



National Grain and Feed Association Arbitration Decision

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December 14, 2016

CASE NUMBER 2720

PLAINTIFF: FAMO FEEDS, INC.
FREEPORT, MN

DEFENDANT: HOFF DAIRY
RICHARDTON, ND

STATEMENT OF THE CASE

The parties in this case, Hoff Dairy (Hoff) and FAMO Feeds, Inc. (FAMO), entered into 15 contracts between July 10, 2012 and March 15, 2013, for the purchase of feed for Hoff's dairy cows.

FAMO claims that it delivered feed under the contracts for which Hoff failed to make full payment. According to FAMO, Hoff made payments under the contracts during the fall of 2012 and early 2013, but then Hoff stopped making payments after March 2013, for the later feed deliveries.

Hoff does not dispute that it stopped making the payments for feed delivered by FAMO. Hoff argues it was entitled to relief from these payments given the circumstances presented in this case. Further, Hoff asserts in a counterclaim that it suffered damages in the form of lost milk production, diminished milk quality and deterioration in the health of its cattle that resulted from alleged negligent administration of the feed to Hoff's cattle for which Hoff argues FAMO was responsible.

The parties raise several arguments based upon provisions in the contracts and various legal theories. The parties also contest the timeliness of their respective claims.

FAMO claims damages of \$79,416.53 for the unpaid feed shipments and finance fees through February 2014, as well as ongoing finance charges, reimbursement of the arbitration filing fee of \$1,194.17, and reasonable attorney's fees. Hoff seeks damages of \$104,313 in its counterclaim.

THE DECISION

The arbitrators noted that the parties do not dispute that this case is subject to NGFA Arbitration.

Further, neither party disputes that it entered into the contracts that are the subject of this case. Because there is also no dispute that Hoff ceased making payments under the contracts, the arbitrators chose to

resolve the claims in a step-wise fashion as follows: (1) Timeliness of Claims; (2) FAMO's Claim; (3) Negligence Claim (Basis for Hoff's Counter-claim); and (4) Hoff's Counter-claim.

1. Timeliness:

The parties dispute the timeliness of their respective claims.

Hoff argues that FAMO's arbitration complaint is untimely because FAMO failed to file it within the 12-month deadline provided under the NGFA Arbitration Rules. More specifically, according to Hoff, FAMO's complaint is untimely because performance under all but one of the contracts was to have occurred over a year before FAMO filed its complaint. FAMO responds that its complaint is timely because FAMO filed it within a year of when Hoff had been making continuous payments on its open account with FAMO.

FAMO also argues that the negligence claim in Hoff's counterclaim was untimely based upon the provision in the contracts which states: "ANY ACTION ON BEHALF OF THE BUYER FOR BREACH OF THIS CONTRACT MUST BE COMMENCED WITHIN ONE YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED." According to FAMO, the one-year deadline in the contract relates back to when Hoff first noticed the decline in milk production, which was more than a year before Hoff filed its counterclaim.

The arbitrators determined that the claims by both parties were timely. The arbitrators concluded the open account represented running and current dealings between the parties and that the continuous partial payments on the open account tolled the limitations period for the entire debt such that FAMO's initial complaint was timely filed. The arbitrators agreed with the interpretations and legal support presented by FAMO on that question.

The arbitrators also determined that Hoff's counterclaim was timely. Simply because Hoff may have started to notice some problems at a particular point did not support that Hoff knew (or should have known) it had a claim against FAMO at that time. The arbitrators also noted Hoff's counterclaim was asserted following FAMO's filing a complaint and after FAMO submitted its first argument in the case in accordance with NGFA Arbitration Rule 4. Further, the arbitrators noted that the one-year deadline in the parties' contracts, which FAMO was relying upon in its argument, refers to causes for "breach of contract," whereas Hoff's counterclaim was for negligence.

2. FAMO's Claim:

The arbitrators concluded that FAMO's claim for the unpaid feed shipments was valid. Hoff was responsible to pay for feed delivered under contract. Although Hoff claimed that it notified FAMO that Hoff could not pay for the feed, it did not stop ordering the feed. Nor did Hoff reject or return any of the feed. The arbitrators noted that Hoff did not switch to another feed supplier. Instead, Hoff continued to order and take feed from FAMO. Further, Hoff continued to make partial payments for the feed which was delivered. The arbitrators consequently determined that the facts and arguments presented by the parties supported FAMO's claims for payment for the feed delivered under the contracts.

