National Grain and Feed Association

Arbitration Decision

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June 16, 2011

Arbitration Case Number 2328

Plaintiff: **FGDI, LLC, Bowling Green, Ohio**

Defendant: **Keith Truckor, Metamora, Ohio**

Statement of the Case

This case involved two soybean contracts (numbers 35073 and 35102) for delivery in October/November 2007, a wheat contract (number 37007) for delivery in July/August 2008, and three corn contracts (numbers 35166, 35161, and 39291) for delivery in October/November 2007 between FGDI, LLC (FGDI) as buyer and Keith Truckor (Mr. Truckor) as seller.

FGDI sent written confirmations for all of the contracts to Mr. Truckor. Mr. Truckor signed and returned all of the confirmations to FGDI. Therefore, the arbitrators confirmed that the terms in those contracts governed this dispute, along with the applicable provisions of the NGFA Grain Trade Rules.

Soybean Contracts

On Oct. 31, 2007, Mr. Truckor informed FGDI that he could not deliver soybeans during the October/November 2007 delivery period specified in the contract. FGDI asserted that in this and several subsequent conversations, Mr. Truckor requested that the contracts be rolled to a later delivery period. Based upon these requests, FGDI said it rolled the contracts several times, with a final delivery period of May 2008. Each time the contracts were rolled, FGDI said it sent Mr. Truckor a contract change form, none of which were signed or returned by Mr. Truckor. The contracts eventually were cancelled on June 25, 2008.

However, Mr. Truckor claimed that he never requested that the contracts be rolled. Rather, he maintained that they should have been cancelled as of Oct. 31 when he informed FGDI that he would not deliver on the contracts. Mr. Truckor argued that, because none of the contract- change forms were signed, he never agreed to amend any of the contracts.

Wheat Contract

The wheat contract specified a delivery period of July/August 2008. On July 16, 2008, a representative of FGDI made a farm visit to Mr. Truckor. Mr. Truckor had not planted any wheat at that time. FGDI alleged that, during this visit, Mr. Truckor indicated that he could not fulfill his obligation to FGDI. Therefore, FGDI cancelled the wheat contract that afternoon.

However, Mr. Truckor contended that he had advised that, although he had not planted any wheat himself, he had the means to purchase the wheat needed to fill the contract and that he requested that the contract remain open.

Corn Contracts

On Oct. 31, 2007, Mr. Truckor informed FGDI that he could not deliver corn during the contractually specified October/November 2007 delivery period. FGDI maintained that in this conversation, Mr. Truckor requested that the contracts be rolled to a July 2008 delivery period. On this basis, FGDI said it rolled the contracts and sent Mr. Truckor contract change forms, which neither were signed nor returned by Mr. Truckor.

On July 16, 2008, a FGDI representative made a farm visit to Mr. Truckor and asked whether he planned to deliver corn under the contracts. FGDI alleged that Mr. Truckor requested that the contracts be cancelled at that time. However, Mr. Truckor claimed that he never requested that the contracts be rolled in the first place, but rather said they should have been cancelled as of Oct. 31 when he maintained he informed FGDI that he would not deliver on the contracts. Mr. Truckor argued that because none of the contract change forms were signed, he never agreed to amend any of the contracts.

FGDI asserted that it suffered $167,325 in damages as a result of Mr. Truckor's alleged default on the soybean, wheat and corn contracts. Mr. Truckor did not dispute that he had defaulted on the contracts, but claimed that he owed FGDI significantly less in damages because the contracts should have been cancelled sooner.

The Decision

The arbitrators verified that on Oct. 31, 2007, FGDI rolled the futures reference month on the two hedge-to-arrive (HTA) contracts for soybeans from November 2007 to January 2008 and sent contract change confirmations to Mr. Truckor. That same day, FGDI also rolled the futures reference month on the three HTA contracts for corn from December 2007 to July 2008. While the contract change forms were not signed by Mr. Truckor, the arbitrators referenced NGFA Grain Trade Rule 3(A), which states, in relevant part:

> "…Upon receipt of said confirmation, the parties shall carefully check all specifications therein and, upon finding any material differences, shall immediately notify the other party to the contract, by telephone and confirm by written communication…."

