National Grain and Feed Association
Arbitration Decision
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August 2, 2007

Arbitration Case Number 2139

Plaintiff: **Bailey Merchandising Co. LP/Frank Bailey Grain Co. Inc., Fort Worth, Texas**

Defendant: **Abengoa Bioenergy Corp., Chesterfield, Mo.**

Statement of the Case

On Jan 12, 2004, Bailey Merchandising Co. LP ("Bailey") sold 900,000 bushels of U.S. No. 2 or better yellow grain sorghum to Abengoa Bioenergy Corp. ("Abengoa") in three separate contracts of 300,000 bushels each for deliveries in October, November and December 2004. All three contracts were to be delivered in the seller's trucks to the Abengoa facility in Portales, N.M., and delivery was to be made at buyer's call.

Bailey then sold Abengoa a further 150,000 bushels of sorghum on Feb. 10, 2004 for delivery in October 2004. This contract was based upon similar terms to the three previous contracts, but also contained the notation *"Buyer's option to carry. Storage starts 11/1/04 @ $0.01/cwt for each 4 days."*

On March 31, 2004, the parties entered into two additional contracts for 300,000 bushels each for November and December delivery, respectively. Both of these contracts contained similar *"to carry"* language as contained in the Feb. 10 contract. For the November contract, storage was to commence on Dec. 1, 2004; and for the December contract, storage was to commence on Jan. 1, 2005.

All six contracts were priced July 22, 2004 by an exchange of futures. Table 1 summarizes the pertinent provisions of all the contracts at issue in this arbitration.

Table 1

Contract Number[1]	Bushels	Delivery	Basis	Futures	Cash Price
P000159	300,000	1-31 Oct	35+Z	$2.32	$2.67
P000166	150,000	1-31 Oct[2]	35+Z	$2.32	$2.67
P000160	300,000	1-30 Nov	28+Z	$2.32	$2.60
P000167	300,000	1-30 Nov[2]	29+Z	$2.32	$2.61
P000161	300,000	1-31 Dec	25+Z	$2.32	$2.57
P000168	300,000	1-31 Dec[2]	29+Z	$2.32	$2.61

[1] Abengoa's purchase confirmation numbers have been used for convenience of identification.
[2] These contracts contained "to carry" language.

The parties also had other sorghum contracts with delivery dates in months prior to the contracts in question, which were not involved in the claims in this arbitration case. Deliveries were being made on these prior contracts throughout the summer of 2004.

On Aug. 10, 2004, Abengoa sent an email to Bailey that read, in relevant part:

> *". . . We ran out of grain this morning at Portales and have only received 8 trucks as of 10:45 local time in Portales. My scheduler is not having any luck getting Sandoval to get us more of the grain which we have bought from you delivered to us. I cannot have this plant running out of grain anymore.*
>
> *. . I would appreciate your efforts to increase our shipments this week so we can have a cushion which prevents this situation from being so close to the knife. We need at least 20 trucks a day for production and an extra 5 – 10 would help the situation."*

Bailey contracted for trucks with Sandoval Trucking Co. of Olton, Texas, ("Sandoval") to transport all sorghum deliveries on the contracts in dispute. Routine communications from Abengoa to Sandoval regarding daily logistics and requirements occurred throughout the period.

Bailey made deliveries of sorghum to the Portales plant through the summer until the end of November 2004. At that time, 190,692 bushels had been delivered against contract number P000159, but no additional sorghum had been delivered against the other five contracts.

On Nov. 30, 2004, Abengoa sent Bailey a letter, which was received by Bailey on Dec. 1, 2004. In relevant part, the letter stated:

> *"Despite notice and numerous demands for delivery, Bailey has failed and refused to timely deliver on these and prior grain supply contracts with ABC. . . . Based on the failure to deliver within the applicable contract period, even after*

numerous notices and requests by ABC, ABC hereby cancels portions of the contracts referenced above which call for delivery on or before November 30, 2004 and which have not been fulfilled as of your receipt of this letter. Based on Bailey's historical inability to timely deliver contracts, Bailey's inability to assure ABC of future deliveries, and Bailey's historical unjustified contract cancellations, ABC believes that Bailey has repudiated the December delivery contracts, and ABC hereby cancels the contracts referenced above for December delivery.

As a partial offset to damages suffered, we are withholding any further payments to Bailey for grain already delivered or other charges alleged to have been incurred by Bailey."

The two parties conducted a conference call on the morning of Dec. 2, 2004 in what proved to be an unsuccessful attempt to resolve the dispute. On Dec. 2, 2004, Bailey sent a fax to Abengoa, which read in relevant part:

"Your letter dated 11/30/04 ineffectively attempts to cancel all outstanding contracts with Bailey Merchandising, because it does not conform to trade rule procedure.