3. Negligence Claim (the Basis for Hoff's Counter-Claim):

After much discussion, the arbitrators agreed that Hoff's counter-claim was based solely upon a finding of negligence on the part of FAMO. Further, the arbitrators agreed that if, in fact, there was no negligence attributable to FAMO then Hoff had no basis for a counter-claim. Therefore, this step of the arbitrators' decision-making process received a great deal of attention.

Hoff states that FAMO was its sole supplier of feed products from approximately December 2008 until March 2013. Hoff claims that FAMO also supplied livestock nutrition services, which allegedly included the development and supply of feed rations that were then administered to Hoff's cattle pursuant to FAMO's instructions.

Hoff states during this time it transitioned to an automated milking system from a "common parlor milking model" to decrease reliance on manual labor and improve cattle health and increase overall efficiency and milk production. Hoff claims in July 2012 it noticed deteriorating health and diminished milk production in its herd. Hoff also claims it informed FAMO in August 2012 of the problems it was experiencing and that it was unable to pay for further deliveries of feed. Hoff argues that it identified alleged nutritional deficiencies from the feed provided by FAMO after contacting a different nutritionist. Hoff further claims that after making subsequent adjustments provided by the new nutritionist, the palatability of the feed improved as did milk production and the health of the cattle.

FAMO disputes the credibility of Hoff's claims of diminished milk production, milk quality and cattle health. FAMO refers to statements by Hoff reported in the local farmer press, which indicated that Hoff's transition to the automated milking system had been successful and was resulting in the gains and benefits sought by Hoff. FAMO also argues that to the extent Hoff suffered the claimed losses, a large number of alternative factors could have been responsible including those involving herd management, composition and efficiency.

Key to the negligence claims in the case was the dispute between the parties concerning the validity and application of warrantee disclaimers and limited liability provisions in the contracts. Specifically, the contracts between the parties included the following provisions:

BUYER ACKNOWLEDGES THAT BUYER HAS CONDUCTED DUE DILIGENCE PRIOR TO PURCHASING GOODS UNDER THE AGREEMENT AND IS NOT RELYING ON ANY REPRESENTATIONS, ORAL OR WRITTEN, OF FAMO FEEDS, INC. IF GOODS DO NOT PERFORM OR CONFORM TO BUYER AND BUYER AT FAMO FEEDS, INC.'S AGREEMENT, BUYER AGREES TO WAIVE ALL CLAIMS AGAINST FAMO FEEDS, INC. UNLESS BUYER NOTIFIES FAMO FEEDS, INC. IN WRITING WITHIN FOURTEEN (14) DAYS AFTER RECEIVING THE GOODS.

FAMO FEEDS, INC. MAKES NO WARRANTIES INCLUDING ANY WARRANTIES AS TO MERCHANTABILITY OR FITNESS FOR USE, EITHER EXPRESS OR IMPLIED WITH RESPECT TO ANY OF THE PRODUCTS SOLD HEREUNDER UNLESS SPECIFICALLY SET FORTH HERE ON. BUYER SHALL BE LIMITED TO THE WARRANTIES OF THE RESPECTIVE MANUFACTURERS OF THE PRODUCTS SOLD.

IT IS UNDERSTOOD AND AGREED THAT FAMO FEEDS, INC.'S LIABILITY, WHETHER IN CONTRACT, TORT, UNDER ANY WARRANTY AND NEGLIGENCE OR OTHERWISE SHALL

NOT EXCEED THE RETURN OF THE AMOUNT OF THE PURCHASE PRICE PAID BY BUYER AND UNDER NO CIRCUMSTANCES SHALL FAMO FEEDS, INC. BE LIABLE FOR SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES. THE PRICE STATED FOR THE GOODS PURCHASED IS A CONSIDERATION IN LIMITING FAMO FEEDS, INC.'S LIABILITY.

... YOU ASSUME ALL RISK AND LIABILITY FOR RESULTS OF YOUR USE OF THE COMMODITY SOLD HEREUNDER, WHETHER YOU USE SINGLY OR IN COMBINATION WITH OTHER PRODUCTS, AND YOU AGREE TO INDEMNIFY AND HOLD FAMO FEEDS, INC. HARMLESS FOR ANY COST FAMO FEEDS INC. INCURS, INCLUDING WITHOUT LIMITATION, REASONABLE ATTORNEY'S FEES, AS A RESULT OF YOUR USE OR SALE OF THE PRODUCT.

