Arbitration Decision
National Grain and Feed Association

February 16, 1995

Arbitration Case No. 1717

Plaintiff: Commodity Specialists Co., Overland Park, Kan.

Defendant: Nathan Segal & Co., Houston, Texas

Statement of the Case

This arbitration case concerned whether timely shipments of rice bran were made against a contract entered into between Commodity Specialists Co., the plaintiff-buyer, and Nathan Segal & Co., the defendant-seller.[1] The trade was made through a broker, Imcor Inc., Olathe, Kan.[2]

The plaintiff contended that the defendant-seller did not make timely shipments on the contract during February 1994. On March 4, 1994, the plaintiff declared the defendant-seller in default and canceled the disputed shipments. The plaintiff sought damages in the amount of $3,500 against Nathan Segal & Co. The defendant disputed the plaintiff's claim, and counterclaimed for $75, plus interest.

On Oct. 31, 1993, Nathan Segal & Co. entered into a contract for the sale of 22 truckloads of approximately 25 tons each, of rice bran at $60 per ton F.O.B. New Madrid, Mo., to Commodity Specialists Co. The contract provided for shipment of one truckload per week during the period November 1993 through March 1994. Both the seller and buyer, as well as the broker, sent confirmations of the transaction.

Nathan Segal & Co. began applying shipments to the contract on Nov. 16, 1993. Four loads were made available to Commodity Specialists Co. over a two-week period in November. But the buyer chose to take only two shipments. Four loads were applied to the contract in December 1993 and five loads were applied in January 1994. Nathan Segal & Co. contended that three truckloads were applied to the contract in February 1994.

While 14 truckloads of rice bran were applied to the contract through February 1994, Commodity Specialists Co. contended that 18 of the 22 scheduled loads on the contract were due through February 1994. In February, Commodity Specialists Co. demanded shipment of the two loads not taken in November 1993.

Nathan Segal & Co. contended that Commodity Specialists Co. was at fault for failing to take some shipments earlier in the contract period. In addition, Nathan Segal & Co. contended that the parties had reached an oral agreement through the broker that the

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[1]Both the seller and buyer were NGFA Active members. The dispute was, therefore, subject to compulsory arbitration under Section 3(a)(1) of the NGFA Arbitration Rules and Article II of the NGFA Bylaws.

[2] While the parties were NGFA Active members, the broker was not a NGFA member. The broker's confirmation provided, among other things, that: "[t]his contract is subject to the specific trade rules of the commodity involved. NCPA rules to apply on all cotton products." The confirmations sent by the buyer and seller made no reference to any trade rules. The product being traded by the two NGFA Active members was rice bran, which is a feedstuff subject to the NGFA Feed Trade Rules. Therefore, the NGFA Feed Trade Rules were applicable to this contract because no agreement to exclude the applicability of the NGFA Feed Trade Rules was made at the time of trade. [See Preamble to the NGFA Feed Trade Rules and Article II of the NGFA Bylaws.]

shipping dates were to be subject to the milling schedule of Louis Dreyfus Corp.'s rice mill in New Madrid, Mo., or "as available." A letter from Louis Dreyfus Corp. was submitted as part of defendant's arguments confirming that, "during the weeks of 2/14/94, 2/21/94, 2/28/94 and 3/7/94, LDC produced no bran to fill any contracted orders." Further, Nathan Segal & Co. argued that unavailability of product was provided for in the contract by virtue of the "force majeure" language[3] in its confirmation of sale.

On March 7, 1994, Commodity Specialists Co. gave notice to Nathan Segal & Co., both orally and in writing, that a default on the shipping period was being declared.[4] Commodity Specialists Co. also stated in writing that, "[i]t is my intention to wash the unshipped February Ricebran at market price which I feel is $95.00/ton. I purchased three loads of ricebran at this price today (3-7-94)!"

The Decision

The arbitrators concluded that the primary issues in this case were: 1) whether the parties intended to make the contract subject to the production schedule of Louis Dreyfus Corp.'s rice mill in New Madrid, Mo.; and/or 2) did the parties contemplate a flexible shipping schedule either by express agreement or conduct?

Evidence was submitted by both Nathan Segal & Co. and the broker that the buyer and seller both understood that the shipping dates were to be subject to the milling schedule of Louis Dreyfus Corp.'s rice mill or "as available." The broker confirmed that this information was conveyed to Commodity Specialists Co. prior to the formation of the contract. The arbitrators concluded that this term became part of the contract between the buyer and seller pursuant to NGFA Feed Trade Rule 15(d).

The arbitrators also concluded that the parties' performance of the contract during November, December and January corroborated this conclusion because erratic shipments were made and accepted during that period without objection from either the buyer or seller.

Further, the arbitrators concluded that it was customary in the rice bran trade to provide for shipments "subject to availability" because the availability of rice mill byproducts is dependent upon the run-time of each rice mill. Ordinarily, missed loads are added to the end of the contract.

The Award

For these reasons, the arbitrators found that Nathan Segal & Co. did not breach the contract because the arbitrators determined that the contract terms included the "as available" provisions for the reasons stated previously. Therefore, Commodity Specialist Co.'s claim for damages was denied. The arbitrators also denied Nathan Segal & Co.'s claim for damages.

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

David W. Bickerstaff, *Chairman*
Riceland Foods Inc.
Stuttgart, Ark.

Steve Kimes
Producers Rice Mill Inc.
Stuttgart, Ark.

Jeff Atkins
Grain Service Corp.
Atlanta, Ga.

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[3] Nathan Segal & Co.'s confirmation provided that: "[f]ulfillment of this contract is contingent upon strikes, fires, embargoes, or other force beyond our control." No similar language was contained in the confirmations sent by the broker or Commodity Specialists Co.

[4] NGFA Feed Trade Rule 14(a) sets forth the requirements for declaring a seller in default. Commodity Specialists Co. gave proper notice to Nathan Segal & Co. if an actual default on the shipping period occurred.