



National Grain and Feed Association

Arbitration Decision

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July 16, 2009

Arbitration Case Number 2262

Plaintiff: Sunrise Cooperative Inc., Fremont, Ohio

Defendant: Wayne Toth and Wayne Toth Farms I LLC, Elyria, Ohio

Statement of the Case

This case concerned two contracts for U.S. No. 2 yellow corn entered into by Sunrise Cooperative Inc. (Sunrise), as the buyer, and Wayne Toth and Wayne Toth Farms I LLC (Toth), as the seller. Sunrise alleged that Toth did not fully deliver on these contracts.

On July 21, 2006, the parties entered into contract number 41723, under which Toth was to deliver 35,000 bushels of U.S. No. 2 yellow corn to Sunrise at a price of \$2.41 per bushel in January 2007. On Feb. 21, 2007, the parties entered into a second contract – number 48728 – under which Toth was to deliver 5,000 bushels of U.S. No. 2 yellow corn at \$4 per bushel in January 2008. Each contract was signed by both parties.

By August 2007, Toth had delivered only 16,111.4 of the 35,000 bushels of corn contracted to be delivered under the first contract. At that time, Toth signed a contract change that shifted the delivery date on this contract from January 2007 to October and November 2007, and decreased the price to \$2.15 per bushel. However, as of May 2008, Toth had delivered only an additional 5,137.19 bushels, leaving an undelivered balance of 13,751.41 bushels on the first contract.

On May 2, 2008, Sunrise notified Toth by phone and by letter that it had canceled the balances on the two contracts, and that Toth owed Sunrise for the market difference on each contract, plus a 10-cent-per-bushel cancellation fee. Sunrise claimed total damages of \$62,252.25 for the cancellation of the two contracts.

In response, Toth alleged that it made numerous attempts to deliver corn to Sunrise in October and November 2007, as well as in April 2008, but that Sunrise refused to permit Toth to do so.

Toth also claimed that Wayne Toth should not be held liable as an individual because, in signing the contract, he was acting as an officer of Toth Farms I LLC, and not in an individual capacity.

Toth further argued that the contracts did not contain provisions for cancellation fees and, therefore, Toth never agreed to such fees and they should not be awarded to Sunrise.

The Decision

The arbitrators closely reviewed the facts of this case. The arbitrators concluded that Wayne Toth entered into contract numbers 41723 and 49728 and was individually liable for the performance on the contracts. The arbitrators determined that it clearly was noted in the comments section on the front of the contracts that, *“This agreement shall be binding upon the successors, heirs, administrators and executors of the parties herein.”* Because both contracts contained this provision, the arbitrators decided that Toth Farms I, LLC; Toth I, LLC; and Wayne Toth all were potentially liable for contract performance.

For these reasons, the arbitrators ruled in favor of Sunrise on this aspect of the case.

Toth’s second argument was that Sunrise breached the terms of the purchase contract because it did not rotate applications of deliveries to each of the contracts, and because Sunrise allegedly refused to permit delivery against the contract. The arbitrators noted that the Terms and Conditions section of both contracts clearly stated: *“Buyer will use its best efforts to accept the grain covered by this contract as it is delivered.”*

However, if acceptance is impossible due to conditions beyond Buyer's control, it does not cancel seller's obligations." Contract number 41723 was executed on July 21, 2006 for corn to be delivered in January 2007. Contract number 49728 was executed on Feb. 21, 2007 for delivery in January 2008. On Aug. 29, 2007, the remaining balance under contract number 41723 was amended to change the delivery period to October/November 2007, with an adjustment to the contract price. Customary practice in the grain industry is to apply deliveries to the oldest contract within the earliest delivery period. The arbitrators concluded that Sunrise's actions demonstrated consistency with the customary practices in the industry for application of deliveries against contracts. Therefore, the arbitrators ruled in favor of Sunrise on this aspect of the case.

Toth further argued that Sunrise was prohibited from charging Toth cancellation fees on the canceled portions of the contracts. The arbitrators noted that Number 4 of the Terms and Conditions section of the contract clearly stated: *"The MINIMUM charge to the Seller, in the case of failure to fulfill this contract, would be the difference between the contract price and the replacement cost at the time of cancellation, but additional cancellation charges could be included."* [Emphasis in original.] Although Sunrise's contract secured the ability to charge the cancellation fee, the arbitrators determined that Sunrise did not strictly follow protocols concerning appropriate written notification to the seller of "seller's default" and subsequent contract cancellation dates for performance failure. Consequently, the arbitrators ruled in favor of Toth on this aspect of the claim and denied an award for cancellation fees in this case.

The Award

The arbitrators awarded damages of \$60,377.11 to Sunrise Cooperative Inc.

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

Tom McLaughlin, Chair
Vice President/General Manager
Integrated Grain & Milling
Fresno, Calif.

William W. Doyscher
Assistant General Manager
Farmers Cooperative Elevator Co.
Hanley Falls, Minn.

Wade Entriiken
Merchandiser
Heartland Co-op
West Des Moines, Iowa