National Grain and Feed Association

Arbitration Decision

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922
Phone: (202) 289-0873, FAX: (202) 289-5388, E-Mail: ngfa@ngfa.org, Web Site: www.ngfa.org

April 4, 2013

Arbitration Case Number 2581

Plaintiff: **Northern Sun, a division of Archer Daniels Midland Co., Enderlin, N.D.**

Defendant: **Brian Berube, Bismarck, N.D.**

Statement of the Case

This case concerned two production contracts between the buyer, Northern Sun, a division of Archer Daniels Midland Co. (Northern Sun), and the seller, Brian Berube (Berube), for a specialty grain, Nexera® Canola, for a total of crop grown on 750 seeded acres. Northern Sun is a member of the NGFA. Both Northern Sun and Berube agreed to NGFA Arbitration in this case.

On or about March 8, 2010, Northern Sun and Berube entered into a basis contract (contract number 2514) for the purchase by Northern Sun of 340.20 metric tons of Nexera Canola representing the production from 500 seeded acres. On or about March 18, 2010, Northern Sun and Berube entered into a second basis contract (contract number 2530) for the purchase by Northern Sun of 170.10 metric tons of Nexera Canola representing the production from 250 acres. Northern Sun issued grain purchase contract confirmations for each of these contracts. Contemporaneous with the issuance of contract numbers 2514 and 2530, Northern Sun issued a *"2010 ADM Nexera Canola Production Contract"* for each of these numbered grain purchase contract confirmations. Northern Sun and Berube each signed both sets of the grain purchase contract confirmations and production contracts. The production contracts included the following provision under *"Special Conditions:"*

> *12.) Neither party shall be liable for failure to perform its obligation under this contract if such failure is caused by fires, strikes, accidents, or acts of God such as flooding, hail, frost or other severe weather problems . . . or other causes beyond the control of the parties hereto. Should said events occur, ADM or the above named Grower is to notify the other in writing within 10 days of the occurrence of the act of God for verification. If this written notice is not given within 10 days, the full obligations of this contract remain in effect . . .*

Upon review of the grain purchase contract confirmations and the production contracts, the arbitrators noted numerous inconsistencies in the contract terms, two of which were especially pertinent to this case. First, the grain purchase confirmations provided a time of shipment of *"9/01/10 thru 9/30/10";* but also noted on these confirmations were the terms, *"US Nexera Delivery at Buyers Call."* The production contracts had delivery terms of *"FOB Farm site - 'Buyers Call' - ADM to arrange freight with 2 weeks' preadvice."* Second, the grain purchase contract confirmations provided that the *"Seller must establish the futures price or spread to another futures month by 10/29/2010."* The production contracts stated that the *"Grower will have until May 31, 2010 to price up to 1,500 pounds per seeded acre."* Since Berube did not set a price on the canola by May 31, 2010, Northern Sun set the futures price as of May 28, 2010 (the last trading day in May) at $354.92 per metric ton on contract number 2514A and at $356.92 per metric ton on contract number 2530A for a price on both contracts of $371.92 per metric ton. Northern Sun subsequently issued pricing confirmations to Berube on these contracts.

In early January 2011, Northern Sun called for delivery of the canola. Berube objected stating that this call for delivery was out of the contracted delivery period as stated on the grain purchase confirmations. Berube further stated that weather conditions had prevented delivery under the contracts. After several attempts to complete delivery, the last of the available canola was delivered on May 6, 2011. A total of 175.34 metric tons of canola was delivered against the contracted obligation of 510.30 metric tons. Northern Sun processed a settlement to Berube for the delivered 175.34 metric tons at

$371.92 per metric ton (less discounts), for a total settlement value of $62,626.27. Northern Sun withheld this payment as partial settlement on its claim for the undelivered quantities. Northern Sun claimed a default penalty of $90,228.18 on those undelivered quantities and provided documentation of a buy-in price of $641.29 per metric ton.

Berube disputed that it defaulted on the undelivered quantity. Berube cited the "Act of God" clause in the production contracts, referencing excessively wet growing conditions and other alleged damage to his crop that he maintained were beyond his control. Northern Sun claimed that Berube was barred from relying upon the Act of God provisions because he did not notify Northern Sun in writing that he was invoking this defense as was required under the contracts. In response, Berube claimed he gave verbal notification to Northern Sun of his inability to plant the canola.

