



# National Grain and Feed Association Arbitration Decision

www.ngfa.org | www.ngfa.org/decisions

1250 I (Eye) Street, N.W., Suite 1003  
Washington, DC 20005-3922

P: (202) 289-0873  
F: (202) 289-5388

April 17, 2015

## CASE NUMBER 2664

**PLAINTIFF: ALL STAR TRADING, OAK BROOK, IL**

**DEFENDANT: KALMBACH FEEDS INC., UPPER SANDUSKY, OH**

### STATEMENT OF THE CASE

All Star Trading (All Star) and Kalmbach Feeds (Kalmbach) entered into two contracts on April 10, 2012, for the delivery of organic soybean meal between April and September 2012. These two contracts (contract nos. 7621 and 7622) were for quantities of 350 and 650 tons of product, respectively. All Star and Kalmbach then entered into another contract (contract no. 7719) on May 21, 2012, for the delivery in September 2012 of another 100 tons of organic soybean meal. The description provided in each of the contracts of the commodity to be delivered was “Soybean Meal – Organic.”

All Star delivered seven truckloads without issue under the first contract (number 7621) between the initial contract date of April 10 and the end of May 2012. All Star was prevented from delivering additional shipments during the week of May 29, 2012, because the soybean meal imported by All Star was “on FDA Hold.” All Star stated that it kept Kalmbach regularly informed of the status and availability of these shipments. All Star also claimed that at no time did Kalmbach request All Star to buy-in for Kalmbach’s account. Rather, according to All Star, Kalmbach simply requested that All Star advise when the product would be available for shipment.

On June 15, 2012, Kalmbach notified All Star by email that Kalmbach’s customer had submitted samples of the product provided by All Star for testing. Kalmbach claimed that the tests indicated that the KOH protein solubility levels were lower than its customer had anticipated.

On July 5, 2012, All Star notified Kalmbach that its account was 40 days past due with respect to the truckloads delivered in April and May.

On July 9, 2012, All Star notified Kalmbach that ten truckloads were ready for shipment. All Star noted that sampling of those loads had indicated low KOH levels and All Star offered to Kalmbach the option of declining these truckloads and removing them from the contracts.

On July 30, 2012, Kalmbach wrote in a letter to All Star: “We have now received definitive information from our customers, regarding the damages they incurred” as a result of Kalmbach supplying it with “allegedly defective organic soybean meal” and “failing to deliver in accordance with [Kalmbach’s] contract commitment.” In its July 30 letter, Kalmbach claimed its customer was due damages for a decrease in productivity of its egg-producing chickens resulting from allegedly deficient KOH levels in the soybean meal derived from All Star. Kalmbach also claimed it incurred losses from All Star’s

alleged failure to complete delivery under the contracts. Kalmbach's letter further stated: "The total of the foregoing components is \$353,229.08. This is the amount of damages that [Kalmbach] is demanding that All Star Trading pay."

In September 2012, Kalmbach was sued by its customer in state court in Ohio for damages related to the allegedly defective soybean meal. According to the allegations in the complaint filed in the lawsuit, the KOH level must be at least 80% for the use of the soybean meal intended, but sampling of the product delivered by Kalmbach tested at 68.10% and 53.52%. Kalmbach subsequently settled the court case with its customer in October 2012 for \$192,920.98.

In the arbitration case between All Star and Kalmbach, All Star requested damages for unpaid invoices for the delivered soybean meal as well as for delivered soybeans and "bakery byproduct" totaling \$111,863. All Star also requested finance charges of \$10,875 and reimbursement for attorney and arbitration fees.

In its counterclaim against All Star, Kalmbach claimed the \$192,920.98 paid to its customer in the settlement of the court case. Kalmbach argued that the product alleged to be defective in the court litigation was exclusively derived from the shipments delivered by All Star. Kalmbach also claimed \$267,849 for damages it incurred as a result of All Star's alleged failure to complete delivery under the contracts (less \$89,816.30 that Kalmbach recognized it owed to All Star for delivery of soybeans and bakery byproducts) for a total claim against All Star of \$370,953.68.

The parties disputed whether All Star met its obligations concerning the later shipments that were delayed "on FDA hold." Kalmbach argued that the shipments were untimely and it did not agree to an extended shipment date. All Star argued that it was not responsible for the delays, referring to the provision in the contracts that stated, "Seller shall not be responsible for any acts of . . . governments."

The parties disputed whether it was universally accepted in the feed industry that KOH be at a certain level for this product. All Star submitted that KOH levels were not a component of the written contracts between the parties, but Kalmbach claimed that All Star nonetheless agreed to deliver the product with specific minimum KOH levels. Kalmbach argued that this was "a given" for the use of soybean meal as feed for poultry or livestock, which did not have to be separately stated in the contracts. According to All Star, KOH levels were a "quality issue" and a vast range of levels are commercially acceptable. All Star argued that lower KOH levels might bear upon the quality of a product but not render the product "defective." The parties further disputed whether All Star was aware of the specific purposes and requirements of the product intended by Kalmbach and its customer. All Star also referred to the provisions in the contracts, which stated: "Seller makes no expressed warranties except herein specified and makes no warranty of merchantability of the goods or fitness of the good for any purpose."

