



Arbitration Decision

National Grain and Feed Association

February 26, 1998

Arbitration Case Number 1834[©]

Plaintiff: Parrish and Heimbecker Inc., Brown City, Mich.

Defendant: Mark Williams, North Branch, Mich.

Statement of the Case

This dispute involved claims by Parrish and Heimbecker Inc. (the plaintiff-buyer) against Mark Williams (the defendant-seller) over the defendant's alleged breach of contracts for failure to deliver on a wheat contract.

The plaintiff asserted that it exercised its right to cancel the contracts based upon the defendant's failure to deliver wheat. The plaintiff claimed damages for the market difference, as well as cancellation charges totaling \$3,970, interest from June 4, 1996, legal fees and expenses.

On Oct. 13, 1995, defendant Mark Williams sold 1,000 bushels of U.S. No. 2 soft red winter wheat at \$3.82 per bushel for delivery during July/August 1996 to the plaintiff Parrish and Heimbecker Inc. On Oct. 20, 1995, Mr. Williams sold 3,000 bushels of the same commodity to the plaintiff on the same delivery terms at \$3.95 per bushel. The defendant signed and returned copies of both contract confirmations¹.

Both parties acknowledged a conversation in April 1996 regarding crop problems and ways in which Mr. Williams might need to adjust the contract terms because of a possible inability to deliver the quantity and quality specified. The submitted evidence also showed that there were several more conversations during spring 1996 about the crop conditions and potential inability of the defendant to fulfill the contracts.

The plaintiff claimed that the defendant agreed on June 4, 1996 to cancel the contracts at the market price that day of \$4.81 per bushel. The plaintiff subsequently issued sales contract confirmations to the defendant to offset the purchases. Those cancellation contract confirmations detailed the market difference – 10 cents per bushel – as well as cancellation charges and payment terms. These confirmations were not signed by the defendant.

The defendant maintained he declined to cancel the contracts, and contested the plaintiff's allegation to the contrary. The defendant instead stated that "the parties began negotiations to extend the contracts or otherwise substitute product in fulfillment of the contracts." In addition, the defendant asserted that numbered paragraph 10 of the plaintiff's purchase contract terms² (an act of God clause, providing relief to either party for performance shortfalls "outside their control"), should have allowed the defendant to delay delivery into the next crop year, or to deliver wheat of another class to fill the contract. In contrast, the plaintiff contended that numbered paragraph 10 provided "temporary relief for either party from performance of a contract if an unexpected event prohibits performance. Temporary relief or delay is for a short period of time and is not for an extended period like a year or a 12-month crop year cycle."

¹ The contracts referenced the National Grain and Feed Association Trade Rules and provided that the parties agreed to resolve disputes through NGFA Arbitration.

² Numbered paragraph 10 provided as follows: "Should either party's performance of this Contract be delayed by act of God, war, civil insurrection, fire, flood, storm, strikes, lockouts, total or partial failure of transportation or delivery facilities, interruption of power, or by any law, regulation, or order of any governmental authority, or by any other cause beyond such party's control, its performance to the extent of the delay shall be excused."

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The Decision

The arbitration committee unanimously found in favor of the plaintiff, Parrish and Heimbecker Inc.

The arbitrators concluded that the purchase contracts expressly addressed the situation in this case in numbered paragraph 7, which provided as follows³:

"If Seller finds it cannot deliver the contracted quantity, Seller shall immediately advise Buyer. If Seller fails to notify Buyer of its inability to complete the contracted delivery, Seller's liability shall continue until Buyer can determine whether Seller has defaulted. Buyer, when so notified or upon such determination, shall by the close of the next market day elect either to: a) agree with Seller to extend the time for delivery; or b) after having given notice to Seller to complete the contract, buy-in for Seller's account the defaulted portion of the contract; or c) after having given notice to Seller to complete the contract, cancel the defaulted portion of the contract at the difference between the contract price and the replacement cost based on the close of the market the next business day when trades can be made."

While the parties disagreed over the effect of numbered paragraph 10 (the so-called "act of God" clause) of the contracts, both parties appeared to agree that the plaintiff did not agree to otherwise extend the delivery dates of the contracts. The arbitrators concluded that numbered paragraph 7 of the purchase contracts clarified that the defendant (the seller) had no unilateral right to extend the contracts. Nor did the defendant have the unilateral right to substitute the delivery of another type of wheat for the contracted commodity. Therefore, in the absence of an agreement to extend the delivery dates of the contracts, the plaintiff had the right and obligation to offset the contracts, mitigate losses to both parties and to collect market differences immediately upon first learning of the inability of the defendant to fulfill the terms of the original contracts.

The plaintiff's failure to immediately cancel the purchase contracts in early spring, upon first learning of the defendant's crop problems, worked in favor of the defendant in this case, as market prices declined by June 4, 1996. Evidence submitted in this case placed the April 23, 1996 price of wheat at \$5.70 per bushel. On June 4, 1996, the contracts were canceled at \$4.81 per bushel.

While the cancellation charges (10 cents per bushel) were not specified in the original purchase contracts, the

evidence submitted by Parrish and Heimbecker showed that the cancellation charges clearly were stated in "a published Parrish & Heimbecker, Inc. Policy" made available to customers. More importantly, the arbitrators concluded that the "sale contract" confirmations issued on each canceled contract — each of which clearly stated the cancellation charges on their face — bound the defendant in this case. The defendant had an obligation under NGFA Grain Trade Rule 6(a) to "immediately notify the other party [the plaintiff] to the contract" if he disagreed with the stated terms.

NGFA Grain Trade Rule 6(c) provides that "if either Buyer or Seller fails to send out confirmation, the confirmation sent out by the other party will be binding upon both in case of any dispute, unless confirming party has been immediately notified by nonconfirming party, as described in 6(a), of any disagreement with the confirmation received."

The Award

The arbitrators awarded the plaintiff the full amount of \$3,970 in market difference and cancellation charges. Compound interest on that amount shall accrue from June 4, 1996 to date of payment at the rate of 8.5 percent per annum, rather than the 18 percent per annum rate requested by the plaintiff. No legal fees or expenses were awarded to either party.

It is hereby ordered that Mark Williams pay to Parrish & Heimbecker Inc. the sum of \$3,970, plus compound interest at the rate of 8.5 percent per annum from June 4, 1996 until the judgment is paid in full.

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

Kim Dauch, Chairperson
Grain Manager
Auglaize Farmers Co-op/Proviso
Wapakoneta, Ohio

Rick Longbrake
Vice President, Grain
Mennel Milling Co.
Fostoria, Ohio

Joe Needham
Manager
The Andersons Inc.
Delphi, Ind.

³ The contract language was similar, but not identical, to that contained in NGFA Grain Trade Rule 10. While the contracts also expressly provided that they were subject to the NGFA Trade Rules, the express language contained in numbered paragraph 7 of the contracts controlled the parties' agreements to the extent any differences existed. See, Preamble to NGFA Grain Trade Rules.