Arbitration Decision
National Grain and Feed Association

May 23, 1996

Arbitration Case Number 1740

Plaintiff: Continental Grain Co., Milwaukee, Wis.

Defendant: William J. Walker, Bristol, Wis.

[Editor's Note: This case was arbitrated pursuant to "Stipulation and Order" issued in Continental Grain Co. vs. William J. Walker, Case No. 94-CV-000998 (Kenosha Co. Wis., Cir. Ct., 1995.)]

Statement of the Case

From April 1993 through July 1993, the defendant, William J. Walker, entered into a total of five contracts with the plaintiff, Continental Grain Co. The contracts provided for the delivery of a total of 45,000 bushels of corn during October through December 1993 at various contract prices ranging from $2.30 to $2.50 per bushel.

From Nov. 10-23, 1993, the defendant delivered to the plaintiff a total of 12,716.06 bushels of corn, which were applied against the contracts. The evidence submitted indicated that between Jan. 5-21, 1994, the plaintiff attempted to contact the defendant to discuss the undelivered balance on the contracts. Subsequently, on Jan. 24, 1994, the plaintiff notified the defendant by letter that the latter was in default on the balance due under the contracts, stating that the plaintiff had bought in the contracts at a net loss of $18,473.44. The plaintiff assessed these charges against the defendant.

Discussions ensued between the parties in an attempt to reach agreement on repayment of the cancellation charges by the defendant to the plaintiff. After various offers and counter-offers, the plaintiff said a verbal agreement was reached during an April 15, 1994 telephone conversation; the plaintiff maintained that the defendant agreed to repay the cancellation charges by delivering to the plaintiff a sufficient quantity of 1994-crop corn (in the fall of 1994). In addition, the plaintiff stated that under the agreement, the defendant was required to sign a note evidencing the debt, supported with a security agreement on the defendant's crops and a UCC-1 form to perfect the security agreement. The plaintiff further stated that cash contracts for the 1994 corn crop were included in the agreement.

In the telephone conversation between the plaintiff and defendant on April 15, 1994, the defendant contracted for the delivery of 5,000 bushels of 1994 new-crop corn to the plaintiff at $2.44 per bushel. In the same conversation, the defendant left an offer to contract a second 5,000 bushels at $2.50 per bushel. This price was reached on May 18, 1994. On each occasion, the plaintiff issued to the defendant a contract for the purchase made. Copies of the contracts issued by the Continental Grain Co. were submitted as evidence.

Although contracts were written for delivery of 1994-crop corn, efforts by the plaintiff to obtain a signed note, security agreement and form UCC-1 from the defendant apparently were unsuccessful. After various attempts to obtain these documents, the plaintiff, Continental Grain Co., on June 24, 1994 sent a letter to the defendant, William Walker, stating that the settlement proposal was withdrawn and purporting to cancel the two contracts for the 1994 corn crop. At that same time, the plaintiff offered the defendant a cash settlement of $10,000.

Subsequently, the defendant sent to the plaintiff a signed copy of the agreement made in April. The plaintiff said it received the signed agreement on July 6, 1994. The plaintiff again responded that this offer had been withdrawn, and that the current offer was a cash settlement of $10,000 due by July 11, 1994.

No evidence was submitted to indicate that any action occurred subsequent to the letter of July 6, 1994 sent by

Continental Grain Co. to Mr. Walker stating that the April proposal had been withdrawn and a cash settlement of $10,000 offered instead.

From Nov. 3 - Dec. 1, 1994, the defendant made delivery to the plaintiff of a total of 10,282.49 bushels of corn. These deliveries were spotted at current market prices after the close of the market on each day that grain was delivered. The value of this corn at spot market prices, as calculated by the plaintiff, was $16,760.99. The plaintiff claimed that it was due an additional $3,218.60 -- comprising a balance of $1,712.45 resulting from the original cancellation charges of $18,473.44 plus interest of $1,506.15.

In his response, the defendant, William Walker, did not dispute the facts surrounding the contracts and delivery of corn in 1993. The defendant stated he was unable to deliver the full amount due on the 1993 corn contracts because of a poor growing season. The defendant also did not dispute the calculation or the amount of the cancellation charges on the 1993 contracts as computed by the plaintiff, Continental Grain Co.

While the defendant conceded that a series of negotiations occurred between January and June 1994 to discuss various proposals to settle the debt, he contended that no agreement was fully reached. Instead, the defendant said he consistently maintained the position that he would enter into contracts for the delivery of 1994-crop corn that would be sufficient to cover the 1993 cancellation charges. The defendant further affirmed the existence of the two contracts for the delivery of the 1994-crop corn, and contended that at the time these contracts were made the plaintiff was aware that no overall agreement had been reached. Further, the defendant also pointed out that the 1994 contracts did not contain any language making them contingent upon the resolution of other issues, or on other actions required to be taken by the defendant.

The defendant, in his counterclaim, sought $3,281.05 from the Continental Grain Co. representing the value of the corn delivered in 1994 (calculated at the contract prices) less the cancellation charges for the 1993 contracts of $18,473.44. The defendant further contended that the Continental Grain Co. had no legal authority to charge interest on the amount it was due as a result of the cancellation of the 1993 contracts.

The Findings

Since the two parties did not dispute the essential facts of the 1993 and 1994 corn crop contracts and deliveries, the case basically involved two question: 1) Whether the 1994 corn crop should be applied to the contract at a higher price (as the defendant claimed) or applied at the spot market price, which was lower (as the plaintiff claimed); and 2) Whether the plaintiff was entitled to any interest on the cancellation charges from the 1993 corn crop contracts.

