



National Grain and Feed Association Arbitration Decision

www.ngfa.org | www.ngfa.org/decisions

1400 Crystal Drive, Suite 260
Arlington, VA 22202

P: (202) 289-0873
F: (202) 289-5388

May 23, 2018

CASE NUMBER 2747

**PLAINTIFF: AGRIBUSINESS UNITED DMCC
DUBAI, UAE**

**DEFENDANT: POET NUTRITION, INC.
SIOUX FALLS, SD**

STATEMENT OF THE CASE

Agribusiness United DMCC (Agribusiness) and POET Nutrition, Inc (POET) entered into multiple contracts totaling over 100,000 metric tons of Dried Distillers Grains with Solubles (DDGS) for delivery between May 2011 and February 2013.

Agribusiness claimed that POET breached the contracts by failing to deliver DDGS that met the contractual specifications for combined protein and fat (profat), moisture level and product shrinkage. Agribusiness also claimed that a barge slated to load into the *MV Rodina* (carrying some of the contracted DDGS) arrived four days after the delivery deadline in the contract, which caused Agribusiness to incur demurrage charges. Agribusiness claimed a total of \$413,668.95 in damages (\$221,911.67 for excessive moisture, \$58,128.91 for low profat, \$74,831.83 for excess shrink and \$58,796.54 for demurrage).

POET argued that Agribusiness accepted the DDGS in all cases without making any claim that the DDGS did not meet specifications. Also, except the last few barge loads, POET argued that Agribusiness paid for all the DDGS without making any such claim. POET further argued that Agribusiness waited to make its claim for demurrage on the *MV Rodina* until ten months after it had accepted the load and promptly paid the invoice in full.

POET submitted a counterclaim of \$64,310.61 for damages resulting from its cancellation of one of the contracts (contract no. 70017904-001), which was for 4,950 short tons of DDGS.

THE DECISION

After extensive consideration, the arbitrators reached the following conclusions:

- The parties traded on a regular basis for several years before the issues in this dispute arose or were addressed. The parties, in so far as the arbitrators could determine, failed to come to a full agreement about the specifications and discounts that were to be applied to the product being sold. Both parties referred to specifications at various times, but neither party took measures to rectify the differences contained in each other's contracts.

- It appeared to the arbitrators that if a bona fide broker had been engaged, the issues in the case would be simpler because the specifications in the broker's contract would govern, including discount schedules. Instead, appearing to act in the role of a broker was Agribusiness United, Inc. – a subsidiary wholly-owned by the plaintiff – which meant it was more of a buyer's agent that at times more closely resembled a principal and received no separate compensation. Therefore, the terms in Agribusiness United, Inc.'s contracts did not govern as if it had been a broker in the context of the NGFA Trade Rules and trade custom.
- Agribusiness raised several years' worth of discounts to bear in one final accounting on the last trade. In doing so, Agribusiness withheld payment in the amount of the final invoice that Agribusiness determined represents its cumulative damages for all protein, fat, moisture and weight discrepancy discounts, and some demurrage. These steps by Agribusiness occurred well after the barges in question had been shipped.
- In typical trades, the buyer or seller whose grades and weights are to govern are pre-determined. Customarily, pursuant to both the Trade Rules and the custom of the trade, discounts for moisture and quality are invoiced within five days of the unloading of the barges. Also, in most trades, and pursuant to the custom of the DDGS trade, there is an agreed upon discount schedule that is mostly standard and listed on the parties' contracts.
- In the transactions specific to this dispute, there was no agreement related to specifications (both parties provided for different specifications), nor was there an agreed upon discount schedule or a determination of the results of which party's analysis and testing of the product would govern.
- Within the DDGS barge trade, there are at times allowances to extend the five-day-after-unload period when the barge passes through a string of traders, but that did not apply in the transactions in this dispute. With respect to each of the barge loads in this dispute, Agribusiness raised the issue well after the five days so it was past the point of any reasonable consideration.
- Regarding Agribusiness' claim for demurrage for the *MV Rodina* (which contained barge SCF 1025B), although both party's contracts reference the barge as needing to be "load ready" by May 10, 2012, there was no contractual agreement on the penalty for not having the barge available as load ready by that date (Agribusiness's contract provides for a penalty, but POET's does not) and Agribusiness did not put POET on notice with a penalty for the barge. Therefore, Agribusiness has no recourse for this claim.

Because the parties never contractually came to an agreement regarding the specifications, discounts and weights to govern, the arbitrators denied all the protein, fat, weight and moisture discounts claimed by Agribusiness.

POET notified Agribusiness that because of its withholding of funds due for the barges from February 13, 2013, Agribusiness was out of the contract terms and POET would cancel the contracts and invoice Agribusiness for the cost to resell the barges. The arbitrators concluded that POET acted correctly. Therefore, the arbitrators awarded POET its claim of \$64,310.61.

THE AWARD

The arbitrators awarded \$64,310.61 in damages to POET Nutrition, Inc. from Agribusiness United DMCC.

Decided: April 18, 2018

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

Sean Broderick, *Chair*
Senior Merchandising Manager
CHS Inc.
Inver Grove Heights, MN

Joel Eckelman
Merchandising Manager
East Kansas Agri Energy LLC
Garnett, KS

Jim Harding
Senior Group Manager
Scoular
Sarasota, FL