National Grain and Feed Association

Arbitration Decision

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July 6, 2006

Arbitration Case Number 2120

Plaintiff: **Auglaize Farmers Cooperative, Wapakoneta, Ohio**

Defendant: **Gold Kist Inc., Atlanta, Ga.**

Statement of the Case

This arbitration case concerned a claimed late fee involving a delayed shipment of corn that was scheduled to occur in the second half of October 2004, but which actually was not shipped until Nov. 20, 2004.

The case involved an April 29, 2004 contract for the sale by Lansing Grain Co. (Lansing) of various trainloads of corn to Gold Kist Inc. (Gold Kist) that included one trainload for shipment in the second half of October 2004. On Oct. 15, 2004, Lansing purchased a 65-car trainload for shipment for the second half of October 2004 from Auglaize Farmers Cooperative (Auglaize) (Lansing purchase contract number 72442) through Palmetto Grain Brokerage (Palmetto brokerage contract number 39195). The arbitrators observed that both the Lansing purchase contract and Palmetto brokerage contract included the stipulation, *"buyer to supply equipment,"* and that both contracts stipulated origin as *"FOB Columbus, OH."* The arbitrators noted that neither the Lansing purchase contract nor the Palmetto brokerage contract referred to Gold Kist as the ultimate buyer, and that no documentation of the sale to, or purchase by, Gold Kist was provided by any of the parties in this case.

On Oct. 21, 2004, Lansing received a request from Gold Kist that Lansing identify an origin for the shipment. Gold Kist was informed that *"Uniopolis"* was the loading origin. On Oct. 27, Auglaize notified Lansing by letter of Auglaize's concerns about the anticipated shipment, including that a car number or train identification number to trace the anticipated empty train had not been provided. The Oct. 27 letter was captioned, *"Notice on Last Half October 2004 CSXT Train,"* and stated, in relevant part:

> *"Considering the short timetable, it is seriously doubtful that a train will arrive to an Auglaize Farmers facility and bill by 10/31/04. Therefore, notice is hereby given for you to perform according to contract terms. Failure to act will cause Auglaize Farmers to exercise its rights under NFGA Trade Rule 28."*

On the same day – Oct. 27 – Lansing acknowledged receipt of Auglaize's letter and *"immediately faxed same to Gold Kist."* The arbitrators noted that neither party to this case provided documentation confirming that this facsimile was sent to, or received, by Gold Kist.

On Nov. 1, 2004, Auglaize followed up with notice to Lansing that again referenced the terms of the contract, and concluded with the following statement:

> *"As of 4:20 p.m. 11/1/04, no train has arrived at an Auglaize Farmers facility or interchange point. Therefore, Auglaize Farmers Cooperative is going to exercise its rights under NGFA Trade Rule 28. Auglaize Farmers Cooperative is asking Lansing Grain to pay a late fee on this grain train of 17¢/bushel on complete contract of 230,000 bushels."*

Lansing then notified Palmetto, in its capacity as Auglaize's broker, that Lansing had contacted Gold Kist regarding the status of the train. In addition, Lansing on Nov. 1 sent Auglaize's formal notice by facsimile to Gold Kist. The arbitrators noted that the parties did not provide documentation confirming that this facsimile was sent to, or received by, Gold Kist.

On Nov. 4, 2004, Auglaize was notified of an empty train (lead car number CSXT260328) in Live Oak, Fla., that was being applied to Auglaize for loading. This train subsequently was diverted to another facility and was replaced by another train (lead car number CSXT 250363) that ultimately was loaded and

released by Auglaize on Nov. 20. On Nov. 23, 2004, Auglaize sent an invoice to Lansing for the 17-cents-per-bushel late fee (Auglaize invoice number 40327). On Jan. 4, 2005, Auglaize sent another letter to Lansing that stated, in relevant part:

> *"If Auglaize Farmers does not receive any reasonable correspondence from Lansing Grain within the next 10 days, then Auglaize Farmers will be forced to proceed with the next process under the NGFA rules."*

Subsequently, Auglaize filed this arbitration case, seeking total damages of $39,547.37 (late fee of 17-cents-per-bushel on 232,631.57 bushels of corn).

The Decision

The arbitrators observed that Lansing had been a party in the initial stages of this case. Lansing asserted that it was *"in the position of being in the middle of a string transaction between Auglaize and Gold Kist…[and] that Lansing's activities were those of a pass-through functionary."* With the consent of Auglaize and Gold Kist, Lansing subsequently was excused from these proceedings.

The arbitrators determined that all of the written contracts submitted in this case provided for the application of the NGFA Trade Rules. The arbitrators noted that Auglaize's claims were based upon NGFA Grain Trade Rule 28(B) [Buyer's Non-Performance]. The arbitrators observed that each of the notices that Auglaize sent to Lansing contained language that specifically referred to the remedies available for the buyer's failure to perform under Rule 28(B). That rule provides as follows:

> *"If the Buyer finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Seller by telephone and confirmed in writing. The Seller shall then, at once elect either to: (1) agree with the Buyer upon an extension of the contract, or (2) sell out for the account of the Buyer, using due diligence, the defaulted portion of the contract, or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."*
>
> *"If the Buyer fails to notify the Seller of his inability to complete his contract, as provided above, the liability of the Buyer shall continue until the Seller by the exercise of due diligence, can determine whether the Buyer has defaulted. In such case it shall then be the duty of the Seller, after giving notice to the Buyer to complete the contract, at once to: (1) agree with the Buyer upon an extension of the contract, or (2) sell out for the account of the Buyer, using due diligence, the defaulted portion of the contract, or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."*

