



Arbitration Decision

National Grain and Feed Association

May 6, 1999

Arbitration Case Number 1949

Plaintiff: Didion Milling Inc., Cambria, Wis.

Defendant: Commodity Specialists Co., Shawnee Mission, Kan.

Statement of the Case

This case involved claims and counterclaims arising from seven contracts for the sale by Didion Milling Inc. (Didion) to Commodity Specialists Co. (CSC) of 40 rail cars of hominy feed for shipment from April through December 1997. Both companies were and are NGFA Active members.

The dispute included allegations of non-payment of invoices, failure to furnish rail cars for loading, differences over agreed loading locations, demurrage charges and, ultimately, cancellation of the contracts. Didion claimed damages in the amount of \$58,286.54, plus interest and costs. CSC sought an award of \$38,152, plus interest as a deduction against Didion's claims.

While the parties agreed that contracts were entered into, they disagreed on several facts concerning contract formation, contract performance and interpretation of various contract terms. Moreover, it was evident from the contract confirmations issued by both companies that inconsistent information was provided concerning which firm was to furnish the rail cars and where they were to be loaded. Nor were all confirmations signed by both parties. The parties' conduct on initial shipments under the contracts implied a situation in which some oral agreements relating to the contracts were not written. This may have led to some of the subsequent disputes.

The following table summarizes the contracts at issue:

CSC Contract No.	Price	Number of Cars	Shipment Period
P-44790	\$93	8	April-May 1997
P-48818	83	8	June 1997
P-49039	82	4	July 1997
P-51004 ¹	82	10	August-September 1997
P-49996	76	6	October 1997
P-49997	76	12	November 1997
P-49998	76	12	December 1997

Didion contended that CSC presented rail cars for loading in Cambria, Wis., for the first three contracts (P-44790, P-48818 and P-49039) that were loaded with hominy feed. However, Didion contended that CSC failed to furnish rail cars in accordance with the shipment periods of the four remaining contracts. On Nov. 21, 1997, Didion sent CSC a letter canceling two contracts (P-51004 and P-49996) "for nonperformance." Subsequently, on Jan. 21, 1998, Didion sent a letter to CSC canceling the remaining two contracts (P-49997 and P-49998).

In contrast, CSC contended that all of the contracts were made "F.O.B. Chicago" and that CSC was not required to send

¹ Also represented by Didion's sales confirmation contract number 10027, which provided "scattered delivery, buyers [sic] cars," but under "BASIS" indicated "Chicago, IL."

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rail cars to Cambria on any of the contracts. However, CSC conceded that it was obligated to furnish equipment on four of the contracts. CSC asserted that it was Didion that breached the contracts by refusing to honor the "F.O.B. Chicago" terms. Further, CSC claimed that even if it defaulted, it was entitled to compensation or credits based upon the higher fair market value of the hominy versus the contract price at the time of cancellation based upon NGFA Feed Trade Rule 14, which provides as follows:

"Feed Trade Rule 14. Default on the Shipping Schedule and/or the Contract Shipping Period:

"(a) Default by the Seller: *When the seller finds that he is in default on the shipping schedule, and/or the contract shipping period, he shall notify the Buyer at once by telephone, facsimile or wire.*

"Upon receipt of such notice, the Buyer shall, within twenty-four (24) hours thereafter, advise the Seller by telephone, facsimile, or wire, which of the following options he elects to exercise:

"(1) agree to extend the shipping period; or

"(2) buy-in, for the Seller's account, the defaulted portion of the shipments; or

"(3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.

"If the Seller fails to notify the Buyer of his default, the liability remains in force until the Buyer, by the exercise of due diligence, can determine whether the seller has defaulted. The Buyer shall notify the seller at once by telephone, facsimile, or wire and within twenty-four (24) hours thereafter, advise the seller by telephone, facsimile, or wire which of the options (1) or (2) or (3) above he elects to exercise.

"If the Seller defaults on the contract, he is liable for all reasonable costs and expenses as shall have been incurred to and including the day the Buyer elects one of the three options.

"(b) Default by the Buyer: *When the Buyer finds that he is in default on the shipping schedule, and/or the contract shipping period, he shall notify the Seller at once by telephone, facsimile or wire.*

"Upon receipt of such notice, the Seller shall, within twenty-four (24) hours, thereafter, advise the Buyer by telephone, facsimile, or wire, which of the following options he elects to exercise:

"(1) agree to extend the shipping period; or

"(2) sell-out, for the Buyer's account, the defaulted portion of the shipments; or

"(3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.

"If the Buyer fails to notify the Seller of his default, the liability remains in force until the Seller, by the exercise of due diligence, can determine whether the buyer has defaulted. The Seller shall notify the Buyer at once by telephone, facsimile, or wire and within twenty-four (24) hours thereafter, advise the Buyer by telephone, facsimile, or wire which of the options (1) or (2) or (3) above he elects to exercise.

"If the Buyer defaults on the contract, he is liable for all reasonable costs and expenses as shall have been incurred to and including the day the Seller elects one of the three options."

Notwithstanding the above, Didion's "Sales Confirmation" (identified as "Contract No. 10027") was different from NGFA Feed Trade Rule 14 because it provided on the first page that:

"8) In case Buyer fails to furnish shipping directives in accordance with time of shipment mentioned, Didion may make demand on the buyer and failing to receive such directives within twenty four hours after demand has been made, Seller may elect to do any of the following:

"(a) Cancel the contract or any portion thereof.

"(b) Sell same for Buyer's account, charging in either event any difference or loss to the Buyer, said amount to be due and payable at once.

"(c) Charge reasonable interest, insurance or storage for Buyer's accounts."

