



Arbitration Decision

National Grain and Feed Association

June 4, 1998

Arbitration Case Number 1809

Plaintiff: Commodity Specialists Co., Cordova, Tenn.

Defendant: Goetz Farms Inc., Dodge City, Kan.

Statement of the Case

This dispute involved the plaintiff's claim for damages arising from the buy-in of 593 tons of ground alfalfa hay on a contract it alleged was breached by the defendant-seller. The plaintiff also sought an award of legal expenses and interest. The defendant-seller denied that it breached the contract and asserted a counterclaim for alfalfa delivered under the contract.

The parties—Goetz Farms Inc. (seller) and Commodity Specialists Co. (buyer)—entered into a contract early in 1996. The trade was brokered by Southwest Brokerage Co., Levelland, Texas. The contract¹ provided that the defendant-seller was to ship and deliver 200 tons of ground alfalfa hay each month over a seven-month period from June 1996 through December 1996. The total tonnage was 1,400 tons of alfalfa at \$90 per ton, with the defendant to provide delivery within a 200-mile radius of Dodge City, Kan. The confirmations sent by both the plaintiff and the defendant also provided that the ground alfalfa hay was to be “15% moisture” and “15% protein.”

While the defendant-seller made deliveries to the end-user² of alfalfa during each month of the contract's term, the tonnage delivered from June through November 1996 was less than the 200-ton-per-month quantity specified in the contract. The defendant delivered 216.17 tons in December 1996. The defendant-seller, by letter dated Jan. 3, 1997, stated to plaintiff-buyer that:

“This is to inform you that the above mentioned contract between CSC and Goetz Farms, Inc. is completed. It was stated in the contract, 200 ton per month, June thru December. Any remaining tons that were not delivered in that month, were not added to the following month.”

The plaintiff communicated its disagreement with the defendant's cancellation to both the broker and the defendant-seller. The plaintiff withheld payment on two of the defendant's invoices and asserted a claim for damages against the defendant. The plaintiff's damages were based upon the buy-in by its customer (McCormick Grain) of 593 tons of alfalfa at a net cost that was \$34-per-ton higher than the \$90-per-ton contract price.

¹ The plaintiff's purchase confirmation expressly provided that “the Grain Trade Rules of the National Grain and Feed Association apply on grain; and the Feed Trade Rules of the National Grain and Feed Association apply on millfeed and other commodities not specifically stated above.” The seller's confirmation did not address the issue, but the broker's confirmation provided that “Association trade rules to govern as applicable on all commodities.” In addition, the plaintiff's purchase confirmation expressly provided that the “Buyer and Seller agree that all disputes and controversies of any nature whatsoever between them with respect to the subject matter of this confirmation shall be arbitrated according to arbitration rules of the applicable trade association.” An order compelling arbitration of this dispute was entered in Goetz Farms, Inc. v. Commodity Specialists Company, Case No. 97 C 39, District Court of Ford County Kansas (June 1997).

² Deliveries were to the end-user, Heritage Beef Cattle Co., Wheeler, Texas, which was not a party to this case.

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The facts showed that the plaintiff gave initial shipping instructions through the broker to Goetz, but that Goetz failed to meet the requested schedule of shipments. Each party claimed its representatives spoke directly and/or indirectly to the end-user where the actual product was being shipped. However, the parties disagreed as to the reasons for the failure to meet the shipping/delivery schedule specified in the contract. The plaintiff contended that the defendant "had a continual problem providing dry product within [the contract's] specifications." In contrast, the defendant maintained that the end-user "indicated that it did not need as much hay as [the broker] was ordering."

Both parties appeared to agree or concede that the end-user orally agreed to, and allowed for, the modified

shipping schedule of less than 200 tons per month, although no written amendments to the contract were made by either of the parties, nor by the broker or the end-user. The defendant claimed it was adamant about cash-flow concerns and was not willing to continue to roll the contract periods forward. But no written notification was given throughout the first six contract months demanding billing instructions and/or notice of default. The facts showed that by the end of September 1996, approximately one-third of the contract shipments was not delivered within the express terms of the contract. Only after the seventh and final month of the contract did the defendant and plaintiff discuss the contract performance issues. The plaintiff contended that it assumed all along that the unshipped balances for each contract month would be rolled forward. The defendant-seller claimed it never intended to roll any product forward.

