



Arbitration Decision

National Grain and Feed Association

November 19, 1998

Arbitration Case Number 1860

Plaintiff: Frick Services Inc., Wawaka, Ind.

Defendant: Holdeman Farms Inc., Wakarusa, Ind.

Statement of the Case

Frick Services, Inc. (Frick), by a letter from its attorney dated Sept. 25, 1997, initiated this arbitration case against Holdeman Farms Inc. (Holdeman). The dispute involved the alleged breach by Holdeman (the producer/seller) of two contracts for corn and one contract for soybeans. Each of the contracts contained pre-printed language referencing the National Grain and Feed Association Trade Rules¹.

Frick (the buyer) contended that Holdeman breached its hedge-to-arrive (HTA) or flex hedge-to-arrive contracts by not delivering or agreeing to cancel the contracts. Frick sought damages of \$86,354.37, plus interest, from Aug. 22, 1997, the day Frick contended the contracts were canceled. Holdeman contended that it had instructed Frick to cancel the contracts in June 1995 because of a disagreement between the parties over operational issues at Frick's Bremen, Ind., facility.

The pertinent facts presented to the arbitrators showed that these contracts were entered into on Aug. 26, 1994 and Oct. 21, 1994. The written contracts did not contain a delivery date, delivery location or reference to how a cash price would be established. However, both parties appeared to agree that the original delivery date was intended to be summer 1995. The dispute arose from the refusal of Holdeman to continue delivering grain after an operations issue resulted in a souring of the parties' business relationship. The parties disagreed on when this occurred. Frick contended it occurred in June 1995, while Holdeman contended it occurred in late October 1994. Nevertheless, both parties agreed that Holdeman informed Frick that deliveries on the contracts would not be made.

The evidence showed that a Frick representative contacted Holdeman to settle the disagreement. In the interim – apparently in June 1995 – Frick rolled the contracts' "futures month" to allow time for a decision to be made on the alternatives presented by Frick to Holdeman. No other contact seemed to have occurred between the parties until winter 1996, when a meeting was conducted that apparently resulted in no agreement. Several other attempts at reaching a settlement were attempted during spring 1996, winter 1996-97 and summer 1997 before Frick canceled the contracts. All these discussions dealt with canceling the contracts, even though Holdeman communicated its intention not to deliver to Frick at some point between late October 1994 and June 1995.

Holdeman contested the specifics of various allegations and the effectiveness of the various rollings of the contracts made by Frick. For example, Holdeman contended that NGFA Grain Trade Rule 41 required that it expressly consent to any amendments to the contracts. Frick countered that NGFA Grain Trade Rule 6 applied to each of the amendments made by rolling the contract "futures months," and that Holdeman consented to the amendments by failing to object. In addition, Holdeman contended that Frick should be barred from recovering on the alleged claims because the arbitration case was not filed in a timely manner as required by Section 3(d) of the NGFA Arbitration Rules. The relevant provisions of Section 3(d) provide as follows:

"The original complaint in connection with any disputed matter proposed for arbitration must be filed with the National Secretary within twelve (12) months after expiration date for performance of the contract or contracts involved."

¹ Frick was and is a NGFA Active member. Holdeman, a closely-held farming corporation, is not a NGFA member. Both parties executed the *National Grain and Feed Association Contract for Arbitration* after the filing of the complaint by Frick.

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The Decision

While the contracts contained terms stating that only the buyer had the right to extend delivery periods and that the contract remained in force until the grain was shipped or the contract was canceled by the buyer, the arbitrators concluded that such language did not excuse Frick from acting with due diligence to mitigate damages. The contracts expressly incorporated the NGFA Trade Rules. NGFA Grain Trade Rule 10 sets forth the responsibilities of both parties when shipment or delivery does not occur.

The arbitrators carefully reviewed the evidence presented by both parties to determine when Frick should have been aware that performance by Holdeman would not be forthcoming. NGFA Grain Trade Rule 10 imposes affirmative obligations upon a buyer once the seller makes notification that a contract will not be completed. Specifically, the relevant portion of the rule provides that:

"When the Seller finds that he will not be able to complete a contract within the agreed limit, it shall be his duty at once to advise the Buyer by telephone or telegraph, whereupon it shall be the duty of the Buyer at once to elect either to: (a) agree with the Seller upon an extension of the contract; (b) after having given notice to the Seller to complete the contract, the Buyer, by the exercise of due diligence, will buy-in for the account of the Seller, the defaulted portion of the contract; or (c) after having given notice to the Seller to complete the contract, the Buyer will cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day." [Emphasis added]

The arbitrators concluded that subpart (a) required the agreement of both parties. Absent such an agreement, it was the duty of the buyer to choose and act upon the options set forth in subparts (b) or (c).

The arbitrators concluded that Frick should have been aware that Holdeman would not deliver on the contracts more than 12 months prior to the Sept. 25, 1997 filing date² of this arbitration case. The arbitrators concluded that Frick failed to exercise due diligence to mitigate the damages and cancel the contracts within a reasonable time. The contracts were entered into during August and October 1994. Both parties agreed that the delivery period on the contracts was intended to occur during summer 1995. The evidence showed that Frick was aware prior to the agreed-upon time for delivery that delivery would not be made. The arbitration complaint was filed more than two years after Frick became aware that a contract performance problem existed.

NGFA Grain Trade Rule 10 is designed to ensure that parties act with due diligence to mitigate damages. Section 3(d) of the NGFA Arbitration Rules is designed to ensure that claims arising from contractual matters proceed to final resolution within a reasonable time. The arbitrators concluded that in this case, Frick did neither. Thus, the arbitrators found that the claims asserted by Frick were barred by Section 3(d) of the NGFA Arbitration Rules.

The Award

The arbitrators denied the claims asserted by Frick Services Inc. against Holdeman Farms Inc. Each party was directed to pay its own costs.

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

M. John Bender, Chairman
Assistant Manager/Grain Manager
Blanchard Valley Farmers Cooperative Inc.
Findlay, Ohio

David Reinders
General Manager
Northwest Iowa Co-op
George, Iowa

James W. Keistler
Merchandising Manager
Twomey Company
Smithshire, Ill.

²The complaint was received by the NGFA on Sept. 29, 1997, but the filing date was deemed to be the date of mailing of the letter to the NGFA. See Section 10(c) of the NGFA Arbitration Rules.