



National Grain and Feed Association

Arbitration Decision

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April 4, 2013

Arbitration Case Number 2572

Plaintiff: FGDI, A Division of AGREX Inc., Buford, Ga.

Defendant: Turner Grain Merchandising Inc., Brinkley, Ark.

Statement of the Case

On Aug. 26, 2010, Turner Grain Merchandising Inc. (Turner Grain), as the seller, entered into a contract with FGDI, as the buyer, for the sale of 20,000 bushels of yellow corn “*FOB Brinkley, AR*” with a Jan. 1 – Mar. 31, 2011 shipment period.

FGDI then arranged for trucks to pick up grain under the contract, and Turner Grain loaded those trucks provided by FGDI. Shipments were suspended at one point until the remaining balance to complete delivery under the contract could be determined. FGDI paid for all the truckloads that had been picked up except for one load, stating that it would pay for that load once the balance was determined and the contract was completed.

FGDI claimed that after several weeks of going back and forth with Turner Grain, the parties ultimately agreed that the contract lacked 4,321.79 bushels of being filled. However, according to FGDI, Turner Grain would only agree to provide those bushels at the then-current market value of \$7.50 per bushel (an increase of \$3.20 per bushel over the original contract price of \$4.30 per bushel). FGDI also claimed that Turner Grain refused a subsequent offer to roll forward the remaining balance at an

increased contract price of \$4.48 per bushel. FGDI claimed damages of \$8,036.29, which represented \$12,317.09 for cancellation of the remaining 4,321.785 bushels at \$2.85 per bushel (less \$4,280.80 for the amount owed to Turner Grain for the final delivered load).

Turner Grain’s position was it fully performed under the contract by loading all of the trucks provided by FGDI during the contract period. Turner Grain also maintained that it did not agree to any extension of the contract. Rather, Turner Grain alleged that it repeatedly requested information from FGDI about the balance of bushels that had been delivered so that it could complete delivery during the contract period. According to Turner Grain, however, it did not receive information about the balance remaining on the contract from FGDI until after the contract had expired. Turner Grain requested damages of \$33,384.31, which included \$4,280.82 for the final delivered load plus interest and arbitration fees. In its claim for damages, Turner Grain also sought \$28,410 for losses related to a rice contract that it was allegedly unable to take delivery upon as a result of FGDI’s failure to fully perform on the corn contract directly at issue in this case.

The Decision

Upon close review of the evidence and various arguments asserted by the parties, the arbitrators reached numerous conclusions:

▶ The arbitrators considered Turner Grain’s contention that “*certified destination weights*” applied to this contract. The arbitrators noted that NGFA Grain Trade Rule 15(D)

triggers specific obligations for grain buyers regarding the furnishing of certified weights when “*grain is sold basis official or certified destinations weights*.” However, the arbitrators determined that the contract in this case only referred to “*destination weights*” – absent the term “*certified*” – therefore, the requirements of Rule 15(D) did not apply in this dispute.

▶ The arbitrators also considered NGFA Grain Trade Rule 15(F), which provides for final settlement within 10 days of unload to sellers of grain sold under “*destination weights*” when the parties agree that payment is to be “*net cash upon unload.*” The arbitrators concluded that the obligation under Rule 15(F) did not apply in this case because the contract was silent with respect to payment terms.

▶ The arbitrators determined that NGFA Grain Trade Rules 4 and 28 were most significant.

NGFA Grain Trade Rule 4 [Alteration of Contract] provides that contract amendments require the express consent of both parties and immediate confirmation in writing.

NGFA Grain Trade Rule 28 [Failure to Perform] provides that a party is obligated to give immediate notice when it determines that it will not complete a contract within the contract specifications. Under Rule 28, the non-defaulting party then has three options: 1) agree to an extension; 2) buy-in for the defaulted portion of the contract; or 3) cancel the defaulted portion at fair market value. If the defaulting party fails to provide notice of his inability to complete the contract, his liability continues under Rule 28 until the non-defaulting party can by exercising due diligence determine the default on its own. A defaulting party is not entitled to claim compensation under this rule for subsequent shifts in market prices for grain not delivered as the result of that party’s default.

▶ The arbitrators determined that neither party followed the requirements of NGFA Grain Trade Rule 4 or NGFA Grain Trade Rule 28 in their handling of the contract at issue. In this regard, the arbitrators cited various examples:

- Turner Grain failed to properly invoke Grain Trade Rule 28 when FGDI provided notice by email on April 14, 2011, of the total bushels delivered on the contract.
- Based upon the evidence submitted in this case, there was no further communication between the parties until FGDI’s email to Turner Grain, dated May 2, which concerned picking up four additional truckloads. Turner Grain did not respond until May 18, stating that the additional loads were available for FGDI to pick up but only at the current market value. The parties failed to meet the requirements of Rule 28 or Rule 4 through this course of dealings.
- Nor were the requirements of either Rule 28 or Rule 4 met when FGDI communicated with Turner Grain by email on May 19 about the offer to add 18 cents per bushel for the remaining bushels to the price in the original contract. The arbitrators

referred to documentation signed by FGDI on May 31— that represented a new contract (or a contract amendment) – for the balance of the original contract with an additional 18 cents-per bushel for delivery June 1-July 1. The arbitrators concluded that this further indicated that FGDI had failed to fully perform upon the original contract under NGFA Grain Trade Rule 28.

