



National Grain and Feed Association

Arbitration Decision

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August 27, 2009

Arbitration Case Number 2387

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Kenneth and Karla Less, Merrill, Iowa

Factual and Procedural Background

The plaintiff, Cargill Inc. (Cargill), requested the entry of a default judgment in the amount of \$1,954,900 against the defendants, Kenneth and Karla Less (Less). The default judgment was granted for the reasons set forth below.

Cargill submitted an arbitration complaint dated Jan. 6, 2009 to the National Grain and Feed Association (NGFA), which alleged that Less failed to perform on duly signed Cargill contract nos. 29475, 32608, 31360, 31356, 32002, 31997, 28682, 31998, 32273, 31600, 31663, 31664, 31357, 29476, 29479, and 32003 for delivery of yellow corn.

Each contract indicated, “**Rules to Govern:** NGFA,” and under “PURCHASE TERMS,” stated as follows:

1. “Unless otherwise provided herein, this Contract shall be subject to the Trade Rules of the National Grain and Feed Association (NGFA), which Trade Rules are incorporated herein by reference. The parties agree that the sole forum for resolution of all disagreements or disputes between the parties arising under this Contract or relating to the formation of this Contract shall be arbitration proceedings before NGFA pursuant to NGFA Arbitration Rules. The decision and award determined by such arbitration shall be final and binding upon both parties and judgement upon the award may be entered in any court having jurisdiction thereof. Copies of the NGFA Trade and Arbitration Rules are available from Buyer upon request.”

Acting upon Cargill’s complaint, the NGFA prepared an arbitration services contract and submitted it to Cargill for execution. By certified mail dated Feb. 9, 2009, the NGFA also sent to Less a letter providing notice of these proceedings with copies of Cargill’s complaint and attachments, as well as the NGFA Trade Rules and Arbitration Rules. The certified mail return receipt confirmed that this mailing to Less was signed for and received on Feb. 11.

Upon receipt of the duly executed arbitration services contract from Cargill, the NGFA then sent it with accompanying correspondence to Less by certified mail on Feb. 24, 2009. The certified mail return receipt confirmed that this mailing to Less was signed for and received on Feb. 26.

On March 2, 2009, counsel for Less contacted NGFA by telephone with questions about the arbitration process, and followed with a letter dated March 3, 2009 to NGFA specifically requesting an additional 30 days to submit the arbitration services contract and fee. In response to his letter, the NGFA contacted Less’s counsel to inform him that it does not grant formal extensions of time to submit the arbitration services contract, but that no dispositive action would be taken in this case without further notice from NGFA. On March 13, 2009, Less’s counsel sent another letter to NGFA confirming that he understood these facts.

On April 20, 2009, the NGFA sent another letter to Less by Federal Express delivery. Federal Express confirmed that this mailing was delivered on April 22. The NGFA’s letters of Feb. 24 and April 20, 2009 to Less specifically provided notice that Sections 5(c) and (d) of the NGFA Arbitration Rules required that the signed contract be returned within fifteen (15) days.

On April 29, 2009, Less’s counsel contacted NGFA again by telephone with additional questions about the NGFA arbitration process.

After still not receiving an appropriate response from Less, the NGFA sent yet another notice to Less’s counsel on May 27, 2009 by certified mail. This notice further specifically stated as follows:

“NGFA Arbitration Rules 5(d) and (e) provide for the entry of a default judgment when a party fails to execute the arbitration contract and pay the service fee within fifteen

(15) days. Based upon the lack of an appropriate response thus far, we must anticipate that the defendants do not intend to respond. *This is our last attempt to elicit a response from the defendants in this matter. A default judgment may be entered against the defendants at any time, which the Plaintiff may enforce in a court of law.*” [Emphasis in original.]

The certified mail return receipt confirmed that this mailing was signed for and received on June 1, 2009.

The NGFA has yet to receive an executed arbitration services contract from Less.

Default Judgment

The NGFA established jurisdiction over this matter pursuant to the express terms of the contracts by way of Cargill’s status as a NGFA active member.

Cargill properly and in a timely manner filed its complaint under NGFA Arbitration Rules Section 5(a). Pursuant to Section 5(b), the NGFA then submitted an arbitration services contract to the parties. Section 5(d) states that, “it shall be the duty of both parties to complete the contract for arbitration within fifteen (15) days from the date the party receives the contract from the National Secretary.” Cargill properly executed and returned the arbitration services contract. Less refused to comply with the NGFA Arbitration Rules, and refused to appropriately respond to arbitration-related mailings.

NGFA Arbitration Rule Section 5(e) provides for the following:

“Where a party fails to pay the arbitration service fee and/or fails to execute the contract for arbitration, the

National Secretary may without further submissions by the parties enter a default judgment or such other relief as the National Secretary deems appropriate.”

As it appears that Less made a conscious decision to disregard these arbitration proceedings, pursuant to Section 5(e) of the NGFA Arbitration Rules, the National Secretary finds that entry of default judgment against Less is proper and warranted.

Therefore, on July 20, 2009, the NGFA entered a default judgment against the defendants. The defendants were also advised that NGFA Arbitration Rule Section 5(e) sets forth the requirements and conditions under which, “[a]ny party against whom a default judgment has been entered under this provision may apply for vacation of the default judgment within fifteen (15) days of entry of the default judgment.” In this case, the defendants did not apply to vacate the default judgment pursuant to Section 5(e).

The Award

THEREFORE, IT IS ORDERED THAT:

1. Cargill Inc. is awarded judgment against Kenneth and Karla Less for \$1,954,900.
2. Interest on the judgment shall accrue at the statutory rate available for judgments in the applicable jurisdiction from this date until paid in full. This award is not intended to preclude the plaintiff from pursuing an additional award for interest, legal fees or costs in a court of law.

Dated: July 20, 2009

NATIONAL GRAIN AND FEED ASSOCIATION

By: Charles M. Delacruz
National Secretary