



# Arbitration Decision

National Grain and Feed Association

July 17, 1997

## Arbitration Case Number 1789<sup>©</sup>

**Plaintiff: The Andersons, Inc., Maumee, Ohio**

**Defendant: Bruce Homkes, Holland, Mich.**

### Findings and Default Judgment

The Andersons Inc., the plaintiff, filed a request for arbitration with the National Grain and Feed Association by letter dated Oct. 29, 1996, which was received by the NGFA on Nov. 5, 1996.

The plaintiff alleged that the defendant, Bruce Homkes, failed to deliver or to provide adequate assurance of performance on his "to arrive cash contracts" with The Andersons Inc. The plaintiff's request for NGFA arbitration was based on express terms in the contracts which provided for arbitration of disputes by the National Grain and Feed Association.

The plaintiff sought contractual damages of \$65,855 in connection with five contracts<sup>1</sup> canceled on July 8, 1996. The amount sought was based upon the difference between the contract price and the replacement cost at the time of cancellation, plus the cancellation charge as provided for in the contracts and certain fees associated with the contracts. The plaintiff also asserted that it was entitled to receive its attorney's fees, costs of collection and interest.

Acting upon the plaintiff's request for arbitration, the NGFA prepared a "National Grain and Feed Association Contract for Arbitration" and mailed it to the plaintiff for

execution on Nov. 7, 1996. Concurrently, the defendant, Bruce Homke<sup>2</sup>, was notified of the plaintiff's request and sent copies of the plaintiff's letter requesting arbitration. The contract for arbitration was executed by an officer of The Andersons Inc. and was returned to the NGFA with the arbitration service fee of \$800. The NGFA then sent the NGFA contract for arbitration to the defendant for execution by certified mail letter dated Nov. 15, 1996. However, the U.S. Postal Service returned the Nov. 15 letter to the NGFA, noting that the letter was "unclaimed" after making at least two notices (on Nov. 18 and Nov. 27, 1996) to Bruce Homkes. Subsequently, the NGFA on Dec. 20, 1996 sent another letter enclosing the Nov. 7 letter to the defendant via Federal Express (*Airbill Tracking Package No. 4670691384*). Federal Express indicated that the package was delivered on Dec. 23, 1996 and was signed for by a "Jan Homkes." Federal Express is a "recognized overnight delivery service" within the meaning of Section 10 of the NGFA Arbitration Rules.

The defendant failed to return the NGFA contract for arbitration or pay the arbitration service fee. The plaintiff filed an action against Bruce Homkes in the U.S. District Court, Western District of Michigan, Southern Division [*Case No. 1:97-CV-34*] to compel arbitration,

<sup>1</sup> The contract numbers were identified as 23934, 23961, 24151, 24283, and 24433.

<sup>2</sup> All notices and correspondence were sent to defendant at the following address: A 4069 47<sup>th</sup> St., Holland, MI 49423.

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as required by the contracts. The court issued an order compelling arbitration. In addition, the court awarded The Andersons Inc. its actual costs and fees in bringing the action to compel arbitration.

Upon being notified that the court order had been issued, the NGFA on June 4, 1997 sent another request to the defendant via Federal Express (*Airbill Tracking Package No. 4670686683*) and regular U.S. mail. Federal Express said that the package was delivered on June 5, 1997. The NGFA requested that the defendant execute and pay the arbitration service fee by June 20, 1997. Further, the NGFA letter also advised the defendant of the following:

“IMPORTANT: You should also note that The Andersons Inc. has requested the entry of a default judgment against you on its claims asserted in this case should you not sign and return the *NGFA Contract for Arbitration* and arbitration service fee of \$800 within fifteen (15) days. The amount of damages claimed by The Andersons, Inc. is \$65,855 plus attorney fees, costs of collection and interest.”

The defendant did not respond to the NGFA’s June 4, 1997 notice. In this case, there was no question that the defendant was subject to NGFA arbitration. The contracts clearly provided that “any disputes or controversies arising out of this contract shall be arbitrated by the National Grain & Feed Association pursuant to its arbitration rules.” Likewise, the federal court issued an order which provided, among other things, that:

“IT IS FURTHER ORDERED that pursuant to Title 9 United States Code Section 4 that Defendant Bruce Homkes shall immediately proceed with arbitration before the National Grain and Feed Association as to the following commodity contracts between plaintiff and defendant: Contract No. 23934 (entered on October 7, 1994), Contract No. 23961 (entered on October 12, 1994), Contract No. 24151 (entered on November 16, 1994), Contract No. 24283 (entered on December 7, 1994), and Contract No. 24433 (entered on December 27, 1994).”

There was no indication that the defendant intended to execute the NGFA contract for arbitration, pay the required arbitration service fee, or otherwise comply with the NGFA Arbitration Rules. Section 5(d) of the NGFA Arbitration Rules requires a party to “complete

the contract for arbitration within fifteen (15) days from the date the party receives the contract from the National Secretary.” The defendant clearly violated the time limits in the rules. Further, the defendant was notified that his failure to proceed could result in the entry of a default judgment.

The Andersons Inc. submitted affidavits and supporting documentation outlining the damages requested in this case. The damages requested were as follows:

Initial claim based on invoice dated July 9, 1996 showing cancellation on July 8, 1996 (includes cancellation charges):	\$65,855.00
Compound interest at 9 percent from July 8, 1996 through July 3, 1997:	\$ 5,933.57
Attorney Fees and Costs (including interest through July 3, 1997):	\$ 3,089.20
Total Damages Claimed through July 3, 1997:	<u>\$74,877.77</u>

Section 1 of the NGFA Arbitration Rules vests in the National Secretary the responsibility and authority to administer the NGFA Arbitration System. As such, the National Secretary makes such procedural decisions as are necessary to implement the provisions of the NGFA Arbitration Rules. The defendant in this case failed to comply with the NGFA Arbitration Rules, both before and subsequent to the issuance of a court order compelling arbitration of this dispute. Thus, it is appropriate to enter the requested award in favor of the plaintiff, The Andersons Inc., against the defendant, Bruce Homkes.

### **Default Judgment**

Therefore, it is ordered that:

The Andersons Inc. is awarded a judgment against Bruce Homkes in the amount of \$74,877.77. Compound interest at the rate of 9 percent on the judgment of \$74,877.77 shall accrue from July 3, 1997 until paid.

Dated July 7, 1997.

NATIONAL GRAIN AND FEED ASSOCIATION

By: David C. Barrett, Jr.  
National Secretary