National Grain and Feed Association
Arbitration Decision
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August 13, 2020

# CASE NUMBER 2836

**PLAINTIFF:** **GARTH HANDKE**
**WALDRON, SASKATCHEWAN, CANADA**

**DEFENDANT:** **GRAIN MILLERS, INC.**
**EDEN PRAIRIE, MN**

## STATEMENT OF THE CASE

Garth Handke sold 100,000 pounds (two full truckloads of 50,000 lbs. each) of yellow mustard to Grain Millers, Inc. ("Grain Millers"), pursuant to purchase contract no. 12230, dated February 17, 2016.

The price to be paid under the contract was .60 CN$ per lb. The shipment period was "Buyer's Call" with a start date of May 1, 2016 and end date of July 1, 2016. The shipping mode was "Truck" with destination weights and grades to Govern, "FOB Waldron, SK" (Mr. Handke's farm). The contract included a discount schedule for "FM"; "MSTS"; "ADMIX"; "Green Damage max. 1.5%, subject to rejection"; "HEAT: .1 max, subject to rejection" and "TW: min. 48 lbs, subject to rejection".

The first bulleted provision under "TERMS AND CONDITIONS" in the contract stated:

> Suppliers to submit samples to the Grain Millers Inc, Quality Control Laboratory for analysis prior to shipping. However, acceptance of grain on the basis of submitted sample does not imply acceptance of the grain shipment. Acceptance of grain shipment is contingent upon the destination grade.

Another bulleted provision in the contract terms and conditions stated:

> Zero tolerance for mold, sour, and musty odors, Insects, animal/rodent droppings, filth or hair. Reject if found and all costs will be for the sellers account.

The contract terms and conditions also stated:

> TRUCK SAMPLES WILL BE SUBMITTED TO NORTH DAKOTA STATE GRAIN INSPECTION FOR THIRD PARTY GRADE ANALYSIS. (Emphasis in original).

Mr. Handke contended that Grain Millers defaulted on the contract. Mr. Handke cited NGFA Grain Trade Rule 8 and Grain Trade Rule 28 (B) in support of his contention. Mr. Handke stated he sold 45,982 pounds of yellow mustard on September 20, 2017, at .4509 CN$ per pound to another buyer in Minneapolis through a third party to cover Grain Miller's defaulted portion of the contract. The load of yellow mustard graded at No. 1 Canada. Mr. Handke claimed he was owed 6,855.92 CN$.

On June 9, 2016, two truckloads of yellow mustard were delivered to Grain Millers' facility in St. Peter, Minnesota. One load made grade and was accepted. Grain Millers stated the second load was rejected after a finding of "Musty" on USDA Federal Grain Inspection Service certificate US-SG-1-144645.

Mr. Handke claimed for the rejected load, he did not receive a grain analysis report or written confirmation that the sample was forwarded to the state inspection agency, and he was not allowed an opportunity to settle for a lesser grade. Mr. Handke also contended he was not provided an opportunity to make satisfactory adjustment with Grain Millers after it rejected the load under Grain Trade Rule 8. Mr. Handke further stated he requested the opportunity to provide a second load to replace the rejected load. Mr. Handke claimed a subsequent origin sample from the bin was submitted which Grain Millers would not forward to a third party nor would it pick up the load based on the origin sample even though the destination sample grade would govern. Mr. Handke stated Grain Millers was adamant in its refusal to send a truck for another load. In a January 26, 2018 letter, Mr. Handke's attorney wrote: "Mr. Handke has requested that I write to you (Grain Millers) with his concern which is that you rejected the load not because of the grade but because you did not want to accept the grain as the market price fell."

