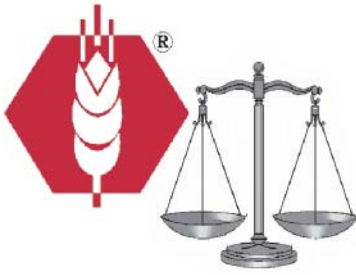

National Grain and Feed Association

Arbitration Decision

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October 21, 2010

Arbitration Case Number 2404

Plaintiff: **Ludlow Cooperative Elevator Co., Ludlow, Ill.**

Defendant: **Robert E. Miller, Melvin, Ill.**

Statement of the Case

In this dispute, Ludlow Cooperative Elevator Co. ("Ludlow") alleged Robert E. Miller ("Miller") defaulted on a contract by failing to deliver corn as agreed under the contract. As a result of this alleged default, Ludlow sought damages in the amount of $121,375, plus interest.

On Nov. 7, 2007, Miller contacted Ludlow's office in Ludlow, Ill., to inquire about his grain balances, as well as to explore pricing and selling some of his grain that already had been delivered to Ludlow's elevator. During the conversation with Ludlow's employee, it was determined that it would be beneficial to Miller to sell the corn for January delivery and pay storage charges until Jan. 1, 2008, even though the grain was already in-store at Ludlow's elevator. As a result, contract number 41925 was written for 50,000 bushels of corn to be delivered to Ludlow during January 2008 at a price of $3.79 per bushel. A written confirmation of the contract was sent by Ludlow and was signed by both parties.

On Dec. 3, 2007, Miller contacted Ludlow's office in Perdueville, Ill., and spoke with a Ludlow employee about selling his grain in the elevator. Miller told the employee to sell the rest of his corn and to defer the payment of the sale until January 2008. As a result of this sale, on Dec. 13, 2007, Ludlow sent to Miller purchase settlement number 900-020256, which specified the sale of 59,820 bushels of corn on Dec. 3, 2007 and also listed contract number 41925 as outstanding.

In January 2008, Ludlow mailed all deferred payments to Miller, along with purchase settlements showing the grain that had been sold, as well as all outstanding contracts, including contract number 41925. These checks were deposited by Miller into his bank.

At the end of January or early February 2008, Ludlow contacted Miller asking when he would be delivering the corn associated with contract number 41925. At that time, Miller allegedly told Ludlow's employee that he had delivered all of his corn and would not be able to deliver the disputed 50,000 bushels. After several conversations and attempts to reach agreement, Ludlow deemed the contract in default on May 9, 2008, and cancelled the contract at a futures price of $6.57 per bushel compared to an initial hedge of $4.14 ¼ per bushel, resulting in a loss of $121,375.

The Decision

In the arguments of both parties, there was no dispute as to the existence of contract number 41925 at its onset. Both parties agreed the contract was entered into on Nov. 7, 2007 and called for the delivery in January 2008 of 50,000 bushels of corn at a price of $3.79 per bushel. The dispute arose as a result of the Dec. 3, 2007 sale of grain.

On Dec. 3, 2007, Miller contacted Ludlow's employee to sell the open-store grain and to defer the payment until January 2008. As a result, the Ludlow employee sold all of the corn that was in open storage. Miller contended that it should not have included the grain that had been "earmarked" for contract number 41925. As a result of the sale of grain, Ludlow mailed a purchase settlement on Dec. 13, 2007 that showed the sale, as well as the outstanding contract number 41925. Upon receipt of the purchase settlement, Miller failed to notify Ludlow of any discrepancies.

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In early January 2008, Miller received his payment from Ludlow for the deferred grain sales. Although a purchase settlement also was included with the payment, as well as other details, Miller once again failed to contact Ludlow to note any discrepancies and deposited the check into his bank. Concerning the Dec. 13, 2007 mailing and the January payment, Miller was in the best position to catch the alleged error, yet he made no contact.

Pursuant to NGFA Grain Trade Rule 3(B):

"If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party, as described in Rule 3(A), of any disagreement with the confirmation received."

Further, NGFA Grain Trade Rule 3(D) states: *"A document otherwise complying with this rule shall be effective even though it fails to use the term 'confirmation.'"*

For these reasons, the arbitrators determined that a contract had been entered into and was enforceable. As a result, Ludlow had no opportunity to catch the discrepancy until the end of the delivery period, which was January 2008.

At the end of the delivery term, Ludlow, in accordance with Grain Trade Rule 28, had the option of using one of three remedies. Ludlow elected to use Grain Trade Rule 28 (A)(1): *"agree with the Seller upon an extension of the contract."*

Over the course of several weeks, from the end of January until March 18, 2008, it was unclear how much discussion occurred between Ludlow and Miller concerning contract number 41925. On March 18, 2008, Ludlow's manager discussed several options with Miller, which included a buy-out and possible rolling of the contract to the 2008-crop year, as well as rolling to the 2009-crop year. It was pointed out that a combination of these alternatives may be used. This also was relayed to Miller in an email from Ludlow's manager on the same day.

On March 27, 2008, no agreement had been reached between Ludlow and Miller. As a result, the Executive Committee of the Board of Directors of Ludlow met with Miller to discuss alternatives. Ludlow claimed that an agreement was reached when Miller informed Ludlow's manager on May 28, 2008, that he would roll the contracts forward to January 2009. However, when the confirmation was mailed to Miller, it was not returned, and on May 9, 2008, Ludlow received a letter from Miller's attorney stating Miller would not agree to the confirmation. Miller argued that no agreement had been reached at the March 27, 2008 meeting.

Based upon the arguments submitted by the parties, the arbitrators did not determine that there had been a "meeting of the minds" during the March 27 meeting, and thus whether any confirmation that was sent would have been invalid. It also appeared that given the significance of market price fluctuations that had been occurring during the time period covered by this dispute, reasonable due diligence would have suggested Ludlow's need to act in a timely manner. Thus, the arbitrators determined that Ludlow should have covered its loss at the conclusion of the March 27, 2008 meeting. Using the information that was presented, the closing prices for the end of March would have resulted in damages of $76,375.

The Award

Therefore, the arbitrators ruled the Dec. 3, 2007 transaction was valid and enforceable based upon Grain Trade Rule 3. As a result, contract number 41925 was in default, and based upon Grain Trade Rule 28, Ludlow should have exercised due diligence and covered its losses effective at the end of March 2008. The arbitrators awarded to Ludlow the amount of $76,375. The arbitrators denied interest, and ruled that attorney fees remain the responsibility of the individual parties.

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

Todd Gerdes, *Chair*
Specialty Grains Manager
Aurora Cooperative
Aurora, Neb.

Tom McCreight
Chief Executive Officer
Equity Marketing Alliance LLC
Enid, Okla.

Steve Strong
Senior Corn Trader
Bunge North America, Inc.
St. Louis, Mo.