ANY TECHNICAL ADVICE OR ASSISTANCE FURNISHED TO BUYER BY FAMO FEEDS, INC. WITH RESPECT TO USE OF ITS MATERIALS IF GIVEN TO BUYER GRATIS AND THE BUYER ASSUMES ALL RISK AND AGREES TO HOLD FAMO FEEDS, INC. HARMLESS IN ACCEPTING SUCH ASSISTANCE AND ADVICE FROM ANY OCCURRENCE RESULTING THEREFROM.

(Emphasis in original).

The arbitrators noted that according to the *GUIDELINES FOR NGFA ARBITRATION COMMITTEE MEMBERS* (which are provided to the parties at the outset of the case and to the arbitrators after they are appointed to a case) the “*first obligation is to enforce the agreement made by the parties*”. Further, “[a]s an arbitrator, therefore, it is [the committee’s] duty to: *first, interpret the contract; second, apply the NGFA Trade Rules; and third, apply trade custom if appropriate.*”

The arbitration committee agreed – by consensus – that the “second obligation” in the guidelines (application of any specific NGFA Trade Rule) had little, if any, bearing on the arguments presented by either party. Therefore, the committee agreed that the crux of the decision regarding negligence was to be based upon: (1) the contract terms and interpretation of those terms, and (2) application of trade custom.

Regarding the contract terms, the arbitrators concluded that the contract provisions are conspicuous, clear, and a *bargained-for* component of the agreement between the parties. Hoff’s statements (presented as item numbers 6, 7, and 8 in Harvey Hoff’s second affidavit) claiming Hoff’s ignorance of the contract terms did not comport with Hoff’s overall level of sophistication or experience. The arbitrators noted that even if Hoff may not have made itself aware of the contract terms before the first delivery of feed, Hoff was responsible for reading and being aware of all the terms in conjunction with the first delivery. Further, Hoff implicitly agreed to, and fully accepted the contract terms, and was responsible for performing on the contracts from that time forward.

The arbitrators also unanimously concluded that the feed, as a product, was not faulty. That is, there were no claims that the feed quality was sub-par, *per se*. For example, there were no claims of mold, unacceptable levels of fines, or similar characteristics which would have warranted rejection of a load of feed by Hoff.

The sole point on which the arbitration committee was split in its decision concerned interpretation of the negligence claim – specifically with regard to nutritional advice and/or diet formulation. On this issue, the committee was divided: two to one in favor of FAMO.

The majority and minority findings are presented separately:

a. Majority Finding (Matt Gibson and Jim Lee):

- i. Contract: The majority of the arbitration committee concluded that the contract terms were clear: FAMO specifically made no assurances, and Hoff accepted the risk of relying on any advice or assistance furnished by FAMO. The warrantee disclaimer and liability limitation provisions preclude Hoff's negligence-related claims.

Further, Hoff's claims that the contract provisions regarding liability do not apply in the state of North Dakota should have been presented after the first delivery of feed. In the absence of any immediate dispute, Hoff is bound by all terms of the contracts.

One discussion point during the committee's deliberations revolved around the absence of the specific term "negligence" from the waiver-related provisions in the contracts. The majority found this to be inconsequential.

- ii. Application of Trade Custom: The majority agreed that if Hoff was dissatisfied with the performance of FAMO (either the product or the nutritional advice provided by FAMO), then trade custom dictated that Hoff was responsible to take action to change nutritionists, feed companies, or both.

Hoff states that it was operated by Janal and Harvey Hoff, who are sophisticated producers with considerable experience. In his affidavit, Harvey Hoff stated how (1) Hoff dairy had been under the management of Harvey and Janal for 34 years, and (2) they were employing the robotic milking parlor equipment, which was a notably sophisticated process.

Harvey and Janal Hoff began dairying in 1980 and began using FAMO (for feed and nutritional consulting) in 2008. The Hoff's consequently used at least one other feed company and nutritionist before switching to FAMO. Any argument that the Hoff's did not know how or when to make a change when they became dissatisfied with a particular feed company's products or services seems naïve. Further, to use that lack of know-how to support a claim for negligence does not jibe given the level of the Hoff's experience.

The majority consequently found Hoff's arguments in this regard to be without merit.

