



March 24, 2020

CASE NUMBER 2830

**PLAINTIFF: PARRISH & HEIMBECKER LIMITED
BIGGAR, SASKATCHEWAN, CANADA**

**DEFENDANT: TSM WINNY AG LTD.
SOVEREIGN, SASKATCHEWAN, CANADA**

STATEMENT OF THE CASE

In this case, Parrish & Heimbecker, Limited (P&H) claimed that on June 2, 2017, TSM Winny Ag Ltd. (TSM) entered into a grain purchase order (GPO) with P&H for 75,000 bushels of Canadian West Red Spring Wheat (CWRS) at “13 protein 2 grade” for delivery in October 2017 at \$6.90 per bushel.

According to P&H the following sequence of events occurred: On June 7, 2017, market conditions triggered the GPO, and P&H sent purchase contract confirmation no. 131118 by email to TSM. On June 9, TSM replied by email to P&H stating, “*Sorry love, how the hell do I sign this thing.*” TSM received various requests that it sign the confirmation from P&H through June 22. TSM did not provide signed confirmation of the contract to P&H. On June 23, TSM communicated by text to P&H stating, “*No you guys can buy all my grain when om done combining and I know whats in my bins. But til i know for sure no contracts without act of god [sic].*” On June 27, P&H discussed with TSM by telephone that P&H was still expecting performance under the contract and they discussed the current buy-in values applicable to the contract terms in the event of non-performance. According to P&H, the conversation concluded with P&H stating that it needed confirmation of the contract from TSM by the following day. On the following day (June 28), P&H made further unsuccessful attempts to telephone TSM, and P&H sent an email to TSM stating it would be canceling the contract at the close of the market unless TSM provided signed confirmation of the contract. P&H subsequently issued a cancellation of the contract at the close of the market on June 28 with a buy-in value of \$8.00 per bushel. In this arbitration case, P&H sought \$102,937.22 in contract buy-in costs plus interest.

TSM sought dismissal of P&H’s claim and full reimbursement for legal expenses. TSM argued that the lack of a confirmation was evidence that no contract was ever made. The terms of the contract and notice of contract default referenced the NGFA Trade Rules.

THE DECISION

Paragraph B of NGFA Grain Trade Rule 3 [Confirmation of Contracts] provides that if either the buyer or the seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party of any disagreement with the confirmation received. The evidence provided by the parties demonstrates

that the parties discussed the terms of the GPO on June 2, P&H sent the confirmation contract to TSM on June 7, and TSM replied on June 9 (“*Sorry love, how the hell do I sign this thing.*”). Given the terms of NGFA Grain Trade Rule 3(B), the arbitrators concluded the contract was valid and binding.

NGFA Grain Trade Rule 28(A) [Seller’s Non-Performance] provides if the seller fails to notify the buyer of his inability to complete the contract “the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted.” Based on the evidence provided in this case, the arbitrators determined that at no point had TSM notified P&H of TSM’s inability to complete the contract. Given the lack of this notification from TSM and that delivery was not to occur until October 2017, the arbitrators concluded P&H acted outside of Rule 28(A) when it executed cancellation of the contract in June. TSM was aware of the contract and under the circumstances of this case, TSM retained the obligation and opportunity to perform under the contract despite the ambiguity and lack of responsiveness in the communications between the parties. Thus, P&H’s cancellation in June of the contract for delivery in October was prematurely and unnecessarily executed.

Based upon the information provided, by unanimous decision, the arbitrators denied the claims for monetary damages by P&H against TSM. The arbitrators also denied TSM’s request for legal expenses.

THE AWARD

No damages were awarded in this case.

