National Grain and Feed Association
Arbitration Decision
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September 2, 2004

Arbitration Case Number 2048

Plaintiff: **The Milky Whey Inc., Missoula, Mont.**

Defendant: **Murphy Grain Marketing Inc., Overland Park, Kan.**

Statement of the Case

This dispute involved a contract for the sale of 21,666 hundredweight (cwt.) of whey powder to the plaintiff, The Milky Whey Inc. (Milky Whey), by the defendant, Murphy Grain Marketing Inc. (MGM). The contract included the following terms and conditions:

"COMMODITY: MILK PRODUCT
QUALITY: WHEY POWDER
QUANTITY: 21,666.00 CWT.
FRT. BASIS: FOB PORT ELIZABETH, NEW JERSEY
PRICE: $12.50 PER CWT.
SHIPMENT: STARTING AT 11/07/02 …
GRADES: AS-IS"

The contract also provided for the accrual of specific storage costs to begin on Nov. 7, 2002, as well as loading and other costs on the buyer's account. After Milky Whey inspected the product on-site at the storage facility on Oct. 23, 2003, both parties signed the contract submitted by MGM on Oct. 28.

Several loads of the product were shipped at the contact price without incident. A dispute subsequently arose on the balance of the contract resulting from disagreements between the parties concerning product differentiation (quality) and market valuation (significant decline in market prices) over the duration of the shipment period. Milky Whey claimed that MGM failed to comply with a conforming product under the terms of the contract. MGM countered that it complied with the contract, and asserted that it was Milky Whey that defaulted following a substantial decline in market values.

The Decision

The arbitrators concluded that both parties entered into and were bound by the contract dated Oct. 28, 2002. The contract clearly provided for the purchase of 21,666 cwt. of "whey powder" on an "AS-IS" basis, with specific charges for storage and handling. The arbitrators also determined that Milky Whey inspected the product before signing the contract.

Pursuant to NGFA Feed Trade Rule 16, "Default on Quality,"[1] the arbitrators referred to definitions within the "Milk Products" category of feedstuffs in the ***Official Publication*** of the Association of American Feed Control Officials (AAFCO). After extensive review of the AAFCO product definitions for whey, as well as industry trade practices, the arbitrators concluded that MGM fulfilled the terms of the contract. The arbitrators consequently decided that Milky Whey was responsible for cancellation of the contract and incidental costs.

[1] NGFA Feed Trade Rule 16 states that it is the responsibility of both seller and buyer to verify that the feedstuff complies with an Association of American Feed Control definition, a mutually acceptable industry standards or a specific quality description.

The Award

The arbitrators ordered Milky Whey to pay MGM $108,383.54 for cancellation of the contract, which included freight and warehouse-handling fees, as well as a credit for $2,214.35 in travel costs. The arbitrators denied MGM's claims for administrative fees of $13,139.60 and arbitration expenses of $956.96. The arbitrators also declined to award any interest to MGM.

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

Michael F. Malecha, *Chairperson*
President
Ag Innovations LLC
Madison, Wis.

Grieg Dougherty
Vice President
R.F. Cunningham & Co. Inc.
Auburn, N.Y.

Jerry Osborne
Vice President, Commodity Management
ConAgra Trade Group Inc.
Omaha, Neb.