NATIONAL GRAIN AND FEED ASSOCIATION

Arbitration Decisions

September 6, 1984

ARBITRATION CASE NUMBER 1606

Plaintiff: J. W. Flammer Co. Inc., Anaheim, Calif.
Defendant: Cargill Inc., Minneapolis, Minn.

## Statement of the Case

On May 18, 1982, the plaintiff, through its agent, McGowan Grain Inc., sold 30,000 bushels of rail soybeans to the defendant. The soybeans were sold basis destination weights and grades delivered to Cargill at Council Bluffs, Iowa. The price agreed to was $6.22¼ per bushel, which included a 10-cent discount because the soybeans had a COFO or sour odor caused by smoke damage. The discounts agreed to were Cargill Processors Scale of Discounts No. 4. Subsequently, a reduced heat damage scale was agreed to by both parties.

All parties to the trade were aware that the soybeans were being salvaged from a facility that had experienced significant damage caused by an explosion and fire. Eleven hopper cars of soybeans were loaded and shipped across town to the defendant's facility. Official origin grades were taken prior to shipment.

Seven full cars and a partial car were unloaded based on the origin grades and a visual inspection at destination. The defendant refused to unload the remaining cars because the visual inspection indicated the soybeans were in significantly worse condition than indicated by the origin grade. Further, the defendant said the cars contained various sized pieces of concrete.

At the plaintiff's request, the rejected cars were officially inspected. Federal appeal grades also were obtained. Even though the soybeans had been officially graded sample grade at origin, the federal appeal grades discovered that some individual grade factors were significantly worse.

The cars continued to be rejected by the defendant, and the plaintiff sold the rejected cars to another party.

The plaintiff originally claimed $16,572.74, plus interest. The amount claimed was the result of loss from the rejection of three cars and part of a fourth with subsequent resale. The claim also reflected the fact that the discount scales applied were not agreed to and were excessive.

The plaintiff's claim later was amended to $27,013.

## The Decision

Both the plaintiff's and defendant's contracts called for destination grades. The cars that were accepted and unloaded were inspected visually for condition as compared to the origin grade and then accepted at destination on the basis of the origin grade. The cars not unloaded were rejected because of

the presence of foreign substances in the grain and the defendant's opinion that the condition of the soybeans had materially worsened. This was borne out by the subsequent official destination grade and federal appeal. The arbitration panel believes that the defendant was within its rights to reject these cars and did so according to the Trade Rules.

Both parties agreed to Cargill's Processor Scale of Discounts No. 4. The plaintiff agreed to these discount scales even though it was uncertain what it was agreeing to. The discounts for heat damage and total damage were applied based upon Cargill's scale of discounts and normal trade practice. The exception was the reduction in the heat damage scale of discounts, to which both parties contractually agreed.

The arbitration panel believes that the defendant generally applied the discount scales correctly and that the agreement to the discounts in the negotiating process of forming a contract made it irrelevant whether or not the discounts were excessive.

The discounts were in error in two instances:

--car #UP81144, splits of 27 percent called for a discount of one-half cent (½¢) instead of one quarter cent (¼¢) or a difference due the defendant of $6.12;

--car #UP74349, total damage of eight-tenths of a percent (8/10%), there should be no total damage discount, which resulted in a reduction of 31.11 cents per bushel or $857.51 due to plaintiff for a net difference of $851.39.

The arbitration panel awarded the plaintiff $851.39 and interest from June 1, 1982, at 12 percent or $165.43 for a total of $1,016.82.

Submitted with the consent and approval of the arbitration panel, whose names are listed below.

| | | |
|---|---|---|
| John McClenathan, Chairman | Jerry Barre | Richard Neet |
| GROWMARK Inc. | Louis Dreyfus Corp. | Rocky Mountain Brokerage |
| Bloomington, Ill. | Overland Park, Kan. | Greeley, Colo. |

* * * *

ARBITRATION APPEAL DECISION

Appellant: J. W. Flammer Co./McGowan Grain Co.
Appellee: Cargill Inc.

The Arbitration Appeals Committee individually and collectively reviewed all the evidence submitted in Arbitration Case Number 1606 and reviewed the findings and conclusions of the original arbitration panel.

After prolonged deliberation, the Arbitration Appeals Committee unanimously voted to reverse the findings of the original arbitration committee as to the right of the appellee (Cargill Inc.) to reject cars and to apply double discounts for the following reasons:

--Both parties were well aware that the soybeans involved had been in an extensive fire and explosion, and that they were COFO -- fire burnt -- and would contain foreign substances. Therefore, the appellee's (Cargill) claim that it had purchased U.S. No. 1 yellow soybeans does not withstand the evidence presented in this case.

--This was not an ordinary day-to-day trade. Rather, it was an unusual trade of salvaged grain where ordinary contract terms and Trade Rules must be supplemented by special arrangements between the traders involved. The intent of the trade must be an important consideration.

--The appellee's original contract 30694 used a "boiler plate" form which included such terms as "via truck," "guaranteed to arrive cool and sweet at destination," "subject to rejection due to excess corn and weed seeds" -- none of which could possibly be construed as part of this particular trade. The evidence proves that the intent of the traders involved did not include these terms, as they had already negotiated a discount for COFO and a special schedule of discounts for heat damage.