However, your letter and your verbal confirmation of your intention to not pay the $500,000 that you currently owe us does serve as your default on these contracts. Therefore, in accordance with Trade Rule 10 of the Texas Grain and Feed Association, we hereby elect to cancel the contracts that you referenced in your letter at fair market value. . . ."

Bailey subsequently filed for arbitration with the Texas Grain and Feed Association. Abengoa failed to respond to the TGFA Agreement to Arbitrate, and Bailey filed a Motion to Compel Arbitration in the U.S. District Court. After waiting five months for a decision on that motion and Abengoa's counter-motion, the parties agreed to use the NGFA Arbitration System and NGFA Trade Rules as the basis for resolving the dispute.

Claims

The plaintiff, Bailey, made claims totaling $1,699,542 in four subparts:

1) $466,380 for sorghum that was delivered to the Portales plant but for which payment never was received from Abengoa.
2) $1,153,412 for cancellation of the open balances of the contracts at a price of $1.82 per bushel.
3) $79,453 for storage charges on the open balances until the end of February 2005.
4) $35,615.50 in attorney's fees.

The defendant, Abengoa, made counterclaims totaling $458,084.08 in two subparts:

1) $68,498.23 for storage/carrying costs relating to contracts with delivery periods of March through October 2004.
2) $389,585.85 for loss of production and increased costs at the Portales plant.

The Decision

After a thorough review of all the documents presented by both parties in this case, the panel made the following determinations:

1. The six contracts in question were valid and binding upon both parties, even though the confirmations issued by the two parties differed in some minor respects. Both parties agreed that the contracts were fully priced on July 22, 2004. Further, the parties agreed that a total of 190,692 bushels were delivered against contract number P000157 and that payment for 167,352 bushels of that contracted quantity had not occurred. In addition, the parties agreed that a total of 1,459,000 bushels remained unshipped against the contracts.

2. Although Bailey's confirmations referenced trade rules and arbitration by the Texas Grain and Feed Association and Abengoa's confirmations referenced trade rules and arbitration by the National Grain and Feed Dealers *(sic)*, the parties mutually agreed to resolve this dispute through the NGFA's Arbitration System using NGFA Trade Rules.

3. There is no question that one party or the other failed to perform on the contracts as of Dec. 2, 2004. Abengoa's notice to Bailey was sent on Nov. 30, 2004, and Bailey's notice to Abengoa was sent on Dec. 2, 2004. Abengoa argued that its notice was valid, stating that Bailey consistently had failed to perform on the October and November contracts despite Abengoa's repeated attempts to obtain additional deliveries from Bailey during the period. Bailey argued that it had not received any complaints from Abengoa throughout the period, and that Abengoa's letter of Nov. 30, 2004 was a repudiation of the existing contracts.

4. All of the contracts were on "Buyer's call" terms. Under this type of contract, the buyer has the obligation to inform the seller of his particular requirements for quantities and delivery schedules. The seller, in turn, has the obligation to deliver the grain to the buyer in accordance with those requirements. If the seller does not meet the requirements provided by the buyer, the buyer has the option to elect any of the remedies found in NGFA Grain Trade Rule 28(A).

5. While the evidence presented showed a communication from Abengoa to Bailey on Aug. 10, 2004 regarding late deliveries at that time, no clear-cut evidence was provided that Abengoa communicated its displeasure with the delivery schedules to Bailey at any subsequent time until Nov. 30, 2004. The evidence presented did show that Bailey delivered some 850 truckloads of sorghum to Abengoa during October and November 2004. It appeared that much of this grain was applied to contracts that had delivery periods prior to the time period in question. If Abengoa required more sorghum than was being delivered, it had a duty to raise this issue with its seller (Bailey) on a timely basis.

6. Abengoa's notice of Nov. 30, 2004 did not appear to constitute proper notice under the Trade Rules in at least two respects. First, in attempting to cancel the open October and November balances, Abengoa did not elect any of the options found in Grain Trade Rule 28(A). Instead, Abengoa referred to consequential damages resulting from plant shutdowns and slowdowns. Although it did refer to "forced purchase of alternative grain supplies and storage charges at higher costs" in its letter, Abengoa did not present any evidence of these damages to the arbitrators. Second, Abengoa's attempt to cancel the December contracts conflicted with Grain Trade Rule 28(C), which states, *"Failure to perform any of the terms and conditions of a contract shall be grounds only for the refusal of such shipment or shipments, and not for recision of the entire contract or any other contract between the Buyer and the Seller."* The time for performance on the December contracts had not expired on Nov. 30, 2004. Thus, Abengoa was incorrect in its attempted cancellation of these contracts.

