Arbitration Decision

National Grain and Feed Association

August 30, 1990

Arbitration Case Number 1663

Plaintiff: Louis Dreyfus Corp., Wilton, Conn.

Defendant: Farmers Grain Terminal Inc., Greenville, Miss.

Statement of the Case

On Sept. 26, 1988, Louis Dreyfus Corp. purchased 100,000 bushels of U.S. No. 2 yellow corn for shipment during October 1988, C.I.F. New Orleans, at 17 1/2 over Chicago December corn futures from Farmers Grain Terminal Inc. through Haug Brokerage Inc. Both parties and the broker mailed confirmations of the trade.

A dispute arose based upon Louis Dreyfus Corp.'s detection of the presence of aflatoxin in the barge.

The sequence of events involved in this case are as follows:

Sept. 29, 1988: Farmers Grain Terminal Inc. loaded barge AR 812. The bill of lading was dated Oct. 1, 1988.

Sept. 30, 1988: Louis Dreyfus Corp. wired Farmers Grain Terminal Inc. a "Notice to our corn sellers" which provided: "We will sample and test all barge and rail shipments at destination for aflatoxin. Any corn that tests aflatoxin positive will be deemed to be of unmerchantable quality and will be rejected . . . ."

Oct. 3, 1988: Farmers Grain Terminal Inc. applied barge AR 812 to Louis Dreyfus Corp. and billed the barge to Reserve, La.

Oct. 4, 1988: Wire services reported the federal Food and Drug Administration issued the following guidelines for aflatoxin if detected in corn shipped in interstate commerce: 20 parts per billion for corn marketed for consumption by humans, dairy cattle, immature animals, or if the ultimate destination of the the corn was unknown; 100 p.p.b. for breeding cattle, swine or poultry; 200 p.p.b. for finishing swine; and 300 p.p.b. for finishing beef cattle on feedlots.

Oct. 4, 1988: A federal appeals grade was provided.

Oct. 8, 1988: Barge AR 812 was placed for discharge at CGB/Laplace fleet at 0940 hours.

Oct. 26, 1988: Louis Dreyfus Corp. performed a "black-light" screening test that detected the corn was positive for the presence of aflatoxin.

Oct. 27, 1988: Louis Dreyfus Corp. performed a Neogen-Screening Test that found aflatoxin in the corn exceeded 20 p.p.b.

Nov. 2, 1988: Louis Dreyfus Corp. had the Federal Grain Inspection Service sample and perform a thin-layer chromatography analysis on the corn, which detected aflatoxin was present at 48 p.p.b.

Nov. 4, 1988: Louis Dreyfus Corp. telexed Farmers Grain Terminal Inc. rejecting barge AR 812 as being "unmerchantable" pursuant to the FGIS aflatoxin test.

Nov. 8, 1988: Farmers Grain Terminal Inc. wired Louis Dreyfus Corp. referring to phone conversations on Nov. 4th and 7th in which it stated it "Does not agree with or accept your attempted rejection . . ."

Nov. 14, 1988: Louis Dreyfus Corp. wired Farmers Grain Terminal Inc. that the latter firm was in default of the contract and Louis Dreyfus Corp. was selling out barge AR 812.

Nov. 15, 1988: Farmers Grain Terminal Inc. wired Louis Dreyfus Corp. stating it did not agree with the " . . . attempted rejection . . . ."

Nov. 15, 1988: Louis Dreyfus Corp. wired Farmers Grain Terminal Inc. a notice of contract cancellation.

Nov. 18, 1988: Louis Dreyfus Corp. sold barge AR 812 to Benhard Grain.

The Claim

The plaintiff, Louis Dreyfus Corp., claimed $92,788.92 plus interest. It argued that its contract confirmation terms and conditions No. 5 which stated "The commodity to be delivered . . . (ii) to be fit for human consumption; and (iii) not to be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act or an article or commodity which may not, under the provisions of the Act, be introduced into interstate commerce . . . " contained no time limit and the warranties were valid until the corn lost its identity. Louis Dreyfus Corp. further contended the aflatoxin was present at harvest and remained static and unchanged during handling and loading by Farmers Grain Terminal Inc. and during storage on the barge by Louis Dreyfus Corp.

