



National Grain and Feed Association Arbitration Decision

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May 23, 2018

CASE NUMBER 2787

**PLAINTIFF: ADM MILLING COMPANY
DECATUR, IL**

**DEFENDANT: STEVE TONG
JASPER, MO**

STATEMENT OF THE CASE

This case concerns two contracts for the sale of soft red winter (SRW) wheat by the defendant, Steve Tong (Tong), to the plaintiff, ADM Milling Company (ADM). Contract number 102613, dated May 12, 2015, provided for the sale and delivery of 20,000 bushels of SRW wheat at \$4.64-per bushel. Contract number 02663, dated May 18, 2015, provided for the sale and delivery of 10,000 bushels of SRW wheat at \$4.96 per bushel. The original delivery periods under both contracts were June 1-July 31, 2015. The delivery periods were extended on multiple occasions by agreement between both parties with the last agreed upon extension for delivery to occur by the end of October 2015 under both contracts.

ADM claims that Tong failed to deliver wheat that met quality specifications under the contracts, particularly related to the minimum *falling number* and the standards for vomitoxin, which resulted in ADM's cancellation of the contracts at a loss to ADM. Tong disputes that the quality specifications claimed by ADM were part of the contracts, and Tong argues that ADM failed to show that the wheat delivered failed to meet those specifications regardless.

ADM's main arguments in the case were as follows:

- The contracts were fully signed by both parties.
- Wheat was never delivered under the contracts that met the quality specifications.
- The communications between the parties and their actions indicated that Tong was aware of the specifications under the contracts at issue, and he failed to dispute them over a period of several months while he was delivering wheat in an attempt to fulfill the contracts.
- The contracts clearly state that ADM's discount schedule applies.
- The minimum falling number specified on ADM's discount schedule had been in place for several years before the contracts in this dispute with Tong.

Tong's main arguments in this case were as follows:

- "No protein requirement" was specified on the contracts.

- The falling number test is a protein test.
- The falling number test was not specified on the contracts.
- ADM failed to provide a discount schedule with the contracts prior to execution of the contracts by the parties.

THE DECISION

The arbitrators reached the following conclusions in their decision:

- Tong never disputed the terms of the contracts, and both contracts were fully signed by both parties.
- Based upon common usage of the trade, the test for falling number is a grain quality test (relating to the ability of bread to rise) – it is not a “protein test.” Protein levels are specified separately from falling numbers in the trade, and testing for protein levels is conducted in a different manner. Tong did not present sufficient evidence to establish a link between falling numbers and protein levels. Trade practice clearly distinguishes between protein tests and tests for falling numbers or vomitoxin.
- Further, trade practice for flour mills has included falling number as a component of milling quality for several years. Tong was aware he was contracting with a flour mill.
- Trade practice is also that official grade tests do not include tests for falling numbers. Official grade tests are performed at final destination, which in this case was ADM’s mill. No evidence was submitted that Tong requested official grade tests when the loads were rejected.
- ADM clearly demonstrated that falling numbers and vomitoxin were part of its discount schedule.
- It is not trade practice to include the discount schedule when a contract is negotiated and signed. Trade practice is that it is the seller’s responsibility to inquire about such schedules at the time of contracting and prior to delivery.
- It is unlikely that Tong was unaware of the testing for falling numbers, particularly after the first load was rejected for failing to meet the falling number minimum.
- Tong was aware of the quality issues as they were being discussed between the parties in the course of attempted performance under these contracts. Tong failed to challenge that the specifications applied to the contracts or dispute the test results for vomitoxin and falling numbers at the time.
- Tong sought to remedy those issues by taking action to attempt to improve the condition of his grain to meet the contract specifications.
- Tong never asked for an official grade when the loads were rejected.
- Affidavits provided by ADM indicate that it offered to cancel the contracts on each occasion that the parties agreed to an extension. ADM offered Tong the option to *sell out* of contracts. Tong did not dispute this assertion by ADM in its arguments. The parties even met over dinner to discuss how to resolve the situation.

- During the period after the contracts were extended, the futures and basis price increased significantly. The last extensions of the contracts expired, and Tong failed to respond to ADM. The next business day, ADM elected to cancel the contracts and executed the cancellations. ADM supported with documentation its calculation of the basis on the date of cancellation from multiple sources, and the basis quoted among these sources was consistent.

THE AWARD

In calculating the amount to be paid by Tong to ADM, the arbitrators determined that ADM proved and supported its claims for both the futures and basis components of the market price cancellation. The arbitrators noted that ADM selected a basis closer to the low end of the range indicated by the evidence provided. Thus, the arbitrators awarded as follows:

Contract 102613	Price Difference of \$1.44 per bushel on 20,000 bushels = \$28,800	
Contract 102663	Price Difference of \$1.12 per bushel on 10,000 bushels = \$11,200	
	Total awarded: \$40,000	

Interest shall accrue on the award at a rate of 3.5 percent per annum pursuant to NGFA Arbitration Rule 6(F) from the date of this award until it is paid in full. The arbitrators declined to award any amount for legal fees and costs.

Decided: April 26, 2018

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

Jean Bratton, *Chair*
 General Manager
 Centerra Cooperative
 Ashland, OH

Matt Gruhlkey
 Origination Manager
 Attebury Grain LLC
 Amarillo, TX

Ronnie Truelock
 General Manager
 Farmers Cooperative Association
 Alva, OK