



National Grain and Feed Association Arbitration Decision

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December 28, 2000

Arbitration Case Number 1848

Plaintiff: Dale Tammen and Edwin Tammen, Rural Danforth, Ill.

Defendant: Timberlake Transportation and Transfer Co. and Illinois Cattle Feeders, Springfield, Ill.

Statement of the Case

This case involved the shipment of a liquid feed ingredient by the defendant – Timberlake Transportation and Transfer Co., Springfield, Ill., a merchant of feed and feed ingredients – to the plaintiff – Dale and Edwin Tammen (“Tammens”) of Tammen Dairy Farms, rural Danforth, Ill.

On July 29, 1994, Timberlake delivered a truckload of liquid feed called “corn condensed distiller solubles - TSI #27” (“TSI #27”) to the Tammens under a contract dated that same day. The Tammens sought damages alleging that the liquid feed contained salmonella that caused their herd to have a salmonella outbreak. Timberlake denied the allegation, and counterclaimed for the costs incurred in defending against the Tammens’ claim.

Prior to the delivery of TSI #27 on July 29, 1994, the Tammens’ herd reportedly was in good health and was maintaining an average milk yield of as high as 66 pounds per head. The Tammens were feeding their herd a ration mixed on the farm that included silage/hay, liquid and dry feed ingredients, and a manufactured feed concentrate. In July, the Tammens began a transition from old forage to new forage. During this transition period, two feed ration changes were made, the second occurring around July 30, 1994, when TSI #27 was made a part of the ration.

In early August, the Tammens complained about solids separating in TSI #27. A Timberlake employee visited the Tammens, discussed this issue, and recommended procedures for agitating TSI #27 prior to mixing it into the feed ration. During that visit, there was no mention of any other problem. On or about Aug. 17, 1994, one cow exhibited illness symp-

toms and was sent to a veterinary clinic, where it died the next day. A second cow died on Aug. 30, 1994. The post-mortem diagnosis report for both cows, dated Aug. 25, 1994 and Sept. 2, 1994, respectively, indicated salmonella infections.

The Tammens had a sample of their feed ration taken sometime in late August or early September 1994. This first sample contained a feed product manufactured by another company – which contained “meat and bone meal” – and was sent along with a cow that died on the farm to the University of Illinois Veterinary Diagnostic Laboratory, where a “salmonella-enrichment” test was conducted. On Sept. 8, 1994, a negative result was reported on this first sample. It was not known how many shipments of this feed concentrate were received, from which shipment the sample was taken, who took the sample, or how the sampling was conducted.

A second sample of feed, containing TSI #27, was taken on Sept. 23, 1994. The Tammens kept a portion of the TSI #27 in their basement after they stopped using it in the herd’s feed. The Tammens took a sample of TSI #27 from this storage tank and sent it to the National Veterinary Services Laboratory in Ames, Iowa, along with some blood and feces samples from infected cows. On Sept. 30, 1994, the samples were received. All samples tested positive for salmonella.

By the end of September 1994, a total of five cows had died. At this time, the herd milk production averaged 51 pounds per head. Between September and December 1994, the Tammens liquidated the dairy herd. The sales prices of the herd were materially less than an appraised value of the herd that had been performed in April 1994, approximately six months prior to the liquidation.

Timberlake was not notified of any problems until almost two years later, when it received a letter from the Tammens' attorney on June 19, 1996. The Tammens filed a complaint against Timberlake in the Circuit Court of Iroquois County, Ill., on June 2, 1997. However, the court compelled the parties

to NGFA arbitration by order issued on April 6, 1998. The Tammens claimed damages of \$219,972.07, based on the losses in value in their dairy herd, lost income based on milk production and expenses paid for treating sick cows.

The Decision

The facts presented in both the written testimony and the oral hearing established that there was a contract between the Tammens and Timberlake to supply liquid feed to the dairy. Both parties fulfilled their obligations under the contract. The evidence presented by the Tammens demonstrated that an outbreak of salmonellosis occurred at the dairy during the time that TSI #27 was fed. The evidence also established that TSI #27 was contaminated with *Salmonella* Uganda approximately four to six weeks after delivery.

Based upon all of the facts presented, the arbitrators concluded that the Tammens did not provide a compelling case to support their position that the TSI #27 was the source of the salmonella. The Tammens' primary piece of evidence was a test of TSI #27 that reported positive for salmonella about 60 days after delivery of the feed.