Counter Claim

The defendant, Farmers Grain Terminal Inc., claimed $14,535.59 plus interest from final settlement on barge AR 812, plus legal fees and arbitration fees. Farmers Grain Terminal Inc. argued that clause No. 9 in its terms and conditions, which stated: "Seller warrants that no carload or other shipping unit of this commodity covered by this contract shall be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, or is an article or commodity which may not under the provisons of Section 404 or 506 of the Act, be introduced into interstate commerce" was valid until title passed and that climatic conditions in New Orleans were favorable for the growth of aflatoxin.

The Decision

Louis Dreyfus Corp.'s wire on Sept. 30, 1988, could not alter the contract. NGFA Trade Rule 41, Alteration of Contract, is quite clear on requirements to alter a contract.

The defendant did not provide proof as to the level of aflatoxin, if any, present at the time of shipment.

The terms and conditions of the contracts did not agree in total. However, both contained language that the shipment would not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act or consist of an article or commodity that may not, under the provisions of the Act, be introduced into interstate commerce. The contracts did not address specific aflatoxin levels.

NGFA Trade Rule 6(b) addresses the responsibility of each party to a trade in respect to confirmations to "*. . . carefully check all specifications named therein and upon finding any differences, shall immediately notify the other party to the contract, and the broker, by wire, or telephone and confirm in writing. In default of such notice, the contract shall be filled in accordance with the terms of the confirmation issued by the broker.*" The broker contract made no mention of any warranty. However, under the Uniform Commercial Code, certain warranties — merchantability — are implied unless excluded in a conspicuous writing.

Title as well as risk of loss had passed to Louis Dreyfus Corp. under the Trade Rules. However, aflatoxin is not a part of the U.S. grain standards and the buyer must be provided the reasonable opportunity to inspect the shipment. The Trade Rules, Barge Trade Rules and the Uniform Commercial Code all address time limits for the buyer to make any determination at destination. NGFA Trade Rule 16 and NGFA Barge Trade Rule 2(i) provide specific time frames. Sections of the Uniform Commercial Code provide the buyer a reasonable opportunity to inspect the goods.

Louis Dreyfus Corp. did not inspect the barge in a timely manner according to the NGFA Trade Rules, the Uniform Commercial Code or practices of the trade at that time. Therefore, any rights or guaranty Louis Dreyfus Corp. may have had were waived.

The Award

The arbitrators found in favor of the defendant, Farmers Grain Terminal Inc., and awarded the sum of $4,434.84 for final settlement of barge AR 812 plus interest at 1 percent over prime from Jan. 11, 1989 until such time payment was made. The calculation was based upon the following: 50,642 bushels which were loaded into the barge at origin, less the 0.0025 percent customary deduction for shrink equals 50,515.395 bushels multiplied by the contract price of $3.075, less the advance of $150,900.

Legal, consultant and arbitration fees were not awarded to the defendant.

Submitted with the consent and approval of the arbitration committee, whose names are listed below.

James Keistler, *Chairman*
Twomey Company
Smithshire, Ill.

Anthony Lewis
Peavey Grain Companies
Minneapolis, Minn.

Larry Stenberg
Indiana Farm Bureau Co-op Assn.
Indianapolis, Ind.

Arbitration Appeals Case Number 1663

Appellant: Louis Dreyfus Corp., Wilton, Conn.

Appellee: Farmers Grain Terminal Inc., Greenville, Miss.

Decision on Dismissal

This case was submitted to the Arbitration Appeals Committee to decide whether Louis Dreyfus Corp., the plaintiff-appellant, should be permitted to file an appeal beyond the date specified in Sections 8(k) and 9(d) of the Arbitration Rules. The NGFA secretary has ruled that the "Notice of Appeal" filed by Louis Dreyfus Corp. was not timely and concluded that the appeal should be dismissed.

