National Grain and Feed Association

Arbitration Decision

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January 23, 2003

Arbitration Case Number 2020

Plaintiff: **Hansen Mueller Co., Omaha, Neb.**

Defendant: **American Nutrition Inc., Ogden, Utah**

Statement of the Case

This case involved the application of four railcars of corn to a contract for the sale of corn by Hanson Mueller Co. (HMC) to American Nutrition Inc. (ANI).

The contract (HMC#88656RA), dated July 18, 2001, provided for the sale of 43,200 bushels of U.S. No. 2 yellow corn at $2.2608 per bushel, with first official weights and first official grades to apply. Delivery was by rail to Ogden, Utah, Sept. 1-30, 2001.

On Oct. 4, 2001, HMC billed the four cars at issue in this case, totaling 14,325.46 bushels of corn and showing Federal Grain Inspection Service (FGIS) grades within the contract tolerances. According to the Union Pacific Railroad (UP) online trace summaries, all four cars were constructively placed at the UP rail yard in Ogden on Oct. 14. The UP summaries indicated actual placement for two cars on Nov. 1, and two cars on Nov. 2.

On Nov. 2, ANI had the four cars inspected by FGIS, and upon determining that the contents were of poor quality, ANI rejected the shipment through telephone notification to HMC and by a follow-up letter dated Nov. 5. ANI had already partially unloaded one of the cars. On Nov. 8, HMC sold the estimated remaining contents of the four cars (13,648 bushels) to a third party on an "as-is" quality basis at $1.40 per bushel. HMC incurred additional freight charges totaling $4,060 for delivery to the new destination at Elberta, Utah.

ANI disputed the application of these four cars to the contract. In its argument, ANI referred to NGFA Grain Trade Rule 18, which states as follows:

> ***"Rule 18. Time of Shipment or Delivery.*** *Contracts shall state a specific time within which shipment or delivery is to be made.*
>
> *"A specific number of days shall mean calendar days, excluding the date of sale in which to load and ship grain to apply on a contract for shipment, or to deliver at the agreed destination grain to apply on a contract for delivery.*
>
> *"Grain to apply on a contract for shipment must be billed within the shipment or delivery period of the contract, as evidenced by a bill of lading properly executed and signed by an authorized agent of the carrier…."*

ANI argued that HMC was in violation of this rule and in breach of the contract that specified shipment by Sept. 30, because HMC did not bill the rail cars at issue until Oct. 4.

ANI also referred to NGFA Grain Trade Rule 30(H)(1), which defines *"arrival of a rail car"* as *"the time of actual physical placement at the billed destination."* ANI contended that because its personnel were prohibited from entering UP rail yard property, *"arrival"* did not occur until Nov. 1 and 2, when the cars were physically placed at ANI's facility in Ogden. ANI further argued that because it determined the corn in those cars was out of condition when officially graded at the time of physical placement of the cars on Nov. 2, HMC was in default of the contract.

HMC's arguments, on the other hand, referenced NGFA Grain Trade Rule 30(H)(2), which expands upon the definition of *"arrival."* This trade rule provision states that, *"arrival of a rail car shall be… [i]f not physically placed, then 48 hours after the car is constructively placed or reported to the Buyer as available for Buyer's instructions."* HMC claimed that because the rail cars were constructively placed on Oct. 14, the arrival date was Oct. 16 and that ANI waived its rights of refusal by failing to act until 16 days later.

To support its contention, HMC also relied upon NGFA Grain Trade Rule 13(A), which states as follows:

*"Rule 13. **Condition Guaranteed on Arrival of Rail Cars.*** *(A) If grain is sold with condition guaranteed on arrival at its destination, and the destination is provided in the billing instructions, the Buyer shall ascertain the condition and official grade of the grain. The Buyer shall report the condition and official grade to the shipper by a telephone call placed not later than 12 noon of the next business day after arrival of the car of grain at the destination.*

"If the Buyer fails to ascertain and report the condition and official grade as provided above, he shall waive all rights under the guarantee for that portion of the contract. Diversion of the shipment by the Buyer to a point beyond the original destination shall constitute an acceptance of the grain and a waiver of the guarantee."

HMC argued that, pursuant to Grain Trade Rule 13(A), ANI failed to properly and timely ascertain and report the condition and official grade of the corn in the four rail cars upon arrival. HMC claimed that ANI consequently waived its rights under the guarantee portion of the contract.

In its arguments, HMC further referred to NGFA Grain Trade Rule 28(B), which provides as follows:

"Rule 28. Failure to Perform…(B) Buyer's Non-Performance. *If the Buyer finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Seller by telephone and confirmed in writing. The Seller shall then, at once elect either to: (1) agree with the Buyer upon an extension of the contract, or (2) sell out for the account of the buyer, using due diligence, the defaulted portion of the contract; or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."*

HMC argued that because ANI refused to take delivery, HMC was not able to complete shipment within the contract specifications. HMC claimed that, pursuant to Grain Trade Rule 28(B), it consequently exercised due diligence, including properly notifying ANI of its intent to sell out the contents of the cars for the account of ANI.

HMC claimed damages of $23,146.92, consisting of the cost of the original shipment of 14,325.46 bushels at the contract price of $2.6208 per bushel ($37,544.17); freight increase of $150 per car ($600); and additional freight charges for shipment to Elberta of $1,010 per car ($4,060); less the amount received from the third-party for the remaining 13,612.31 bushels at $1.40-per-bushel.

The Decision

After considering all the evidence and reviewing the materials provided by both parties, the arbitrators decided in favor of HMC and rejected the arguments of ANI.

According to NGFA Grain Trade Rule 28(A): *"[T]he liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted."* Therefore, ANI should have notified HMC that application of the four cars did not comply with the original contract shipment specifications when ANI failed to receive application by the final date of the original contract shipment period. Failure to do so by ANI constituted its acceptance as the buyer of application of the four cars.

The arbitrators concluded that a decisive factor in this case was Grain Trade Rule 30(H), which states in relevant part: *"[A]rrival shall be …[i]f not physically placed, then 48 hours after the car is constructively placed or reported to the Buyer as available for Buyer's instructions."* The arbitrators reasoned it was the duty of ANI to notify HMC of ANI's inability to inspect the cars unless they were physically placed at ANI's facility. Since the carrier constructively placed the four cars on Oct. 14, it was ANI's obligation to notify HMC of the condition of the contents of the cars within 48 hours of constructive placement. Failure to do so constituted acceptance of these four railcars.

The Award

Based upon the evidence presented, the arbitrators ordered that ANI pay HMC the following amounts to resolve this dispute:

$37,544.17	Application of 14,325.46 bushels of corn at $2.6208 per bushel
600.00	Increased freight rate at $150 per car
(19,057.25)	Less proceeds for sale of remaining corn in four rejected cars
4,060.00	Additional freight charges on the four rejected corn cars
$23,146.92	Total Award Due HMC

The arbitrators also awarded interest to HMC at a rate of 5.75 percent (1.5 percent over the current prime rate) that will apply if ANI fails to make prior payment of this award, to begin to accrue 15 days after the deadline by which ANI must file a notice of appeal of this decision.

Submitted with the unanimous consent and approval of the arbitrators, whose names appear below:

Dean P. O'Harris, *Chair*
Commodity Manager
Parrish & Heimbecker Inc.
Oxford, Mich.

Randy Seibel
Manager, Commodity Department
Associated Feed & Supply Co. Inc.
Turlock, Calif.

Mike Barrett
Corn Merchandiser
The Andersons Inc.
Maumee, Ohio