All Star further argued that Kalmbach failed to comply with NGFA Feed Trade Rule 18(B), which states:

It shall be the duty of the Buyer to ascertain by inspection or other means and report the condition of the shipment not later than 12 noon of the second business day after arrival at final destination, otherwise the Seller's liability ceases at the expiration of such time.

## THE DECISION

After extensive consideration of the issues raised and the arguments and materials provided by the parties, the arbitrators reached the following conclusions:

- The contracts between All Star and Kalmbach expressly and simply provided for “Soybean Meal – Organic.” This was the sole identification and description for the commodity to be delivered under the contracts. The contracts did not provide specific quality standards or other terms and conditions to apply. In particular, KOH and protein solubility levels were not defined or mentioned in any form in the contracts between All Star and Kalmbach. Although Kalmbach claimed that All Star was required to deliver soybean meal with specific KOH levels, the parties failed to state or agree to these terms in writing.
- The contract between Kalmbach and its customer provided for the delivery of 1,000 tons of “BK1195 Organic Soybean Meal.” This contract also failed to provide for specific KOH levels.
- Because the contracts presented in this case failed to provide for specific KOH levels, the arbitrators considered what trade practice and industry standards might apply. The complaint filed by Kalmbach’s customer in the court case claimed that KOH levels were allegedly required to be at or above 80%. However, there was insufficient evidence presented in this case to indicate that KOH levels at 80% were standard trade practice. Indeed, the emails exchanged between Kalmbach and All Star after the issues first arose referred to KOH levels of only 70-75%. Consequently, even if All Star and Kalmbach had agreed that those levels applied, they still at best would have been 5% less than the levels purportedly expected by Kalmbach’s customer.
- The arbitrators closely examined what might be the applicable expectations and standards in the industry concerning KOH levels in these circumstances, including a comprehensive review of how the relevant commodities are traded within the industry on a regular and practical basis. Nowhere in their investigation could the arbitrators ascertain a general industry standard of a specific minimum KOH level to support Kalmbach’s claims.
- The implications that Kalmbach submitted for this case from the law suit and settlement agreement involving its customer were at best tenuous. Rather than speculating regarding the circumstances and discussions that led to the settlement between Kalmbach and its customer in the court case, the arbitrators relied upon the express terms in the signed contracts between Kalmbach and All Star as direction for their ruling in this arbitration case.
- It was unclear how the claimed sampling and testing of the soybean meal was conducted. It was questionable whether the sampling and testing was done properly. It was unclear from where the samples were taken. It was especially not ascertainable that the sampling derived from Kalmbach was traceable to All Star. It was also questionable whether Kalmbach conducted any sampling or testing itself or simply relied on testing conducted by its customer.

- Upon becoming involved in the lawsuit with its customer, Kalmbach simply sought to pass those claims onto All Star. The customer presented general allegations in its court complaint. Kalmbach then settled the litigation with its customer, and with little more than the allegations presented against it, Kalmbach subsequently sought the amount it agreed to pay in settlement against All Star.
- With respect to All Star’s potential liability for the shipments delayed beginning in late May because, the arbitrators noted that the contracts specifically stated that All Star was not liable for “acts of governments.” Further, at no time did Kalmbach request All Star to buy in for Kalmbach’s account. Rather, Kalmbach simply requested that All Star advise when the product would be available.
- Kalmbach’s July 30, 2012 letter was the first notification to All Star of claims against it for breach of contract. Kalmbach’s earlier email to All Star on June 15 simply claimed that Kalmbach’s customer had submitted samples of the product for testing, which indicated particular KOH levels that Kalmbach later claimed were lower than desired. All Star still had until September to deliver under the contracts but Kalmbach had by then refused to pay outstanding invoices or take further deliveries. Kalmbach’s position suggested that the product that All Star would have delivered would have similarly caused the alleged negative impact on its customer’s egg production. However, this could not be substantiated due to the lack of testing of that product.
- Also, there may have been causes or contributing factors other than the KOH levels for the claimed loss in egg production. It was not adequately shown in this case that the KOH levels were the sole or main cause. Particularly with a product delayed at import, there may have been other issues affecting the claimed egg production.
- Poor communication as a whole between Kalmbach and All Star was evident, and clearly a contributing factor in the disputes that resulted in this case.

<b>THE AWARD</b>
------------------

The arbitrators awarded damages in favor of All Star Trading against Kalmbach Feeds Inc. for the sum of \$111,854.42 for the delivered products (\$65,965.72 for bakery product, \$22,098.70 for soybean meal, and \$23,790 for soybeans). The arbitrators declined to award additional charges and fees to either party in this case and determined that each party was responsible for its own legal and arbitration costs.

Decided: June 2, 2014

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

**David Reiff**, *Chair*  
 President  
 Reiff Grain & Feed Inc.  
 Fairfield, IA

**James Dell**  
 General Manager  
 Interstate Mills LLC  
 Owatonna, MN

**Scott Lovin**  
 Vice President  
 Ag Partners LLC  
 Albert City, IA