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Arbitration Decision
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June 24, 2020

CASE NUMBER 2848

PLAINTIFFS: **ALLEN HOGER, HOGER FARMS, HOGER LTD PARTNERS**
ROSSVILLE, IL

DEFENDANT: **PREMIER COOPERATIVE**
ROSSVILLE, IL

STATEMENT OF THE CASE

The issues in this case centered upon a basis contract for 40,000 bushels of corn between the plaintiffs, Allen Hoger, Hoger Farms, Hoger LTD Partners (collectively, "Hoger") and Premier Cooperative ("Premier").

On August 29, 2018, Hoger entered into a verbal agreement with Premier for 40,000 bushels of corn. Both parties, in their arguments filed in this case, acknowledged that the verbal agreement for a basis contract at (-49CH) for 40,000 bushels of corn was reached on August 29, 2018, for delivery October 1 to November 30, 2018. Premier states it generated and mailed to Hoger contract no. 11501 as a confirmation of the verbal agreement, but Premier did not receive a signed copy back from Hoger. Hoger states it did not sign or receive a copy of contract no. 11501 from Premier, and when Mr. Hoger inquired about obtaining a copy of the confirmation from Premier, that Premier stated it did not have one. In particular, this case involved specific components of the agreement disputed by the parties – the delivery point and whether trucking of the grain was involved.

In its arguments, Hoger claims that as a part of the verbal agreement, it was agreed that Premier would pick up the grain at Hoger's farm and truck it to Premier's facility in Rossville, IL, at a 6-cent per-bushel freight charge to be assessed against Hoger. Hoger argues Premier was unable to provide trucks pursuant to their agreement, and when Hoger tried to deliver grain to Premier's Rossville facility during Hoger's harvest on Saturday, October 13 and Sunday, October 14, the facility was closed. Hoger also claims Premier changed the location for delivery to Royal, IL, which was not agreed to by the parties and is farther away than Rossville. Mr. Hoger states he cancelled the contract during a conversation with Premier while delivering grain at the Rossville location on October 25, 2018, under a different contract unrelated to this dispute. Hoger states he reminded Premier during a telephone conversation in December 2018, that he had cancelled the contract on October 25. Hoger is seeking damages in this case of $11,672.20, which Hoger claims Premier withheld from a settlement payment under a different contract for cancellation of the contract in this dispute.

In its arguments, Premier claims the contract provided that the grain be "delivered by the producer to the elevator." Premier also claims it notified its customers by email and posted a sign on the office door at the Rossville facility on October 13 and 14, stating, *"if you wish to haul in you could make* *arrangements by calling the location managers cell listed below."* Premier notes it received a call from a different customer and made special arrangements to open the elevator for that customer. Premier states it received no such inquiry from Hoger. Premier denies Hoger's claim he cancelled the contract on October 25 when visiting the Rossville facility, and Premier argues Hoger failed to make a genuine attempt to honor the contract. On November 11, 2018, an employee at Premier's facility in Royal telephoned Hoger to inquire what he would like to do with bushels of corn that were delivered, but unapplied to a contract. Premier states it informed Hoger that contract no. 11501 remained open. Premier claims Hoger then provided specific instructions to split off the 4,092.21 bushels from contract 11501 and create a new contract (no. 11072). According to Premier, this resulted in 35,907.79 bushels remaining under contract 11501. Premier argues it then cancelled the contract on December 20, 2018, after a conversation on December 19 with Hoger during which Premier offered Hoger the option to roll or price the contract; however, Hoger stated he had no intention to deliver the remaining bushels under contract 11501. Premier states it withheld $11,672.70 from settlement of other contracts with Hoger for cancellation of contract 11501, drying charges and a late payment finance charge.

The arbitrators also noted that Hoger delivered upon a portion of contract no. 11501 (4,092.21 bushels) by applying to that contract an overrun from bushels delivered to another location. Premier paid this portion of the contract to Hoger. This resulted in 35,907.79 bushels remaining under contract 11501 at the time it was cancelled by Premier.

THE DECISION

Upon review of the arguments and documentation provided in this case by both parties, it is clear the agreement was reached between Hoger and Premier as both parties acknowledged it in several occurrences and performed, at least in part, under this agreement. Based upon industry standards and trade practices a verbal agreement is in fact a contract. Pursuant to trade customs and practices and as stated in NGFA Grain Trade Rule 3, the written contract that follows is simply a confirmation of the agreed-upon verbal contract, and the parties are required to immediately respond with notice of any differences or issues related to a written confirmation. The contract also provided in paragraph 6 that Hoger had five days from the date of the confirmation contract to cancel the contract or dispute the terms of the contract if there were any discrepancies.

