



National Grain and Feed Association Arbitration Decision

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May 27, 2004

Arbitration Case Number 2008

Plaintiff: Jefferson Grain Inc., Terreton, Idaho

Defendant: Cargill Inc., Minneapolis, Minn.

Arbitration Case Number 2009

Plaintiff: Lance Stoker Enterprises Inc. d/b/a Amon Elevator, Idaho Falls, Idaho

Defendant: Cargill Inc., Minneapolis, Minn.

Arbitration Case Number 2014

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Roberts Elevator Inc., Roberts, Idaho

Statement of the Case

This case was a consolidation of three separate claims: Jefferson Grain Inc. v. Cargill Inc.; Lance Stoker Enterprises Inc. (d/b/a Ammon Elevators) v. Cargill Inc.; and Cargill Inc. v. Roberts Elevator Inc. Each claim involved a contract for the sale of soft white wheat (SWW) to Cargill. The sellers in each claim - Jefferson Grain Inc., Lance Stoker Enterprises Inc., and Roberts Elevator Inc. (collectively, "Sellers") - share the same principle, Mr. Lance Stoker. Cargill and Sellers agreed to consolidate these claims because the facts and issues in dispute were identical.

On May 15, 2001, Sellers entered into three contracts for the sale to Cargill of a total of 297,400 bushels of soft white wheat (SWW) at \$3.50 per bushel deliverable to Ogden, Utah, as follows:

Cargill		
Contract No.	Bushels	Named Seller
3216	145,400	Jefferson Grain Inc.
3217	125,000	Lance Stoker Enter. Inc. d/b/a Ammon Elevator
3218	30,000	Roberts Elevator Inc.

The terms of the three contracts otherwise were identical. The parties did not dispute the terms of the contracts. This dispute arose because at the time Sellers contracted with Cargill, the SWW was in storage in Sellers' elevators, but actually was owned by the Commodity Credit Corporation ("CCC"). Upon contracting with Cargill, the Sellers then contracted with CCC to purchase approximately 300,000 bushels of the SWW in storage in Sellers' elevators.

Between May 24 and June 30, 2001, Sellers shipped approximately 150,000 bushels on 59 rail cars to Cargill at Ogden, Utah. These shipments partially filled the three contracts. During the initial execution of the contracts, Cargill began advancing money to the Sellers. The terms provided for wiring of transfer funds 10 days after shipment. Because destination weights governed final settlement, the wire-transferred funds were advances against the final settlement.

On or about June 26, 2001, Cargill expressed concerns to the Sellers questioning the clear title of the grain shipped against the contract. Cargill stated it appeared that the Sellers were shipping grain owned by CCC before paying CCC for it.

Cargill notified the Sellers by telephone and facsimile stating its concerns regarding whether they had clear title. Cargill asserted that the Sellers would be required to provide assurances of clear title before proceeding with execution of the contract. Between June 26-29, 2001, Cargill and the Sellers had several conversations attempting to allay Cargill's concerns. The Sellers offered numerous proposals, but none to Cargill's satisfaction. Cargill notified the Sellers on June 29, 2001 that it was canceling all three contracts at contract price.

At the time of cancellation, Cargill already possessed the approximately 150,000 bushels previously shipped by the Sellers. To ensure that title issues would not encumber this grain, Cargill contacted and purchased the grain directly from CCC. Cargill also purchased from CCC the balance of the 300,000 bushels stored at the Sellers' elevators.

The Decision

The arbitrators acknowledged that Cargill had a legitimate concern. The terms of the contract clearly stated that the Sellers were to convey clear title at the time of shipment. Contract Conditions 5 specifically provided: "Seller warrants that commodities delivered under this Contract be free and clear, at the time of delivery, of any lien or encumbrance and that Seller has good title thereto..." Because the Sellers were shipping stored grain prior to paying for that grain, it appeared that they did not have clear title.

However, the arbitrators determined that this is not that unusual of a situation, and similar instances are routinely and uneventfully resolved between the parties. In this case, Cargill notified the Sellers and left the resolution of the problem to them. Despite the fact that the Sellers breached a term of the contract, it is incumbent upon all parties of a contract to find a solution that mitigates their damages. When put on notice by Cargill, the Sellers cooperated by entering into discussions with Cargill to find a solution. In particular, the Sellers proposed involving a credible third party in the dispute resolution process. The Sellers also proposed that Cargill issue checks to them as payment with "CCC" indicated as a lien holder. The Sellers further proposed that Cargill pay CCC directly. Other more complicated ideas involving incremental shipments were suggested as well. Cargill rejected all of these options and failed to propose any alternatives other than cancellation of the contracts.

