



National Grain and Feed Association Arbitration Decision

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May 23, 2018

CASE NUMBER 2791

**PLAINTIFF: TONY L. JONES AND JOHN C. CURTISS D/B/A JONES & CURTISS FARMS
STOCKTON, IL**

**DEFENDANT: GAVILON GRAIN, LLC
WARREN, IL**

STATEMENT OF THE CASE

The plaintiffs, Tony L. Jones and John C. Curtiss d/b/a Jones & Curtiss Farms (“Jones & Curtiss Farms”), and the defendant, Gavilon Grain, LLC (“Gavilon”) contracted for 350,000 bushels of #2 non-GMO yellow corn (Purchase Contract Confirmation No. PYCN7614025, dated Jan. 7, 2014). The contract provided for a 30-cent per bushel non-GMO premium, destination grades and weights to apply, and delivery during the 2014-15 crop year. The contract also provided for basis point “FOB Farm Stockton via truck” and elevator discount scale at the time of unload.

Jones & Curtiss Farms claimed in this dispute that Gavilon improperly deducted from payments under the contract for trucking of some loads from the Stockton farm to Gavilon’s facility. Jones & Curtiss Farms also claimed that Gavilon failed to pay the non-GMO premium on some of the bushels delivered. The arbitrators decided to address the claims, separately, in two parts as follows:

- 1) Was the basis paid by Gavilon on the 350,000 bushels of non-GMO corn correct? Jones & Curtiss Farms claimed Gavilon incorrectly deducted freight from the settlement. Gavilon countered that it correctly set the basis for FOB the farm by using the basis at a known destination and deducting established freight rates.
- 2) Was Gavilon correct when it paid Jones & Curtiss Farms under invoice number 010823-P (check number 43003542) the value for standard #2 yellow corn instead of the value for non-GMO corn due to alleged high levels of detected foreign material (“FM”)?

THE DECISION

Claim 1 – The Basis under the Contract

In January 2014, Jones & Curtiss Farms contracted with Gavilon for 350,000 bushels of #2 non-GMO yellow corn to be grown during the 2014 crop year. According to Jones & Curtiss Farms, the parties agreed that the contract would be “FOB Stockton Farm” and freight would be paid by Gavilon. The basis for “FOB Stockton Farm” was not specified in the contract. Jones & Curtiss Farms claimed it interpreted comments by a Gavilon employee to mean that the terms, “FOB Stockton Farm,” would be

particularly advantageous to Jones & Curtiss Farms because it would benefit from the basis set for Gavilon’s elevator without incurring the cost of the freight.

In early April 2015, Gavilon designated the destination point under the contract as Dove Harbor in Dubuque, IA. Deliveries began on April 20 and continued throughout August 2015. Gavilon’s employees conducted GMO purity and FM tests at the plaintiffs’ farm.

The arbitrators noted that the parties provided many different versions of the contract as exhibits to their arguments submitted in this case. The arbitrators determined it was unclear when the basis was set on the delivered corn. Sometime after the last of the April 2015 deliveries, the parties began to dispute whether freight should be included in the basis applied to the deliveries. Jones & Curtiss Farms continued to deliver corn under the contract.

Claim 1: Delivery and Settlement History Table

Settlement #	Settlement Report Date	Delivery Dates	Bushels on the settlement
010793-P	May 14, 2015	April 21 – 23, 2015	110,799.64
010823-P *	May 21, 2015	April 20 – 23, 2015	68,559.98
011695-P	August 3, 2015	July 13 – 16, 2015	69,350.68
011696-P	August 3, 2015	July 16, 2015	994.29
011865-P	August 17, 2015	August 3 – 7, 2015	129,655.03
011878-P	August 18, 2015	August 18, 2015	10,964.99
			Total Bushels: 390,324.61

*This settlement is also part of Claim 2

Jones & Curtiss Farms stated it interpreted comments from a Gavilon employee to mean that the terms, “FOB Stockton Farm,” were particularly beneficial as the plaintiff would be getting a better basis without the cost of the freight, and if it ultimately hauled the loads, it would receive the freight as additional compensation. Jones & Curtiss Farms also argued that after it received its first settlement, it was told that freight was included in the calculation of the settlement. Jones & Curtiss Farms claimed damages in this dispute amounting to 18-cents per bushel for all loads delivered to Gavilon’s Dove Harbor facility.

Gavilon denied indicating to Jones & Curtiss Farms it would be paid a basis set on Gavilon’s facility when Gavilon had the corn picked up at the farm. Gavilon stated that Jones & Curtiss Farms failed before the first delivery to dispute the terms of the contracts, which provide the basis point as FOB Farm Stockton. Gavilon also argued that Jones & Curtiss Farms failed to dispute the 18-cent per bushel assessment for freight when Jones & Curtiss Farms received it for hauling the corn.