The terms of contract no. 11501 specifically address two important issues in this dispute. Paragraph 3 of the contract states:

> Should Buyer be unable to accept delivery when Seller tenders grain, Seller shall hold the grain for delivery to the buyer at a time as soon thereafter as Buyer can receive delivery. Buyer may designate reasonable alternative delivery point to expedite Seller's performance on this contract but shall not have the obligation to do so.

Also, paragraph 4 states: "Seller agrees to reimburse Buyer for any losses sustained by Buyer as a result of the Seller's failure to perform on this contract."

Upon review of the terms of contract no. 11501, the arbitrators also conclude nowhere does it state that freight was included as a term for this contract.

In Hoger's initial argument filed in this case, Mr. Hoger claimed that Premier was closed on the weekend Hoger was harvesting. The contract specifically states that it is the seller's responsibility to hold grain until the buyer is able to accept grain for delivery. Based upon the documents provided by Premier, there were opportunities both before and after the weekend in question when Hoger had the ability to deliver grain to various Premier locations. Also, it appears there actually were opportunities to arrange delivery on the weekend in question had Hoger inquired further with Premier. Hoger evidently was not satisfied with the availability of trucks for delivery to Premier during his preferred timeframe for harvesting so he chose to deliver the grain elsewhere. There were evident opportunities for Hoger to deliver under this contract both during harvest and afterward with grain in Hoger's bins. Premier went so far as to consider rolling this basis contract to allow for delivery of Hoger's bin-stored bushels in performance of the contract but Hoger refused. Upon this refusal by Hoger, Premier immediately cancelled the contract and calculated market difference to settle the contract. The arbitrators determined that Premier made attempts to work with Hoger in performance of this contract; whereas, Hoger made very little attempt to deliver on the contract once Mr. Hoger discovered Premier could not provide trucking and that access to the Rossville facility would be more limited than he preferred on Saturday, October 13 and Sunday, October 14.

When Premier confirmed with Hoger that Hoger would not be delivering on this contract, Premier immediately cancelled the contract. However, the arbitrators determined Premier should have contacted Hoger at the end of the delivery period. Instead, Premier waited until nearly 20 days later to communicate with Hoger in this regard. Thus, the assessment of damages for settlement in this dispute should reflect Premier's buy-in price at the end of November 2018 (-34CH) – when the cancellation should have occurred rather than the buy-in price when Premier cancelled the contract on December 20, 2018 (-27CH).

Also, Premier assessed against Hoger a 10-cent per bushel cancellation fee, which the arbitrators deny. Nowhere in the documents provided in this case, is it specifically established that a 10-cent per bushel cancellation fee applied in the event the contract between the parties were cancelled.

Therefore, the arbitrators rule unanimously in favor of Premier on the terms of the agreement between the parties and that Hoger failed to fulfill its obligations pursuant to the written terms of the contract. The arbitrators, however, do not agree based upon the facts of the case with Premier's assessment of damages as shown below.

<u>Premier's damages calculations:</u>

A basis market difference of 22-cents per bushel (-49CH original versus 12/20/2018 contract cancellation basis of -27CH) plus a 10-cent per bushel cancellation fee for a total of 32-cents per bushel, which is multiplied by 35,907.79 bushels to arrive at $11,490.49, plus a drying charge of $182.21, for a total deduction withheld from Hoger's check in the amount of $11,672.70.

<u>Damages awarded by the arbitrators:</u>

A basis market difference of 15-cents per bushel (-49CH original versus end of November 2018 basis of -34CH) multiplied by 35,907.79 bushels to arrive at $5,386.17, plus the drying deduction of $182.21, for a total deduction of $5,568.38. The arbitrators denied the cancellation fee of 10-cents per bushel.

Because a deduction of $11,672.70 was previously withheld from Hoger by Premier, and the arbitrator's assessment of damages is $5,568.38, the difference due back to Hoger is $6,104.32.

The arbitrators do not award any interest to either party in this case.

THE AWARD

The arbitrators award $6,104.32 to Allen Hoger, Hoger Farms and Hoger LTD Partners from Premier Cooperative.

Decided: May 7, 2020

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Michael Schon, *Chair*
General Manager
Archer Cooperative Grain Co.
Archer, IA

Mike Hogan
Corporate Origination Manager
Consolidated Grain & Barge Co.
Jeffersonville, IN

Craig Kilian
Grain Merchandiser
Central Farm Services
Truman, MN