Grain Millers stated that, having accepted three prior loads under a previous contract (contract no. 12166) with Mr. Handke from November 2015, it did not require Mr. Handke to provide a grain sample because he represented that the two loads on June 9, 2016 would be of similar quality. However, according to Grain Millers, the second truckload was graded at the destination as having a musty odor and zero tolerance was the cause for rejection under the contract. Grain Millers stated it notified Mr. Handke of state grain inspection agency's determination, and Mr. Handke instructed Grain Millers to return the grain to his farm. The load was returned, and Mr. Handke accepted the transportation costs. Grain Millers stated on or about June 17, 2016, it was mutually decided that a representative would be sent on Grain Miller's behalf to witness the loading of yellow mustard at Mr. Handke's farm. A sample was taken at the time of loading, and on July 6, 2016, Grain Millers evaluated the sample and detected a moldy odor and moldy seeds. According to Grain Millers, on or about July 14, 2016, Grain Millers informed Mr. Handke by phone of the moldy condition of the mustard. Grain Millers stated it reminded Mr. Handke that destination sampling of the truckload would be used to determine its acceptance or rejection, and that Mr. Handke could attempt to have the load delivered. Grain Millers claimed in March 2017, Mr. Handke contacted Grain Millers to discuss the submitted sample and Grain Millers reminded Mr. Handke that only the destination sample would prevail. Another submitted sample was sent in March 2017 that also contained moldy qualities. According to Grain Millers, on July 17, 2017, Mr. Handke spoke by telephone with Grain Millers' employees, and the Grain Millers' employees advised Mr. Handke that he could still deliver on the contract, and if the mustard was good they would accept it, but if it was moldy or musty like the sample it would be rejected. Grain Millers stated Mr. Handke then asserted that the grain was not moldy, he had lost money on the previously rejected load, he may talk to a lawyer about pursuing damages, and he made no commitment to deliver.

## THE DECISION

The arbitrators were required to determine if there was a default by Grain Millers. Grain Trade Rule 8 [Sample Grain] provides as follows:

> Shipments rejected because of quality discrepancies shall be compared with the sale sample by either the inspection committee or some other duly authorized or agreed committee of the market in which such rejection is made, and the finding of said committee shall be final. If the finding is in favor of the Buyer,

> the Buyer shall at once notify the Seller by telephone. It shall then be the duty of the Seller to make satisfactory adjustment with the Buyer not later than 12 noon the following business day. If not adjusted within this time frame, the shipment shall be subject to the order of the Seller and the Buyer shall buy-in for the account of the Seller, cancel, or extend the defaulted contract and notify the Seller of his action.

The arbitrators determined that in this case, Mr. Handke was the seller, and he was at once notified (on June 9, 2016) by Grain Millers that it was rejecting the load because it exhibited mold and musty odors. Mr. Handke was also made aware by Grain Millers of the sample results as determined by the third-party inspection service as previously agreed upon by the parties. Mr. Handke then instructed Grain Millers to return the load to his farm. On or about June 17, 2016, there was communication between the two parties regarding an attempt to provide a replacement load.

The arbitrators also concluded the requirements of NGFA Grain Trade Rule 28(B) Buyer's Non-Performance were not proven by Mr. Handke. Mr. Handke did not provide sufficient evidence to determine that Grain Millers had defaulted nor was there sufficient evidence produced by Mr. Handke that notice was given to Grain Millers to fulfill the contract. The notes from the July 17, 2017 conversation produced by Grain Millers indicate the contrary that Mr. Handke had no intent to deliver.

The arbitrators further determined no market prices were provided by Mr. Handke or his attorney to prove claims that Grain Millers had rejected the load on June 9, 2016 due to the market price falling from February 17, 2016. The arbitrators rejected Mr. Handke's contention the September 20, 2017 shipment to the alternate buyer proved the price had fallen. The arbitrators determined the fact that a load of yellow mustard from the claimant graded no. 1 on September 20, 2017 at another location did not constitute sufficient proof that it was the same yellow mustard from June 2016 because another harvest season had already occurred.

## THE AWARD

The arbitrators unanimously ruled in favor of Grain Millers. No damages were awarded in this case.

