National Grain and Feed Association
Arbitration Decision
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August 27, 2009

CASE NUMBER 2225

Plaintiff: **Bunge North America Inc., St. Louis, Mo.**

Defendant: **Douglas L. Calloway, Holly Grove, Ark.**

STATEMENT OF THE CASE

On June 6, 2006, Douglas L. Calloway ("Calloway") agreed to sell 20,000 bushels of U.S. Number 2 soft red winter wheat to Bunge North America Inc. ("Bunge") on a hedge-to-arrive contract for delivery to Bunge's elevator in Clarendon, Ark., between June 1 and July 31, 2007. Bunge confirmed the purchase by mailing confirmation number 85569 to Calloway, which Calloway then signed and returned to Bunge.

According to Bunge, the following sequence of events occurred: On June 8, 2007, a Bunge employee contacted Calloway to inquire when Calloway would begin delivery on the contract, and Calloway replied that he did not have a contract with Bunge. Bunge claimed that its employee then reminded Calloway about the contract, stated that it was a valid and enforceable contract and that Bunge expected Calloway to fulfill his contractual obligations. On June 27, Bunge established the price of the wheat contract, and mailed a Confirmation of Change (Pricing) to Calloway by certified mail (the certified mail receipt was signed by Calloway on July 6). On June 28, Bunge's employee telephoned Calloway and left several messages advising that Bunge had established the price on the wheat contract and mailed the Confirmation of Change to him. Bunge maintained that Calloway never returned any of the telephone calls.

Bunge said that because Calloway had not delivered any wheat by the end of the delivery period on July 31, 2007, it cancelled the contract at the close of the market on Aug. 1 and issued to Calloway a Confirmation of Change in Contract (Cancellation) with an invoice for the market difference and cancellation fees via certified mail, which Calloway signed for on Aug. 11. In October and November 2007, Bunge and Calloway discussed the default on the contract; including the possibility that Calloway would deliver soybeans to Bunge to compensate for damages under the wheat contract. However, according to Bunge, Calloway failed to deliver any soybeans or otherwise pay on the amounts due. Bunge claimed damages in the amount of $38,000 for the market difference and cancellation fees, plus interest and costs (including the arbitration fee).

In his argument submitted in this case, Calloway concurred that Bunge's employee contacted him in June 2007 about fulfilling the wheat contract. Calloway also concurred that his initial response was that, although he normally did considerable business with Bunge, he did not recall contracting any wheat with Bunge that year. Instead, Calloway stated that he had entered into contracts with a different buyer which he now anticipated having trouble fulfilling because of weather-related crop damages. Calloway recognized in his argument that Bunge's employee then presented to him a copy of a hedge-to-arrive contract that was "signed" and "legitimate."

In his argument, Calloway stated that he "had simply forgotten about the signing of the contract, and there was no way [he] could fulfill it." Calloway argued that Bunge's claim for $38,000 was excessive. Specifically, in his argument, Calloway stated: "I made a mistake and admit it, but I feel the amount of settlement is very excessive."

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THE DECISION

Upon close review of the facts and arguments submitted by each party, the arbitrators reached the following conclusions:

- A valid agreement for delivery of U.S. number 2 soft red winter wheat existed between Bunge and Calloway, with a written contract signed by both parties.

- Calloway breached the contract when he failed to deliver against the contract as agreed.

- Bunge used due diligence when it determined that the contract was in default by cancelling the defaulted portion of the contract at a fair market value based upon the close of the market the next business day.

- Bunge met its obligations under NGFA Grain Trade Rule 3, which requires parties to a contract to issue a written confirmation. The arbitrators noted that Bunge did this in a timely manner, and Calloway signed and returned the written confirmation of the oral contract. Bunge then properly executed under NGFA Grain Trade Rule 28(A), which sets forth remedies when a seller is unable to complete a contract, including cancelling the defaulted portion of the contract at a fair market value, based upon the close of the market the next business day.

- Calloway agreed to the validity of the contract, challenging only the extent of Bunge's claimed damages in very general terms as "excessive." However, Calloway submitted no explanation or basis – nor were the arbitrators themselves able to ascertain a basis – upon which to conclude that the damages were excessive, inappropriate or miscalculated.

THE AWARD

In computing the award, the arbitrators relied upon the following assessments on the 20,000-bushel contract:

Contract Price as Established on June 27, 2007:		$3.72 per bushel
Market Valuation on July 31, 2007:	–	$5.57 per bushel
Cancellation Fee:	–	$0.05 per bushel
Market Difference:		$1.90 per bushel
Market Difference:		$1.90 per bushel
Total Bushels:	x	20,000
Total Damages:		$38,000.00
Recovery of Arbitration Fee:		$780.00

The arbitrators therefore awarded to Bunge $38,780, plus interest to accrue from the date of this decision at the rate of 6 percent per annum.

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

Vickie L. Kennedy, *Chair*
President and General Manager
Lewis Commodities Inc.
(Subsidiary of Southern Plains Co-op)
Lewis, Kan.

Timothy A. Frump
Merchandising Manager
Consolidated Grain and Barge Co.
Naples, Ill.

Gary D. Holcomb
Grain Department Manager
Sunray Cooperative
Sunray, Texas