The parties were notified of the original decision of the NGFA arbitration committee in this case by letter from the NGFA secretary dated June 19, 1990. The correspondence was sent to both parties by certified mail. The relevant sequence of events being as follows:

Tuesday, June 19, 1990:	Letter from NGFA secretary to parties with copy of arbitration panel's decision.
Thursday, June 21, 1990:	Farmers Grain Terminal Inc. received decision.
Saturday, June 23, 1990:	Louis Dreyfus Corp. received decision.
Monday, June 25, 1990:	NGFA received certified mail receipts indicating the respective dates on which each of the parties received the decision.
Wednesday, July 11, 1990:	NGFA received "Notice of Appeal" from Louis Dreyfus Corp. via Federal Express package mailed on July 10, 1990.
Thursday, July 19, 1990:	NGFA mailed to both parties the original decision that the time had expired for appeal.

Section 9(d) of the Arbitration Rules provides that the *"[n]otice of appeal ... shall be filed with the National Secretary within fifteen (15) days from the date of receipt of the said award."* Likewise, Section 8(k) of the Arbitration Rules provides that *"[t]he parties to the arbitration shall file a notice of appeal, ... within fifteen (15) days from receipt of said award."* There is no reference in the rules to business days or any exception for mail received on weekends. The NGFA secretary therefore, construed the 15-day period as jurisdictional in nature and, therefore, considered strict compliance with the 15-day rule necessary to proceed with a valid appeal.

It is clear from the sequence of events that on June 23, 1990 someone at Louis Dreyfus Corp. with apparent or actual authority accepted the correspondence containing the decision of the NGFA arbitration committee in this case. The facts indicated that the signature on the certified mail receipt was that of a mail room employee of Louis Dreyfus Corp. The employee picked up the corporation's mail on Saturday and sorted it for in-house delivery. Apparently, the mail was not time-stamped and the Louis Dreyfus Corp. employee in charge of this arbitration case was not aware of the mail room's practice of accepting and sorting mail on Saturdays. The individual at Louis Dreyfus Corp. in charge of this arbitration "assumed" that the decision was received on Monday, June 25, 1990, when he received the mail from his secretary.

While the individual in charge of this arbitration case at Louis Dreyfus Corp. did not physically receive the decision until June 25, 1990, the decision was "received" and signed for at the firm on June 23, 1990. Thus, for purposes of "receipt" under the Arbitration Rules, June 23 is the date on which Louis Dreyfus Corp. "received" notification of the arbitration panel's decision.

Louis Dreyfus Corp. argued that the NGFA secretary should grant the company an after-the-fact extension to file its appeal based upon Section 9(k) of the Arbitration Rules.

Farmers Grain Terminal Inc., the defendant-appellee, objected to the granting of such an extension. Section 9(k) of the Arbitration Rules refers to "default" and is similar to Section 7(h) of the Arbitration Rules dealing with extensions during arbitration cases. Both Sections 7(h) and 9(k) appear to be applicable to otherwise properly intitiated cases because of the reference to the word "default."

The NGFA secretary believes the 15-day time period contained in Sections 8(k) and 9(d) of the Arbitration Rules is jurisdictional in nature. The time period cannot be extended under Section 9(k). Consequently, the fifteen 15-day period for invoking the appellate jurisdiction of the Arbitration Appeals Committee expired on July 9, 1990. **(See Section 10(b) and (c) of the Arbitration Rules.)**

Therefore, the "Notice of Appeal" mailed on July 10, 1990 was not timely. The Arbitration Appeals Committee, therefore, is without jurisdiction to hear an appeal of this case.

Respectfully submitted,

David C. Barrett, Jr.
National Secretary

The Decision of the Arbitration Appeals Committee

The Arbitation Appeals Committee voted not to consider this case, believing that under the Arbitration Rules the NGFA secretary has final authority in this matter.

L. Scott Hackett, *Acting Chairman*
General Mills Inc.
Minneapolis, Minn.

Thomas Feldmann
West Central Cooperative
Ralston, Iowa

Robert W. Pegan
Central States Enterprises Inc.
Camilla, Ga.

John W. McCulley, Sr.
Oakville Feed & Grain Inc.
Oakville, Iowa

Dan B. Miller
Kokoma Grain Co. Inc.
Kokoma, Ind.