NATIONAL GRAIN AND FEED ASSOCIATION

Arbitration Decisions

October 31, 1985

Arbitration Case Number 1621

Plaintiff: Scoular/Welsh Grain Co. Inc., Omaha, Neb.

Defendant: J. W. Flammer Co. Inc., Anaheim, Calif.

Statement of the Case

This case involved three contracts of sample grade yellow corn which the plaintiff (seller) confirmed at 50,000 bushels each (150,000 bushels total) and the defendant (buyer) confirmed at 15 cars each (190,000 pounds/car minimum) for a total of 45 cars. The time of shipment was February/March 1984. Buyer and seller confirmations differed somewhat on specific shipping dates.

The plaintiff, having sample grade yellow corn high in damage, sent a sample to the defendant for evaluation and subsequent bid. The defendant, having seen the sample, established a price based upon the visual inspection of the damage and other factors. Without stipulation as to type of damage, the two parties mutually agreed, per contract confirmations, on grade specifications in each transaction, apparently with the understanding that each shipment was to be similar to the representative sample sent to the defendant.

The dispute involved the application by the plaintiff of some cars loaded from a different elevator than the one from which the representative sample was derived. These cars contained damage of a different nature (insect damage). The first five cars loaded, billed and subsequently unloaded by the defendant's buyer were applied in this manner.

During the shipment period of the contracts, apparently there were several conversations regarding the different qualities due to origin, the summation of which is: 1) 15 cars loaded at the location from which the sample sent to the defendant was obtained, and subsequently unloaded by the end user, were no problem; 2) 15 cars loaded by the plaintiff at the different location than the one from which the original sample was taken were unloaded, but a dispute arose as to the amount of discount against contract; and 3) 15 cars were loaded at the same location but never billed, and subsequently were unloaded at origin resulting in the notice of contract cancellation by the seller (plaintiff) and the "buy in" of milo by the buyer (defendant) for the account of the plaintiff.

The disputed issues and amounts were: 1) the plaintiff claimed $8,575.90 attributable to a 5 percent discount taken by the defendant on the aforementioned 15 cars unloaded, but with disagreement on the amount of discount to apply (the plaintiff apparently first agreed to, then subsequently withdrew, the proposal to settle for a 1.45 percent price discount); 2) the plaintiff claimed $240 in demurrage, which was assessed by the carrier at destination on some of the above-mentioned 15 cars; 3) the plaintiff claimed $16,672.50 in contract cancellation charges arising from its opinion that the contract was canceled at

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a fair price of "contract prices," although that was different from the "market price;" and 4) the plaintiff claimed $1,500 in costs incurred to load, unload and test, and car usage of 15 cars that were loaded and unloaded because of foreign material factors being out of grade, then reloaded and sat idle for two weeks while application to contract attempts was made.

The defendant denied each of the plaintiff's claims as follows: 1) the $8,575.90 discount against one of the contracts was a fair discount; 2) the $240 demurrage cost was incurred while the parties were discussing a mutual discount on 10 cars rejected by the defendant's buyer; and 3) the $16,672.50 was not due the plaintiff because the Chicago May corn futures price had gone up by 34 cents per bushel from the contract date (Jan. 24, 1984) to the plaintiff's cancellation date (April 9, 1984). Further, the defendant contended that the purchase of milo for the account of the buyer was somewhat less costly to the plaintiff but at a comparable cancellation of "fair market value" for the type of corn originally contracted.

The Decision

The arbitration panel, after reviewing all documents submitted by both parties, concluded that the key issue in the case was whether there was an understanding on behalf of both parties that the three contracts were entered into with the intent of the seller/shipper (plaintiff) to load (regardless of the origin) sample grade yellow corn comparable in quality to the sample submitted to the buyer (defendant) prior to contract negotiations. From the documented evidence and stated actions and reactions, the panel concluded that although both the plaintiff and defendant confirmed to each the same grade factor limitations (within which the plaintiff claimed individual car grades fell), there was mutual understanding of the transactions predicated upon the sample submitted by the plaintiff to the defendant. Neither party referenced Grain Trade Rule 20.

The Award

The arbitration panel unanimously found, in principle, in favor of the defendant, J. W. Flammer Co. Inc. However, the panel's award to the plaintiff adjusted the dollar amounts previously withheld by the defendant and claimed by the plaintiff. The plaintiff's claim of $8,575.90 was based upon a 5 percent discount that the defendant assessed against cars unloaded but not of comparable quality of the sample submitted prior to the contract negotiations. Evidence suggested that the plaintiff at one point agreed to a 1.45 percent discount (which subsequently was withdrawn). The panel agreed that an average of the two percentage amounts (3.22 percent) would be fair in the absence of a clearly stipulated agreement; therefore, the difference between 5 percent and 3.22 percent of the contract price (1.78 percent) is due the plaintiff ($3,053.02). The plaintiff's demurrage claim of $240 is denied. The plaintiff's claim of $16,672.50 was denied; however, the defendant's purchase of cars for the account of the plaintiff with minimum weight per car of 195,000 pounds to cancel an original purchase of 190,000 pounds per car was adjusted in favor of the plaintiff by the 5,000 pounds per car using the same 57-cent-per-hundredweight market differential. Thus, the amount should have been $16,245 (5,000 pounds per car times 15 cars equals 750 hundredweight times 57 cents per hundredweight equals $427.50).

The plaintiff's claim of $1,500 for other costs, including interest on the above full amounts, was denied. However, the plaintiff was entitled to interest at 1 percent over the prime interest rate quoted by major New York banks from date withheld by the defendant until date of payment on the amounts awarded herein ($3,480.52).

Submitted with the consent and approval of the arbitration panel, whose names are listed below:

Merrill Donoho, chairman
General Mills Inc.
Minneapolis, Minn.

Richard McWard
Bunge Corporation
St. Louis, Mo.

Thomas Couch
The Early & Daniel Co. Inc.
Cincinnati, Ohio