



Arbitration Decision

National Grain and Feed Association

January 18, 1996

Arbitration Case Numbers 1737 and 1737B

Primary Complaint

Plaintiff: Farmland Industries Inc., Kansas City, Mo.

Defendants: Benson-Quinn Co., Minneapolis, Minn.,
and Continental Grain Co., Chicago, Ill.

Cross-Complaint

Plaintiff: Benson-Quinn Co., Minneapolis, Minn.

Defendant: Continental Grain Co., Chicago, Ill.

Statement of the Case

This dispute concerned a string trade involving two barges of corn that arrived at destination in a deteriorated condition after being delayed on the Illinois River during the 1993 Midwest floods. At the request of one of the parties, as provided for under the NGFA Arbitration Rules, this case also was the subject of an oral hearing involving the affected parties with the arbitrators.

The two barges were as follows:

- **Barge NOMA 311**, which was loaded by the Continental Grain Co. at Hennepin, Ill. The barge was sampled on July 19, 1993 by Kankakee Grain Inspection Inc. The inspection certificate, dated July 20, 1993, showed the cargo to be U.S. No. 2 yellow corn, 56.5-pound test weight, 14.7 percent moisture, 4.5 percent DKT, and 2.2 percent BCFM. The inspection certificate contained the following statement: "No water was applied to grain during loading of this shipment." The order bill of lading issued by ContiCarriers & Terminals Inc. was dated July 20, 1993.
- **Barge CCT 317**, which also was loaded by Continental Grain Co. at Hennepin, Ill. The barge was

sampled on July 19, 1995 by Kankakee Grain Inspection Inc. The inspection certificate dated July 21, 1993 showed the cargo to be U.S. No. 2 yellow corn, 56.5-pound test weight, 14.3 percent moisture, 4.8 percent DKT and 1.9 percent BCFM. The inspection certificate contained the statement: "No water was applied to grain during loading of this shipment." The order bill of lading issued by ContiCarriers & Terminals Inc. was dated July 21, 1993.

These two barges were applied by Continental to Benson-Quinn, who applied the barges to Farmland on July 23, 1993 at 5:19 p.m., EST.

The two barges were applied to Farmland's purchase contract P73945, dated June 25, 1995, for 220,000 bushels of U.S. No. 2 yellow corn, 15 percent moisture, for shipment during the period July 16, 1993 through July 31, 1993, delivered CIF NOLA. The contract called for origin grades and destination weights, and contained the following in the remarks section: "destination negative aflatoxin maximum, 20 parts per billion." The contract also contained the following clause: "5. Grain sold 'guaranteed cool and merchantable on arrival' must be examined and if found out of condition reported within twenty-four (24) hours after arrival; otherwise guarantee is void. Guarantee holds only to first destination of the

grain. It shall be the seller's privilege when grain arrives out of condition to reshipe within a reasonable time at original contract price provided acceptable settlement cannot be agreed upon on the original car."

Benson-Quinn sale contract number SC 002274 M, dated June 25, 1993, contained the following statement in the remarks section: "St. Louis and North, No Missouri River, but including Ohio River." The Benson-Quinn contract also contained the phrase: "8. Buyers performance under this confirmation is contingent upon conditions beyond buyer's control, such as, but not limited to, labor disputes and disturbances, embargoes, accidents, fire, delay or nonperformance of the carrier, acts of God or war."

Continental's sale confirmation to Benson-Quinn, dated July 12, 1993, specified U.S. No. 2 yellow corn, 15 percent moisture for shipment July 16, 1993 to July 31, 1993. The confirmation contained the following phrases:

- "2. Seller shall not be liable for any delay or failure to deliver any or all of the goods in case delay or failure is due to war, riots, insurrection, civil commotion, labor disputes, or other conditions beyond his control"; and
- "5. Grain sold 'Guaranteed Cool and Merchantable on Arrival' must be examined and if found out of condition reported within twenty-four (24) hours after arrival; otherwise, guarantee is void. Guarantee holds only to first destination of the grain. It shall be the Seller's privilege when grain arrives out of condition to reshipe within a reasonable time at original contract price provided acceptable settlement cannot be agreed upon on the original shipping unit."

The contract between Continental and Benson-Quinn was made through James T. Dunn Co. However, the broker contract was not included in the documentation.

Barge CCT 317 arrived in Westwego, La., on Sept. 11, 1993. A grade certificate issued by the U.S. Department of Agriculture's Federal Grain Inspection Service on Sept. 23, 1993 showed the barge to be sample grade yellow corn, infested, 55-pound test weight, 14.2 percent moisture, 53.3 percent DKT and 4.9 percent BCFM. NOMA 311 arrived in Westwego, La., on Sept. 11, 1993. A grade certificate issued by FGIS on Sept. 23, 1993 showed the barge to be sample grade yellow corn infested, 54.5-pound test weight, 14.5 percent moisture, 81.9 percent DKT, 3.1 percent BCFM and musty odor.

The Claim

The plaintiff, Farmland Industries Inc., sought damages from Benson-Quinn Co., alleging that it knew or should have known the corn barges could not reach New Orleans, La., in a commercially satisfactory manner. Farmland maintained that Benson-Quinn:

- negligently performed its contractual obligation to Farmland;
- breached the warranties of merchantability and fitness for a particular purpose;
- breached its covenant to satisfy the contract with Farmland using good faith, diligence, reasonableness and care pursuant to the Uniform Commercial Code [§1-102(3)]; and
- failed to satisfy its contract obligations to Farmland using honesty in fact and consistent with commercially reasonable standards of fair dealing pursuant to the Uniform Commercial Code [§1-203 and §2-103(1)(b)].