7. Upon receiving Abengoa's notice and after attempting to resolve the dispute amicably, Bailey sent Abengoa valid notice under Grain Trade Rule 28(B). While Bailey's notice referenced Trade Rule 10 of the Texas Grain and Feed Association, it should be noted that at the relevant time in Texas Rule 10 and NGFA Grain Trade Rule 28 were identical. Thus, the arbitrators determined that Abengoa was in default of its obligations on Dec. 2, 2004 on the open balances on all six contracts, and that under Bailey's election of cancellation at fair market value, the market value on Dec. 3, 2006 should be used as the basis for determining damages.

8. On Dec. 3, 2006, the CBOT December corn futures closed at $1.9625 per bushel. This established the futures value for use in calculating damages.

9. Both parties presented considerable evidence relating to the fair market value of sorghum delivered to Portales, N.M., during early December 2004. In determining the basis portion of a fair market value, the arbitrators believed they should examine market quotes and trades on the specific date in question. If such information was not available, the arbitrators believed they should examine the next closest values in time to the date in question. In this case, the parties presented credible evidence of the following basis values:

1 Dec 04	Z – $0.17	
	Z + $0.10	
2 Dec 04	Z + $0.34	= H + $0.22
10 Dec 04	Z + $0.50	= H + $0.38
Average =	Z + $0.1925	

While none of these individual values reflected the market on Dec. 3, 2004, the average over the 10-day period provided a fair approximation of the market value on that date.

10. Table 2 sets out the market difference on each of the six contracts using the cancellation price of $1.9625 plus $0.1925, or a total of $ 2.155 per bushel.

Table 2

Contract Number	Open Qty	Contract Price	Market Price	Difference	Cancellation Value
P000159	109,308	$2.67	$2.155	$0.515	$56,293.62
P000166	150,000	$2.67	$2.155	$0.515	$77,250.00
P000160	300,000	$2.60	$2.155	$0.445	$133,500.00
P000167	300,000	$2.61	$2.155	$0.455	$136,500.00
P000161	300,000	$2.57	$2.155	$0.415	$124,500.00
P000168	300,000	$2.61	$2.155	$0.455	$136,500.00
			Total		$664,543.62

11. The panel further found that Abengoa failed to pay for sorghum that was delivered on the contracts – specifically P000159 – in contravention of Grain Trade Rule 24.

12. The panel also found that Bailey was owed carrying charges on some of the contracts that contained the provision allowing the buyer to carry the grain at a specified rate. These carrying charges could only be calculated up to the time of contract default. However, the December contracts were not part of this calculation because, just as time for performance for these contracts had not expired, neither had the date for the commencement of carrying charges been reached. Table 3 sets out the carrying charges due in accordance with the terms of the contracts and ending on Dec. 3, 2004.

Table 3

Contract Number	Open Qty (cwts.)	Number of Days	Carrying Charges
P000159	61,212.48	33	$ 5,050.03
P000166	84,000.00	33	$ 6,930.00
P000160	84,000.00	3	$ 630.00
P000167	84,000.00	3	$ 630.00
		Total	$13,240.03

The Award

Therefore, the arbitrators ordered that:

1) Abengoa pay to Bailey $664,543.62 as the fair market difference on the disputed contracts at the time of the default.

2) Abengoa pay Bailey $466,830 for sorghum that was delivered, but not paid for, in accordance with the contract terms.

3) Abengoa pay Bailey $13,240.03 for carrying charges owed at the time of default.

4) Abengoa pay Bailey interest on the above total of $1,144,613.65 at a rate of 5 per cent per annum from Dec. 3, 2004 until the date paid.

5) Bailey's claim for attorneys' fees was denied.

6) All of Abengoa's counterclaims, including its request for attorneys' fees, were denied in full.

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

J. Stephen Lucas, *Chair*
President
Jayhawker Consulting Co., LLC
Trumbull, Conn.

Michael F. Malecha
Senior Vice-President
US BioEnergy Corp.
Inver Grove Heights, Minn.

Eric Wilkey
Vice President
Arizona Grain Inc.
Casa Grande, Ariz.