The arbitrators noted that Auglaize provided notice of the default by letter of Nov. 1, 2004, which stated: *"Auglaize Farmers Cooperative is going to exercise its rights under NGFA Trade Rule 28. Auglaize Farmers Cooperative is asking Lansing Grain to pay a late fee on this grain train of ¢17/bushel on complete contract of 230,000 bushels."*

In its defense against Auglaize's claims, Gold Kist asserted that, *"this case arises out of an unfortunate situation that occurred late last year – an unanticipated failure of CSX to timely provide the 65-car train specifically referenced in the grain contracts."* Gold Kist also asserted that, *"CSX's delay in providing the required train left Gold Kist with no other commercially-reasonable transportation alternatives because of railroad route and schedule limitations."* Gold Kist argued that the law, therefore, permitted it *"a reasonable extension of time, without penalty, to procure train cars under these circumstances."* In support of this argument, Gold Kist cited the decision of the U.S. Court of Appeals for the Eighth Circuit in Jamestown Farmers Elevator Inc. v. General Mills Inc. and Section 269 of the Restatement (Second) of Contracts. However, the arbitrators concluded that the authorities cited by Gold Kist did not apply in this case because the contract expressly provided for a specific shipping period, and that the NGFA Grain Trade Rules prescribed the appropriate actions and remedies available in these circumstances.

Gold Kist also asserted that the delay caused it to suffer damages exceeding $40,000 when it was forced to purchase interim supplies of corn for its operations on the spot market. Gold Kist argued that, *"it would be unfair and inequitable to 'double punish' Gold Kist in these circumstances by requiring it both (1) to absorb this extra cost it incurred…and (2) to pay a late fee to Auglaize when the delay was unanticipated, unavoidable, and not Gold Kist's fault."* The arbitrators observed that the contracts submitted for review in this case not only indicated a specific shipping period, but also expressly provided that the buyer would provide the equipment for loading. While recognizing Gold Kist's claim that it, too, incurred damages because of the delay, the arbitrators decided that this did not excuse Gold Kist's obligations under the contract.

The arbitrators consequently concluded that NGFA Grain Trade Rule 28(B) was clear regarding the actions that bound the parties in this case. The arbitrators also relied upon NGFA Grain Trade Rule 3 [Confirmation of Contracts], which provides, in pertinent part:

> *"(B) If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-conforming party, as described in Rule 3(A), of any disagreement with the confirmation received….*
>
> *(D) A document otherwise complying with this rule shall be effective even though it fails to use the term 'confirmation'."*

The arbitrators closely examined the provisions of NGFA Grain Trade Rule 28. The arbitrators determined that after the seller receives notice or determines that the buyer will not be able to complete a contract with the specifications, the seller has three options ["*(1) agree with the Buyer upon an extension of the contract, or (2) sell out for the account of the Buyer, using due diligence, the defaulted portion of the contract, or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.*"]

The arbitrators concluded that the seller must declare which of those three options it is invoking and the proposed remedy involved. In this case, Auglaize stated in its Oct. 27 letter that the buyer's *"failure to act will cause Auglaize Farmers to exercise its rights under NFGA Trade Rule 28"* without further specifics. Auglaize's Nov. 1 letter stated that, *"Auglaize Farmers Cooperative is asking Lansing Grain to pay a late fee …."* The arbitrators concluded that while it might be construed that Auglaize's intention was to invoke the first option (*"agree with the Buyer upon an extension of the contract"*), Auglaize was not sufficiently specific. Nor was it adequately shown that the parties agreed to an extension of the contract based upon the 17-cents-per-bushel late fee.

In this determination, the arbitrators referred to NGFA Grain Trade Rule 4 [Alteration of Contract], which provides:

> *"The specifications of a contract cannot be altered or amended without the express consent of both the Buyer and the Seller. Any alteration mutually agreed upon between the Buyer and the Seller must be immediately confirmed by both in writing."*

The arbitrators concluded that there was no evidence to support Auglaize's claim that the buyers in this case agreed to the 17-cents-per-bushel late fee.

The arbitrators decided that for Auglaize to prevail in this case, Auglaize was required to show specific execution under NGFA Grain Trade Rule 28 stating which of the three remedies it intended to invoke. Further, if Auglaize was electing the first option for an extension of the contract with the buyer's agreement, then Auglaize was required to show that the contract was altered by mutual agreement in accordance with NGFA Grain Trade Rule 4.

Because there was insufficient support for the allegation of an alteration to the contract, the arbitrators determined that the original contract would remain in effect with the terms and pricing as originally agreed upon. Auglaize had the option prior to loading the cars to demand an understanding that an alteration to the original contract had been agreed upon by the buyer. It was of interest to the arbitrators that no evidence was provided of any rebuttal of the late fee charge on behalf of any parties after Nov 1. The arbitrators noted that discussion, if any, seemed to cease after Nov. 1. Yet this was an important point of the dispute. At any point after the date of the notice, Auglaize could have cancelled the contract for non- performance under NGFA Grain Trade Rule 28(B)(3) or sold out the contract for the account of the buyer under Rule 28(B)(2).

The Award

Because Auglaize was the only party seeking a monetary judgment, and the arbitrators denied that claim, no award was granted to either party. The arbitrators further ordered that each party pay its own costs.

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

Russell E. Bragg, *Chair*
President of OK Transportation
OK Industries Inc.
Fort Smith, Ariz.

Todd McQueen
Vice President
The Scoular Co.
Omaha, Neb.

Fred Reeves
General Manager
Taloma Farmers Grain Co.
Delavan, Ill.