Some of the contract confirmations expressly stated that CSC was to supply the rail cars. Other confirmations did not. Some confirmations were signed by both parties²; some by one party; and one confirmation³ was not signed by either party.

While the written provisions of CSC Contract P-48818 did not expressly require CSC to provide rail cars, the facts showed that CSC did, in fact, do so. There was no record of a CSC request during performance of that contract for cars to be provided by Didion. Nor did either party provide any evidence that CSC disputed the issue at the time.

CSC provided cars late on CSC Contract P-49039. But again, there was no requirement to do so in the written confirmation. Once more, there was no record of CSC calling for cars from Didion or disputing that CSC would provide cars. CSC did not provide records requesting cars on CSC Contract P-51004, even though that confirmation also failed to include any mention of buyer's equipment.

² CSC Contract Numbers P-48818, P-51004, P-49996, P-49997, P-49998.

³ CSC Contract Number P-49039.

Decision

The parties agreed that oral contracts were made and that written confirmations were sent by one or both parties. The arbitrators concluded that the written confirmations failed to include all of the terms agreed to by the parties. As such, the arbitrators believed that both parties should share some of the fault for the conflicts regarding both the shipping point and the issues surrounding furnishing of rail cars.

The arbitrators concluded that CSC's early contract performance evidenced an agreement between the parties for CSC to provide private cars for all of the contracts at issue in this case. Likewise, CSC's initial performance showed agreement with Didion's contention that Cambria, Wis., was the shipping point for all contracts, even though Didion signed or had possession of purchase confirmations from CSC stating "F.O.B. Chicago," with three contract confirmations making no mention of buyer's cars. CSC provided cars on contracts leading up to performance on CSC Contract P-51004, and there was no evidence of any attempt by CSC to obtain clarification or requests of Didion to provide cars until CSC was given notice of contract cancellation by Didion.

NGFA Feed Trade Rule 14 is not structured so as to guarantee a profit or loss for either the buyer or seller. Instead, Rule 14 provides the non-defaulting party with certain alternatives in an effort to mitigate losses to both parties if a default occurs. But the language contained in Didion's confirmation on the transaction for 10 cars identified as Didion Contract Number 10027 and CSC Contract P-51004 appeared to contemplate an outright cancellation of unshipped portions of defaulted contracts. This appeared to be the major difference between Didion's terms and NGFA Feed Trade Rule 14.

The arbitrators concluded that NGFA Feed Trade Rule 14 should be applied to the remaining contracts. Both parties, however, failed to fully comply with the rule. A non-defaulting party (either seller or buyer), after giving appropriate notice, has the following options under NGFA Feed Trade Rule 14:

- (1) agree to extend the shipping period; or
- (2) buy-in, for the Seller's account, the defaulted portion of the shipments; or
- (3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.

Since the market value was greater on the cancellation dates (Nov. 21, 1997 and Jan. 21, 1998), Didion could resell its product at higher prices than CSC's contract price. Therefore,

the arbitrators believed, CSC (the buyer) should be allowed the market difference under the facts of this case. A fair market value of \$90 F.O.B. Chicago, Ill., on the November and January cancellation dates was verified by non-related broker firms for these periods.

The arbitrators concluded that CSC was due the following credits on the canceled contracts:

P-51004	10 cars 750 tons @ \$82.00 vs. \$90.00 = \$8.00/ton=	\$6,000
P-49996	6 cars 450 tons @ \$76.00 vs. \$90.00 = \$14.00/ton=	\$6,300
P-49997	12 cars 900 tons @ \$76.00 vs. \$90.00 = \$14.00/ton=	\$12,600
P-49998	7 cars 525 tons @ \$76.00 vs. \$90.00 = \$14.00/ton=	\$7,350
Total:		\$32,250

The evidence indicated that CSC failed to respond to Didion's original notices of cancellation. Since the contracts were not canceled immediately, Didion was not able to determine when – or if – cars would arrive for loading pursuant to the contracts with CSC. Therefore, the arbitrators concluded that Didion should be awarded reasonable storage costs of \$3 per ton per month resulting from the delay, calculated as follows:

P-51004	10 cars 750 tons	2 months at \$6	=	\$4,500
P-49996	6 cars 450 tons	1 month at \$3	=	\$1,350
P-49997	12 cars 900 tons	2 months at \$6	=	\$5,400
P-49998	7 cars 525 tons	1 month at \$3	=	\$1,575
Total:				\$12,825

The arbitrators agreed that Didion was entitled to prevail on its claim of \$58,286.54 on the unpaid invoices, plus the storage charges as outlined above. However, the arbitrators found that CSC was entitled to a credit of \$32,250 against the amounts owed Didion. Thus, the arbitrators concluded that Didion should be awarded a net judgment of \$38,861.54.

The arbitrators thoroughly reviewed all of the materials submitted by the parties. This decision by the arbitrators is intended as a final resolution of all claims arising from the transactions at issue here, even if not expressly addressed in this opinion.

Award

Therefore, it is ordered that:

Didion Milling Inc. is awarded a net judgment against Commodity Specialists Co. of \$38,861.54, plus compound interest at the rate of 9.5 percent per annum from April 14, 1998⁴ until all amounts are paid in full.

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

Edwin J. Hershberger, *Chairman*
President
English River Pellets Inc.
Kalona, Iowa

Steve Calder
Manager, Feed Ingredients
Farmland Industries Inc.
Kansas City, Mo.

Jack Goldfield
President
Nathan Segal & Co.
Houston, Texas

⁴ Didion's arbitration complaint was dated April 14, 1998. The interest rate of 9.5 percent was based on 1 percent over the average bank prime loan rate for April 1998 of 8.5 percent, as reported by the Federal Reserve Board of Governors.