Arbitration Decision
National Grain and Feed Association

March 14, 1997

Arbitration Case Number 1747

Plaintiff: Coshocton Grain Co., Coshocton, Ohio

Defendant: Danville Feed and Supply Inc., Millersburg, Ohio

Statement of the Case

The plaintiff, Coshocton Grain Co., entered into three contracts with Danville Feed and Supply Inc., the defendant. The contracts were as follows: No. 496 dated July 1, 1993 for 20,000 bushels of U.S. No. 2 yellow corn; No. 568 dated July 9, 1993 for 20,000 bushels U.S. No. 2 yellow corn delivered Coshocton for $2.47 per bushel; and No. 704 dated Aug. 11, 1993 for 30,000 bushels of U.S. No. 2 yellow corn delivered Coshocton for $2.39 per bushel, (collectively referred to as the "contracts"). All three contracts called for delivery to be made in January 1994.

During October 1993, Ronald Hawk, president of Danville, said he heard rumors regarding the plaintiff's financial condition. Matt McConnell, the principal official at Coshocton Grain, confirmed the bank was terminating operating money and advised Hawk to have Coshocton certify checks for nearby grain sales. A foreclosure was filed by National City Bank on Oct. 22, 1993. The Ohio Department of Agriculture suspended the company's state grain handlers license on Oct. 27, 1993, at which time a receiver, Charles Bratton, was appointed by the court.

On Nov. 3 or 4, 1993, Hawk telephoned Bratton seeking assurances that Coshocton would be able to pay for the contracted corn. Bratton provided no such assurances. By letter dated Nov. 5, 1993, the defendant notified Bratton that it was canceling the contracts, invoicing the plaintiff for $5,178.75 to cover 0.03-cents-per-bushel basis depreciation and 0.04 cents per bushel for additional freight since the corn was sold to several undocumented parties in the area. In a letter dated Nov. 9, 1993, Bratton acknowledged the conversation of Nov. 3 or 4 and the letter of Nov. 5, 1993 stating that there was no breach of contract by Coshocton. In addition, Bratton indicated that in his role as receiver, he was obliged to keep the contracts in force until delivery and would not recognize the defendant's $5,178.75 invoice.

Coshocton Grain advised the defendant by letter dated Dec. 6, 1993 that the plaintiff had sold all of its assets to a new entity, Coshocton Elevator, on Dec. 1, 1993. All of the plaintiff's outstanding contracts were a part of the sale. The defendant refused to sign contract assignments to the new entity, resulting in Coshocton Elevator reducing its purchase price by $31,700 (which was the cancellation price of the three contracts brought to market at the close on Dec. 2, 1993). The plaintiff asked that the defendant be held liable for breach of the three contracts totaling $31,700, plus attorney fees and proceeding costs.

The Decision

All three contracts were properly signed and confirmed by both the defendant and plaintiff. Each contract clearly stated that the delivery would be made during January of the coming year. The Oct. 22, 1993 National City Bank foreclosure action against Coshocton Grain and the Ohio Department of Agriculture's determination that Coshocton Grain was insolvent clearly provided the defendant with reasonable grounds to be concerned about Coshocton's ability to meet the terms of its contracts.

In the absence of any specific contract cancellation terms being specified in the contract forms, the NGFA Trade Rules applied. Both the plaintiff and defendant referred to NGFA Grain Trade Rule 10. However, both parties admitted that the rule did not apply directly. Where no trade rule applies, the arbitrators look to the custom of the trade. Common accepted trade custom is for both parties to

agree on cancellation terms if deemed necessary. However, trade custom does not require a legitimately concerned seller to stand by helplessly. Rather, trade custom in this respect coincides with state-enacted versions of the Uniform Commercial Code, permitting a concerned seller to suspend performance until the purchaser provides reasonable evidence that he or she will be able to pay for the commodity for which it has contracted. With respect to Coshocton in particular, by Hawk's November 1993 telephone conversation with Bratton, the defendant requested such assurances. Although it was not clear what actually was said during this conversation, there was no evidence submitted that indicated assurances were given by Bratton. Further, by a letter dated Nov. 5, 1993, the defendant made it clear it would not supply the corn covered by the contracts. Given that Bratton only had been appointed on Oct. 27, 1993, and the defendant only had one discussion with Bratton before it confirmed its cancellation of the contracts, the arbitrators did not believe the defendant gave Bratton a reasonable time to provide any assurance. As a result, the defendant breached the contracts.

Nevertheless, once Bratton was aware of the defendant's intent not to deliver the corn covered by the contracts, it was inappropriate for the plaintiff to ignore such a situation by claiming that the contracts were still in place and delivery of the corn was expected. Rather, the plaintiff had the obligation to mitigate its losses, either by buying corn to cover the canceled contracts or by taking no action if it did not want the additional corn.

