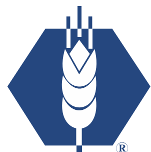

National Grain and Feed Association
Arbitration Decision
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January 26, 2016

CASE NUMBER 2697

PLAINTIFF: **SOUTH DAKOTA WHEAT GROWERS ASSOCIATION**
ABERDEEN, SD

DEFENDANT: **MICHAEL FJETLAND**
HARMONY, MN

STATEMENT OF THE CASE

In June 2012, South Dakota Wheat Growers Association (SDWG) offered a "Grain Target Price Agreement" (commonly known in the grain trade as an "offer contract") to Michael Fjetland (Fjetland). The contract provided for the purchase and delivery of 50,000 bushels of corn during the fall of 2012 to SDWG's Highmore facility at the price of $5.00 per bushel. Both Fjetland and SDWG signed this contract. After the price objective referenced in the contract was subsequently reached due to market conditions, SDWG issued a Grain Purchase Contract Confirmation to Fjetland on June 25, 2012. Fjetland claims that he called SDWG to cancel the Target Price Agreement prior to it being filled. Both the Target Price Agreement and the Grain Purchase Contract Confirmation included language that referenced the NGFA Trade Rules.

On June 26 (the day following SDWG's execution of the Target Price Agreement), SDWG issued two additional Grain Purchase Contract Confirmations with Fjetland. These contract confirmations called for delivery of another 25,000 bushels of corn at a cash price of $5.36 per bushel and 1,800 bushels of soybeans at a cash price of $13.44 per bushel. Both of the additional contract confirmations again provided for delivery to SDWG's facility in Highmore, SD, in the fall of 2012.

The dispute between the parties arose during the summer of 2012, when SDWG states it made numerous attempts to contact Fjetland regarding the three Grain Purchase Contract Confirmations. SDWG claims damages of $150,126 arising from buy-in of the two corn and one soybean contracts with Fjetland. Fjetland maintains that he had contacted SDWG by telephone and cancelled the original Target Price Agreement prior to it being filled. Fjetland further denies that he agreed to the two later contracts for additional deliveries of grain in the fall of 2012. Therefore, according to Fjetland, he would owe SDWG nothing in damages.

The arbitrators determined that the central issue in this dispute was whether the contracts were actually entered into between the two parties.

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THE DECISION

SDWG in this case provided substantial records and documentation related to the transactions and communications between the parties. This included record logs of the SDWG merchandisers' grain transaction activities, listing quantities and associated prices, which was consistent with the custom of the trade. The logs included records of telephone calls and accounts of those calls that are taken contemporaneously at the time the calls occur. SDWG's telephone logs indicated that Fjetland contacted SDWG at 9:52 a.m. on June 12, 2012, and offered under the original Grain Target Price Agreement to sell 50,000 bushels of corn at $5.00 per bushel if that price level was ever reached. The arbitrators noted that this contract was signed by SDWG on June 12, and sent to Fjetland who signed it on June 14, which was consistent with SDWG's telephone log record. SDWG then filled the contract and sent to Fjetland the Grain Purchase Contract Confirmation on June 25. SDWG's telephone log documents the later sales by Fjetland of 25,000 bushels of corn and 1,800 bushels of soybeans as resulting from a telephone call with Fjetland on June 26.

Fjetland contends that he called SDWG on June 20, to inquire if the Target Price Agreement had been filled. Finding that the contract had not yet been filled, Fjetland maintains that he cancelled the Target Price Agreement. In his submission, Fjetland provided a cell phone bill that covers the period June 20 2012 thru July 19, 2012 which was retrieved from his wireless carrier on October 31, 2012. The printed bill has an added handwritten notation *"June 20 @ 2:27 p.m. I called & cancelled the 50K @ 5.00"*. The bill also has an added handwritten notation indicating that on June 26 *"I called & checked on Prices"*.

The arbitrators noted that a grain merchandiser would not record every call received merely when grain sellers "are checking prices". For SDWG's merchandisers to have contemporaneously documented the transactions to include recording of bushel quantities, delivery periods, commodity prices and other terms corroborated that there was an underlying agreement discussed and reached between SDWG and Fjetland rather than a mere "checking prices" as Fjetland maintains. Fjetland failed to provide any evidence other than his handwritten notations on a cell phone bill that was generated well after the calls themselves occurred. Plainly, the arbitrators cannot ascertain the exact conversations between the parties. The arbitrators can only balance the weight of the evidence. And, most importantly, in this case the arbitrators decided the dispute based upon the primary evidence that was presented in this case – the contracts themselves that were exchanged between the parties.

