National Grain and Feed Association

Arbitration Decision

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April 9, 2009

Arbitration Case Number 2205

Plaintiff: **West Plains Co./West Plains Grain Inc., Kansas City, Mo.**

Defendant: **Dallas Langley d/b/a Dallas Langley Trucking, Sidney, Neb.**

Statement of the Case

This dispute involved a contract between Dallas Langley d/b/a Dallas Langley Trucking ("Langley") and West Plains Co./West Plains Grain Inc. ("West Plains") in which West Plains agreed to sell and Langley agreed to buy 165,000 bushels of yellow corn.

Prior to submitting this case for NGFA arbitration, Langley on March 27, 2007 filed a lawsuit against West Plains in the district court of Cheyenne County, Nebraska, seeking damages arising out of West Plains' alleged breach of the contract. Langley attached to the complaint a confirmation sent by his office to West Plains on or about Nov. 1, 2006 (the "confirmation"). The confirmation contained the following statement: *"The Rules and Regulations of [NGFA] Shall Apply in All Respects Regarding This Contract."*

On July 2, 2007, Langley filed a motion for partial summary judgment seeking a determination that the confirmation was a legal and binding contract. Subsequently, West Plains filed a motion for partial summary judgment seeking a determination that the confirmation required arbitration and an order staying the court proceedings and referring the matter to binding arbitration. On Dec. 21, 2007, the district court granted Langley's motion for partial summary judgment, ruling that the confirmation was a "*valid written*" contract. The district court also granted West Plains' motion for partial summary judgment, ruling that the terms of the confirmation "*require binding arbitration.*" The district court ordered the parties to "*submit to arbitration in accordance with the rules and regulations of the [NGFA].*"

This dispute arose from oral conversations that occurred between Langley and his assistant and representatives of West Plains on Nov. 1, 2006. At 8:16 a.m. MST on Nov. 1, 2006, Langley said he contacted West Plains by telephone seeking to purchase 165,000 bushels of corn. After West Plains informed Langley that it could only sell 150,000 bushels, Langley said he declined the trade. Subsequently, Langley said he spoke with West Plains a second time and was informed that it could sell the remaining 15,000 bushels from another location, thus providing 165,000 bushels of corn to Langley. At 8:39 a.m. MST, Langley said he again called West Plains and was told that West Plains could sell 165,000 bushels of corn at an agreed basis of 1 cent per bushel under the CBOT March 2007 corn futures price. Langley agreed to the proposed terms.

Shortly before 11:20 a.m. MST on the same day, Langley said he called another company regarding its desire to purchase 165,000 bushels of corn. While on the phone with the other company, Langley said he directed his secretary to contact West Plains. West Plains informed Langley's secretary that the current price for March 2007 futures was $3.42 per bushel. Langley's secretary said she told West Plains to "*price it.*" West Plains said it asked her to clarify what she meant by "*price it.*" She allegedly responded, "*the corn, price it at $3.41.*" Because Langley simultaneously was selling the corn to the other company (at a flat price of $3.41, plus the delivery charge of 38 cents per bushel, for a total price of $3.79 per bushel), he said he instructed his secretary to tell West Plains that he did not want to "*get caught in the middle of this deal, so it's a done deal, right?*" According to Langley, West Plains responded, "*it's a done deal.*"

The arbitrators determined that the meaning of "*price it*" and "*it's a done deal*" were central to this dispute. Both parties agreed that they intended to enter into a contract. However, Langley argued that West Plains locked in the flat price of $3.41 per bushel ($3.42 futures, minus 1-cent basis) and assumed the risk of futures price movement. West Plains asserted that it took Langley's order to price the basis contract, and in a timely manner, placed that order with its futures desk in Kansas City to purchase 33 contracts (5,000 bushels each) at the stated price of $3.42 per bushel on the CBOT March 2007 corn futures. Consistent with this understanding of the agreement, West Plains placed the order at 12:24 p.m. CST, or four minutes after the call from Langley's secretary. Both parties claimed that their version of the Nov. 1, 2006 transaction was consistent with prior business transactions between them, and that the other party should have known what the terms meant.

At 12:10 p.m. MST (nine minutes before the close of the trading session) on Nov. 1, 2006, West Plains said it contacted Langley to inform him that none of the futures orders had been filled. West Plains said it asked Langley if he wanted to change the pricing order, and stated that March 2007 futures were trading at $3.46 to $3.47 per bushel. Langley responded with strong words and displeasure that the contract had been priced at $3.42, minus the agreed basis of 1 cent, and that it was a done deal. Langley refused to change the pricing order and demanded that West Plains honor its agreement. At 1:46 p.m. MST (after the close of the trading session), West Plains said it called Langley to inform him that 10 contracts (50,000 bushels) had been filled at $3.42 per bushel.[1]

The parties claimed to have sent numerous communications to each other between Nov. 1 and Nov. 9, 2006. Each claimed that it sent written confirmations to the other on Nov. 1, 2006 consistent with NGFA Grain Trade Rule 3(A). Neither party admitted receiving the other's confirmation. West Plains claimed to have mailed its confirmations (numbers 201919, 201920 and 201921). Langley claimed that he faxed his confirmation (number 6256).

