National Grain and Feed Association

Arbitration Decision

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September 24, 2009

Arbitration Case Number 2231

Plaintiff: **Simmons Feed & Supply Co. d/b/a Simmons Grain Co., Salem, Ohio**

Defendant: **Great Lakes Organic Inc., Petrolia, Ontario, Canada**

Statement of the Case

On Nov. 20, 2007, Simmons Feed & Supply Co. d/b/a Simmons Grain Co. ("Simmons Grain") and Great Lakes Organic Inc. ("Great Lakes"), through their respective representatives, entered into some number[1] of agreements to buy and sell a quantity[2] of organic soybeans per month at prices of $19.50 per bushel for January, February, March and April 2008 delivery; $20 per bushel for May, June and July 2008 delivery; and $20.50 per bushel for August, September and October 2008 delivery. The parties exchanged, signed and returned confirmations. Subsequently, Great Lakes delivered two truckloads (1,580.76 bushels) to Simmons Grain in January 2008: one load on Jan. 16, and the second load on Jan. 28. Simmons Grain placed telephone calls and sent emails asking to schedule additional deliveries in January.

Great Lakes' chief executive officer instructed Roger Rivest, who had entered into the agreements with Simmons Grain on Great Lakes' behalf, to advise Simmons Grain that Rivest had lacked the authority to make the agreement. On Jan. 23, 2008, Rivest sent an email to Simmons Grain that explained the difficulty of performance faced by Great Lakes, and inquired as to whether Simmons Grain might be willing to pay more for the beans. Simmons Grain declined Great Lakes' offer to renegotiate their arrangement. Great Lakes subsequently sent an invoice for the 1,580.76 bushels at the January contract price on Jan. 30. Representatives of Simmons Grain and Great Lakes exchanged phone calls until Feb. 22, at which point Simmons Grain wrote a letter demanding delivery of the remaining soybeans and offering to extend the time for contract performance. Great Lakes informed Simmons Grain that it would not perform. On that same day, Simmons Grain sent an invoice for damages based upon "actual buy-ins" to complete the contracts. On March 12, Simmons Grain sent an additional invoice to Great Lakes.

Simmons Grain filed for arbitration on March 20, 2008, seeking damages of $421,752 based upon "buy-ins" and "actual purchases to establish fair market value," interest at a rate of 2 percent per month[3], and the costs of the arbitration proceeding and attorneys fees. Great Lakes countered that it was not responsible for the contracts, that Simmons Grain's calculations for damages were flawed, that Great Lakes was entitled to payment for the soybeans already delivered and interest at the rate of 2 percent per month, and that each party should pay its own costs and attorneys' fees.

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[1] Simmons Grain's documents consisted of three "Contract of Purchase" agreements. Great Lakes' documents consisted of one "Farm Commodity Brokerage" agreement.

[2] Simmons Grain's documents specified 7,350 bushels. Great Lakes' documents specified approximately 200 metric tons.

[3] Or, depending upon the document, 8 percent per annum. See Simmons Grain's Exhibit M.

The Decision

After reviewing the evidence submitted in this case, the arbitrators found that Great Lakes was responsible for the contracts, was entitled to be paid for the soybeans it delivered, and that Great Lakes breached the contracts. Further, although Simmons Grain did not adhere to NGFA Grain Trade Rule 28 (pertaining to documentation of damages), Simmons Grain provided sufficient documentation to enable a majority of the arbitrators to fashion a remedy for a portion of the contractual breach.

Great Lakes Responsible for Contracts

Great Lakes contended it was not responsible for the contracts because Rivest – under the terms of his contract with Great Lakes did not have the authority to enter into contracts with Simmons Grain. However, Rivest was a founding member and shareholder of Great Lakes. Further, he had an employment contract that gave him the exclusive right to sell farm commodities on behalf of Great Lakes and prohibited him from selling farm commodities on behalf of any other person or entity.[4] In addition, Rivest previously had entered into other contracts with Simmons Grain on behalf of Great Lakes. Phone calls made to Rivest were answered by Great Lakes' personnel, who acknowledged that Rivest did (or had) worked for Great Lakes. When Great Lakes' chief executive officer wanted to advise Simmons Grain of its position regarding the contracts, he directed Rivest to deliver the message to Simmons Grain. Great Lakes' structure, its relationship to Rivest and its actions made it appear to third parties that Rivest had the authority to act on behalf of Great Lakes. Moreover, Great Lakes delivered loads of soybeans in partial satisfaction of the Rivest contracts, and referred to the Rivest contract when it invoiced loads to Simmons Grain. Great Lakes' actions demonstrated that, irrespective of whatever authority Rivest may have had, Great Lakes adopted the contract as its own. Whether Rivest violated his agreement with Great Lakes was a matter between Rivest and Great Lakes that was not a concern in this arbitration case.

