



National Grain and Feed Association

Arbitration Decision

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October 7, 2010

Arbitration Case Number 2210

Plaintiff: Ceres Organic Harvest Inc., Minneapolis, Minn.

Defendant: West Plains Co./West Plains Grain Inc., Omaha, Neb.

Statement of the Case

This case involved a claim from Ceres Organic Harvest Inc. (Ceres) alleging that the verbiage and discussion within a series of emails between it and West Plains Co./West Plains Grain Inc. (West Plains) created a contract for 40,000 bushels of organic durum wheat. In response, West Plains asserted the emails were taken out of context and that no contract between West Plains and Ceres existed. West Plains also disputed the presence of a contract as no previous agreement between the two companies existed to use email as a substitution for written contracts, as defined in NGFA Grain Trade Rule 5(B).

It was the opinion of the arbitrators that during the initial email dialog both companies were maneuvering, attempting to leave an out in the event the market changed.

As presented by the parties, the facts of the case were as follows:

On Oct. 4, 2007, an email originating from the desk of a West Plains trader was sent to and received by a Ceres trader. Immediately following the personal greeting, the email stated "FIRM QUOTE for you." The email went on to list Quantity, Kind, Price as well as other specifications outlined in NGFA Grain Trade Rule 1 and consistent with what is considered trade practice. In the body of the email, the authoring West Plains trader wrote: "I will hold this offer for you until Monday COB." The arbitrators considered "COB" to mean Close of Business.

Over the next two days, continued email discussion took place between Ceres and West Plains surrounding the payment terms and updated credit application. During this time frame, Ceres asked West Plains to forward a signed contract, and also stated that Ceres would need approval from its team prior to signing the contract. West Plains responded by sending a document stating: "The criteria below [outlining the articles of trade] will serve as a DRAFT contract from which a formal contract

will be approved and submitted." The email concluded with the West Plains author writing: "Let's do this on Monday!! Sorry for the delay in confirming." On Monday, Oct. 8, 2007, West Plains resurrected the email string with credit application questions, and wrote: "this could be handled internally without you having to do the credit app. If you agree to the sale." West Plains went on to describe actions it would take internally to negate the need for Ceres to return the completed credit application.

- On Oct. 8, 2007, at 2.48 p.m., the Ceres trader sent an email to West Plains stating: "I agree and commit to the contract."
- Beginning on Oct. 10 and through late October, continued email conversation between West Plains and Ceres occurred – consisting of the logistics and grading of the shipments and the possible need to amend payment terms based upon the desired shipment schedule. The arbitrators viewed these exchanges as common trade practice behavior carried out to facilitate the execution of a contract.
- On Oct. 25, Ceres authored an email to West Plains asking for a copy of the durum contract, inclusive of the revisions to which it said both parties had agreed. West Plains responded via email with what appeared to be a computer-generated West Plains sales contract attached and dated Oct 5, 2007. The contract was unsigned. Ceres replied on Oct. 26 stating, "I know we have an agreement for the durum, however I'm required to have a signed copy of the contract on file." Ceres went on to discuss logistics and sampling procedures to be used as shipments were made. West Plains responded 10 minutes later referencing the grade issues Ceres had raised, stating: "Original

contract agreement is based on Canadian grades for sale purposes.” West Plains also went on to discuss further grading procedures.

The entire email string concluded on Nov. 19, 2007, when West Plains stated that it believed no contract existed between West Plains and Ceres.

Ceres provided the arbitrators with a “Buy In” Purchase contract dated Nov. 27, 2007 as the remedy for what Ceres argued was a contract default by West Plains. Ceres requested an award for \$220,000, plus interest after having purchased similar quality durum wheat elsewhere at \$21.80 per bushel, compared with the alleged West Plains-contracted price of \$16.25 for like kind and quality.

The Decision

The arbitrators concluded the primary issues involved in this case were:

- Did a contract exist between the two parties?
- Was there a confirmation of the trade?
- Did the absence of an agreement between the companies allowing email to substitute for written documents also allow for contract non-performance?

First, the arbitrators determined that a contract did exist, even though the arbitrators believed that during the initial email exchanges between the parties, both companies were maneuvering and attempting to provide an “out” in the event the market changed.

Subsequently, though, a **firm quote** was offered by West Plains with sufficient specifications and within an established time frame for the offer to be accepted.

Ceres attempted to negotiate, within the established time frame, a more suitable set of trade specifications. Ceres ultimately accepted the offer as written within the offered time frame by emailing West Plains on Oct. 8, 2007 before the close of business, stating: “I agree and commit to the contract.” Trade practice as well as application of the Uniform Commercial Code Section 2-204(1) supports the conclusion that both Ceres and West Plains behaved in ways on and subsequent to Oct. 8, 2007 that were consistent with having formed a contract. UCC Section 2-204(1) reads: “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”

The arbitrators determined that an emailed offer sufficiently speaking to the original articles of trade as outlined in NGFA Grain Trade Rule 1 may be responded to via email with acceptance. This email exchange constituted a confirmation and satisfied NGFA Grain Trade Rule 3(D), which reads: “A document otherwise complying with this rule shall be effective

even though it fails to use the term ‘confirmation.’”

West Plains’ position surrounded two components of the email string: First, the definition and use of the word “Draft” as written and included within the context of having submitted a firm quote. The arbitrators determined that in the context of the grain business, it is reasonable to use the word “draft contract” initially in moving forward in contract negotiations with the intent of eventually consummating a trade and contract. It is not, however, reasonable to use the term draft within the body and active time frame of a firm quote as a way to contravene one’s first commitment. Therefore, the arbitrators found that the commitment offered and initiated by West Plains was a firm quote through Monday close of business.

In support of its position, West Plains sought remedy within NGFA Grain Trade Rule 5(B), which reads: “These rules may be applied to trades that occur by email in substitution for conventional paper-based documents. A party to a trade may, in lieu of written documents, transmit or receive from the other party an email, and such email shall substitute for a written document provided that the parties have previously so agreed.” West Plains argued that because the companies had no prior agreement regarding use of email or emails to effect trade, they were immune from the contracts arising out of the email exchange. The arbitrators disagreed. Clearly, through their behavior, both Ceres and West Plains were inherently using email communication to initiate, invite and eventually to create a contract with each other. It is reasonable to suggest, because no previous agreement to use email existed, that in fact both parties chose to ignore the last sentence of NGFA Grain Trade Rule 5(B). The arbitrators did not agree with West Plains’ contention that by mutually choosing to ignore one passage of a NGFA rule, such action somehow invalidated other NGFA rules, trade practice or what could be reasonably expected in a mature business.

The arbitrators also agreed with Ceres’ position that the continued logistical, payment terms and grading email discussions were further evidence of intentions to effect performance on the contract that was created on Oct. 8, 2007.

The Award

For the aforementioned reasons, the arbitrators unanimously found that West Plains defaulted on a contract made with Ceres Organic Harvest Inc. on Oct. 8, 2007, and awarded damages to Ceres Organic Harvest in the amount of \$220,000, plus accrued interest at the rate of 6 percent per annum from Nov. 27, 2008 until the conclusion of this case and payment of damages.

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

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