--Integrity among traders in the industry is a long and cherished tradition. Testimony of the actual traders involved is of utmost importance so that an arbitration panel may make the proper decision equitable to all involved. In this case, the appellant (Flammer/McGowan) testified in detail as to phone conversations concerning terms of the trade, agreements on discounts, etc. On the other hand, the appellee's trader, for reason unknown, did not testify in either the original arbitration or the appeal. Therefore, the appellee neither refuted nor denied any of the testimony presented by the appellant (Flammer/McGowan).

--The Arbitration Appeals Committee also disagreed with the original panel concerning Cargill Discount Schedule No. 4. From the admissible evidence presented (one letter in each of the appeal briefs was ruled new evidence and not admissible according to the Arbitration Appeal Rules), the committee found that the double discounting applied by the appellee (Cargill) was excessive. In all processor discount scales that were presented as evidence, including Cargill Discount Scale No. 4, there are only two columns for damage -- one is headed "heat damage" and the other is headed "other damage." Not one processor scale has any mention of total damage. Nor do they have a column for "total damage." The only admissable evidence concerning discounts is a letter from Archer Daniels Midland dated Oct. 10, 1983 (attachment F of Flammer rebuttle), which states "per discussions with Mr. McGowan the soybeans would be discounted using ADM processor scale of discounts for heat damage and damage other than heat would be discounted separately." There is no evidence to support double discounting.

--Since both party's contracts specify destination grades, the Appeals Committee is settling the three full cars that were originally rejected based on destination grades. But, since the appellee unloaded two compartments of car 81186 before having the car inspected, the settlement for this car is based upon origin grades.

## The Award

We therefore find for the appellant (Flammer/McGowan) as follows:

A recomputation of the seven and two-thirds cars unloaded by Cargill Inc. is based upon the origin inspections and corrects the discounts for damage where it was doubled.

| CAR NO. | NET BU. | TW | MOIS. | HEAT | OTHER | SPLITS | DISC. | PRICE | NET |
|---|---|---|---|---|---|---|---|---|---|
| UP75486 | 2770.65 | .01 | 0 | .60 | 0 | .0075 | .6175 | 5.605 | $15,529.49 |
| UP74349 | 2756.39 | 0 | 0 | .02 | 0 | .0025 | .0225 | 6.20 | 17,089.62 |
| UP81144 | 2448.43 | .005 | 0 | .18 | 0 | .0025 | .1875 | 6.035 | 14,776.28 |
| UP74985 | 3032.52 | 0 | 0 | 0 | 0 | .0025 | .0025 | 6.22 | 18,862.27 |
| UP73507 | 2805.57 | 0 | 0 | .32 | 0 | .0025 | .3225 | 5.90 | 16,552.86 |
| UP72266 | 2740.53 | .01 | 0 | .28 | 0 | .005 | .295 | 5.9275 | 16,244.49 |
| UP75565 | 2878.27 | 0 | 0 | .20 | 0 | .005 | .205 | 6.0175 | 17,319.99 |
| UP81186 | 1730.03 | .01 | 0 | .80 | 0 | 0 | .81 | 5.4125 | 9;363.79 |
| | | | | | | | | | $125,738.79 |
| | | | | | | | | Less Weighing | 24.72 |
| | | | | | | | | | $125,714.07 |

As stated, the appellee (Cargill Inc.) is responsible for the three and one-third cars not unloaded. J. W. Flammer Co. in effect sold these cars out for Cargill's account. Car UP 81186 is being discounted based upon origin inspection. The remaining three cars are discounted on the destination inspections.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| UP81186 | 865.01 | .01 | 0 | .80 | 0 | 0 | .81 | 5.4125 | 4,681.87 |
| UP75114 | 2403.90 | .035 | .4978 | 2.68 | 0 | 0 | 3.2128 | 3.0097 | 7,235.02 |
| UP75313 | 1505.49 | .01 | 0 | 1.20 | .9334 | 0 | 2.1434 | 4.0791 | 6,141.04 |
| UP22776 | 2289.84 | .015 | .2489 | 1.60 | 3.1424 | 0 | 5.0063 | 1.2162 | 2,784.90 |
| | | | | | | | | | $20,842.83 |

A summary of the award to the appellant, J. W. Flammer is as follows:

| | |
|---|---|
| 7 2/3 cars due Flammer: | $125,714.07 |
| 3 1/3 cars due Flammer: | 20,842.83 |
| Total Due Flammer | 146,556.90 |
| Flammer cites proceeds received: -91% | 131,024.43 |
| Amount Due Flammer | 15,532.47 |
| Less paid by Cargill on original arbitration award: | 1,016.82 |
| Amount Due Flammer | 14,515.65 |
| Interest at 12 percent from June 1, 1982 to Aug. 1, 1984: | 3,833.28 |
| Total Appeal Award Due Flammer: | $ 18,348.93 |

Respectfully submitted by the Arbitration Appeals Committee, whose names appear below:

James Donnelly, Chairman
R. F. Cunningham & Co. Inc.
Melville, N.Y.

Clayton Johnson
Mid-States Terminals Inc.
Toledo, Ohio

Charles Holmquist
Holmquist Elevator Co.
Omaha, Neb.

Rupert Quinn
Benson-Quinn Co.
Minneapolis, Minn.

Royce Ramsland
The Quaker Oats Co.
Chicago, Ill.