Damages Due Great Lakes

The parties agreed that Great Lakes delivered 1,580.76 bushels of soybeans for which the contract price was $19.50 per bushel, and that Simmons Grain had not paid for those deliveries. The arbitrators determined that Great Lakes was entitled to be paid $30,824.82 for those soybeans.

Damages Due Simmons Grain

Neither set of contract documents discussed how to calculate damages in the event of a failure to deliver. Each party had its own theory of how damages should be calculated. Given this difference, the arbitrators' deferred to NGFA Grain Trade Rule 28(A) concerning the failure to perform. The rule states that when the buyer can determine that the seller has defaulted, *"it shall then be the duty of the Buyer, after giving notice to the Seller to complete the contract, at once to: (1) agree with the Seller upon an extension of the contract; or (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."*

On Feb. 22, in response to Simmons Grain's demand, Great Lakes advised Simmons Grain that it was not going to deliver any additional soybeans on the contract.[5] After Great Lakes rejected Simmons Grain's offer to extend the contract, Simmons Grain had a duty either to buy-in "using due diligence" or to "cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day."

- **Simmons Grain Failed to Produce Evidence of "buy-in … using due diligence":** Simmons Grain provided evidence of 19 transactions in which it either received soybeans or entered into contracts to purchase them. Ten of those transactions occurred on or before Feb. 8, more than two weeks before the default. The arbitrators found that transactions occurring before the date of default cannot constitute a "buy-in" of the defaulted portion of the contract. Nine of the transactions occurred after March 11, 2008. Of those nine transactions, most of the soybeans were purchased after Aug. 1, 2008. The arbitrators found that transactions occurring at random times from two weeks to six months after the default do not constitute evidence of "buy-in … using due diligence". Accordingly, the arbitrators determined that Simmons Grain did not produce evidence of "buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract."

- **Simmons Grain Failed to Produce Evidence that it "cancel[ed] the defaulted portion of the contract at fair market value based on the close of the market the next business day":** Simmons

[4] And, for that reason, Great Lakes' assertion notwithstanding, Rivest was not a "broker." See NGFA Grain Trade Rule 2(b).

[5] The contracts called for soybean deliveries each month. Normally, Great Lakes' failure to deliver the required number of soybeans in January would mean that it breached its January delivery obligation on Feb. 1. The Simmons confirmation, which was executed by Rivest, specified that in the event of an under-delivery, the contract would be treated as "an open contract" and that the shipment period would extend forward.

Grain asserted that it "used actual purchases to establish fair market value damages." As noted, however, none of the documented transactions occurred at the "close of the market on the next business day" (Feb. 25, 2008) or within two weeks before or after the next business day. Accordingly, Simmons Grain did not produce evidence to the arbitrators of any indication of "fair market value based on the close of the market the next business day," and the arbitrators could not find that Simmons Grain cancelled the contracts at that value.

Determining a Remedy for the Contract Default: The arbitrators faced a scenario in which one party ignored its contractual obligations and the other party did not follow NGFA Trade Rules on the calculation of contract damages.[6]

Therefore, the arbitrators concluded unanimously that Great Lakes was responsible for the contract default, and then sought to determine a remedy for the default. A review of the documentation convinced a majority of the arbitration panel that Simmons Grain provided sufficient evidence from which the panel could infer a fair market value at about the time the contract breach occurred, on the basis of NGFA Grain Trade Rule 30(B).

Scale Tickets, Settlement Sheets and Cancelled Checks: Simmons Grain submitted assorted scale tickets, settlement sheets and cancelled checks corresponding to eight sets of soybean purchases from parties other than Great Lakes:

Trans.	First Delivery	Last Delivery	Bushels	Price ($/bu.)
1	Jan. 3, 2008	Jan. 7, 2008	1,829.31	22.00
2	Jan. 3, 2008	Jan. 18, 2008	6,073.45	19.75
3	Jan. 14, 2008	Jan. 31, 2008	2,790.21	23.00
4	Jan. 18, 2008	Jan. 28, 2008	922.75	22.00
5	Jan. 18, 2008	Jan. 31, 2008	3,848.27	22.00
6	Jan. 29, 2008	Feb. 8, 2008	4,784.66	23.00
7	Jan. 31, 2008	Feb. 4, 2008	1,689.59	20.75
8	March 13, 2008	March 13, 2008	744.67	27.00

The scale tickets demonstrated when the soybeans were delivered. The cancelled checks demonstrated how much Simmons Grain paid. The arbitrators could not determine whether these were spot purchases (which would have provided relatively good evidence of fair market value of the soybeans at time of delivery) or deliveries on pre-existing contracts (which would have been relatively good evidence of fair market value of the soybeans at time of contracting). Because the arbitrators could not determine when the pricing decisions were made, they agreed that they could not use the transactions to establish fair market value at the time of the contractual breach (or at any other time).