Mr. Truckor admitted receiving the contract change confirmations but failing to contact FGDI to challenge the contract changes for being incorrect. Mr. Truckor claimed he wanted to cancel the contracts on Oct. 31, but he did not send any confirmations in writing to FGDI. In this regard, the arbitrators referred to NGFA Grain Trade Rule 3(B), which states:

> "If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party, as described in Rule 3(A) of any disagreement with the confirmation received."

FGDI rolled the futures reference month on the soybean contracts to July 2008 and contract change confirmations were sent to Mr. Truckor with no response. It was the arbitrators' opinion that it was not until a phone conversation on June 25 that both parties agreed to cancel the soybean contracts under NGFA Grain Trade Rule 28(A). Therefore, the prices calculated for the cancellation of the soybean contracts were correct and Mr. Truckor owed $90,375 to FGDI.

It also was the arbitrators' opinion that it was not until July 16 that both parties agreed to cancel the corn contracts under Grain Trade Rule 28(A). However, since the corn was contracted for delivery to Metamora, Ohio, the arbitrators determined that the basis for delivery to Metamora should be used for the cancellation rather than the contracted basis.

The correct calculation should be as follows:

Cancellation Price (per bushel)

Futures:	$6.46
Basis:	($0.50)
Cash Price	$5.96

Contract Number:		#35166	#35161	#39291	
Cancellation Price:		$5.96	$5.96	$5.96	
Contract Price:	-	($2.58)	($2.59)	($4.07)	
Cancellation Fee:	+	$0.10	$0.10	$0.10	
Net Cost:		$3.48	$3.47	$1.99	
Bushels:	X	5,000	5,000	10,000	
Total Cost:		$17,400	$17,350	$19,900	= $54,650

Therefore, Keith Truckor owes FGDI $54,650 for the cancellation of the three corn contracts.

On July 16, Mr. Truckor also advised FGDI that he did not have any wheat production to fill his contract. Based upon Grain Trade Rule 28(A)(3), FGDI chose to cancel the contract. However, since the wheat was to be delivered to Metamora, Ohio, the arbitrators concluded that the basis for delivery to Metamora should be used to determine the cancellation charges rather than the contracted basis. As such, the correct calculation should be as follows:

Contract Price:		Cancellation Price:		Difference:
Futures	$4.48	Futures	$8.24	$3.42
Basis -	($1.25)	Basis -	($1.59)	+$0.10 (Cancellation Fee)
Cash Price	$3.23	Cash Price	$6.65	$3.52 x 5,000 bu.= $17,600

Therefore, Keith Truckor owes FGDI $17,600 for the cancellation of the wheat contract.

The Award

The arbitrators decided that the total awarded to FGDI for cancellation of all contracts was $162,625, with interest accruing at 5 percent per annum from the date of this decision until the award is paid in full.

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Kris Roberts, *Chair*
Corn Procurement Manager
Tate and Lyle Ingredients Americas Inc.
Decatur, Ill.

John C. Ripple
General Manager
Morrow County Grain Growers Inc.
Lexington, Ore.

Kevin Whitehall
General Manager
Central Washington Grain Growers Inc.
Waterville, Wash.

Arbitration Appeals Case Number 2328

Appellant/Defendant: Keith Truckor, Metamora, Ohio

Appellee/Plaintiff: FGDI, LLC, Bowling Green, Ohio

Statement of the Case

The original arbitration committee decided this case in favor of the plaintiff/appellee, FGDI, LLC (FGDI), against the defendant/appellant, Keith Truckor (Truckor).

Truckor subsequently appealed the decision.

The Arbitration Appeals Committee, individually and collectively, reviewed all the arguments and supporting exhibits originally presented by both parties involved in the original Arbitration Case 2328, along with the findings and conclusions of the original Arbitration Committee. The Appeals Committee also reviewed the appellant's brief.