However, in rebuttals and during an oral hearing in this case, significant evidence to the contrary was presented. Based upon this evidence – outlined below – the arbitrators were not persuaded that TSI #27 was the cause of the salmonella outbreak:

1. While testimony demonstrated that it would take a massive dose of the salmonella in the feed to cause an outbreak of salmonellosis, the following three considerations did not support the presence of a massive dose of *Salmonella* in TSI #27:

▶ **If massive amounts of salmonella were present in TSI #27, a "point-source" outbreak would have been expected:** A "point-source" exposure will cause a dramatic "spike" in the number of clinically ill animals. In such a case, after introducing salmonella-contaminated feed to the herd, several cases of salmonellosis will promptly occur and then the outbreak will accelerate quickly. To the contrary, the epidemiology of the salmonella outbreak in the Tammens' dairy herd did not support the existence of a "point-source" of infection. The small number of cases and the very slow progression of the outbreak that occurred did not support the Tammens' allegation that the salmonella outbreak was the result of "point-source" contamination.

▶ **TSI #27 was not conducive to supporting the existence and growth of salmonella organisms:** Dr. Roderick Mackie, professor of microbiology at the Department of Animal Sciences at the University of Illinois, testified compellingly that it was highly unlikely that TSI #27 would carry a massive amount of salmonella because of its low PH. None of the other expert witnesses effectively countered this assertion.

▶ **The laboratory was not requested to perform a quantitative analysis on the actual number of bacteria found in the sample:** Evidence was presented that a very small population of bacteria could cause a positive culture, but not enough to cause salmonellosis. No evidence was presented that the sample contained a "massive" amount of salmonella organisms.

2. The existence of salmonella in TSI #27, as indicated by laboratory results at the end of September 1994, was insufficient evidence to conclude that TSI #27 was the original cause of infection. This determination was based on several reasons:

▶ **Not all of the feed ingredients used by the Tammens were tested.** In addition, the tested ingredients were not tested at the same time, in the same way or by the same laboratory.

▶ **The sampling procedures used by the Tammens were not controlled properly, resulting in the chance for a greater probability for error or environmental contamination:** To obtain the sample, the Tammens climbed atop the feed wagon to reach the discharge hose and an open bucket was used to pull the sample from an open hose. The sample then was stored in the Tammens' basement for at least 30 days prior to a sub-sample being pulled and submitted for testing.

▶ **The TSI #27 sample was taken from the on-farm storage container about one month after delivery, causing a "chain-of-custody" concern:** Since a sample was not taken when the product was received and since the product existed on the farm for so long, the possibility existed that the contamination occurred after delivery.

3. Other sources of contamination were not adequately addressed and eliminated. The evidence presented showed a gradual increase in the number of clinically ill animals, which was more consistent with either an "animal-to-animal" or "environment-to-animal" transmission as the source of infection. According to testimony presented in this case, new cows were purchased during the two-month period after the delivery of TSI #27. However, the new cattle were never eliminated as a possible source of the infection. Further, all expert witnesses testified that birds could have been a source for environmental contamination of the dairy premises; yet this possible source was not sufficiently addressed to eliminate it as an explanation for the outbreak.
4. The Tammens also left Timberlake without sufficient means to defend itself or mitigate damages. The length of time before the Tammens notified Timberlake of the health challenges at the farm virtually eliminated the opportunity for Timberlake to address and solve the problem. This delay in notifying Timberlake of a potential problem is in direct violation of NGFA Feed Trade Rule 13, which provides as follows:

"Condition Guaranteed upon arrival: (a) Shipment on contracts shall be guaranteed by Seller to arrive at final destination, cool, sound, sweet, and free of objectionable extraneous material....(The remainder of Rule 13(a) concerns reconsignment, which is not an issue in this case); (b) 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."

In addition, in the first two months after the delivery of TSI #27, it was apparent that the Tammens believed that there may have been contaminated product from some source. At a minimum, Timberlake should have been notified soon after the Tammens were aware of the possible contaminated feed product.

The Award

Based upon the findings described in the decision, the arbitrators determined that no damages should be awarded to the Tammens. Further, Timberlake's counterclaim for costs incurred in its defense of this claim are denied.

Submitted with the unanimous consent and approval of the arbitrators, whose names are listed below:

Ben Baer, Chairman
President
Livestock Nutrition Center
Guthrie, Okla.

Bill Knapper
Veterinarian
Feed Division,
Farmland Industries Inc.
Kansas City, Mo.

David Frederking
Feed Division Manager
Farmway Co-operative Inc.
Beloit, Kan.