National Grain and Feed Association

Arbitration Decision

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October 22, 2009

Arbitration Case Number 2215

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

Defendant: **MDS Inc., Reydell, Ark.**

Statement of the Case

This case involved a dispute over the alleged non-delivery and subsequent cancellation of contracts for 10,000 bushels of soybeans and 25,000 bushels of soft red winter wheat.

On Jan. 12, 2006, Bunge North American Inc. (Bunge) purchased 10,000 bushels of soybeans from MDS Inc. (MDS) for delivery to Bunge's elevator in Pine Bluff, Ark., between Oct. 1 and Nov. 30, 2006. Bunge confirmed its purchase by issuing confirmation number 109539 (the "soybean contract"). Mark Sheppard ("Sheppard") signed the soybean contract on behalf of MDS. The contract stated that it was "subject to the rules of the National Grain and Feed Association."

On Dec. 8, 2006, Bunge agreed to extend the delivery period on the soybean contract to Dec. 31, 2006. Between Jan. 11 and Jan. 26, 2007, MDS delivered 8,650.27 bushels of soybeans.

Based upon statements made by Sheppard, Bunge said it expected MDS to deliver the balance due under the soybean contract, but no further bushels were delivered. On May 11, 2007, after notifying Sheppard of its intention to cancel the soybean contract, Bunge cancelled the contract. Bunge sent MDS a confirmation of change in contract (cancellation), which indicated the market difference and cancellation fees owed in the amount of $2,011.10. MDS did not pay the invoice on the soybean contract. In addition, Bunge on June 1, 2006 purchased 25,000 bushels of soft red winter wheat from MDS for delivery to Bunge's elevator in Pine Bluff, Ark., between June 1 and July 30, 2007. Bunge confirmed its purchase by issuing confirmation number 10967 (the "wheat contract"). Sheppard signed this purchase confirmation on behalf of MDS. The contract stated that it was "subject to the rules of the National Grain and Feed Association."

On May 31, 2007, MDS delivered 238.08 bushels of wheat, and Bunge applied the bushels to the wheat contract.

In mid-June 2007, Sheppard spoke with Bunge's elevator manager and informed Bunge that he would not have enough wheat to fill the balance of the contracts for his four business entities. At that time, Sheppard did not indicate how much wheat each entity would be able to deliver. Sheppard asked Bunge if it would roll the wheat contract to the following year, but was told by Bunge's manager that Bunge would not do so. Bunge's elevator manager and Sheppard discussed the options of canceling the wheat contract at that time, or delivering the wheat by the end of the delivery period. Sheppard responded that he did not want to cancel the wheat contract.

Subsequently, in early July 2007, Sheppard traveled to Bunge's Pine Bluff, Ark., office to discuss the status of his open contracts with Bunge's Southern District commercial manager. Another Bunge district manager also attended the meeting. During that meeting, Sheppard explained that he did not have enough wheat to fill the wheat contract, and that he did not want to cancel the contract at that time. Bunge once again advised Sheppard that if MDS did not deliver the wheat or cancel the wheat contract prior to the close of business on July 31, 2007, then Bunge would cancel the contract at fair market value.

MDS subsequently failed to deliver the wheat by the close of business on July 31, 2007. In response and consistent with its prior notice to Sheppard, Bunge canceled the wheat contract at the close of the market on Aug. 1, 2007. On the next day, Bunge mailed MDS a certified letter notifying MDS of the contract cancellation. The letter included an invoice for $40,361.93 based upon the market difference and cancellation fees owed upon cancellation of the wheat contract. It also included the past due invoice associated with the soybean contract cancellation. Sheppard signed the certified mail receipt on Aug. 14, 2007. To date, MDS has failed to pay the invoices.

In its written arbitration response, MDS did not dispute the basic facts of the case or any of the conversations with Bunge's representatives. Nor did MDS dispute that it owed Bunge $2,011.10 on the soybean contract. MDS referred to weather-related conditions that arose in the fall of 2006 and spring of 2007 that affected MDS's planting and crop yields, as well as simultaneously occurring family-related issues that MDS said affected its focus on market prices. However, MDS failed to notify Bunge of any potential problems in fulfilling the contract in a timely manner, and MDS declined to cancel the contract through the end of the delivery period.

Regarding the wheat contract, MDS' only relevant response was an attempt to declare *force majeure* because of production-related issues caused by a wet fall season and yields impacted by a late-season freeze.

The Decision

Both parties entered into binding contracts, which they each signed, specifically stating that they were subject to the rules of the NGFA. After determining that MDS was not going to deliver additional soybeans, and in accordance with NGFA Grain Trade Rule 28(A), Bunge properly notified MDS of its intention to cancel the soybean contract at fair market value.

In July 2007, MDS advised Bunge that it would not have enough wheat to fulfill the wheat contract. Because MDS had not fulfilled the wheat contract by the end of the delivery period, Bunge, consistent with it prior notice to MDS, elected under NGFA Grain Trade Rule 28(A), to cancel the defaulted portion of the wheat contract. The arbitrators determined that Bunge properly calculated the market difference owed.

The seller, MDS, signed both the soybean and wheat contracts, and was bound by the express terms of those contracts. Claiming *force majeure* did not excuse MDS' performance on the wheat contract as the contract did not provide for a declaration of *force majeure* by the seller.

MDS failed to timely notify Bunge of reduced yields and its inability to fully perform under the wheat contract. NGFA Grain Trade Rule 28(A) clearly requires a seller to immediately notify the buyer if the seller will not be able to complete a contract. On multiple occasions, MDS communicated to Bunge representatives that it did not want to cancel the wheat contract prior to the end of the delivery period. MDS did not dispute any of these conversations, and the arbitrators determined it should not be excused from performance under the wheat contract.

The Award

Bunge properly canceled the soybean contract and wheat contract based upon MDS' default, and properly calculated the market difference and cancellation fees owed as $2,011.10 on the soybean contract and $11,502.51 on the wheat contract ($40,361.93 minus $28,859.42 in proceeds held by Bunge).

Therefore, the arbitrators awarded to Bunge $13,513.61, plus its request for reimbursement of arbitration fees of $823.73 for a total award of $14,337.34.

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

Kent Kupfner, *Chair*
Commodity Merchant
Columbia Grain International Inc.
Great Falls, Mont.

Kevin T. Walker
Manager
Heritage Grain Cooperative
Bethany, Ill.

Kayra S. Weisbrod
Grain Originator
StateLine Cooperative
Cylinder, Iowa