



# National Grain and Feed Association Arbitration Decision

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## CASE NUMBER 2634

**Plaintiff:** Heartland Co-op, West Des Moines, IA

**Defendant:** Broken Wing Farms Inc., Denison, IA

### STATEMENT OF THE CASE

This dispute involved 20 hedge to arrive contracts between Broken Wing Farms Inc. (“Broken Wing”), as the seller, and Heartland Co-op (“Heartland”), as the buyer, for a total sale of 605,000 bushels of corn.

The “Hedge to Arrive Confirmation” for each of the 20 contracts was signed by both Broken Wing and Heartland. The contracts were issued on different dates from November 2009 through April 2011. The contracts also provided for different delivery periods and were priced according to various Chicago Board of Trade futures reference months.

The parties also entered into other transactions for the sale and delivery of grain that were not a part of this dispute. In their arguments submitted in this arbitration proceeding, the parties stated in detail how they each allegedly performed throughout 2010 and 2011 under both the contracts that are part of this dispute and those contracts that are outside this dispute. Broken Wing delivered on additional contracts outside of this dispute, with a final delivery of corn occurring on January 20, 2012. On this delivery, Broken Wing delivered 570.77 extra bushels, which was then applied to a contract that was in dispute. Heartland consequently claimed the remaining undelivered balance due was 604,429.23 bushels.

During a telephone conversation between the parties’ representatives on February 14, 2012, according to Heartland, Broken Wing requested payment for the delivered bushels and Heartland requested a plan on how Broken Wing intended to remediate contract shortages and complete delivery of the remaining bushels. Heartland stated it had reason to anticipate that those deliveries would not occur because it had become aware that Broken Wing had oversold its crop. Heartland stated the parties continued to discuss these issues, including in another telephone conversation on February 27.

Broken Wing then wrote to Heartland on March 4, inquiring about payment for the delivered grain. The letter stated that “no further delivery of grain will occur until payment for the January delivery is received.” Heartland claimed that the parties continued to communicate regarding these issues. On April 11, Broken Wing wrote to Heartland, stating as follows:

You received my March 4th, 2012 letter where I informed you that no further delivery of grain would occur until payment for the January delivery is received. No payment was made during March 2012. Because I can no longer trust Heartland Co-op to perform and pay Broken Wing Farms Inc. what it is owed, I am cancelling our contractual relationships.

Heartland then cancelled the contracts and so advised Broken Wing by letter dated April 12. Heartland claimed damages of \$810,021.95 (which included a deduction in the amount of \$45,347.47 owed to Broken Wing for the delivered grain). Heartland also sought attorneys’ fees and arbitration costs.

Broken Wing claimed that Heartland wrongfully withheld the payment of \$45,347.47 for the grain delivered in January 2012. Broken Wing also claimed that Heartland failed to adequately respond to Broken Wing's March 4, 2012 letter. According to Broken Wing, its April 11 letter, cancelling its "contractual relationships" with Heartland, was consequently justified. Broken Wing further claimed that Heartland wrongfully proceeded to cancel the contracts with an assessment of damages, in particular, because Broken Wing alleged the contract terms entitled it to an absolute right to roll its obligations to deliver the remaining grain.

## THE DECISION

The arbitrators closely considered the terms of the signed contracts between the parties. The arbitrators noted that paragraph 13 in each of the contracts states as follows:

**Dispute resolution.** The parties agree that the sole remedy for resolution of all disputes arising under this contract will be through arbitration proceedings before the National Grain and Feed Association (NGFA) under the NGFA Arbitration Rules. The decision and award determined through this arbitration will be final and binding on both parties and may be enforced by any court having jurisdiction. The "seller" as appears on this contract confirmation shall be liable for all legal fees associated with the consequences of his or her nonperformance under the terms contained in this agreement.

The arbitrators determined that based upon the parties' agreement, the "sole remedy" for resolution of this dispute was through these proceedings in accordance with the NGFA Arbitration Rules. The arbitrators noted that each of the contracts provided for specific delivery periods and quantities of bushels to be delivered. The contracts also each contained the following provision in paragraph 9:

**Seller's Delivery Warranty:** The Seller has an obligation to deliver the grain described in this contract during the delivery period. The Seller's obligation to deliver is absolute and the Seller warrants that he/she will deliver the quantity described above regardless of any other delivery commitments the Seller has or may have with the Buyer or any other parties. The Seller shall pay the Buyer for any loss occasioned under the contract caused by failure to deliver the grain in the time, quantity, and location specified. The responsibility of the Seller is in no manner abridged by loss, or reduction in the amount of grain available for delivery or by lack of transportation, bad weather or other handicaps.