The arbitrators identified and evaluated several key considerations:

- Terms such as “basis point FOB Farm Stockton via truck” are typical in the industry, and commonly calculated using a known delivery point with a published basis less the freight cost from FOB the farm to that delivery point. Gavilon followed commonplace methodology in its calculation of the basis for FOB Farm Stockton in this dispute.
- Gavilon produced evidence in this case of the freight cost for the calculations noted above, but Gavilon failed to produce the published basis for the known delivery point it relied upon in these calculations.

- There are multiple versions of contract 7614025 provided as evidence by the parties. The version submitted by Jones & Curtiss Farms (Exhibit E of the Plaintiffs' First Argument), which was signed by Gavilon, indicates a pricing of 112,857 bushels with a $-\$0.09$ basis price. The contract includes the printed note, "OTHER: $\$.02$ FOR HTA & ROLLING FEE + $\$.30$ NON-GMO PREMIUM," but the contract does not clearly indicate that these are already reflected in the $-\$0.09$ basis. The contract also has a handwritten note from Gavilon showing how the $-\$0.09$ basis was calculated including the FOB Stockton farm basis of $-\$.37$ and the non-GMO premium of $\$.30$. The version of the contract submitted by Gavilon (Exhibit E of Defendant's Answer), which was not signed by either party, indicates pricing of 110,799.64 bushels. This version of the contract includes additional printed notes, including "BASIS FOB STOCKTON: -33 CK To -37 CN (4 CENT SPREAD)." No explanation was provided to assist the arbitrators in reconciling between these different versions of the contract.
- Industry practice is to detail in print calculation of the basis for the corn, the premium, and any fees and other adjustments to the basis. Contract 7614025 does not provide this detail. The contract could be interpreted as written to mean that the basis on the delivered corn should be $-\$0.09$, less the $-\$.02$ HTA and rolling fee, and plus the $\$.30$ non-GMO premium.
- Based upon the affidavits submitted by the parties in this case, it seems likely that the handwritten note on Jones & Curtiss Farms' Exhibit E, and the additional printed notes on Gavilon's Exhibit E, were made after the parties met in dispute of the settlements.

The arbitrators noted that certain factors supported Gavilon's position:

- When corn was hauled by a third party, the freight of 18-cents per bushel was not deducted from the settlements with Jones & Curtiss Farms. On the other hand, when corn was hauled by Jones & Curtiss Farms, freight of 18-cents was added to the settlements.
- Gavilon provided evidence to support that freight paid to third parties was generally 18-cents per bushel.

The arbitrators also noted that additional information would have assisted in reaching their decision:

- Gavilon failed to produce evidence for the FOB Dubuque basis. If such evidence had been produced, it might have confirmed that the $-\$0.09$ basis included the $\$.30$ non-GMO premium.
- The parties failed to demonstrate when was the basis set on the first 112,857 bushels. The typed date on the top of the contract is January 7, 2014. However, the date next to Gavilon's signature is April 30, 2015. The initial assumption could be that April 30, 2015 is the date on which the basis was set, but no timeline was provided.

With respect to Claim 1, the arbitrators concluded as follows:

- Contract 7614025 did not clearly document whether the basis of $-\$0.09$ included the $\$.30$ non-GMO premium separate from the FOB the farm basis. The contract could have been interpreted as written to mean that the basis on the delivered corn was $-\$0.09$ plus the $\$.30$ non-GMO premium and less the $\$.02$ roll fee for a net basis of $+\$.19$.

- Gavilon’s documentation relating to contract changes and amendments was below industry standards.
- Gavilon failed to provide sufficient and complete evidence for its calculation of the FOB Farm Stockton, particularly including bid sheets or third-party confirmations of the FOB Dubuque basis. However, Jones & Curtiss Farms apparently did not request this information or contest these particular calculation, which led the arbitrators to anticipate that calculation of the FOB Dubuque basis was not in dispute.

The arbitrators decided – given the claims, circumstances and submissions presented by the parties in this case – to award to Jones & Curtiss Farms half of the amount claimed for the $-\$.18$ in dispute for the basis component of plaintiffs’ claim. Therefore, the amount awarded to Jones & Curtiss Farms for Claim 1 was $\$35,129.21$ ($390,324.61$ bushels x $\$.09$).

Claim 2 – The Non-GMO Premium

From the settlement information provided, the arbitrators determined that 179,359.52 bushels were loaded on the farm and accepted at Dove Harbor between April 20-23, 2015. Of the 179,359.52 bushels accepted by Gavilon at Dove Harbor, 68,559.88 bushels were settled and paid for as regular #2 corn under settlement number 010823-P on May 21, 2015. The remaining 110,799.64 bushels were settled and paid for as non-GMO corn under settlement number 010793-P on May 14, 2015.