Since the contract expressly provided "contract terms governed by rules of the National Grain and Feed Association," the arbitrators relied upon NGFA Grain Trade Rule 43 to address the first question. Grain Trade Rule 43 states that *"failure to perform in keeping with the terms and conditions of a contract shall be grounds for the refusal only of such shipment or shipments, and not for the recision of the entire contract or any other contract between buyer and seller."* [Emphasis added.] Further, NGFA Grain Trade Rule 41 states: *"The specifications of a contract cannot be altered or amended without the express consent of both the seller and the buyer. Any alteration mutually agreed upon between buyer and seller must be immediately confirmed by both in writing."*

In the preamble, the NGFA Grain Trade Rules do provide that contracting parties *"are free to agree upon any contractual provisions that they deem appropriate and these rules apply only to the extent that the parties to a contract have not altered the terms of the rules, or the contract is silent as to a matter dealt with by the pertinent rule."* In this particular case, if the Continental Grain Co. had intended the 1994 contracts to be part of a larger settlement, any additional conditions required for validation of the contracts should have been included in such contracts at the time they were issued in April and May 1994. No evidence was submitted to document such a condition was made a part of these contracts; on the contrary, the copies of the contracts submitted by the plaintiff contained a paragraph stating: "The terms expressed herein are the entire contract between parties. No modifications or amendment of the contract shall be valid or binding unless agreed to by both parties and confirmed in writing by either party to the other."

The letter of June 24, 1994 from the plaintiff to the defendant (which the plaintiff contended cancelled the 1994 contracts) did not contain any specific language stating that the contracts were being cancelled. Rather, they stated that the defendant is: "Now considered in default of our subsequent agreement (i.e., partial payment, new crop contracts, note, security agreement, and financing statement)." This same letter contained a cash settlement offer of $10,000. While this might be inferred as a cancellation of the 1994 contracts, the language did not specifically state that the plaintiff was attempting to cancel these contracts. Further, the plaintiff did not submit any evidence that showed the defendant agreed to these "cancellations."

While the arbitration committee sympathized with the plaintiff's apparent difficulties in obtaining timely responses from the defendant, the plaintiff nonetheless prepared and signed firm priced contracts with the defendant for the purchase of 10,000 bushels of 1994-crop corn. If the plaintiff was unwilling to contract with someone that had failed to perform on an earlier contract, it should not have executed the subsequent contracts. Alternatively, if the plaintiff intended for these contracts to be part of a larger settlement, the additional conditions required should have been set out plainly on the contracts themselves, as the plaintiff's own contract form and the NGFA Grain Trade Rules require. Absent these additional conditions, once the contracts were made, a failure to perform on an earlier contract was not grounds for cancellation, as per NGFA Grain Trade Rule 43.

Concerning the question of interest charges on the balance resulting from the cancellation of the 1993 contracts, the plaintiff, in its rebuttal argument, cited "Item 13 on contracts," which they stated allowed collection of "additional sums and attorney's fees." The copies of the plaintiff's contracts, which were submitted, only listed terms numbered one through 11. No evidence was submitted by the plaintiff of the existence of any "item 13." In the absence of any such submission by the plaintiff, the committee was compelled to rely upon the NGFA's Arbitration Rules, which provide in Section 6 (a)(1) that *"[p]arties to the arbitration are responsible for clearly presenting all aspects of their case (the National Secretary and the arbitration panel are not responsible for undertaking fact finding searches or discovery)."* Again, the arbitrators were sympathetic to the plaintiff, in that it failed to obtain prompt payment and apparently encountered difficulties in obtaining timely responses from the defendant. Nevertheless, in the absence of any contractual provision for the imposition of interest charges, the arbitrators were unable to find a basis for allowing them. Moreover, the plaintiff did offer the defendant, in July, a cash settlement of $10,000 that not only failed to include interest but represented only slightly more than 50 percent of the original cancellation charges.

The Decision

Based upon the evidence submitted and the applicable NGFA Grain Trade Rules, the arbitration committee unanimously rendered the following decision:

➢ The plaintiff was entitled to cancellation charges for non-delivery on the 1993 corn crop contracts;

➢ the plaintiff was **not** entitled to interest on these cancellation charges, in the absence of any contractual authority; and

➢ the plaintiff was obligated to honor the two 5,000-bushel 1994 corn crop contracts which it signed with the defendant.

The Award

The arbitrators did not attempt to ascertain the validity of the prices used by the plaintiff in its calculation of the damages from the 1993-crop contracts. Since the defendant did not dispute these charges, the committee accepted the charges as calculated by the plaintiff, which amounted to $18,473.44. The defendant calculated that at the contracted prices, the corn delivered during 1994 should have resulted in a net payment of $21,754.49. The committee found that calculation to be substantially correct.

Therefore, the arbitration committee found that the plaintiff, Continental Grain Co., was owed $18,473.44 from the defendant, William Walker, for the cancellation of the 1993 contracts; and that the defendant was owed $21,754.49 from the plaintiff for the delivery of corn on the 1994 contracts. Since the evidence submitted indicated that no payment had been made by either party to the other (other than the payment by the plaintiff to the defendant for the corn actually delivered on the 1993 contracts), the plaintiff, Continental Grain Co., was ordered to pay the defendant, William J. Walker, the difference between these two sums, amounting to $3,281.05.

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

Edward P. Milbank, *Chairman*
President
Milbank Mills Inc.
Chillicothe, Mo.

Don Woodburn
Commodity Manager
Ag Processing Inc.
Omaha, Neb.

Janelle Martin
Grain Desk Coordinator
Pioneer Hi-Bred International Inc.
Des Moines, Iowa