



# Arbitration Decision

National Grain and Feed Association

May 4, 1989

## Arbitration Case Number 1655

**Plaintiff: Morrison Enterprises, Salina, Kan.**  
**Defendant: AgMax, Inc., Frankfort, Ind.**

### Statement of the Case

This claim has been filed by Morrison Enterprises on behalf of its affiliate, Thermo-Flex, both of Salina, Kan., against AgMax Inc., of Frankfort, Ind. on a contract to supply air-supported structures for grain storage at AgMax's site in Scircleville, Ind. AgMax, a member of NGFA, has withheld final payment from Thermo-Flex, a nonmember of NGFA, for some alleged non-performance by Thermo-Flex, for which neither party has proffered any evidence.

The dispute presented to these arbitrators is jurisdictional in nature, in that AgMax does not consent to arbitrate the underlying monetary claim with nonmember Thermo-Flex. Thermo-Flex presented a proposal to contract to AgMax, dated March 31, 1987, that allegedly was prepared on stationery exhibiting only Thermo-Flex's name and address. On June 23, 1987, an addendum to that proposal on Thermo-Flex's stationery was presented to AgMax; the addendum was signed by AgMax on July 3, 1987.

The exhibits of the March 31st proposal presented by the parties indicated the addition of "... and Morrison Enterprises, Joint Venture." In a sworn affidavit, AgMax averred that the original March 31st proposal contained no such addition; Morrison did not dispute this claim. Morrison Enterprises is a member of NGFA. A sworn copy of the June 23rd addendum originally contemplated execution only by Thermo-Flex. But a signature space for Morrison Enterprises was added after that addendum was signed by AgMax. Thus, the amended addendum provided for execution by Thermo-

Flex and Morrison Enterprises after AgMax's signature and acceptance. From AgMax's sworn statement, which is uncontradicted by Morrison Enterprises, and from an examination of the March 31st and June 23rd documents, it is clear that Morrison Enterprises as a joint venturer was added after execution and acceptance by AgMax on July 3, 1987. The evidence further contained numerous letters and other documents from Thermo-Flex to AgMax that did not indicate or refer to Morrison Enterprises as a joint venturer.

Morrison Enterprises claimed that it was added as an alleged party to this transaction to facilitate the securing of a performance bond that was required by AgMax and which Thermo-Flex did not believe it could obtain on its own. The evidence indicated that Thermo-Flex did not relate to AgMax prior to July 3, 1987 that Morrison Enterprises' addition as a joint venturer would be necessary as a condition of the contract or transaction.

### The Decision

At the apparent instant of agreement, it is clear to the arbitrators that AgMax was contracting only with Thermo-Flex, a nonmember of NGFA. Morrison Enterprises was, at most, rendering an accommodation to secure a performance bond. Morrison Enterprises' accommodation may have benefitted both parties. But it is clear that, if necessary as an accommodation party, Morrison Enterprises' principal beneficiary was Thermo-Flex, for without Morrison Enterprises' intervention for the bond the transaction would have terminated for Thermo-Flex.

Thus, the arbitrators found that AgMax contracted only with Thermo-Flex, regardless of any additions or alterations in the documentation intended to suggest a contrary conclusion.

Arbitration Rule 3(a)(2) of the NGFA established our jurisdiction to consider disputes between members and nonmembers as follows: "Members of National and nonmembers by consent of both parties.... In the absence of a court order a case between a member and a nonmember may not be properly considered by the National Arbitration Committee without the consent of both parties..."

The contractual agreement between AgMax and Thermo-Flex did not provide for arbitration under NGFA's Arbitration Rules. AgMax, a member, has not consented to the arbitration brought by Thermo-Flex, a nonmember, through its affiliate, Morrison Enterprises. Morrison Enterprises' involvement is irrelevant in view

of our finding that Morrison was not a party to the contract between AgMax and Thermo-Flex. In these circumstances, the arbitrators concluded that the NGFA's Arbitration Committee is without jurisdiction to consider this dispute.

Submitted with the consent and approval of the Arbitration Committee, whose names are listed below:

**Rodman Kober, chairman**  
Continental Grain Co.  
Chicago, Ill.

**Orville Mayer**  
St. John Grain Growers  
St. John, Wash.

**Keith Peltier**  
Arthur Farmers Elevator  
Harvey, N.D.