



National Grain and Feed Association

Arbitration Decision

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July 14, 2011

Arbitration Case Number 2469

Plaintiff: Network Trading Inc., Nerstrand, Minn.

Defendant: Furst McNess Co., Freeport, Ill.

Statement of the Case

This case involved a contract between Network Trading Inc., the buyer, and Furst McNess Co., the seller, for the purchase of 5,000 tons of extruded cottonseed meal pellets at \$155/ton f.o.b. Lake Providence, La., for the shipment period of Oct. 1, 2007 through Sept. 30, 2008.

As noted by the arbitrators, controversy over which party's contract took precedence emerged from the very beginning of the dispute.

The first load of extruded cottonseed meal product was shipped by Furst McNess in mid-October 2007. The customer/end-user of the extruded cottonseed meal pellet then complained about the alleged inferior quality of the product. The customer retained the loaded product and Furst McNess provided discounts as compensation to the customer. According to Network Trading, there were other quality control issues with Furst McNess's subsequent shipments, including excessive fines, heating and molding. Network Trading argued that these problems slowed the rate of delivery on the contract.

According to Network Trading, a pattern then began whereby Network Trading would request product (via either barge or rail), but for various reasons Furst McNess would be unable to supply the requested extruded cottonseed meal pellets. Furst McNess, for its part, argued that Network Trading failed to take timely delivery of product between October 2007 and February 2008, and contested Network Trading's claim that it was unable to supply product during that time period.

As Furst McNess became increasingly delinquent in providing delivery and in arrears under the terms of the contract, Network Trading proposed a wash-out of the delinquent quantities by February 2008. However, Furst McNess did not agree to the

wash-out, and instead requested to extend the delivery period on the contract.

Further difficulties ensued because of a mechanical breakdown on Feb. 19, 2008 at the facility of Furst McNess's sole supplier of extruded cottonseed meal pellets. Furst McNess – the exclusive distributor of these pellets – was unable to provide any product to Network Trading during this breakdown, which exacerbated the delay and delinquencies under the contract.

An electrical fire then occurred at the supplier's plant on March 15, 2008, resulting in complete closure of the facility. Neither the plant nor its exclusive distributor, Furst McNess, was able to inform Network Trading of when production of the extruded cottonseed meal pellets would resume.

In April 2008, Furst McNess indicated to Network Trading that it would declare *force majeure* on this contract and absolve itself of the unfilled tonnage obligations unless Network Trading agreed to extend the terms of the contract. According to Network Trading, it did agree to extend the terms of the contract and it further offered to accept a substitute product (whole fuzzy cottonseed), but that offer allegedly was rejected by Furst McNess. Later, on July 1, 2008, Furst McNess declared *force majeure* on the contract expressing "regret for any difficulty this action has caused on the Buyer."

In total, 4,589.13 of the originally contracted 5,000 tons of extruded cottonseed meal pellets were not shipped. As a result, Network Trading sought monetary damages in the amount of \$619,200 from Furst McNess. Furst McNess argued that its non-performance was excused based upon its exercise of the *force majeure* clause in the contract.

The Decision

Regarding the question of which party’s contract would govern in this case, the arbitrators noted that two different versions of the contract indeed were submitted in this case. Network Trading first sent its contract to Furst McNess for signature. Furst McNess instead sent its own contract to Network Trading. Although Network Trading alleged it was “coerced” into signing Furst McNess’s contract, the arbitrators decided that Furst McNess’s version of the contract should govern the transaction, as it was signed by both parties.

The arbitrators determined that the evidence demonstrated that early problems with the quality and availability of the product were substantiated and had delayed Network Trading’s performance from the beginning of the contract period up until the plant fire in March 2008. The Network Trading’s performance was slowed, due to workouts with customers caused by poor product on the first few loads. Furst McNess never mentioned production problems, and would not provide shipping authorizations when requested.

The arbitrators calculated the differences between spot and contract values by “marking to the market” for those 4.5

months (November to mid-March). For the 1,872 total tons that were unshipped at the time of the fire, the arbitrators calculated that 416 tons were unshipped per month. By applying the market values at the close of each month as published in the *Cottonseed Digest*, the arbitrators awarded total damages to Network Trading in the amount of \$139,568, as follows:

Month	Tons	Cottonseed Digest price	Contract Price	Market Difference	Loss
November	416	\$170	\$155	\$15	\$6,240
December	416	\$210	\$155	\$55	\$22,880
January	416	\$237.50	\$155	\$82.50	\$34,320
February	416	\$273	\$155	\$118	\$49,088
March	208	\$285	\$155	\$130	\$27,040
					Total: \$139,568

Concerning the post-fire unshipped tonnage – the arbitrators were troubled that no mention was made by Furst McNess about fire insurance proceeds that might have been available to fix the electrical damage and permit the plant to resume operations, or business interruption insurance proceeds that also may have facilitated shipment of the remaining delivery obligations or fulfillment of the contract. Nonetheless, the arbitrators concluded that the *force majeure* clause in the governing contract relieved Furst McNess from performing under the contract after the fire.

The Award

Therefore, the arbitrators concluded that Network Trading Inc. should be awarded \$139,568 from Furst-McNess Co. Interest shall accrue on the judgment at a rate of 3.25 percent from the date of this decision until paid in full.

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

David Reiff, Chair
President
Reiff Grain & Feed Inc.
Fairfield, Iowa

Scott Bunz
Senior Director of Renewable Fuels
Gavilon Grain LLC
Omaha, Neb.

Joel Karlin
Market Analyst/Merchandiser
Western Milling, LLC
Goshen, Calif.