Similarly, both parties agreed that they engaged in regular phone conversations between Nov. 2 and Nov. 8, 2006. However, they disputed the details of the conversations. Langley claimed that West Plains made assurances that it would honor its agreement and "*make it right*" or otherwise "*make Langley whole.*" West Plains contended that it explained to Langley on numerous occasions why the futures orders on the contracts were not filled. West Plains denied that it made any representations to Langley that it would "*make it right*" or "*make [him] whole.*"

On Nov. 9, 2006, each party had clearly, and in writing, informed the other party of a dispute in contract terms. Between Nov. 10, 2006 and Jan. 16, 2007, Langley and West Plains' representatives had regular phone contact; however, there was no evidence provided that either party took action to mitigate damages. According to Langley, West Plains continued to make assurances it would "*make it right.*" West Plains, on the other hand, stated that it made numerous attempts to explain why the futures orders on the basis contract were not filled and why the remaining bushels of corn were not priced. West Plains argued that there was no apparent reason for Langley to wait almost three months, and that he could have mitigated his damages by pricing the corn remaining on his contract immediately after Nov. 1, 2006.

On Jan. 18, 2007, Langley canceled the 110,000 bushels outstanding on his contract with the other company. As a result of the partial cancellation, on Jan. 19, 2007, Langley paid the other company $78,000 (the difference between the contract price and the then-current market price per bushel).

The Decision

The arbitrators concluded that both parties intended to enter into a contract for the sale and purchase of 165,000 bushels of corn on Nov. 1, 2006. Both parties claimed to have sent timely written confirmations to the other on Nov. 1, 2006. The arbitrators, however, noted that each party disputed receiving the other's written confirmation until Nov. 9, 2006. As a result, the arbitrators could not simply adopt either party's argument that its written confirmation should have been considered the binding confirmation under the NGFA Grain Trade Rules.

Similarly, the arbitrators identified many inconsistencies in the affidavits and evidence presented by the parties. The parties disputed each other's recollection of events and conversations on multiple occasions. Given the conflicting accounts provided by Langley and West Plains and the lack of supporting evidence for certain of their positions, the arbitrators questioned the credibility of the evidence presented by both parties.

The arbitrators believed that a key point in resolving the dispute between Langley and West Plains was a determination of what constituted "*normal trade practice*" between the parties. Each party claimed that it intended to establish the price on Nov. 1, 2006 in the same manner as had been done on prior contracts between the parties. Langley asserted that the flat price was locked-in on the phone. West Plains contended that it took the pricing order, submitted the futures order to the broker and locked in the price only when the futures fill was confirmed.

The arbitrators concluded that West Plains acted with diligence in placing the pricing order with its futures broker for 33 contracts of CBOT March 2007 corn futures at $3.42 per bushel, as supported by the Shay Grain Clearing Co.'s futures order report. The fact that ultimately only 11 contracts were filled at $3.42 per bushel was not evidence of any failed duty or breach on West Plains' part, the arbitrators determined.

[1] Ultimately, West Plains provided Langley with 55,000 bushels of corn at the March 2007 futures price of $3.42 per bushel.

Both parties were aware that there was a dispute in contract terms by 12:10 p.m. MST on Nov. 1, 2006, when West Plains called Langley to inform him that none of the futures orders had been filled. NGFA Grain Trade Rule 28 governs a party's failure to perform. Langley alleged that West Plains failed to honor its contract, resulting in the damages. NGFA Grain Trade Rule 28(A), Seller's Non-Performance, provides in pertinent part:

> "If the Seller fails to notify the Buyer of his inability to complete his contract…, the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted. In such case it shall then be the duty of the Buyer, after giving notice to the Seller to complete the contract at once to: (1) agree with the Seller upon an extension, or (2) buy-in for the account of the Seller, 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."

The first verifiable exchange of written documents disputing the terms of the others' confirmation occurred on Nov. 9, 2006. By this time, Langley knew, or should have known, that West Plains, as the seller, did not agree with Langley that the contract was priced at $3.41 per bushel. As a result, Langley should have taken steps to mitigate his damages by timely electing one of the remedies specified in Grain Trade Rule 28. Had Langley done so, his damages would have been far less.

The arbitrators concluded that by Nov. 10, 2006, a reasonable amount of time had passed for Langley to determine that West Plains was not going to supply corn at $3.41 per bushel according to Langley's version of the agreement. If Langley had mitigated his damages on Nov. 10, 2006, the day after the parties exchanged notices of disputes with the other's confirmation, Langley's damages would have totaled $18,700 (the difference between the Nov. 1, 2006 target price of $3.42 per bushel and the Nov. 10, 2006 CBOT closing price for March 2007 corn futures of $3.59 per bushel, times 110,000 bushels). The arbitrators concluded that there was not reasonable justification for Langley to delay beyond Nov. 10, 2006 in mitigating his damages.

The Award

Therefore, the arbitrators ruled in partial favor of Langley and awarded him $18,700, which represented the difference between the futures order price on Nov. 1, 2006 of $3.42 per bushel and the closing price on Nov. 10, 2007of $3.59 per bushel (17 cents per bushel for 110,000 bushels).

The arbitrators did not award the full amount requested by Langley because he could have mitigated his damages had he bought-in for the account of the Seller, for example, immediately upon receiving documentation of the dispute. As the damaged party, Langley had a duty to mitigate his losses as soon as it was apparent that West Plains did not agree with Langley's version of the contract.

The arbitrators also declined to award costs, interest or arbitration fees to either party.

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

John R. Cranor, *Chair*
Logistics Operations Manager
Northwest Grain Growers Inc.
Walla Walla, Wash.

Derrick Bruhn
Grain Merchandising Manager
Topflight Grain Cooperative
Monticello, Ill.

Beverly D. Garner
Senior Corporate Counsel
Bunge North America Inc.
St. Louis, Mo.