Decided: July 10, 2019

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

**Dan Beard**, *Chair*
Assistant Manager
Assumption Cooperative
Assumption, IL

**Chris Hager**
Merchant
Sunrise Cooperative
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**Matt Stuever**
Origination Manager
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August 13, 2020

# APPEAL CASE NUMBER 2836

## APPELLANT/PLAINTIFF: GARTH HANDKE

## APPELLEE/DEFENDANT: GRAIN MILLERS, INC.

### DECISION OF THE APPEALS COMMITTEE

In the appeal, Garth Handke (Handke) claimed Grain Millers, Inc. (Grain Millers) failed to provide proper notice of termination of contract 12230; Grain Millers breached the FOB contract by not ordering delivery of the undelivered balance under contract 12230; Grain Millers defaulted on contract 12230 pursuant to NGFA Grain Trade Rule 28(B) for "Buyer's Non-Performance;" and procedural bias in favor of Grain Millers under the NGFA Arbitration Rules.

After review of the facts, arguments and documents presented in this case, the appeals committee reached the following conclusions:

- The appeals committee agrees with the original arbitration committee that Grain Millers did not default on the contract, and Handke failed to meet the requirements set forth in NGFA Grain Trade Rule 28(B) for "Buyer's Non-Performance."

  Grain Millers instructed Handke to redeliver the load to St. Peter, MN, via a teleconference between Grain Millers employees and Handke, as evidenced by affidavits of two of Grain Millers' associates, but Handke did not do so. Further, Grain Millers employees' notes from a telephone call with Handke on July 21, 2017, indicate Handke had no intent to deliver under the contract. Finally, a letter and facsimile from Handke's lawyer to Grain Millers dated January 26, 2018, specifically states that Handke already had sold the grain to another buyer. During this time, contract 12230 remained open, as evidenced by Grain Millers continued willingness to accept delivery and attempts to at least twice to schedule delivery of the FOB load.

  Therefore, the appeal committee finds that contract 12230 was not terminated until Handke informed Grain Millers via letter and facsimile from Handke's attorney dated January 26, 2018, that the grain had been sold elsewhere to a third party pursuant to NGFA Grain Trade Rule 28(A) ("Seller's Non-Performance.")

- Regarding Handke's argument of procedural bias, the purchase contract 12230 dated February 17, 2016, specifically states in the "terms and conditions" as follows:

> This purchase is made under the National Grain and Feed Association's (NGFA) Trade Rules and Arbitration Rules. The parties to this contract agree that the sole remedy for resolution of any and all disagreements or disputes arising under this contract shall be through arbitration proceedings before the National Grain and Feed Association under NGFA Arbitration Rules. The decision and award determined through such arbitration shall be final and binding upon the buyer and seller. Judgement upon the arbitration Award may be entered and enforced in any Court having jurisdiction thereof.

Both parties agreed to these terms and conditions on February 17, 2016, thereby agreeing to abide by and resolve any disputes under the NGFA Arbitration Rules. The procedures set forth in the NGFA Arbitration Rules are clear and applied equally to all parties.

The appeals committee further noted the NGFA's arbitration system has been operating informally since 1896 and formally since 1901 and is believed to be North America's oldest industry-based arbitration system. In 2007, Lisa Bernstein, Wilson Dickenson Professor of Law at the University of Chicago, authored an independent study of the advantages and disadvantages of the most prominent forums available for resolving commercial disputes in this area – the courts, the NGFA Arbitration system and other general commercial arbitration tribunals. The report concluded that the NGFA system is the most highly developed and sophisticated of the trade-run systems, and it is superior to both general commercial arbitration and litigation in state and federal court for resolving commercial disputes in the trade. In particular, the report noted the fairness and equities provided by the NGFA Arbitration system. Prof. Bernstein's report, "The NGFA Arbitration System at Work," published March 15, 2007, is widely available on-line for reference.

## AWARD

Therefore, the appeals committee unanimously agrees with the original arbitration committee ruling in favor of the Defendant, Grain Millers. No damages are awarded in this case.

Decided: July 28, 2020

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

**Sharon Clark,** *Chair*
Sr. VP, Transportation &
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Perdue AgriBusiness LLC
Salisbury, MD

**Jean Bratton**
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**Sean Broderick**
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**Dennis Inman**
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**Steve Nail**
President & CEO
Farmers Grain Terminal Inc.
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