Decided: June 7, 2019

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Lacey Seibert, *Chair*
Farm Advisement Director
CoMark Equity Alliance LLC
Enid, OK

Jerry Cope
Vice President, Marketing
Dakota Mill and Grain Inc.
Rapid City, SD

Steven Stegenga
Merchandiser
CHS Inc.
Sycamore, IL



March 24, 2020

APPEAL CASE NUMBER 2830

**APPELLANT/PLAINTIFF: PARRISH & HEIMBECKER LIMITED
BIGGAR, SASKATCHEWN, CANADA**

**APPELLEE/DEFENDANT: TSM WINNY AG LTD.
SOVEREIGN, SASKATCHEWAN, CANADA**

DECISION OF THE APPEALS COMMITTEE

After review of the facts, arguments and documents of the case, the appeals committee reached the following conclusions:

As stated by the original arbitration committee, a valid and binding grain contract, specifically grain pricing order (GPO) #131118, was generated on June 5, 2017, by Parrish & Heimbecker, Limited (P&H) with TSM Winny Ag Ltd. (TSM) for 75,000 bushels (2,042 metric tons) of Canada Western Red Spring Wheat (CWRS) utilizing MGEX December 2017 Hard Red Spring Wheat (HRSW) futures price which equated to a price of \$217.34 per metric ton. As cited by the original arbitration committee, Paragraph B of NGFA Grain Trade Rule 3 (Confirmation of Contracts) provides that if either the buyer or the seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party of any disagreement with the confirmation received. TSM failed to respond to P&H's grain confirmation, and consequently GPO #131118 was valid.

The appeals committee found that the contract language in P&H's Purchase Confirmation superseded NGFA Grain Trade Rule 28 regarding contract default. As shown below, P&H's contract clause permits the buyer to determine when the seller has defaulted. NGFA Grain Trade Rule 28 permits the liability of the seller to continue until the buyer, by the exercise of due diligence, can determine whether the seller has defaulted. Since TSM did not acknowledge or change any of the terms of the GPO, the following terms in P&H's original grain confirmation apply and determine this dispute:

P&H Purchase Confirmation Contract Section 7: "If Seller finds he/she cannot deliver the contracted quantity, Seller shall immediately advise Buyer. If Seller fails to notify Buyer of their ability to complete the contracted delivery, Seller's liability shall continue until Buyer can determine whether Seller has defaulted. **Buyer, when so notified or upon such determination, shall by the close of the next business day** elect either to: (a) agree with Seller to extend the time for delivery; or (b) after having given notice to Seller to complete the contract, buy-in for Seller's account the defaulted portion of the contract; or (c) after having given notice to Seller to complete the contract, cancel the defaulted portion of the contract at the difference between the contracted price and the replacement cost, plus an administration fee. Seller shall pay to Buyer on demand the amount as may be determined under paragraph 7(b) or (c) as may be applicable. [Emphasis added].

The appeals committee also concluded that TSM defaulted on the contract on June 23, 2017, by way of their text to P&H which stated: *“No you guys can buy all my grain when om done combining and I know whats in my bins. But til I know for sure no contracts without act of god [sic].”* Hence, according to the contract terms, the default price should have been determined on the next business day which was Monday, June 26, 2017. MGEX December 2017 HRSW futures closed at \$6.664 per bushel (or \$244.89 per metric ton) on June 26.

The appeals committee calculated the payment owed to P&H by TSM for default on the contract as follows:

The replacement value of the contract on June 26, 2017, was 573,230.24 CAD (\$244.89 futures + \$35.83 basis = \$280.72 net price x 2,042 metric tons).

The original value of the contract on June 5, 2017 was 517,749.10 CAD (\$217.34 futures + \$36.21 basis = \$253.55 x 2,042 metric tons).

Resulting in a gain/loss of 55,481.14 CAD (573,230.24 – 517,749.10 CAD).

The appeals committee also determined that according to Section 7 of GPO #131118, P&H was entitled to an administration fee.

AWARD

Therefore, the appeals committee unanimously award P&H monetary damages of 55,481.14 CAD for contract default and 20,420.00 CAD for administration fees for a total award of 75,901.14 CAD.

Decided: January 10, 2020

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE APPEAL ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Sharon Clark, Chair
Sr. VP, Transportation &
Regulatory Affairs
Perdue AgriBusiness LLC
Salisbury, MD

Dennis Inman
Vice President of Grain
Central Farm Service
Truman, MN

Jay Mathews
Grain Marketing Manager
Midwest Grain LLC
Bloomington, IL

Mike Meyers
Director of Wheat By-Products
APEX LLC
Hamburg, NY

Steve Nail
President & CEO
Farmers Grain Terminal Inc.
Greeneville, MS