By taking no action, the plaintiff had on its books a nonperforming piece of business, which according to the plaintiff's Dec. 8, 1993 letter it assigned to the new entity, Coshocton Elevator. The plaintiff did not provide a copy of the actual sales arrangement with Coshocton Elevator so the arbitrators had no evidence to counter the December letter, which showed that the contracts were transferred to Coshocton Elevator and the plaintiff no longer was the owner. The fact that the purchase price for the assets was reduced by $31,700 did not in and of itself establish that the contracts actually were reassigned to the plaintiff. The price reduction just as easily could have established that these particular assets (i.e., the "contracts") were given little or no value when pricing the entire sale. Further, the arbitrators saw no basis to compute the loss on these contracts as of Dec. 2, 1993 where delivery under the contracts was to be in January 1994 and the first notice of the breach was in November. The plaintiff only calculated its damages as of December 1993.

Based upon the aforementioned facts and reasoning, the arbitrators did not believe that the plaintiff had met its burden of proof with respect to the damages it had incurred. And more importantly, the plaintiff did not establish that it was the appropriate party to bring any claim under these contracts. As noted in Section 6(a)(1) of the Arbitration Rules of the National Grain and Feed Association, it is not the arbitrators' responsibility to undertake fact-finding searches or discovery.

The Award

After carefully reviewing all the circumstances in this case, the arbitrators found that the defendant breached the contracts, but that the plaintiff had not proved its right to any recovery. Therefore, no damages, costs nor legal expenses were awarded to either party.

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

Daniel W. Walski, *Chairman*
General Manager
Luckey Farmers Inc.
Woodville, Ohio

Joel Silverman
Assistant General Counsel
Continental Grain Co.
New York, N. Y.

Steve Speck
Assistant Vice President, Export Merchandising
Farmers Commodities Corp.
Perrysburg, Ohio

Appeal Decision -- Arbitration Case Number 1747

Appellant: Coshocton Grain Co., Coshocton, Ohio

Appellee: Danville Feed and Supply Inc., Millersburg, Ohio

The Arbitration Appeals Committee individually and collectively reviewed all the evidence submitted in this case. It also reviewed the findings and conclusion of the original arbitration committee.

The Arbitration Appeals Committee believed that the bringing of this dispute by these two parties to the National Grain and Feed Association for arbitration purposes was appropriate and proper.

The arbitrators (and Arbitration Appeals Committee) in this case were not bound by decisions in previous cases, as arbitration decisions are not precedent-setting relative to future arbitration cases.

The main focus of this dispute centered around the corn contracts that called for January 1994 delivery. Related to these contracts and the two parties to the dispute, several things occurred:

- Foreclosure action was filed by the appellant's provider of operating capital.
- The state of Ohio suspended the appellant's grain handler's license. The license was reinstated temporarily by court action.
- The appellee, to protect itself, promptly requested assurances from the appellant that payment would be made upon performance on the contracts.
- No assurances of payment were given by the appellant.

The Decision

The Arbitration Appeals Committee concluded that the appellee, Danville Feed and Supply Inc., provided proper notification, both verbally and in writing, of its intent to cancel the disputed contracts after the appellant, Coshocton Grain Co. (operating under court-ordered receivership), would not give assurance that payment could be made upon delivery.

NGFA Grain Trade Rule 10 and Grain Trade Rule 13 (even though the wording therein does not coincide with the exact occurrence) could have been the basis for the appellant (buyer) to mitigate damages at the time of cancellation notification by appellee (seller). The appellant chose not to accept the cancellation notification and continued under the premise that the contracts were in force. The Arbitration Appeals Committee concluded that even under the unusual circumstances as occurred in the evolution of this dispute, the appellee (seller) followed proper procedure under the general guidelines of Grain Trade Rule 10 in notifying the appellant (buyer) of its intent not to complete delivery against the contracts in question.

Accordingly, the Arbitration Appeals Committee agreed with the conclusion of the original arbitration committee that no damages, costs nor legal expenses should be awarded to the appellant.

The appellee's counterclaim ($5,178.95) also was denied. The Arbitration Appeals Committee concluded that insufficient information was submitted to ascertain the correct amount, and that, in fact, the invoice was for "expenses incurred" which did not reflect "fair market value."

Submitted with the consent and approval of the Arbitration Appeals Committee, whose names are listed below:

John McClenathan, *Chairman*
Vice President, Grain Marketing
GROWMARK Inc.
Bloomington, Ill.

Donald Cameron
Chairman
Cameron Brokerage Co.
Charlotte, N.C.

Tommy Couch
Eastern Grains
Farmland Industries Inc.
Kansas City, Mo.

Richard McWard
Vice President
Bunge Corp.
St. Louis, Mo.

Steve Nail
President and Chief Executive Officer
Farmers Grain Terminal Inc.
Greenville, Miss.