



Arbitration Decision

National Grain and Feed Association

November 22, 1996

Arbitration Case Number 1759

Plaintiff: Coshocton Grain Co., Coshocton, Ohio

Defendant: Brennan Durbin, Mount Vernon, Ohio

Statement of the Case

On July 6, 1993 the defendant, a producer, sold 20,000 bushels of corn to the plaintiff on two contracts.¹ The first contract (contract number 519) was for 10,000 bushels priced at \$2.40 for December delivery, while the second contract (contract number 520) was for 10,000 bushels priced at \$2.50 for January 1994 delivery. The plaintiff issued both contract confirmations on July 6, which the defendant signed on July 8. The signed copies indicated there was no dispute over the contract price or terms.

The plaintiff filed this case claiming damages based upon a contract cancellation that allegedly occurred because of the defendant's refusal to assign the two aforementioned contracts to a new owner of the plaintiff's business pursuant to the plaintiff's written request, conveyed in a Dec. 6, 1993 letter to the defendant. The plaintiff's financial problems had resulted in a state court receivership on Oct. 27, 1993. All operations, assets and inventories of the plaintiff's company were sold and conveyed to the new buyer effective on Dec. 1, 1993.

The plaintiff claimed \$10,600 in damages, plus interest, for the defendant's cancellation of the contracts. Calculations for damages were based upon the difference between the contract price and the market on Dec. 2, 1993, the date the plaintiff alleged was used by the purchaser of the plaintiff's assets to determine the market value of the plaintiff's open contracts.

The defendant rejected the claim, challenging the validity of the assignment since he maintained he had canceled the

contracts on Nov. 5, 1993. The defendant provided evidence as to why he believed the contracts were canceled as of that date. In addition, he provided market information on local market values for Nov. 5, 1993 that showed the market actually was lower than the contract price at the time the defendant claimed the cancellation occurred. The defendant claimed that the plaintiff could have reinstated its position in the market on or about Nov. 5, 1993 at a price more favorable to the plaintiff than the contract price. The defendant did not make a counterclaim.

The Facts

There were several issues pertaining to the contract cancellation:

- The defendant claimed the right to cancel at no cost on grounds of nonperformance (i.e. nonpayment) of previous contracts by the plaintiff.
- The plaintiff claimed that the defendant had no right to cancel the contract, and maintained he merely was trying to take advantage of the market situation at the time.

Both parties cited the Ohio Uniform Commercial Code in their arguments. As discussed subsequently, the arbitrators concluded that the reasons for cancellation or the right to cancel were not at issue in this case, since the NGFA Trade Rules provide for the proper method of cancellation.

Instead, the arbitrators concluded the relevant issues were as follows:

¹ This case was arbitrated pursuant to a court order issued in *Coshocton Grain Co. vs. Brennan Durbin*, Case No. 94-CI-325, Court of Common Pleas of Coshocton County, Ohio (Nov. 9, 1995). The court found that "[b]y contract, both parties agreed to be bound by the regulations of the National Grain and Feed Association."

- Was there a cancellation of the contracts by the defendant?;
- If so, when did the cancellation occur?; and
- If so, what, if any, cancellation damages are due the plaintiff from the defendant?

Sometime on or about Nov. 5, 1993, the defendant contacted the plaintiff to inform it that he was going to cancel the two contracts. It was unclear how this initial notification was made (in person or via telephone). That same day, the defendant followed up the previous verbal contact by informing the plaintiff by letter that the defendant was canceling all contracts with the plaintiff.²

The plaintiff acknowledged that it had been contacted and subsequently had received the letter. Therefore, the undisputed evidence in this case is that the defendant did cancel the contracts. Although irrelevant to the decision herein, the reason given in the letter for canceling the contract was that the plaintiff had not paid the defendant \$15,343.43 owed to him at that time for previously delivered grain. The letter further stated that the cancellation was being made because of a lack of confidence that the defendant would be paid for his grain after delivery. In this case, no information was given substantiating this debt or how long it had been outstanding. The plaintiff did not deny the debt in this case.

The Decision

Even though the plaintiff wrote a letter dated Nov. 24, 1993 to the defendant disputing cancellation of the contracts, the arbitrators concluded that the defendant clearly canceled both contracts on Nov. 5, 1993 when he called and wrote the plaintiff and clearly expressed his intention to cancel both contracts. The arbitrators believed that NGFA Grain Trade Rule 10 was applicable to this situation. Grain Trade Rule 10, Seller's Conveyance, stresses the timeliness of communication (as do other NGFA Grain Trade Rules). Timely communications are critical in the grain business because of the volatile nature of grain markets.³ Pursuant to Grain Trade Rule 10, when a seller cancels, the buyer shall at once [emphasis added] give notice to the seller to complete the contract and then either buy-in the defaulted portion of the contract for the account of the seller or cancel the defaulted portion of the contract at fair market value based upon the close of the market on the next business day.⁴

The arbitrators concluded that the plaintiff in this case should have promptly mitigated its damages by buying-in the

canceled contract or canceled the contracts at fair market value. The plaintiff's Nov. 24, 1993 letter to the defendant was both untimely (having been sent nearly three weeks after the defendant's notice of cancellation) and ineffective since it did not notify the defendant of what action the plaintiff was going to take in response to the defendant's contract cancellation.

Because it obviously was too late for the plaintiff to buy-in the contracts for the defendant's account, the arbitrators were left with no choice but to calculate the cancellation damages, if any, owed by the defendant to the plaintiff by placing the parties in the same positions as if the plaintiff had canceled the contracts at fair market value on or about Nov. 5, 1993. The only evidence of market price for Nov. 5, 1993 was provided by the defendant. Because that evidence showed the market price on that date was lower than the price set forth in both contracts, the arbitrators ruled that the plaintiff was not entitled to any damages.

Thus, the arbitrators rejected the plaintiff's argument that damages should be calculated as of Dec. 2, 1993 because that date is irrelevant to the plaintiff's contracts with the defendant. In addition, the plaintiff did not act in a prompt and timely manner concerning the defendant's cancellation of the two contracts. Under these circumstances, it would be improper and counter to the spirit and intent of the NGFA Grain Trade Rules to calculate damages as of Dec. 2, 1993 -- 25 days after the defendant's cancellation on Nov. 5, 1993.

The Award

The arbitrators ruled that the plaintiff was not entitled to any monetary damages from the defendant.

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

Ben Baer, Chairman
Guthrie Corp.
Guthrie, Okla.

Edmund Gross
Farmland Industries Inc.
Kansas City, Mo.

Ed Nienaber
Champaign Landmark Inc.
Mechanicsburg, Ohio

² Although the Nov. 5 letter stated that the defendant was canceling all contracts with the plaintiff, the only contracts at issue in this case were contracts 519 and 520.

³ For example, see NGFA Grain Trade Rule 6(a), which requires confirmations to be sent no later than the close of business on the day following a trade.

⁴ Although NGFA Grain Trade Rule 10 states that the buyer also may elect to agree with the seller on an extension of the contract, this alternative was not available to the plaintiff because of the defendant's clear intent to cancel.