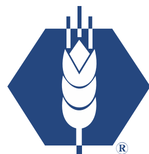

National Grain and Feed Association
Arbitration Decision
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February 6, 2014

CASE NUMBER 2658

Plaintiff: **Bunge North America Inc., St. Louis, Missouri**

Defendants: **Ernest Sikes and Gwen Sikes, St. Joseph, Louisiana**

STATEMENT OF THE CASE

This dispute involved two contracts between the buyer, Bunge North America Inc. ("Bunge"), and the sellers, Ernest Sikes and Gwen Sikes ("Sikes"), for the delivery of a total of 100,000 bushels of U.S. No. 2 yellow corn to Bunge's elevator at St. Joseph, Louisiana.

The parties agreed in this case that on Aug. 30, 2011, the Sikes contracted to sell to Bunge 70,000 bushels of corn at $7.08-per bushel. Bunge signed the corresponding Confirmation of Purchase Contract number 2000454048 on Sept. 8, 2011; Ernest Sikes signed it on Sept. 15, 2011. The parties also agreed that on Feb. 28, 2012, the Sikes contracted to sell to Bunge another 30,000 bushels of corn at $5.78-per bushel. Bunge signed the corresponding Confirmation of Purchase Contract number 2000546285 on Feb. 29, 2012; Ernest Sikes signed it on March 5, 2012. Both contracts were flat-priced contracts with delivery periods between Aug. 1 and Sept. 30, 2012.

The parties further agreed that in July 2012, the Sikes attempted to deliver two loads of corn under the contracts. Bunge rejected both loads based upon testing that indicated aflatoxin levels in excess of 20 parts per billion (ppb). Bunge stated that in August 2012, the Sikes submitted a sample of corn for testing that indicated aflatoxin levels below 20 ppb. Bunge stated it then advised the Sikes that despite the results of the test of this later sample, Bunge would nonetheless continue to test all individual loads of corn delivered. According to Bunge, the Sikes did not attempt further deliveries of corn under the contracts.

On Aug. 19, 2012, the Sikes advised Bunge that they had delivered all their corn to another elevator and Bunge informed them that it would be consequently cancelling the contracts. Bunge then cancelled the contracts on Aug. 20.

Bunge argued that it properly rejected the loads delivered in July 2012 based upon the terms of the agreements between the parties and the applicable "action levels" for aflatoxin determined by the U.S. Food and Drug Administration (FDA). The Sikes challenged both Bunge's rejection of the corn delivered and the market value relied upon by Bunge in its calculation of damages.

THE DECISION

In their review of this case the arbitrators determined that, pursuant to the NGFA Grain Trade Rules, there were clearly defined agreements between the parties. The contract confirmations included the necessary specifications for the trades between the parties as provided under NGFA Grain Trade Rule 1 [Trade]. The contracts were also properly confirmed in writing by both parties as provided under NGFA Grain Trade Rule 3 [Confirmation of Contracts]. Further, there was no dispute between the parties regarding the terms and validity of the signed contracts.

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Regarding the question of whether Bunge properly rejected the two loads of corn delivered in July 2012 based upon the testing it conducted that indicated aflatoxin levels greater than 20 ppb, the arbitrators noted that the following provision was contained on the front page of both contracts:

> **SPECIAL TERMS:** SUBJECT TO BUYER'S DISCOUNT SCHEDULE IN EFFECT ON DATE OF DELIVERY UNLESS OTHERWISE SPECIFIED IN THIS CONTRACT.

Under "General Terms and Conditions" both contracts also provided as follows:

> 2. Warranties. Goods are intended to be transported in interstate or foreign commerce. Seller warrants that all Goods furnished hereunder ... are not adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act (the "Act") [and] not an article or commodity which may not, under the provisions of the Act, be introduced into interstate commerce.

Bunge presented as evidence in this case its "Corn Discount Schedule" that was in effect during the delivery period for the contracts, which stated:

> No corn will be accepted for purchase, or received on contract, which shows evidence of Aflatoxin contamination by any method of testing.

Bunge argued that under its policy corn was "contaminated" if it exceeded the applicable action level set by the FDA for food and feed. Bunge presented evidence in this case that the applicable FDA action level for aflatoxin in corn was 20 ppb.

After Bunge rejected their corn, the Sikes sold it to another elevator. The Sikes stated that testing by Bunge had also detected excessive aflatoxin levels in other submitted samples, which the Sikes similarly then sold to another buyer. The Sikes' argument that Bunge acted improperly in rejecting their corn was based solely upon that the Sikes subsequently secured this alternative buyer for that corn. The arbitrators determined that the Sikes' position on this issue was not sufficiently supported, particularly without specific information concerning the subsequent sale between the Sikes and the alternative buyer. The arbitrators determined that the written agreements between the Sikes and Bunge clearly defined the acceptance policy regarding adulterated grain and the discount schedule in effect at the time of delivery. Based upon the contract terms and evidence provided in this case, the arbitrators concluded that Bunge acted properly in rejecting the two loads of corn delivered in July 2012 upon discovering that the loads exceeded the acceptable levels for aflatoxin. In the end, the Sikes did not deliver grain against their contracts with Bunge. Therefore, the Sikes defaulted on the agreements between the parties and they were responsible for damages to Bunge.

The arbitrators concluded that Bunge followed the proper cancellation procedures under NGFA Grain Trade Rule 28 [Buyer's Non-Performance], which states as follows:

> If the Buyer finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Seller by telephone confirmed by subsequent written communication. The Seller shall then, at once elect either to: . . . cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

In calculating its damages, Bunge employed a fair market value of $7.40-per bushel for the price of corn on Aug. 20, 2012. Bunge argued that it confirmed with other elevators in the local market to reach the conclusion that this price represented a fair market value. In its filings in this case, Bunge submitted detail regarding its investigation into pricing in the local markets. Bunge also presented evidence, which included affidavits from other elevators regarding the relevant prevailing prices. Bunge further stated that although the contracts also provided for a cancellation fee of 10-cents per bushel, Bunge elected not to include those charges in its claims against the Sikes in this case.

The Sikes challenged Bunge's determination of market value based solely upon that the price the Sikes received for their corn was $7.18-per bushel. The Sikes consequently argued that they only owed Bunge $49,000 in total damages. The arbitrators decided that the price received by the Sikes in this case was not determinative on prevailing market prices, particularly given that Bunge had already rejected at least some of this product and the conditions of sale with the subsequent buyer were unknown.

Bunge, on the other hand, provided detail and evidence in support of its determination of fair market value. Calculation of damages based upon the fair market value of $7.40-per bushel resulted in a market difference of 32-cents per bushel (or $22,400 for 70,000 bushels) under contract number 2000454048; and $1.62-per bushel (or $48,600 for 30,000 bushels) under contract number 2000546285.

Bunge also requested a refund of its arbitration fee of $1,100.00.

THE AWARD

The arbitrators ruled in favor of Bunge in the amount of $71,000 for its costs in cancelling the contracts. The arbitrators denied Bunge's request for reimbursement of its arbitration fee. Interest shall accrue on the award at the 3.25 percent per annum from December 3, 2012, until the award is paid in full.

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

Chad Nagel, *Chair*
Manager of Trading
Nagel Farm Services Inc.
Wye Mills, Maryland

Craig Hebrink
President/ CEO
Co-op Country Farmers Elevator
Renville, Minnesota

Todd Phillips
Vice President,
Grain & Risk Management
Heartland Co-op
West Des Moines, Iowa