Jones & Curtiss Farms argued it was not made properly aware these loads would be discounted for failure to meet the non-GMO standards. Jones & Curtiss Farms stated these loads passed Gavilon’s testing at the farm and the elevator. According to Jones & Curtiss Farms, it was first informed by a Gavilon employee that these loads would be paid as regular #2 corn after Gavilon’s barge loads failed to pass grades. Jones & Curtiss Farms claimed that pursuant to contract number PYCN7614025, it was entitled to the $\$.30$ per bushel non-GMO premium.

Gavilon argued “the nonconforming corn” was rejected when it was unloaded at Dove Harbor because when it was probed it was determined to contain FM levels in excess of 3%. Gavilon claimed Jones & Curtiss Farms was notified that the corn was “non-conforming” pursuant to the 3% FM maximum on non-GMO corn when the loads were graded at Dove Harbor. Gavilon also argued Jones & Curtiss Farms accepted the corresponding change in the contract and provided evidence that Jones & Curtiss Farms signed a contract for 68,559.98 bushels of regular #2 corn (contract B001128).

The arbitrators considered several key factors:

- Contract PYCN761025 stated that destination weights and grades applied. Destination was not specified; thus, industry practice is applicable.
- Industry practice is that destination weights and grades apply at time of unload.
- Grades at the plaintiffs’ farm or grades after the time of unload (such as when the barge loads were rejected) are not relevant.
- Gavilon had the right to reject any loads or to notify Jones & Curtiss Farms at the time of unloading that the loads did not meet the non-GMO requirements and would be priced as regular #2 corn. Gavilon did not reject the loads that pertain to this claim prior to unload.

- Gavilon failed to produce any written evidence (such as emails or handwritten notes), which indicated that Jones & Curtiss Farms was aware of a change in the contract, particularly referring to how payment for the loads would be determined.
- After accepting the loads, Gavilon had the responsibility for grades, including meeting standards for non-GMO corn at subsequent destinations.
- The arbitrators reviewed the FM grade on each load pertaining to settlement 010793 (for non-GMO corn) and settlement 010823 (for regular #2 corn). There is not a consistent pattern (referring to FM levels, dates or ticket numbers) to determine which loads were non-GMO and which were regular #2 corn. For example, under the regular #2 corn settlement, 19 tickets had an FM level of less or equal to 3%; and under the non-GMO settlement, 23 tickets had an FM level greater than 3%. Therefore, the arbitrators concluded Gavilon did not use FM levels at time of unload to determine which loads it claimed were “non-conforming.”
- The arbitrators noted that additional information would have assisted them in reaching their decision, including the factors Gavilon used to determine when to reject some loads due to non-GMO quality and accept other loads at the farm and its facility.
- With respect to contract B001128 (68,559.98 bushels at \$3.40 per bushel), Gavilon claimed that this contract was prepared to provide for the sale of the “non-conforming” loads as regular #2 corn. The printed date on the contract was April 30, 2015 – ten days after shipments began of the first loads rejected for not qualifying as non-GMO, and seven days after shipments by Jones & Curtiss Farms were completed. This contract was not signed by Gavilon, which prepared the contract, until June 24, 2015. Jones & Curtiss Farms signed the contract on June 25, 2015. The arbitrators could not determine when the contract for “the non-conforming corn” was agreed upon.
- The arbitrators also noted a discrepancy with the calculations on Gavilon’s settlement document (68,559.98 bushels x \$3.40 contract price less \$3,022.77 in deductions = \$230,081.16) versus what it paid for the settlement (\$161,536.79). However, because Jones & Curtiss Farms did not contest this discrepancy or claim it in damages, the arbitrators did not consider it as part of this case.

With respect to Claim 2, the arbitrators concluded as follows:

- Gavilon could have rejected the loads in question prior to unload.
- Gavilon did not consistently use the FM grade, pursuant to the contract terms, at time of unload to determine if the load should be paid for as regular or non-GMO corn.
- Gavilon did not produce any written evidence that Jones & Curtiss Farms agreed to some grading process other than the grades at destination at time of unload on each individual load pursuant to trade custom and industry standards.
- The timeliness of Gavilon’s documentation of the transaction, especially the contract used to settle the regular corn, was slower than industry standards.
- Therefore, the arbitrators awarded to the plaintiffs the amount claimed (68,559.98 bushels x \$.30 per bushel non-GMO premium = \$20,567.99).

- The arbitrators' decision was unanimous. The total amount awarded to Jones & Curtiss Farms for Claims 1 and 2 is \$55,697.20.

THE AWARD

The arbitrators awarded \$55,697.20 in damages to Tony L. Jones and John C. Curtiss d/b/a Jones & Curtiss Farms from Gavilon Grain, LLC.

Decided: April 26, 2018

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

Jean Bratton, *Chair*
General Manager
Centerra Cooperative
Ashland, OH

Matt Gruhlkey
Origination Manager
Attebury Grain LLC
Amarillo, TX

Ronnie Truelock
General Manager
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