The arbitrators also noted that a portion of the contracts had been rolled by agreement of the parties and pursuant to the contract terms, which provide that the "Buyer will allow replacement of this contract with a new HTA contract using a CBOT reference Month/Year forward within the crop year as defined within this contract." The arbitrators considered the parties' arguments about whether the seller's right to roll the contracts was "absolute", as claimed by Broken Wing, or "limited" as Heartland claimed. The arbitrators determined that the provision for rolling a contract did not apply in this dispute because the parties had clearly cancelled. In its April 11, 2012 letter, Broken Wing specifically stated that it was "cancelling our contractual relationships." In its April 12, 2012 letter, Heartland stated that it had followed up with a buy-in of the defaulted portions of the cancelled contracts and an assessment of damages.

The arbitrators considered the parties arguments concerning Heartland's withholding of payment for the delivered grain as it relates to the subsequent cancellation of the remaining contracts by Broken Wing. The evidence and arguments presented by the parties does not demonstrate that Heartland at any time denied its obligation to pay Broken Wing for the delivered grain. Heartland confirmed throughout the course of communications between the parties that it was prepared to pay the amount due on the delivered grain. In its submissions, Heartland produced a check (written and dated February 16, 2012) payable to Broken Wing for the full amount of \$45,347.47. The parties continued to discuss Heartland's obligation for the delivered grain and Broken Wing's obligation to deliver the remaining bushels. It appeared that Heartland's representative was requesting the opportunity to meet with Broken Wing to personally deliver the check for final payment and discuss the execution of the outstanding contracts when Broken Wing communicated that it was cancelling the contracts.

The arbitrators determined that Heartland was justified in asking for assurances on the remaining bushels, particularly given the volumes due and the information it had received about Broken Wing having oversold its crop. The arbitrators further determined that Heartland also acted reasonably to the extent that it withheld payment on the delivered grain subject to its request for a discussion and assurances regarding the significant damages associated with the large volume of undelivered grain. The arbitrators noted that paragraph 5 in the HTA contracts stated:

**Payments to Seller:** Payments due Seller under this contract will be paid after delivery and acceptance by Buyer of the contracted commodity at the Final Cash Price determined according to the terms of this contract. Any payments to Seller for grain delivered under this contract shall be subject to deduction for applicable discounts, storage, drying, or other service charges owed to the buyer.

The arbitrators further concluded that even if Heartland was not justified in withholding payment in this manner in connection with one contract, Broken Wing was not justified in cancelling the other and separate contracts. The arbitrators noted that NGFA Grain Trade Rule 28(C) 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 rescission of the entire contract or any other contract between the Buyer and the Seller.

The withholding or redirecting of payment by Heartland for some contracts or deliveries did not justify Broken Wing's refusal to perform any further deliveries under all of the contracts.

Upon receipt of Broken Wing's letter stating it was "cancelling the contractual relationships" between the parties, it was appropriate for Heartland to proceed with cancellation of the contracts and assessment of damages under the NGFA Trade Rules. NGFA Grain Trade Rule 28(A)(3) [Seller's Non-Performance] states:

If the 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. The Buyer shall then, at once elect either to: . . . (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

The arbitrators concluded that the contracts were cancelled in accordance with NGFA Grain Trade Rule 28 and customary standards in the trade. The arbitrators further determined that Heartland calculated its damages in accordance with the terms of the contracts between the parties and Heartland properly substantiated its claim for damages in this case.

## THE AWARD

Therefore, the arbitrators awarded damages to Heartland in the amount of \$810,021.95. The arbitrators further awarded interest of 3.25% on this amount pursuant to NGFA Arbitration Rule 8(m) from August 15, 2013, the date of the decision, until the date the award is fully paid.

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

**David Fiebiger**, *Chair*  
Manager  
Finley Farmers Grain & Elevator  
Finley, ND

**Robert Knief**  
President  
Bartlett Grain Company LP  
Kansas City, MO

**Terry Knudson**  
General Manager  
Ag First Farmers Co-op  
Brookings, SD