



National Grain and Feed Association Arbitration Decision

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1250 I (Eye) Street, N.W., Suite 1003
Washington, DC 20005-3922

P: (202) 289-0873
F: (202) 289-5388

January 26, 2016

CASE NUMBER 2702

**PLAINTIFF: THE ANDERSONS, INC.
MAUMEE, OH**

**DEFENDANT: GREG HUHN D/B/A HUHN FARMS
EAGLE, MI**

STATEMENT OF THE CASE

Beginning in 2010, The Andersons, Inc. (Andersons) agreed to purchase grain from Greg Huhn d/b/a Huhn Farms (Huhn) using hedge-to-arrive (HTA) contacts for both the 2011/2012 and 2012/2013 crop years. With each purchase transaction, Andersons issued and sent to Huhn a “Purchase Contract and Confirmation.” Of the total 21 HTA contracts sent to Huhn (7 contracts for the 2011/2012 crop year; 14 contracts for the 2012/2013 crop year), Huhn signed and returned each contract except one.

These contracts referenced various futures option months and delivery periods over each of the two crop years. Delivery of the grain under the contracts was to occur at Anderson’s elevator in Albion, Michigan. Under the “Purchase Contract Terms” printed on each contract was the following provision:

5. Both parties agree: (A) THIS CONTRACT IS MADE IN ACCORDANCE WITH THE APPLICABLE GRAIN TRADE RULES OF THE NATIONAL GRAIN AND FEED ASSOCIATION (A COPY WILL BE PROVIDED UPON REQUEST) EXCEPT AS MODIFIED HEREIN, AND THE PARTIES WILL BE BOUND THEREBY AND (B) ANY DISPUTES OR CONTROVERSIES ARISING OUT OF THIS CONTRACT SHALL BE ARBITRATED BY THE NATIONAL GRAIN AND FEED ASSOCIATION, PURSUANT TO ITS ARBITRATION RULES. ... [Emphasis in original]

Huhn failed to complete delivery during the agreed upon shipment period against the seven 2011/2012 crop year contracts in the amount of 44,214.86 bushels of corn. Andersons then on September 5, 2012, requested that Huhn complete delivery against the open 2011/2012 corn contracts. After Huhn indicated that he would not be delivering further against the 2011/2012 contracts, Andersons cancelled these contracts on September 6, 2012.

Huhn also failed to complete delivery against the 14 HTA contracts for the 2012/2013 crop year. Specifically, Huhn failed to deliver 70,844.17 bushels under the ten corn contracts; 10,000 bushels under the two soybean contracts; and 10,000 bushels under two wheat contracts. On April 4, 2013, Andersons sent correspondence to Huhn seeking assurance that Huhn would deliver against these contracts. After receiving no response from Huhn, Andersons cancelled the 2012/2013 contracts on April 10, 2013.

The dispute between the parties concerned the methodology used by Andersons in calculating the market differences when the contracts were bought-in and cancelled. Andersons claimed to have

suffered a total of \$370,632.32 in damages when buying-in the various contracts due to Huhn's non-performance. These damages were partially offset by grain delivered by Huhn in the fall of 2012 in the amount of \$38,225.75 for a net balance owed of \$332,406.57. Huhn argued the corn that he delivered during the fall of 2012 should not have been applied to the existing contracts for the 2012/2013 crop year. According to Huhn, the delivered grain should have instead been applied based upon the cash market that was considerably higher in price at the time.

THE DECISION

The arbitrators concluded that there was no dispute as to the validity of the various contracts that were agreed upon between the two parties. Since the contracts between the parties were valid, those terms and conditions detailed in the contract language would govern. The arbitrators determined the central issue in the case was whether the manner in which the contracts were cancelled was consistent with the terms of the contracts and the NGFA Grain Trade Rules.

The arbitrators noted that around late October 2010, Andersons became concerned whether Huhn would be performing on the open contracts. Paragraph 12 of the "Purchase Contract Terms" that were printed on each of the contracts stated as follows:

Buyer retains the right to require: (a) payment of dollars up to the replacement cost of any undelivered balance; or (b) other adequate assurance of Seller's performance, if, in Buyer's sole discretion, Buyer has reason to feel insecure about Seller's performance under Contract. ...

Accordingly, Andersons requested assurance of performance from Huhn. On January 14, 2011, Huhn provided an affidavit setting forth the acreage of each crop to be farmed as well as the expected yields and grain sales to elevators other than Andersons for both the 2011/2012 and 2012/2013 crop years. Huhn's affidavit presented that there should be adequate production to cover the grain sales contracts with Andersons.

