



National Grain and Feed Association Arbitration Decision

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3917

Phone: (202) 289-0873, FAX: (202) 289-5388, E-Mail: ngfa@ngfa.org, Web Site: <http://www.ngfa.org>

November 1, 2001

Arbitration Case Number 1983

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

Defendant: Luis Bento, dba Bento Dairy, Modesto, Calif.

Statement of the Case

This case involved three so-called "clock" contracts that required J.D. Heiskell & Co. ("Heiskell") to deliver canola pellets, rolled corn and rolled barley to Bento Dairy ("Bento").

These types of contracts provide for the sale of a given tonnage of commodity that is divided into equal installments and delivered over a prescribed period, as set forth in the contract.

Bento accepted two deliveries under each of the three contracts, and then refused to accept further deliveries. Heiskell treated Bento's refusal as a default on the remaining portions of the contracts and, after sending written notice to Bento, Heiskell sold out the remainder of the contracts for Bento's account. The prices at which the contracts were sold out were lower than the contract prices, resulting in a debit to Bento's account.

Bento refused to pay the difference between the contract price and wash sales price of the three contracts. After unsuccessful attempts to settle this dispute, Heiskell filed suit in the Superior Court of California to compel arbitration. On March 8, 2000, the court ordered the parties to arbitrate.

Subsequently, Heiskell filed a complaint with the National Grain and Feed Association (NGFA) seeking to recover the differences between the contract price and the wash sales price of the three contracts, as well as the costs associated with resolving the dispute, interest, and attorney fees. Bento claimed that the contracts were invalid because there was no mutual consent. Bento also claimed that he was not a merchant, as defined by the California Commercial Code ("Code") and, thus, was not bound by the contract confirmations sent by Heiskell. Since Bento had not signed the contracts, he argued, the contracts violated the statute of frauds, which requires a party's signature if the party is not a merchant.

The arbitrators made the following conclusions as to the facts of this matter: Although the dates were disputed, at some point between October 1997 and March 1998, Bento and

Heiskell entered into contracts for canola pellets and rolled corn and barley. The first contract was for the purchase of 600 tons of canola pellets at the price of \$159 per ton to be delivered starting in September 1998. Bento also agreed to purchase 500 tons of rolled corn at \$124 per ton and 500 tons of rolled barley at \$125.75 per ton.

After each contract was executed, Heiskell sent written confirmations of the contracts to Bento. The confirmation for the canola pellet contract was dated March 18, 1998 and the confirmations for the rolled corn and barley contracts were dated July 31, 1998. Bento claimed that he did not receive these confirmations. Bento further claimed that he contacted Heiskell to request that the confirmations be sent to him sometime in March 1998, but that Heiskell had failed to send them.

The parties completed deliveries under an "old-crop" contract for canola pellets. Heiskell then made two deliveries under the "new-crop" contract on Oct. 2 and Nov. 3, 1998. In addition, Heiskell made two shipments under each of the contracts for rolled corn and barley on Oct. 2 and 9, 1998. The evidence showed that after the initial deliveries under these contracts, Heiskell billed Bento at the current spot prices and not the contract prices because of an error in Heiskell's billing procedures. The spot prices were lower than the contract prices at the time. These errors subsequently were corrected and Bento was billed the correct amount.

Bento did not order further deliveries and, after Bento's refusal to take further shipments, Heiskell conducted a wash sale on June 4, 1999 on the canola pellet contract and wash sales of the two other contracts on June 7, 1999, pursuant to NGFA Feed Trade Rule 14(b).

Heiskell claimed that as a result of Bento's breach of the contracts, it incurred damages in the amount of \$39,642.13, attorney fees totaling \$3,250, court costs of \$198, and arbitration filing costs of \$683.

The Decision

The arbitrators found in favor of J.D. Heiskell & Co., determining that the contracts for canola pellets and rolled corn and barley were valid and that Bento was a merchant within the meaning of the California Commercial Code.

Concerning the validity of the contracts, the arbitrators determined that the parties agreed to the contracts and Heiskell promptly sent confirmations of those contracts to Bento. While NGFA Feed Trade Rule 2(a) provides that both parties have an obligation to send out a confirmation of a trade when it is made, Bento did not send out a confirmation. Such situations are governed by NGFA Feed Trade Rule 2(c), which provides that:

“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-conforming party as described in 2(a), of any disagreement with the confirmation received.”

Bento failed to object to the confirmations sent by Heiskell.

The arbitrators also considered Bento's claim that he was not a “merchant” within the definition of the California Commercial Code and, thus, was not bound by the terms of Heiskell's confirmation. Bento contended that, as a non-merchant, the statute of frauds required his signature on the contracts. Since the contracts were unsigned, Bento maintained that they did not bind him.

The California Commercial Code defines a merchant as follows:

“[A] person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”

The comments accompanying the Uniform Commercial Code, however, indicate that almost every individual involved in business is a merchant for purposes of non-specialized business practices, such as answering mail.¹ The comments are pertinent because the California code is based on the Uniform Commercial Code. Consequently, the arbitrators concluded that Bento was a merchant and, thus, Heiskell's confirmations were binding upon Bento, even though they were unsigned.

The arbitrators also concluded that since three valid contracts were established, Bento's refusal to take further deliveries under those contracts constituted a default on each. Under

Feed Trade Rule 14(b), when a buyer is in default, the seller may elect one of three remedies, including: 1) agree to extend the shipping period; 2) sell-out, for the Buyer's account, the defaulted portion of the shipments; or 3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised.

In this case, Heiskell elected to sell-out, for Bento's account, the defaulted portions of each of the three contracts. Heiskell conducted a wash sale of the canola pellet contract on June 4, 1999 by selling 551 tons at \$125 per ton. On June 7, 1999, Heiskell conducted wash sales of 447 tons of rolled corn and barley at \$109 and \$108 per ton, respectively. Heiskell said the prices at which the wash sales were conducted were determined by surveying prices offered by other firms in the area for those products. The arbitrators noticed Heiskell used f.o.b. – and not delivered – prices when it washed out the rolled corn and barley contracts and adjusted those prices by adding a \$5 per ton delivery charge to each contract. The results of the wash sales were as follows:

Commodity	Undelivered Amount (tons)	Contract Price (\$ per ton)	Wash Price (\$ per ton)	Amount Due
Canola Pellets	551	159	125	\$18,734.00
Rolled Corn	474	124	114	\$ 4,740.00
Rolled Barley	474	125.75	113	\$ 6,043.50
			Total	\$29,517.50

The arbitrators determined that Bento should pay to Heiskell the amount due as shown in the previous table, \$29,517.50. The arbitrators rejected Heiskell's claims that Bento should also pay interest, court costs and attorney fees.

The Award

Therefore, it is ordered that Bento pay Heiskell the amount of \$29,517.50.

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

Wayne Sandberg, Chairman
President
Agland Inc.
Kansas City, Kan.

Russell E. Bragg
Vice-President, Manufacturing
OK Industries Inc.
Ft. Smith, Ark.

Mark Heckman
Consumers Co-Op Society
of Iowa City
Iowa City, Iowa

¹ See *Uniform Commercial Code § 2-104, Official Comment 2.*