National Grain and Feed Association
Arbitration Decision

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September 20, 2001

Arbitration Case Number 1784

Plaintiff: Timberlake Sales Inc., Springfield, Ill.

Defendant: McKinney Grain Corp., McKinney, Texas

Statement of the Case

This case involved a contract for the purchase of a product called Maxa Maize between Timberlake Sales Inc. ("Timberlake") and McKinney Grain Corp. ("McKinney").

After several shipments, McKinney refused further deliveries because of quality problems. Timberlake claimed that McKinney defaulted and sought damages, interest, attorneys fees and costs incurred in this action. McKinney claimed that its cancellation of the contract was justified and sought damages attributable to lost business and unloading costs, as well as attorneys fees and the costs of this proceeding.

Timberlake and McKinney entered into two contracts that called for Timberlake to deliver 30 rail hopper cars of a product called Maxa Maize pellets to McKinney between April and September 1996. Timberlake shipped 13 cars, with the final car being received by McKinney on July 8, 1996. After several of the shipments, McKinney complained to Timberlake about the difficulty of unloading the product and, subsequently, the palatability of the product. McKinney refused to pay Timberlake for five of the 13 shipments, and no further shipments were made.

Following the receipt of the 13th car on July 8, 1996, McKinney verbally informed Timberlake that it would not accept further shipments because of the alleged quality problems and said that it was canceling the balance of the contract. In addition, a letter that included a refusal to take more deliveries was faxed by McKinney to Timberlake on Aug. 1, 1996. The statement read, in part: "We do not intend to pay any fees for cancellation of the contracts." McKinney's letter also claimed that Timberlake owed various freight charges, demurrage charges, extra labor charges and product discounts, which McKinney offered to deduct from the balance of the five unpaid invoices.

Various offers were made to settle the dispute, but the parties could not reach a settlement. On Oct. 15, 1996, Timberlake filed for arbitration with the National Grain and Feed Association ("NGFA"). McKinney responded on Dec. 11, 1996 by filing a complaint with the U.S. District Court for the Eastern District of Texas, Marshall Division. Timberlake responded to the claim and filed a motion to compel arbitration the case to arbitration. That motion was denied for lack of evidence. A subsequent motion to compel was granted by the court on Aug. 10, 1998. McKinney's subsequent appeal of this court ruling was denied on Oct. 1, 1998.

Timberlake requested damages in the following amounts:

- $58,655.93 for five rail hopper cars of Maxa Maize pellets.
- $35,680 for the cancellation of 17 cars of Maxa Maize pellets.
- Interest on market losses at a rate of 6 percent, beginning Sept. 1, 1996 to the date of the award.
- Interest on amounts due in the award at a rate of 10 percent, beginning on the award date until payment was made.
- $24,826 for attorneys fees and expenses related to the arbitration.

McKinney requested damages in the following amounts:

- $10,307.50 for unpaid invoices.
- $27,200 for lost profits on the 17 canceled cars of Maxa Maize pellets.
- $4,760 for demurrage.
- $4,800 for additional unloading labor cost.
- $2,691 for labor in unloading the bins.
- $150 in costs for the cleaning of railcars.
- $46,565.17 for attorneys fees
- $30,000 for lost business.

The Decision

It was undisputed that the parties entered into two contracts for a total of 30 rail hopper cars of Maxa Maize pellets. Timberlake sent confirmations of these contracts to McKinney on April 10 and April 11, 1996. McKinney raised no objection to those confirmations.

Pertinent to this dispute was old NGFA Feed Trade Rule 2(c) *[New Rule 3(B), which is not substantively different], which provided as follows: "If either Buyer or Seller fails to send out confirmation, the confirmation sent out by the other party will be binding upon both in case of any dispute, unless confirming party has been immediately notified by non-confirming party... of any disagreement with the confirmation received."*

The arbitrators concluded that the parties entered into two contracts, the terms of which were embodied in the confirmations sent by Timberlake for the purpose of this dispute.

A total of 13 railcars of Maxa Maize pellets was delivered by Timberlake under the two contracts between April and July 1996. McKinney paid Timberlake for eight of those shipments. Following McKinney's complaints concerning the difficulty experienced in unloading and the alleged low quality of the product, McKinney notified Timberlake that it would not accept further deliveries. However, McKinney's notice did not conform to the NGFA Trade Rules and, thus, was insufficient to cancel its obligation under the contracts. Feed Trade Rule 16(B) *[Old Rule 30]* provides a specific procedure for the buyer to reject a shipment due to unacceptable quality. First, the buyer is to exercise due diligence in determining that the shipment does not comply with the terms of the contract. If the shipment does not comply, the buyer is required to notify the seller of that fact no later than 12 p.m. the next business day. Further, the buyer is required to notify the seller whether the buyer will reject the shipment or accept it under mutually acceptable conditions.

McKinney complained to Timberlake about the alleged low quality of the product, but provided no evidence of a third-party inspection or analysis to document such a claim. Further, in attempting to cancel the balance of the contract, McKinney failed to inform Timberlake whether it: 1) would reject the shipment, in which case the rejected portion could be canceled at fair market value or a replacement shipment scheduled; or 2) accept the shipment subject to mutually acceptable conditions. Thus, McKinney did not comply with NGFA Feed Trade Rule 16, and the arbitrators found that McKinney was required to pay the amounts due for the five unpaid shipments.

As for the undelivered portion of the contracts, Feed Trade Rule 19 *[Old Rule 14]* provides the procedure by which a party is to cancel a contract if either party is in default. Under that rule, the defaulting party is obligated to notify the other party of its default. Upon receipt of such notice – or in lieu of such notice, upon the exercise of due diligence – it determines that a party is in default, the non-defaulting party is required to notify the defaulting party within 24 hours of which of the following options it elects to exercise: 1) agree to extend the shipping period; 2) buy-in/sell-out, for the defaulting party's account, the defaulted portion of the contract; or 3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.

In this case, neither party complied with Feed Trade Rule 19 because neither party notified the other that it had defaulted or that it held the other in default. Likewise, neither party notified the other in a timely fashion as to which option it had elected. Finally, if Timberlake had demonstrated that it had complied with Feed Trade Rule 19, it failed to establish that the contract cancellation price was appropriate. A partial list of ingredient prices and an affidavit from a third party to support its damage claim were insufficient, for the purposes of this arbitration, to establish a cancellation price.

Thus, the arbitrators dismissed all claims related to the undelivered portion of the contracts.

The attorneys fees and other costs were incurred at the discretion of the respective parties. Thus, the claim and counterclaim for attorneys fees and costs were denied.

The Award

Based upon this decision, Timberlake is awarded damages in the amount of $58,655.93, with interest at the rate of 6 percent from the time the dispute arose until the date of this decision. Interest will accrue at a rate of 10 percent after the date of this decision, until the entire amount is paid.

All other claims and counterclaims are denied.

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

James Shanley, *Chairman*
Chief Operating Officer
J.D. Heiskell and Co.
Tulare, Calif.

Bill Smith
President
Edward E. Smith & Co. Inc.
Atlanta, Ga.

Steve Cummings
Grain Group Operations Manager
TriOak Foods Inc.
Oakville, Iowa