Berube filed a counter claim against Northern Sun claiming storage costs from Jan. 1, 2011 through the date of delivery. Berube also claimed that he was entitled to payment at the highest futures price for canola through and including Oct. 29, 2010, plus the premium for the Nexera brand.

The Decision

The arbitrators concluded that Berube defaulted on the contracted delivery of canola and was obligated for delivery of the entire 510.30 metric tons of canola, as called for in both the grain purchase confirmations and the production contracts. Berube's claim that he provided verbal notification did not meet the requirements of the production contracts for written notification concerning the Act of God provisions. Nor did Berube's actions meet the requirement of NGFA Grain Trade Rule 28(A) [Seller's Non-Performance], which states in relevant part:

> *If Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone confirmed by subsequent written communication.*

However, the arbitrators agreed that Northern Sun's grain purchase contract confirmations and production contracts were inconsistent with respect to pricing terms. Northern Sun's claim for damages on non-delivery was based upon a price of $371.92 per metric ton that it arbitrarily set on May 28, 2010. While agreeing with Northern Sun's date and buy-in pricing of $641.29 per metric ton, the arbitrators took issue with the original price that Northern Sun set on the contracts. Because the conflict and ambiguity were the result of the contract terms drafted and issued by Northern Sun, the arbitrators determined that Berube was entitled to the benefit of the more favorable application of the contract terms.

Thus, the arbitrators agreed with Berube's counterclaim as to the pricing on the contracts. The purchase confirmations permitted Berube until Oct. 29, 2010 to establish a futures price.

Northern Sun's pricing confirmation for contract number 2514A indicated a basis of $17 per metric ton over the Winnipeg Grains and Produce Exchange ("Winnipeg") November 2010 futures; also, contract number 2530A indicated a basis of $15 per metric ton over Winnipeg November 2010 futures. Winnipeg November futures closed at $532.75 per metric ton on Oct. 29, 2010. Therefore, the price that should have been used on the partial settlement of contract 2514A was $549.75 per metric ton, less discounts. The prices used for the default calculation on the undelivered portion of contract 2514A also should have been $549.75 per metric ton, while the price used for the default calculation on contract 2530A should have been $547.75 per metric ton.

The arbitrators also agreed with Berube's claims for storage costs. Both the grain purchase confirmations and the production contracts clearly stated that delivery was at *"Buyer's Call"* with Northern Sun to arrange for freight. Northern Sun claimed it attempted to pick up the grain early in January 2011, but weather conditions prevented the delivery at that time. Delivery was not completed until May 6, 2011. The arbitrators concluded Northern Sun could have arranged for delivery of the canola earlier and then charged Berube for any costs that may have incurred to affect the delivery pursuant to the terms of the production contracts.

The Award

Based upon these findings, the arbitrators ordered as follows:

Berube was due $93,807.28 for the canola delivered (based upon Oct. 29, 2010 prices)

Delv	MT Dlvd	Price ($)	Check off ($)	Net Price ($)	Gross ($)	Fees ($)	Discounts ($)	Net ($)
4/28/11	32.08	549.75	0.8818	548.8682	17,607.69	(14.50)	0.00	17,593.19
4/28/11	28.49	549.75	0.8818	548.8682	15,637.26	(14.50)	0.00	15,622.76
4/29/11	30.65	549.75	0.8818	548.8682	16,822.81	(14.50)	0.00	16,808.31
5/4/11	30.95	549.75	0.8818	548.8682	16,987.47	(14.50)	0.00	16,972.97
5/5/11	34.76	549.75	0.8818	548.8682	19,078.66	(14.50)	(1,532.57)	17,531.59
5/6/11	18.41	549.75	0.8818	548.8682	10,104.66	(14.50)	(811.70)	9,278.46
								$93,807.28

Berube was due $3,103.49 for storage charges from Jan. 1, 2011 through the pickup date at $0.20 per hundred weight per month.

Northern Sun was due $31,002.44 on the undelivered balance under contract number 2514A and the full quantity under contract number 2530A based upon the adjusted contract and buy-in prices.

Therefore, the arbitrators awarded to Berube $65,908.33 from Northern Sun in full settlement of this arbitration case. No interest was awarded and each party was deemed responsible for its own legal fees.

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

Robert E. Burkhardt, *Chair*
Chief Financial Officer
Maxyield Cooperative
West Bend, Iowa

Russ Braun
Grain Division Manager
Primeland Cooperatives
Lewiston, Idaho

Jeff Van Pevenage
Vice President, General Manager
Columbia Grain Inc.
Great Falls, Mont.