Fjetland argues that SDWG has a practice of writing up and issuing contracts for grain so that it can pursue litigation if the other party to the contract fails to dispute the contract within the designated time. The arbitrators noted that because no one, including SDWG, is able to foresee the direction of market movements into the future, SDWG potentially would create as many losing as winning results if it were to act as Fjetland purports. This argument by Fjetland is consequently without merit.

The arbitrators further noted that the Grain Purchase Contract Confirmation issued for each of the three contracts included the terms: *"This contract is governed by the trade rules and arbitration procedures of the National Grain and Feed Association."* Therefore, if Fjetland did in fact seek to cancel the original Target Price Agreement, NGFA Grain Trade Rule 4 would apply. Rule 4 specifically states that a contract cannot be altered or amended without the express consent of both parties, and any alteration must be immediately confirmed in writing. Also, if Fjetland did in fact seek to dispute the three contract

confirmations issued by SDWG, NGFA Grain Trade Rule 3 would apply. Rule 3(A) specifically states that the parties shall issue written confirmations and *"carefully check all specifications therein and, upon finding any differences, shall immediately notify the other party to the contract by rapid written notification, or by telephone confirmed by subsequent written communication."*

Given that Fjetland did not provide any evidence that he issued his own confirmations or objections or changes in writing to SDWG's contract confirmations, the arbitrators further relied upon NGFA Grain Trade Rule 3(B), which requires that "*…the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party…of any disagreement with the confirmation received."*

Fjetland argues that he *"voiced his objections to Wheat Growers via telephone"*, but common trade practice as reflected in the NGFA Grain Trade Rules is very specific that communications related to written agreements must themselves be confirmed in writing.

Fjetland also claims that he was absent from his home due to other employment during the summer of 2012 and, therefore, did not have access to mail that was sent to his home. However, SDWG provided documentation that it sent a certified letter to Fjetland, which he signed for on August 24, 2012, which contained copies of the three Grain Purchase Contract Confirmations.

The arbitrators further noted that SDWG and Fjetland met in the field on October 17, 2012, concerning the three contracts in this dispute. SDWG then telephoned Fjetland again on October 19 (a Friday) informing him that the contracts would be cancelled at the close of business on October 22 pursuant to NGFA Grain Trade Rule 28 (A)(3) (which provides that the buyer has a duty upon non-performance by the seller to "*cancel the defaulted portion of the contract at the fair market value based on the close of the market the next business day."*)

For all of these reasons, the arbitrators decided that SDWG was owed damages. SDWG did not provide to the arbitrators in this case the methodology used to establish the damages it claimed based upon calculation of market price differences nor were the arbitrators able to ascertain whether contract cancellation penalties were included in SDWG's claimed damages. SDWG's damages claims were further muddied by multiple references in the arguments that the contracts were cancelled by SDWG on October 24 (rather than October 22). The arbitrators were troubled by the inattention to detail as to which date's closing price was actually used to establish the market differences. Based upon the materials provided in this case, the arbitrators ascertained the underlying CBOT futures prices used for contract 200-PC02662 (the contract for 25,000 bushels of corn) was $6.09 per bushel and for contract 200-PC02663 (the contract for 1,800 bushels of soybeans) was $14.32 per bushel. No CBOT futures price was documented for contract 200-PC02651 (the contract for 50,000 bushels of corn). However, because this contract was written the day prior to the contract for the 25,000 bushels of corn, the arbitrators concluded that the basis SDWG would very likely have used would be similar. The arbitrators consequently relied upon that basis to deduce that the underlying CBOT futures price would be 5.73 per bushel for the 50,000 bushel contract. The arbitrators used the official CBOT closing price of October 22 to ascertain the contract price differences.

The contracts, delivery periods and prices relied upon by the arbitrators are detailed below:

Contract Number	Commodity	Delivery Period	Contracted Bushels	CBOT Contract Price	Cancellation Price	Dollar Amount
200-PC02651	Corn	Fall 2012	50,000.00	$5.7300	$7.6125	$94,125.00
200-PC02662	Corn	Fall 2012	25,000.00	$6.0900	$7.6125	$38,062.50
200-PC02663	Soybeans	Fall 2012	1,800.00	$14.3200	$15.4650	$2,061.00
						$134,248.50

THE AWARD

Based upon the information provided, the arbitrators awarded judgment to South Dakota Wheat Growers Association against Michael Fjetland for damages of $134,248.50.

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 judgment is paid in full.

Decided: August 6, 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