The Decision

The arbitrators concluded that the evidence showed that the seller, Goetz Farms Inc., failed to perform in accordance with the written contract terms, which incorporated the NGFA Feed Trade Rules³. Thus, the plaintiff-buyer was entitled to damages. Specifically, NGFA Feed Trade Rule 14(a) provides as follows:

"Default by the Seller: When the Seller finds that he is in default on the shipping schedule, and/or the contract shipping period, he shall notify the Buyer at once by telephone, facsimile, or wire.

"Upon receipt of such notice, the Buyer shall, within twenty-four (24) hours thereafter, advise the Seller by telephone, facsimile, or wire, which of the following options he elects to exercise:

"(1) agree to extend the shipping period; or

"(2) buy-in, for the Seller's account, the defaulted portion of the shipments; or

"(3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.

"If the Seller fails to notify the Buyer of his default, the liability remains in force until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted...."

"If the Seller defaults on the contract, it is liable for all reasonable costs and expenses as shall have been incurred to and including the day the Buyer elects one of the three options."

The arbitrators concluded that the original contract was made in good faith and that both parties were aware that performance of the contract was an issue. However, the defendant-seller failed to provide written notice to the plaintiff-buyer during the contract term that it deemed the monthly shipment schedules to be either satisfied or modified. NGFA Feed Trade Rule 23 clearly provides that: *"[t]he specifications of a contract cannot be altered or amended without the expressed consent of both Buyer and Seller. Any alteration of contract specifications mutually agreed upon by Buyer and Seller must be confirmed in writing, by both Buyer and Seller within twenty-four (24) hours of such alteration."*

The arbitrators concluded that the contract had not been fully performed when the defendant-seller (Goetz

³The arbitrators concluded that the NGFA Feed Trade Rules were applicable to this trade under the terms of the parties' confirmations and the broker confirmation. The parties' submissions in this case referred in some instances to provisions of the NGFA Grain Trade Rules, which generally are applicable only to grain as defined in the U.S. Grain Standards Act. See Preamble to NGFA Grain Trade Rules.

Farms Inc.) notified the plaintiff-buyer (Commodity Specialists Co.) on Jan. 3, 1997. The arbitrators further concluded that pursuant to NGFA Feed Trade Rule 14, the plaintiff-buyer was entitled to cancel the defaulted portion of the shipments at fair market value based on the day it learned of the defendant-seller's intent to make no additional deliveries. The stated fair market value of the buy-in executed in January 1997 was \$124 per ton. The arbitrators concluded that the buy-in value submitted by the plaintiff was the best evidence of the cancellation value on the defaulted portions of the contract. The

plaintiff sought interest on its claims at the rate of 8½ percent per annum.

The arbitrators ruled that both parties were responsible for their respective legal fees, and that compound interest on the judgment was to accrue at the rate of 8½ percent per annum from Feb. 5, 1997 (the date the plaintiff's original complaint was received by the NGFA) until payment was made. The defendant was awarded the amount of \$6,098.16 on its counterclaim as an offset against damages owed to the plaintiff.

The Award

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| Contract Cancellation (593 tons at \$34 per ton): | \$20,162.00 |
| <u>Less Payment Due Goetz Farms:</u> | <u>(\$ 6,098.16)</u> |
| Net amount due Commodity Specialties Co.: | \$14,063.84 |

It therefore is ordered that:

Goetz Farms Inc. is to make payment to Commodity Specialists Co. in the amount of \$14,063.84, plus compound interest at the rate of 8½ percent per annum from Feb. 5, 1997 until the judgment is paid in full.

Submitted with the unanimous consent of the arbitrators, whose names appear below:

Ken Vaupel, Chairman
Vice President, Feed Marketing
Koch Agriculture
Wichita, Kan.

Vincent Jensen
Manager
North Central Farmers Elevator
Ipswich, S.D.

Michael Thomas
Director, Business Development and Western Trading Operations
The Scoular Co.
Overland Park, Kan.