Huhn argued in this case that Andersons did not properly apply NGFA Grain Trade Rule 28 [Failure to Perform] when it cancelled the contracts. Paragraph (A) of Rule 28 states as follows:

If the Seller 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 Buyer by telephone confirmed by subsequent written communication. ... If the Seller fails to notify the Buyer of his inability to complete the contract, as provided above, the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted.

Huhn argued that "*Andersons could have covered, or cancelled, the contracts in June 2012 at \$5.50/bu.; in July 2012 at \$6.50/bu.; and in August 2012 at under \$8.00/bu.*" The arbitrators determined, however, that Huhn had provided assurances to Andersons in his affidavit of his intent and adequate production to fulfill the commitments under the contracts. As set forth in NGFA Grain Trade Rule 28, once Huhn, as the seller, "*finds that he is not able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer ...*" Therefore, if Huhn sought to benefit from lower grain prices in June 2012, it was his responsibility to inform Andersons at that time that he would not be delivering against the contracts. Instead, Huhn failed to inform Andersons that he would not be delivering against the 2011/2012 contracts until responding to Andersons's additional inquiries in September 2012. Andersons then properly cancelled the 2011/2012 contracts.

Huhn subsequently delivered corn to Andersons in October and November 2012. Huhn argued that these deliveries should not have been applied to the existing 2012/2013 contracts. Instead, Huhn stated they should have been marketed at the considerably higher then-current cash price. The arbitrators determined, however, Andersons followed trade custom and standard practice by applying these deliveries against the open contracts between Andersons and Huhn for the 2012/2013 crop year. Further, it was clearly marked on each of the scale tickets for these deliveries that they were being applied to "CONTRACT."

The arbitrators also noted that Paragraph 3 under the "Purchase Contract Terms" of the contracts stated:

Buyer may, to the fullest extent permitted by law, exercise its right to set off, or set off rights of Buyer's related businesses against any amounts otherwise due Seller.

Andersons consequently applied the proceeds of \$38,225.75 from the October-November 2012 corn deliveries against the amount Huhn owed to Andersons for the market difference when the 2011/2012 contracts were cancelled in September 2012. The arbitrators noted that one scale ticket (ticket #145366) was marked "DP/PL" (Delayed Price/Price Later). The information provided to the arbitrators in this case indicated that these bushels remained unpriced by Huhn. With respect to claims related to "Ticket 145336," the arbitrators determined that these bushels remained for Huhn to market.

No information was provided to the arbitrators demonstrating that Huhn gave notice to Andersons that he would not complete delivery against his existing 2012/2013 contracts. Andersons consequently followed NGFA Grain Trade Rule 28, which states "*the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted.*" Andersons sent a letter to Huhn on April 4, 2013, which requested that Huhn begin delivery against the contracts immediately. Andersons further stated in its letter as follows:

If we do not receive immediate delivery of these contracted bushels or a mutually agreeable written schedule from you related to the delivery of these contracted bushels by the close of business on Wednesday, April 10, 2013, we will cancel these contracts at fair market value based on the close of the market on that day.

Absent any direction or indication from Huhn that he would be delivering against the 2012/2013 contracts, Andersons properly cancelled them. Andersons' letter specified that April 10, 2013 would be the date that would be used to calculate the fair market value of the contracts as opposed to NGFA Grain Trade Rule 28, which calls for calculation of "*fair market value based on the close of the market the next business day.*" The arbitrators concluded that the date in the letter applied for purposes of calculating market differences.

The arbitrators were only provided copies of the initial HTA contracts between Huhn and Andersons. The arbitrators noted, however, that when the contracts were ultimately cancelled the "futures reference" month specified in each of the original contracts had expired on all but one of the contracts. Neither party provided documentation of price spreads between futures months when the original HTA contracts between the parties were rolled and how the new referenced futures price was calculated. In its arguments, Andersons utilized these new HTA futures price levels to calculate market difference and subsequent damages. Because Huhn did not contest that the HTA contract prices relied upon by

Andersons were inaccurately calculated, the arbitrators concluded that this was not a matter of dispute between the parties.