The significant argument presented upon appeal questioned whether paragraph 17 of the "Terms and Conditions" of the initial FGDI Confirmation of Purchase could be relied upon to outweigh arguments based upon other NGFA Trade Rule requirements and actions taken by the parties. The contract at issue had incorporated the NGFA Trade Rules by reference.

Paragraph 17 of the "Terms and Conditions" in the FGDI Confirmation of Purchase stated as follows:

> *This Contract shall represent the final, complete and exclusive statement of the agreement between both the parties and **may not be amended**, supplemented or waived except in writing **signed by both parties**. (Emphasis added).*

Both parties agreed that they had entered into numerous grain contracts that were documented by FGDI's Confirmation of Purchase contract forms, which included the aforementioned paragraph 17. Truckor signed and returned the original contract confirmations.

FGDI claimed that Truckor later agreed to various contract extensions and that FGDI sent Contract Pricing/Change Confirmations to document such amendments. However, those Contract Pricing/Change Confirmations did not have a line for the counterparty to sign. Nor did they indicate a request to return a copy to the sender.

Truckor maintained that he did not agree to these contract extensions. Because he did not sign any of the Contract Pricing/Change Confirmations, he argued that those amendments (extensions) were not enforceable in light of paragraph 17 of the original contract confirmation. Truckor further stated that he had advised FGDI that he would not be delivering on the contracts "within the time frame stated in the original contracts."

The Preamble of the NGFA Grain Trade Rules, in relevant part, states:

> *All active members and other parties using these rules are free to agree upon any contractual provisions, which they deem appropriate, and these rules apply only to the extent that the parties to a contract have not altered the terms of the rules, or the contract is silent as to a matter dealt with by the pertinent rule.*

Thus, Truckor's argument was that FGDI's confirmation paragraph 17 precluded **any** amendments which were not signed by both parties.

The Arbitration Appeals Committee weighed this argument based upon paragraph 17 against the actions actually taken by Truckor. The Arbitration Appeals Committee noted that Truckor stated that he had advised FGDI that he would not be delivering within the time frame specified in the contract terms. However, Truckor failed to provide proper notice pursuant to NGFA Grain Trade Rule 28 [Failure to Perform], which requires a seller to give notice "by telephone and confirmed in writing" *(emphasis added)* when the seller finds that it will be unable to complete the contract within contract specifications. Truckor also continued to discuss the various contracts in an ongoing manner with FGDI after the ending date of the original agreement.

The Arbitration Appeals Committee concluded that these actions gave credence to FGDI's contention that Truckor agreed to extend the delivery periods of the underlying contracts. However, in light of paragraph 17 of FGDI's own contract confirmation, the Appeals Committee was disappointed that FGDI was not more diligent in obtaining signed confirmations of the extensions.

In this case, both parties' actions were consistent with an extension of the contracts, thus diminishing the argument that paragraph 17 should be the determining factor in resolving this dispute. The Arbitration Appeals Committee acknowledged that if Truckor had given proper notice, and consistently held to that position through actions and further discussions with FGDI, the result would have been different. Truckor further failed to follow trade rules and practices by not objecting to the notices from FGDI with which he claimed to have been in disagreement. Instead of retroactively relying upon paragraph 17 to absolve him of all obligations connected to his actions, Truckor – as an owner of a grain brokerage business – should have been familiar with the customs of the trade and diligent in refuting the Contract Pricing/Change Confirmations received from FGDI.

The Appeals Committee concluded that the weight of the evidence and arguments demonstrated that the contract amendments (extensions) were agreed to by both parties and documented by FGDI.

The Decision

Therefore, the Arbitration Appeals Committee affirmed the decision of the original Arbitration Committee.

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Roger Krueger, *Chair*
Vice President, Grain Marketing
South Dakota Wheat Growers Association
Aberdeen, S.D.

John Anderson
Chief Executive Officer
Ritzville Warehouse Co.
Ritzville, Wash.

Chuck Elsea
Chief Executive Officer
The Scoular Company
Overland Park, Kan.

Edward Milbank
President
Milbank Mills Inc.
Chillicothe, Mo.

Steve Young
Grain Merchandiser
Grainland Cooperative
Holyoke, Colo.