Purchase Contracts: Simmons Grain submitted the following 10 soybean purchase contracts from other sellers:

Contract	Contract Date	Delivery	Bushels	Price ($/bu.)
1	Jan. 7, 2008	JAN	1,700	$23.35
2	Jan. 24, 2008	FEB	4,000	25.00
3	Feb. 8, 2008	APR	6600	29.65
4	March 11, 2008	MAR	1,600	29.00
5	March 18, 2008	MAR	3,340	29.00
6	March 19, 2008	MAR	850	31.10
7	March 20, 2008	MAR	2,550	28.50
8	May 20, 2008	JUL-AUG	4,100	31.50
9	June 6, 2008	JUN	1,700	29.00
10	Aug. 8, 2008	JUL-AUG	5,500	27.50
11	Sept. 5, 2008	SEP-OCT	18,000	27.75

The arbitrators rejected contracts 4 through 11 as proposed evidence of fair market value of grain at the time of the contractual breach. Great Lakes was responsible for damages at the time it breached the contracts. It was not responsible for market conditions after a six-month delay (in the case of contract number 11).

Two of the three arbitrators were, however, willing to accept contracts 1 (for January delivery), 2 (for February delivery) and 3 (for April delivery) as evidence of the fair market value for soybeans to be delivered in those three months.

[6] Simmons asserted Great Lakes' non-delivery had caused damage because of a difference in market price between time the parties entered the contract and the time of default. NGFA Arbitration Rule 6(a)(4) specifies several ways in which a party might establish that damages resulted from a difference in market prices, but Simmons Grain did not avail itself of this provision. Further, NGFA Grain Trade Rule 28 specifies when the calculation is to occur. But Simmons Grain provided no data about transactions within two weeks on either side of the applicable time period.

The arbitrators questioned the calculation and documentation of damages presented on Simmons Grain's behalf in this case. Simmons Grain filed the arbitration action in March 2008, but in its arguments and evidence presented in this case, Simmons Grain used contracts dated in May, June, August and September 2008 to justify its calculation of damages. The arbitrators were concerned with the calculation and documentation of damages presented on Simmons Grain's behalf in this case given that contracts dated in May, June, August and September 2008 were used to calculate buy-in damages in this case which was filed in March 2008. One of the three arbitrators concluded that insufficient evidence was presented under the rules upon which to calculate damages.

Contract	Delivery Month	Fair Market Value ($/bu.)	Minus Great Lakes Contract Price ($/bu.)	= Price Difference ($/bu.)	X Undelivered Beans	= Damages ($/bu.)
1	JAN	$23.35	$19.50	$3.85	5,769.24	$22,211.57
2	FEB	25.00	19.50	5.50	7350.00	$40,425.00
3	APR	29.65	19.50	10.15	7350.00	$74,602.50
TOTAL						$137,239.07

Accordingly, the arbitrators found that Simmons Grain was entitled to damages in the amount of $22,211.57 (5,769.24 undelivered bushels x $3.85 per bushel price differential) for January soybeans, $40,425.00 (7,350 undelivered bushels x $5.50 per bushel price differential) for February soybeans and $74,602.50 (7,350 undelivered bushels x $10.15 per bushel price differential) for April soybeans, totaling of $137,239.07.

Given the benefit of hindsight, the arbitrators noted that soybean prices were increasing during January and February. The arbitrators anticipated that they were awarding Simmons Grain substantially less than the amount to which Simmons Grain potentially would have been entitled had Simmons Grain followed the NGFA Grain Trade Rules pertaining to calculation of damages.

Similarly, although the price of soybeans for delivery in March from May through October 2008 was almost certainly substantially higher at the time of the contractual breach than at the time the parties entered into their contracts, the arbitrators were not provided with sufficient relevant information to formulate an award to Simmons Grain for Great Lakes' breaches of those delivery obligations.

The Award

Arbitration Costs and Attorneys' Fees: Neither contract called for the award of arbitration costs or attorneys' fees. Absent an agreement as to the allocation of such expenses, the arbitrators declined to make such an award.

Interest: The Simmons Grain confirmation did not provide for any payment of interest to any party. The Great Lakes confirmation called for the payment of interest to Great Lakes. Because the net award involved a payment from Great Lakes to Simmons Grain, the arbitrators declined to award interest for the period preceding the arbitration decision.

Award: The arbitrators determined that Simmons Grain was entitled to recover $137,239.07. Deducting $30,824.82 due Great Lakes as payment for the soybeans Great Lakes delivered, the arbitrators awarded Simmons Grain $106,414.25. The arbitrators awarded Simmons Grain interest on the amount of this net award of $106,414.25, beginning on the date of this arbitration decision, at the rate of 5.25 percent per annum.

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

Diana T. Klemme, *Chair*
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