



National Grain and Feed Association Arbitration Decision

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November 29, 2001

Arbitration Case Number 1981¹

Plaintiff: J.D. Heiskell & Co., Tulare, Calif.

Defendant: K.G. Schmitz, a.k.a Kurt Schmitz, San Leandro, Calif.

Statement of the Case

This case involved a "clock" contract between J.D. Heiskell & Co. ("Heiskell") and K.G. Schmitz, a.k.a. Kurt Schmitz ("Schmitz"), involving 300 tons of rapeseed (canola pellets) to be delivered in equal monthly installments.

After some shipments were made, Schmitz allegedly refused further deliveries and Heiskell canceled the remainder of the contract. Heiskell instituted this arbitration to recover the difference between the contract price and the cancellation price on the remaining quantity of undelivered canola pellets covered under the contract, as well as interest and the costs of this proceeding. Schmitz countered by denying that he had entered into the contract, and requested that the arbitrators dismiss the plaintiff's claim and award him attorneys fees and costs.

Heiskell asserted that on Aug. 19, 1997, it entered into a contract with Schmitz for the sale of 300 tons of rapeseed at \$159 per ton to be delivered in equal monthly installments to Schmitz at Five Points, Calif., between October 1997 and September 1998. Heiskell sent Schmitz a written confirmation dated the same day to an address in San Leandro, Calif. Heiskell claimed that Schmitz accepted delivery of only two loads, one on Jan. 20, 1998, and a second on March 23, 1998. Schmitz did not order any further loads. On Nov. 30, 1998, Heiskell rolled the contract forward, which extended the contract to Sept. 30, 1999. Heiskell sent Schmitz a confirmation of this transaction dated the same day to an address in Mexico. Heiskell said Schmitz refused to take further deliveries. On May 3, 1999, Heiskell conducted a "wash sale,"

selling the remaining 250 tons due under the contract at \$125 per ton for Schmitz's account. This resulted in a deficit owed Heiskell of \$8,501.36.

Schmitz denied that he had entered into a contract and claimed that he ordered one load of canola pellets on a trial basis, which Schmitz acknowledged was delivered on March 23, 1998. Schmitz claimed that his intent concerning the transaction was reflected in a letter that he wrote to Paul Boisclair, a Heiskell employee, on May 24, 1999, which disputed the transaction. Schmitz claimed that he neither received nor saw a copy of the contract until the commencement of these arbitration proceedings. Schmitz also claimed that the San Leandro, Calif., address to which the original confirmation was sent was not valid since he had sold the business at that address to his son in 1995. However, even though Schmitz sold his business, he had requested that Heiskell send him correspondence to that address on a signed credit application with Heiskell dated Nov. 29, 1995. Further, he reiterated that request in a communication to Heiskell dated April 13, 1998, stating "...as we are still in San Leandro, we need it here to pay bills."

Schmitz also claimed that the rolling forward of the delivery obligation and the subsequent wash sale conducted by Heiskell represented material alterations of the contract without his consent, in violation of old NGFA Feed Trade Rule 23 [*current NGFA Feed Trade Rule 4*]. Finally, Schmitz claimed that Heiskell agreed to waive interest charges on his account.

¹ The references to "Old" NGFA Feed Trade Rules in this decision refer to the trade rule numbers and terms that were in effect at the time of, and therefore governed, the transaction involved in this dispute. For the edification of the reader, the current NGFA Feed Trade Rule numbers are provided in italicized brackets alongside the reference to the "Old" Feed Trade Rules.

The Decision

The arbitrators determined that Heiskell and Schmitz had agreed to a contract for 300 tons of rapeseed (canola pellets) at \$159 per ton delivered to Schmitz at Five Points, Calif., between Oct. 1, 1997 and Sept. 30, 1998. On Aug. 19, 1997, Heiskell sent confirmation of this contract to Schmitz at the San Leandro, Calif., address, where Schmitz received it. Although old NGFA Feed Trade Rule 2(a) [current NGFA Feed Trade Rule 3(A)] provided that both parties have an obligation to send out a confirmation of a trade when it is made, Schmitz did not send one. Old NGFA Feed Trade Rule 2(c) [current NGFA Feed Trade Rule 3(B), which is substantively unchanged] provided as follows:

"If either buyer or seller fails to send out a confirmation, the confirmation sent out by the other party will be binding upon both in case of any dispute, unless confirming party has been immediately notified by non-confirming party as described in 2(a), of any disagreement with the confirmation received."

Schmitz did not dispute the contract until he faxed a letter to Mr. Boisclair's attention on May 24, 1999, well after the time had passed in which to object under old NGFA Feed Trade Rule 2(c) [current NGFA Feed Trade Rule 3(B), which is substantively unchanged]. Thus, the arbitrators determined that a valid contract had been established that was reflected in the confirmation sent by Heiskell.

Heiskell claimed one load was delivered on Jan. 20, 1998. Heiskell and Schmitz both agreed that one load was delivered on March 23, 1998. Neither party provided any written evidence of those deliveries. Schmitz claimed that by rolling the contract forward and performing the wash sale, Heiskell unilaterally amended the contract in violation of old NGFA Feed Trade Rule 23 [current NGFA Feed Trade Rule 4]. Heiskell claimed that Feed Trade Rule 14(b) [current NGFA Feed Trade Rule 19] permitted it to roll the delivery obligations forward and then conduct the wash sale after Schmitz refused to schedule further deliveries.

The arbitrators determined that the contract clearly provided for equal monthly or "clock" installments to be delivered by Heiskell to Schmitz. However, the arbitrators found that failure to receive or accept one delivery, by itself, was insufficient to terminate an entire "clock" contract. Old NGFA Feed Trade Rule 12 [current NGFA Feed Trade Rule 17, which is substantively unchanged] stated, in relevant part:

"Failure to make any shipment in keeping with the terms and conditions of a contract shall be grounds for the refusal only of such shipment or shipments, and not for the rescission of the entire contract..."

Further, old NGFA Feed Trade Rule 14(b) [current NGFA Feed Trade Rule 19(B)] stated that:

"...If the Buyer fails to notify the Seller of his default, the liability remains in force, until the Seller, by the exercise of due diligence, can determine whether the Buyer has defaulted..."

While Schmitz may have been in default, the threshold issue in this case was whether Heiskell exercised due diligence to verify that a default had occurred and, if so, to elect a remedy under the NGFA Feed Trade Rules. Heiskell provided no evidence that it exercised due diligence to verify that Schmitz had, indeed, defaulted. In addition, as required under old NGFA Feed Trade Rule 14(b) [current NGFA Feed Trade Rule 19 (B)], Heiskell did not show that it notified Schmitz "... at once by telephone, facsimile, or wire..." that it considered Schmitz to be in default. Nor did it demonstrate that it had notified Schmitz within 24 hours of the determination of default of which of the three seller's options that it had elected under old Feed Trade Rule 14(b) [current NGFA Feed Trade Rule 19 (B)].

The Award

Heiskell initially possessed the right to enforce the contract under old NGFA Feed Trade Rule 14 [current NGFA Feed Trade Rule 19]. However, through its lack of due diligence, it lost its opportunity to do so.

Therefore, the arbitrators made no awards to either party. Moreover, the arbitrators ruled that each party shall pay its own attorney fees and costs.

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

Vickie Holdren, Chairman
President
AgVantage Marketing Inc.
Ashland, Ohio

Don Gringer
President
Gringer Feed and Grain Inc.
Hills, Iowa

Hank Northcutt
Commodity Buyer
Cactus Operating Ltd.
Amarillo, Texas