The arbitrators evaluated the options proposed by the Sellers to determine if any of them would have satisfied the clear title and credit risk issues raised by Cargill. The arbitrators concluded that several of the alternatives could have resolved Cargill's concerns. When a "merchant" ships grain to another "merchant," the title after shipment always is better than it is prior to shipment. In this specific case, the Sellers – not Cargill – bore the risk, since they would be the ultimate point of recourse for any claims by CCC. Many of the Sellers' suggestions could have ensured that Cargill would not be at risk

The Sellers claimed that Cargill improperly cancelled the contracts. As damages, the Sellers sought recovery of lost profits (based upon the difference between the contract price of \$3.50 per bushel and the CCC purchase price of \$2.95 per bushel), less credits owed to Cargill, for a total of \$147,400.60, plus interest and costs. Cargill claimed that the contractual terms requiring clear title prior to shipping were breached, and cancellation of the contract consequently was in order. Because Cargill allegedly advanced \$112,868.81 in good faith to the Sellers – but ultimately paid CCC directly for this grain – Cargill sought return of the advance. In essence, Cargill claimed that it "double paid" for the 59 cars of grain shipped, and requested return of that money with interest from the Sellers.

from subsequent claims related to clear title on the grain shipped under the contracts.

Cargill should not have unilaterally canceled the contracts. In arriving at their decision, the arbitrators relied heavily upon trade practices and NGFA Trade Rules. In particular, NGFA Grain Trade Rule 28 (Failure to Perform) addresses relevant issues of a seller's breach of contract. Under Rule 28(A), upon a seller's non-performance, the buyer may: (1) agree to an extension of the contract; (2) buy-in for the seller's account, using due diligence, the defaulted portion of the contract; or (3) cancel the defaulted portion of the contract at fair market value. Rule 28(C) further provides that, "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 [*sic*] of the entire contract or any other contract between the Buyer and the Seller."

Consequently, the arbitrators determined, Cargill only had the right to unilaterally cancel the contract if there were no alternatives that would make it whole. If legitimate alternatives were available, then Cargill should have accepted one. The breach by the Sellers did not *ipso facto* terminate Cargill's contractual obligations. In light of viable alternatives to resolve the dispute, the arbitrators decided that Cargill should not have unilaterally cancelled the contracts. Further, Cargill failed to properly execute the unilateral cancellation.

Cargill improperly canceled the contracts. When Cargill elected to reject the options presented by the Sellers and cancel the contracts, NGFA Grain Trade Rule 28 provides how Cargill should have proceeded. Under Rule 28, Cargill had the option to agree to a contract extension, buy-in for the account of the Sellers, or cancel at "fair market value." When Cargill purchased the SWW directly from CCC, Cargill was, in essence, "buying in" for the account of Sellers. When taking such action, any resulting profit or loss would be for the Sellers' account.

The Award

The parties claimed the following damages:

Claim No.	Sellers' Claimed Damages	Cargill's Claimed Damages
2008	\$79,970.00 - lost profit (55 cents/bu. for 145,400 bushels)	None (no money advanced by Cargill)
2009	\$57,557.66 - lost profit of \$68,750 (55 cents/bu. for 125,000 bushels) less \$11,192.34 (the amount advanced by Cargill allocable to profit). (The remainder of Cargill's advance was paid to CCC).	\$71,288.81 (amount advanced by Cargill)
2014	\$9,971.94 - lost profit of \$16,500 (55 cents/bu. for 30,000 bushels of \$16,500) less \$6,528.06 (the amount advanced by Cargill allocable to profit). (The remainder of Cargill's advance paid to CCC).	\$41,580.00 (amount advanced by Cargill)
Total	\$147,499.60	\$112,868.81

Based upon the evidence and arguments provided, the arbitrators made the following rulings:

1. Sellers were entitled to lost profits resulting from the cancellation of the contract.
2. Cargill was entitled to advanced funds that did not go to paying for grain shipped.
3. All claims for attorney fees and interest were denied.

Lost Profits: In a transaction based on a f.o.b.-origin value and delivery to Ogden, Utah, calculation of lost profits requires factoring of: 1) the actual freight cost from each location; and 2) any load-out charges for shipping the CCC-owned grain (Sellers were not entitled to both lost profits and load-out charges). The parties did not provide information on freight rates and load out charges. The amount of the margin between the CCC purchase price and the sale price to Cargill did not in-and-of-itself constitute lost profits.

Return of advanced funds: The Sellers claimed that the money advanced from Cargill went to CCC to pay for the grain shipped to Cargill. Cargill countered that it paid CCC directly for the same grain for which it had advanced money to the Sellers (i.e. "double payment"). The parties' claims in this regard were unverified and unsupported.

The parties failed to provide sufficient information upon which the arbitrators could properly calculate damages in dollar amounts that result from this decision. The parties

consequently are ordered to provide suitable verification to each party to the case as necessary to implement the findings of this decision. Consistent with this decision, the Sellers are hereby:

- ▶ entitled to payment from Cargill for lost profits, with adjustments for freight costs and load-out charges to be verified by the Sellers to Cargill; and
- ▶ Cargill is entitled to have advanced funds constituting a "double payment" from Sellers be returned upon verification by Cargill to Sellers.

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

Ben Baer, Chair
 President
 Livestock Nutrition Center
 Memphis, Tenn.

Joel Moore
 General Manager
 Arthur Companies
 Arthur, N.D.

Robert Salstrom
 Senior Vice President
 ConAgra Trade Group
 Omaha, Neb.