Manager/Vice President
DeBruce Grain Inc.
Kansas City, Mo.

Lori J. Goetzinger
Grain Merchandiser
West Central Cooperative
Ralston, Iowa

Jeff Spence
Grain Division Manager
Crystal Valley Co-op
Lake Crystal, Minn.