- iii. Performance as Indicator of Negligence: The committee deliberated extensively about what should be an appropriate indicator of negligence. If animals were harmed, this might be used as an indicator of negligence. (Obviously, there must be more findings to support a claim of negligence; but, "harm" could be a starting point.)

In the current case, there was no sufficiently evident or demonstrable indication that the animals had been harmed or impaired due to any alleged negligence by FAMO. Therefore, the majority denied any claims of negligence.

The majority concluded that a determination of negligence based solely upon Hoff's claims related to the animals' performance as presented in this case was not supportable and would be in conflict with trade custom. For example: if "Nutritionist A" formulated a diet which

resulted in “Performance X” and “Nutritionist B” formulated a diet which resulted in “Performance X + 10 %”, then it might be concluded that Nutritionist B could be *better* than Nutritionist A. A producer would have the right to choose whichever nutritionist is preferable; but, it does not mean that Nutritionist A was negligent.

Based upon the arguments and materials presented by the parties, the majority concluded that Hoff failed to sufficiently establish that it had suffered damages for which FAMO was responsible. Further, even if the contracts had not precluded Hoff’s negligence claims, the majority determined that Hoff’s claimed damages and arguments that FAMO’s actions were the cause of those damages were nonetheless deficient.

There was no negligence.

b. Minority Finding (Mike Traxinger):

With regards to the negligence counterclaim by the respondent, the minority respectfully dissents from the majority opinion.

- i. Contract: As cited in the Respondent’s Answer to Complaint and Counterclaim Against FAMO Feeds, Inc., “a disclaimer of liability must plainly and precisely provide that limitation of liability extends to negligence or other fault of the party claiming the disclaimer.” Haugen v. Ford Motor Co., 219 N.W. 2d 462, 470 (N.D. 1974). The contract terms do not specifically disclaim negligence. Therefore, the minority finds that the negligence counterclaim is not barred by the language in the contract.
- ii. Negligence: As cited in the Respondent’s Answer to Complaint and Counterclaim Against FAMO Feeds, Inc., “Negligence is the lack of ordinary care and diligence required by the circumstances.” For the minority, the key issues in determining whether or not ordinary care and diligence was provided by FAMO was the length of time it had to correct or remedy the feed deficiency in Hoff’s dairy cattle and that FAMO was providing Hoff with a service in providing the feed and nutrition services for Hoff’s dairy cattle.

FAMO had ample time, over the course of several months, to address the feed deficiency in Hoff’s dairy cattle. FAMO was negligent because it was aware of the feed deficiency and did not practice ordinary care and diligence, over the course of several months.

Respondent’s counterclaim is not barred by the economic loss doctrine, as FAMO was providing Hoff with feed and nutrition services and the negligence is related to the services, not the actual goods (the feed).

Therefore, the minority believes that FAMO was in fact negligent and Hoff should be eligible to recover damages for lost profits under the terms of the contract, which is limited to the amount of the purchase price paid by Hoff for the goods (feed) purchased.

4. Hoff's Counter-claim:

The arbitrators agreed that since they did not find negligence on the part of FAMO, Hoff had no basis for a counter-claim. Therefore, the arbitrators agreed (by consensus) that Hoff's counter-claim was to be dismissed.

5. Other Issues:

The parties disputed various other alleged facts and circumstances in the case, including when and how it was that communications were made regarding the potential problems with the contracts. The arbitrators considered various additional arguments presented by the parties such as those related to mitigation of damages. The arbitrators determined that none of those issues had the result of changing the conclusions reached in this case.

THE AWARD

The Committee decided solely for FAMO Feeds: The amount is itemized in the following table.

Item	Amount (\$)
Unpaid Feed	67,574.94
Finance Charges (thru FEB 2014)	11,841.59
Requested On-going Finance Charges, Etc. ¹	Not Awarded
Total	79,416.53

¹ Finance Charges stopped accruing once the case was submitted to NGFA.
No other requested monies were awarded.

Decided: November 14, 2016

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

Matthew L. Gibson, Ph.D, *Chair*
VP, Sales & Tech Services
Lifeline Foods LLC
Saint Joseph, MO

Jim Lee
Grain Merchandiser
Beachner Grain Inc.
Parsons, KS

Mike Traxinger
Corporate Attorney
South Dakota Wheat
Growers Association
Aberdeen, SD