- FGDI’s email to Turner Grain, dated May 20, (which calculated FGDI’s potential claim for damages) similarly failed to satisfy the requirements of Rule 28 as it left open the option for Turner Grain to deliver additional grain under the original contract terms.
- The arbitrators further observed how in its own arguments FGDI implicitly agreed that it did not fully perform on the contract. Turner Grain in its prior argument referred to NGFA Grain Trade Rule 28(B)(3) [Buyer’s Non-Performance], which provides:

*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: ...
(3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.*

In response to the statement by Turner Grain that it had elected to rely upon Rule 28(b)(3), FGDI in its rebuttal argument, stated “*We agree.*” In doing so, the arbitrators concluded that FGDI implicitly agreed that it, as the buyer, had defaulted on the contract. Therefore, FGDI, as the defaulting party, was not entitled to damages under Rule 28.

▶ The arbitrators considered Turner Grain’s contention that FGDI was aware of – but withheld information from Turner Grain – concerning the exact amount of bushels that had been shipped under the contract until April 14, which was after the contract had expired. The arbitrators noted, however, that documentation provided by Turner Grain as evidence in its arguments (Turner Grain’s *Load Summary – Corn*) indicated that Turner Grain already had the load out numbers. Therefore, the arbitrators concluded that Turner Grain should have known it had shipped out 16 or 17 loads, thus falling short of the contract amount. Turner Grain’s prior knowledge of this shortfall was further indicated in its argument when it stated, “*Turner Grain offers again to deliver based on FDGI’s limited information*” during a telephone conference on March 23 or 24.

The Award

The arbitrators determined that Turner Grain was due \$4,280.80 from FGDI for the unpaid load. The arbitrators did not award interest because the contract was silent on payment terms. The arbitrators declined to award any damages to Turner Grain for the claimed losses arising out of the rice contract because Turner Grain failed to provide proper notice of this claim to FGDI pursuant to NGFA Grain Trade Rule 28(b)(2) or (3) with supporting documentation. The arbitrators further concluded that such damages would be considered incidental losses that are not warranted under the NGFA Trade Rules.

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

Jim Lee, *Chair*

Merchandiser
Beachner Grain Inc.
Parsons, Kans.

Ladd Lafferty

Vice President
Wheeler Brothers Grain Co.
Watonga, Okla.

David Pope

Senior Merchandiser
CHS
Inver Grove Heights, Minn.

Arbitration Appeals Case Number 2572

Plaintiff/Appellant: **FGDI, A Division of AGREX Inc., Buford, Ga.**

Defendant/Appellee: **Turner Grain Merchandising Inc., Brinkley, Ark.**

Statement of the Case

This case was originally decided in favor of Turner Grain Merchandising Inc. (“Turner”). Subsequent to that decision, the plaintiff, FGDI, filed an appeal.

The Arbitration Appeals Committee, individually and collectively, reviewed all the arguments and supporting exhibits of Arbitration Case 2572, along with the findings and conclusions

of the original Arbitration Committee. The Appeals Committee also reviewed the briefs filed in the appeal.

The statement of the case as presented by the original Arbitration Committee detailed the essential facts of the case. The essence of the case, and the appeal, is whether a defaulting party is entitled to compensation if fair market value and contract price would otherwise warrant.

The Decision

FGDI, as the buyer, defaulted on a portion of a truck contract by not picking up the total contracted bushels within the contracted “time of shipment.” FGDI argued that since the fair market value of the defaulted portion was higher than the contract price, normal trade practice would be for the seller to allow such market difference as an offset on the “cancellation” of the defaulted portion.

An arbitrator’s duty is to, first, interpret the contract agree-

ment; second, apply the NGFA Trade Rules incorporated in the contract and, where contract language and trade rules are silent, the duty is to apply trade custom.

The applicable contract is silent on the issue of contract shortages (defaulted portion). Therefore, NGFA Grain Trade Rule 28 (D) applied as follows: “This rule does not permit compensation to the defaulting party to a contract.”

The Award

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
Senior Vice President, Grain, Grain Marketing
South Dakota Wheat Growers Association
Aberdeen, S.D.

Sharon Clark
Vice President, Transportation
Perdue AgriBusiness Inc.
Salisbury, Md.

Dean O’Harris
Commodity Manager
Parrish & Heimbecker Inc.
Oxford, Mich.

Steve Campbell
Vice President
Louis Dreyfus Commodities
Kansas City, Mo.

Steven Nail
President & CEO
Farmers Grain Terminal Inc.
Greenville, Miss.