National Grain and Feed Association
Arbitration Decision

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June 1, 2000

Arbitration Case Number 1976

Plaintiff: Harold Klinker, dba Diamond K Land & Cattle, Fairfield, Mont.

Defendant: General Mills Inc., Great Falls, Mont.

Statement of the Case

Harold Klinker, *dba* Diamond K Land & Cattle ("Diamond K"), and General Mills Inc. on March 10, 1999, entered into a contract (number B097327) for May 1999 delivery of 17,000 bushels of U.S. No. 1 hard red winter wheat, 14 percent protein, to General Mills' Carter, Mont., facility, at a price of $3.15 per bushel.

The contract included a protein premium schedule and referenced a "Sch of Disc., GMI." No other references to quality discounts were made in the contract. The contract also referenced the NGFA Trade Rules and provided for resolution of any disputes through NGFA arbitration. Both parties signed the contract.

Diamond K subsequently alleged that General Mills breached the contract because it failed to accept some of the wheat tendered for delivery by Diamond K. In addition, Diamond K contended that General Mills did not properly calculate the price on the resulting underfill on the contract balance. Diamond K sought as damages the difference between the market price and contract price as calculated by General Mills and the lower market price existing at the time of Diamond K's receipt of final settlement, including reimbursement for a $664.37 sum deducted by GMI as an offset. Diamond K also sought reimbursement for attorney fees and costs.

General Mills contended that it had the right to reject grain not meeting contract terms. It asserted that the rejected wheat failed to meet the contract's terms because it was of poor quality[1]. General Mills stated that it fully complied with the contract and the NGFA Grain Trade Rules. General Mills said it determined the market difference of 10 cents per bushel on the underfill of 6,643.71 bushels at the close of the business day following the date on which the last load was rejected.

The Decision

The arbitrators relied foremost upon the parties' signed contract to analyze the terms of trade between the parties.

While the contract contained a reference to "Sch. of Disc., GMI," the arbitrators noted that neither party submitted any evidence of what the schedule contained. Such evidence may have clarified the issues raised in this case, but it is the responsibility of the parties to supply the relevant evidence and documentation when submitting their arguments. Section 6(a)(1) of the NGFA Arbitration Rules provides, among other things, that "the National Secretary and the Arbitration panel are not responsible for undertaking fact-finding searches or discovery."

Based upon the evidence submitted, the arbitrators concluded that only U.S. No. 1 hard red winter wheat was applicable to the contract, as written. General Mills' acceptance of lower-quality grain previously delivered by Diamond K was done at its discretion[2] as stipulated in clause 13 of the contract, which stated that the "[b]uyer shall have the right to reject or

[1] *According to General Mills Inc., samples taken from the tendered wheat showed insect-damaged kernels (IDK) of up to 287 per 100 grams. General Mills said that the wheat was of unmerchantable or unblendable quality.*

[2] *Evidence submitted by General Mills included grain inspection certificates (submitted samples) that showed prior deliveries by Diamond K included five lots of "sample grade" wheat, along with remarks indicating high levels of insect-damaged kernels, as well as infested, sour, and sprout-damaged kernels. One lot graded U.S. No. 2.*

revoke acceptance of any grain irrespective of the grade...which otherwise fails to conform to the terms of this Contract."

The arbitrators, again from the evidence presented, concluded that General Mills communicated to Diamond K its intent to reject further deliveries of wheat not meeting contract specifications. Diamond K was aware of this on March 30, 1999. The parties on March 31, 1999, discussed final payment of the grain delivered and accepted by General Mills, along with the issue of the contract underfill. The parties' contract, in clause 11, also addressed this issue as follows:

"**Underfills/Overfills**: Any underfill that is agreed to by Buyer, or overfill Buyer accepts, shall be settled at the market price at the Delivery Point, or in the absence of such a price a market reasonably close to such Delivery Point, on the day of settlement of this Contract."

General Mills issued, at the time (March 31) of the underfill, a document entitled "Confirmation of Contract Amendment" that set forth the price and quantity underfilled on the underlying contract between the parties[3]. While this General Mills document actually constituted a statement of how the underfill was addressed versus a proposed contract amendment[4], the arbitrators concluded that this documentary evidence showed that the company acted in accordance with the parties' express contractual terms.

No evidence was submitted by Diamond K showing that it, upon receipt of the General Mills document, contested or refuted the notice that showed how the underfill was addressed. Instead, Diamond K argued that if it was in default, General Mills should have extended the contract[5] under NGFA Grain Trade Rule 10. This is not a correct reading of Rule 10, because it vests only the non-defaulting party – in this case, General Mills – with the three alternatives outlined in the rule. Thus, if Rule 10 applied, General Mills also had the right to "buy-in for the account of the seller" or to "cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."

Diamond K also contended that the wheat rejected by General Mills was of merchantable quality because Diamond K was able to sell the wheat to a competitor in Great Falls, Mont. However, this assertion failed to prove that Diamond K was in compliance with its contract with General Mills. It merely showed that Diamond K was able to sell the wheat to another buyer based upon whatever terms were negotiated between Diamond K and the other buyer.

Thus, the arbitrators found that General Mills acted in a manner consistent with the parties' express contractual terms. Consequently, Diamond K's claims were denied.

The Award

Therefore, it was ordered that:

- The claims asserted by Diamond K Land & Cattle are denied in all respects.
- Each party shall be responsible for its own attorney fees and costs.

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

Eric C. Wilkey, *Chairman*
Vice President
Arizona Grain, Inc.
Casa Grande, Ariz.

Tom Bressner
General Manager
Assumption Cooperative Grain Co.
Assumption, Ill.

Bill Chandler
Merchandiser
Collingwood Grain Inc.
Hutchinson, Kan.

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[3] The contract was cancelled on March 30, 1999, with the fair market value established at the close of the following business day, March 31, 1999.

[4] This conclusion is important because neither party had the right to unilaterally amend the parties' contract.

[5] Diamond K's extension argument appeared related to its contention that the price declined in the days following the pricing made by General Mills on the underfill and "never did get back up to the contract price."