Huhn disputed the assessment of \$11,242.15 for “HTA fees” in Andersons’ claim for damages. Each of the contract confirmations submitted to the arbitrators in this case provide that *“Final settlement will reflect the deduction of [.05 for the corn contracts; .10 for the soybeans contracts; .08 for the wheat contracts] c/bu. for contract administration.”* In accordance with trade custom, HTA contracts normally involve assessment of charges when this type of marketing option is provided to the seller. While some buyers will deduct the charges at the time the contract was initially written, Andersons’ policy was to deduct them when basis was established to arrive at the final pricing of the contract. When Andersons cancelled the defaulted portion of Huhn’s open contracts, most had no basis levels established. The arbitrators, therefore, determined that deduction of HTA fees on these contracts was not warranted because they were “washed” at cancellation and never settled.

Huhn also disputed the assessment of cancellation charges in Andersons’ claim for damages. Paragraph 9 of the Purchase Contract Terms in the contracts stated as follows:

Seller’s failure to perform on this Contract will result in contract cancellation charges to the Seller, the total of which will be the difference between the Contract price and the replacement cost at the time of cancellation, plus a minimum cancellation charge of ten cents (10c) per bushel. ...

Huhn’s express agreement to the contracts demonstrated that he agreed to these cancellation charges.

The contract cancellation damages in this case were calculated as follows:

2011/2012 Crop Contracts	Commodity	Contracted Bushels	Contract Price	Cancellation Price	Cancellation Fee	Difference	Dollar Amount
69354	Corn	5,000.00	\$4.4900	\$7.9725	\$0.10	3.5825	\$17,912.50
69359	Corn	10,000.00	4.5200	7.9725	0.10	3.5525	35,525.00
69413	Corn	5,000.00	4.6000	7.9725	0.10	3.4725	17,362.50
69552	Corn	5,000.00	4.0825	7.9725	0.10	3.9900	19,950.00
69703	Corn	5,000.00	4.1925	7.9725	0.10	3.8800	19,400.00
69709	Corn	5,000.00	4.1325	7.9725	0.10	3.9400	19,700.00
70284	Corn	9,214.86	4.3325	7.9725	0.10	3.7400	34,463.58
		44,214.86					\$164,313.58
						Less Amount Set Off	(38,225.75)
							\$126,087.83
2012/2013 Crop Contracts	Commodity	Contracted Bushels	Contract Price	Cancellation Price	Cancellation Fee	Difference	Dollar Amount
69337	Corn	10,000.00	\$4.0750	\$6.4875	\$0.10	2.5125	\$25,125.00
69449	Corn	5,000.00	3.9925	\$6.4875	0.10	2.5950	12,975.00
69861	Corn	844.17	4.4700	\$6.4875	0.10	2.1175	1,787.53

69979	Corn	10,000.00	4.5600	\$6.4875	0.10	2.0275	20,275.00
70061	Corn	5,000.00	4.0950	\$6.4875	0.10	2.4925	12,462.50
70211	Corn	5,000.00	4.2250	\$6.4875	0.10	2.3625	11,812.50
70283	Corn	15,000.00	4.6200	\$6.4875	0.10	1.9675	29,512.50
70591	Corn	10,000.00	4.2850	\$6.4875	0.10	2.3025	23,025.00
75316	Corn	5,000.00	5.7450	\$6.4875	0.10	0.8425	4,212.50
75317	Corn	5,000.00	5.7450	\$6.4875	0.10	0.8425	4,212.50
69791	Soybeans	5,000.00	9.2325	13.9350	0.10	4.8025	24,012.50
69836	Soybeans	5,000.00	9.3525	13.9350	0.10	4.6825	23,412.50
70374	Soft Red Wheat	5,000.00	7.7775	6.9575	0.10	(0.7200)	(3,600.00)
70453	Soft Red Wheat	5,000.00	7.7775	6.9575	0.10	(0.7200)	(3,600.00)
		90,844.17					\$185,625.03
						Total	\$311,712.86

THE AWARD

Based upon the information provided to the arbitrators by the parties, The Andersons, Inc. was awarded judgment against Greg Huhn d/b/a Huhn Farms for damages in the amount of \$311,712.86. Interest on the judgment was also awarded at a rate of 3.25 percent per annum pursuant to NGFA Arbitration Rule 6(F), to accrue from the date of this decision until the judgment is paid in full. Each of the parties is responsible for payment of its own expenses associated with this arbitration case.

Decided: December 22, 2015

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

Jay Mathews, Chair
 Grain Marketing Manager
 Midwest Grain LLC
 Bloomington, IL

Ernie Theilen
 General Manager
 Garber Co-op Association
 Garber, OK

Andrew Wold
 General Manager
 Leland Farmers Company
 Leland, IL