Further, Farmland sought damages from the Continental Grain Co., alleging that when loading Barges NOMA 311 and CCT 317 with corn, it knew, or should have known, that the corn could not successfully be transported to New Orleans, La. Specifically, it was asserted that Continental:

- was negligent in loading the barges with corn and assigning it pursuant to the NGFA Grain Trade Rules;
- breached its warranty of merchantability and warranty of fitness for a particular purpose;
- breached its obligation to perform the referenced contract with good faith, diligence, reasonableness and care pursuant to the Uniform Commercial Code [§1-102(3)];
- breached its obligation to provide transportation "as may be reasonable having regard to the nature of the goods and other circumstances of the case" pursuant to the Uniform Commercial Code [§2-504(a)].

On barge NOMA 311, Farmland sought damages of \$75,756.50 (\$45,201.62 attributable to the deterioration of the cargo and \$30,554.88 in additional freight and

demurrage expenses incurred in the sale of the corn). On Barge CCT 317, Farmland sought damages of \$51,886.30 (\$39,762.99 attributable to the deterioration of the cargo and \$12,103.31 in additional freight and demurrage expense incurred when selling the corn).

The Decision

After reviewing all of the arguments of the parties and the testimony presented at the oral hearing, the arbitrators made the following determinations:

- On June 25, 1993 (the date Farmland purchased the 220,000 bushels of CIF NOLA corn from Benson-Quinn), Lock Nos. 3, 10, 12, 16, 17, 18 and 20 on the Mid- and Upper-Mississippi River closed; Lock Nos. 11, 13, 21 and 22 closed on June 26, 1993. The contract did not contain any provisions for "*guaranteed cool and merchantable upon arrival.*" Nor did it reference other alternative origins not affected by flood-related lock closures. The committee concluded that Farmland, like other firms in the industry, had information relative to the forecast of lock closure and river conditions at the time it chose to make the purchase.
- None of the parties claimed a condition for delayed shipment or asserted that force majeure existed.
- The barges applied to the contract between Farmland, Benson-Quinn and Continental met all the contract specifications.
- The NGFA Trade Rules supplemented the parties' written confirmations exchanged in this case, and were expressly incorporated into each confirmation. In addition, all of the trading parties were NGFA Active members.
- In the statement submitted by Farmland, it stated: "*5. The river closing and associated navigation problems of stranded barges was widely publicized and well-known within the grain and shipping industries,....*" The arbitrators, therefore, believed that Farmland should have been aware of the conditions and the exposure assumed under its purchase contract. When questioned during the oral hearing as to how Farmland knew the river would be closed for exactly five weeks, Farmland's counsel responded: "How did we know the future? Essentially, no one knows. No one is omnipotent,...." Because of the complex hydrometeorological conditions that prevailed during the "flood of '93" the National Oceanic and Atmospheric Administration of the Department of Commerce (which operates the North Central River Forecast Center which prepares river forecasts of the Upper Mississippi River) underforecasted the severity and duration of the flooding. Based upon these reports, what seemed as a reasonable expectation of river crests along sections of the river system and lock openings failed to occur through no fault of the transportation or grain industries.
- Based upon information provided by an independent broker, a market existed for corn "St. Louis and North, No Missouri River, but including Ohio River" at the time of application of the barges to Farmland. Yet the buyer made no attempt to sell or protest the application of corn it claimed was "doomed."
- The barges' condition was not checked until 12 days after arrival at destination. If purchased with condition guaranteed upon arrival, this would not meet any of the provisions stipulated in the NGFA Trade Rules.
- NGFA Barge Trade Rule 10 expressly sets forth the industry's expectations about the effect of passing of title to barge grain, as well as risk of loss and/or damage. Title, as well as risk of loss, passed to Farmland under the facts presented.
- The Uniform Commercial Code [Section 2-316(3)(c)] permits the exclusion or modification of implied warranties "by course of dealing or course of performance or usage of trade." The NGFA Trade Rules Committee continually reviews the trade rules to ensure that they reflect what is a commercially reasonable standard of fair dealing. These rules have been approved by the NGFA membership.
- Farmland contended that, "knowing that when the contract also provided Ohio River corn can be applied effectively does not provide the benefit of the bargain..., that a reasonable commercial practice would be to either delay that assignment until it were navigable or to simply assign Ohio River barge at the outset to undertake that." Yet Farmland made no contact with its seller or Continental to contend that a condition existed to warrant a delay in shipment.

The Award

The arbitrators found in favor of the defendants and denied the claims made by Farmland in Arbitration Case No. 1737. The arbitrators denied the requests by the defendants for reimbursement of legal and travel expenses. Since no award was made to Farmland in Arbitration Case No. 1737, Benson-Quinn's cross-claim asserted against Continental in Arbitration Case No. 1737-B is moot.

Farmland was ordered to pay the oral hearing expenses incurred by the NGFA and the arbitration committee, as set forth in Section 8 of the NGFA Arbitration Rules.

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

Larry Mills, *Chairman*
General Manager
Morrow County Grain Growers, Inc.
Lexington, Ore.

James Keistler
Merchandising Manager
Twomey Company
Smithshire, Ill.

Andrew K. Riffe
Marketing Manager
Stratford Grain Company
Stratford, Texas