National Grain and Feed Association

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August 2, 2007

Arbitration Appeals Case Number 2139

Plaintiff: **Bailey Merchandising Co. LP/Frank Bailey Grain Co. Inc., Fort Worth, Texas**

Defendant: **Abengoa Bioenergy Corp., Chesterfield, Mo.**

Statement of the Case

The facts in this case are set out in the original arbitration decision. Subsequent to that decision, the defendant, Abengoa Bioenergy Corp. ("Abengoa"), filed an appeal. Both parties in this case filed voluminous amounts of documents and evidence in the original case, which the arbitration appeals committee carefully reviewed and considered. In their consideration of this case, the arbitration appeals committee addressed the following questions:

The Decision

1. The plaintiff, Bailey Merchandising Co. LP ("Bailey"), raised the issue as to whether the defendant, Abengoa, had filed its appeal in a timely matter. Upon reviewing the facts, the appeal arbitrators concluded that Abengoa had in fact filed a timely appeal. The record shows that Abengoa received the original decision, by certified mail, on Oct. 4, 2006. Section 9, Paragraph A, of the NGFA Arbitration Rules provides that an appeal shall be filed within 15 days "from the receipt of said award," which would mean that the deadline for filing an appeal was Oct. 19, 2006. By this date, the NGFA's Washington office had received Abengoa's notice of appeal, appeal fee, and deposit for the original arbitration award. Based upon these facts, the appeal arbitrators unanimously concluded that the appeal was filed in a timely manner.

2. The parties raised a question as to whether the appeal arbitrators could reconsider the entire case, and the entire original arbitration decision, or only specific portions of these. Again, Section 9 of the NGFA Arbitration Rules clearly states that the appeal arbitrators may review the entire original decision, and may "affirm, modify, reverse, or remand" the original award. Additionally, it is important to note that the rules provide that "arguments on appeal shall be confined only to the facts contained in the record of the case." Thus, appeal arbitrators may not consider or accept any new or additional evidence submitted by the parties.

3. The appeal arbitrators next considered the proper date to use for the cancellation of the contracts in this case. The appeal arbitrators concluded that a valid notice of cancellation was first issued on Dec. 2, 2004 by the plaintiff. Under Rule 28 of the NGFA Grain Trade Rules, this would mean that the settlement for the defaulted portion of the contracts in this case would be based on the market value "the next business day," or Dec. 3, 2004.

4. The appeal arbitrators next had to consider "fair market value" as specified in NGFA Grain Trade Rule 28. On this issue, there was, unfortunately, very little evidence of actual sales submitted by either party to this case. Since under the appeal arbitration rules, the appeal arbitrators must confine their review to the original evidence submitted, the appeal arbitrators, after considering various affidavits, records of conversations, and other pleadings, concluded that the proper basis for settlement of the cancelled contracts should be +.34Z. (Note that neither party to this case submitted any evidence of an actual trade on the "fair market value" date of Dec. 3, 2004. In the original decision, the arbitrators chose to use affidavits and/or trades from dates close to the Dec. 3rd date. The dates selected ranged between Dec. 1, 2004 and Dec. 10, 2004, and had widely differing values. Averaging these four values produced a basis of +0.1925Z. The appeal panel, after extensive analysis, averaging, and review of the evidence submitted by the parties, finally concluded that the most reasonable estimate of fair market value on Dec. 3, 2004, should be the figure of +.34Z.) As a result of this conclusion, the appeal arbitrators unanimously voted to modify the original award, for fair market difference, by amending the market price of $2.155 as determined in the original award to a revised market price of $2.3025 ($1.9625+$0.34). Thus, table 2, as presented on page 3 of the original award is revised as follows:

Contract Number	Open Qty.	Contract Price	Market Price	Diff.	Cancellation Amount
PO00159	109,308	$2.67	$2.3025	$0.3675	$40,170.69
PO00166	150,000	$2.67	$2.3025	$0.3675	$55,125.00
PO00160	300,000	$2.60	$2.3025	$0.2975	$89,250.00
PO00167	300,000	$2.61	$2.3025	$0.3075	$92,250.00
PO00161	300,000	$2.57	$2.3025	$0.2675	$80,250.00
PO00168	300,000	$2.61	$2.3025	$0.3075	$92,250.00
				Total	**$449,295.69**

5. The appeals committee next considered the other issues raised in the original case and on appeal. On all of these issues, the appeals committee upheld, in full, the decision of the original arbitrators.

The Award

As a result, the appeals committee unanimously orders that:

1) Abengoa pay to Bailey $449,295.69 as the fair market difference on the disputed contracts at the time of the default.

2) Abengoa pay Bailey $466,830 for sorghum that was delivered, but not paid for, in accordance with the contract terms.

3) Abengoa pay Bailey $13,240.03 for carrying charges owed at the time of default.

4) Abengoa pay Bailey interest on the above total of $929,365.72 at the rate of 5 per cent per annum from Dec. 3, 2004 until the date paid.

5) Bailey's claim for attorneys' fees was denied.

6) All of Abengoa's counterclaims, including its request for attorneys' fees, were denied in full.

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

Edward Milbank, *Chair*
President
Milbank Mills Inc.
Chillicothe, Mo.

Steve Colthurst
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Land O' Lakes Purina Feed LLC
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Jeffrey Edwards
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Donald W. Wenneker
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