Arbitration Decision
National Grain and Feed Association

October 24, 1991

Arbitration Case Number 1685

PLAINTIFF: Cargill Inc., Minneapolis, Minn.

DEFENDANT: ADM/Growmark Inc., Decatur, Ill.

Statement of the Case

In February 1990, Cargill Inc. purchased 1,280 net tons of corn screenings from ADM/Growmark Inc. to be delivered to its Nutrena feed facility in Memphis, Tenn., during February through April 1990. The defendant, ADM/Growmark Inc., issued a contract dated Feb. 7, 1990, whereas the plaintiff's contract was dated Feb. 12, 1990. Both contracts agreed on quality issues of test weight, aflatoxin, weights and grades. However, Cargill Inc.'s contract included a variety of additional terms and conditions. Of particular interest to this case was the contract specification that the commodities "...be of merchantable quality and fit for the purpose of being fed to animals...."

ADM/Growmark Inc. signed and returned Cargill Inc.'s contract, although Cargill Inc. did not sign ADM/Growmark Inc.'s contract. One of the uses of these screenings by Cargill Inc. was in the manufacturing of pelleted horse feed.

On June 1 it became known to Cargill Inc. that several horses being fed Nutrena horse pellets had died. Autopsy of the affected animals confirmed the cause of death to be Leucoencephalomalocia, or "moldy corn poisoning." Laboratory analysis of both the horse pellets and corn screenings remaining at Nutrena's Memphis plant confirmed the presence of a mycotoxin called fumonisin, which has been shown to result from the growth of the mold fusarium moniliforme. The mycotoxin, fumonisin, recently has been identified as the cause of "moldy corn poisoning" in horses. These results were known on or around June 16, 1990.

Currently there is no practical, commercially available test to detect the presence of fumonisin. Nor is there any treatment for horses once they are exposed.

On Aug. 14, Cargill Inc., via fax, notified ADM/Growmark Inc. of the problem regarding the horses and its intention to hold ADM/Growmark Inc. responsible. ADM/Growmark Inc. immediately denied any liability due, in part, to the lack of sufficient information. Cargill Inc. made settlement with the horse owners and on Aug. 20, 1990, obtained a formal release of liability from them.

Between Sept. 4 and Oct. 11, Cargill Inc. loaded out the remaining 128-ton inventory of corn screenings and disposed of it. As damages in this case, Cargill Inc. sought $56,946.17 to cover the loss of horses, the commodities destroyed, expenses and legal fees.

ADM/Growmark Inc. denied responsibility, arguing that: 1) since Cargill Inc.'s confirmation was dated five days late that only the ADM/Growmark Inc. contract was valid; 2) the presence of the fumonisin was not proven upon arrival of the shipments and could have been produced later; 3) Cargill Inc. did not inform ADM/Growmark Inc. in a timely fashion; and 4) given a well-publicized propensity for screenings to contain fumonisin, which is toxic almost exclusively to horses, the use of corn screenings in horse feed was not an ordinary and prudent use for the product.

Cargill Inc. contended that the presence of fumonisin caused the corn screenings to be unmerchantable and not "fit for the purpose of being fed to animals," as required by its confirmation.

The Decision

The arbitration committee rendered the following decision based upon the evidence provided in this case.

■ Both parties agreed that their contracts either expressed or implied merchantability. Since the only reasonable use for corn screenings is in animal feeds, Cargill Inc.'s clause was redundant. Further, as specified in Grain Trade Rule 2(a), Cargill Inc.'s confirmation was late. However, since both confirmations were in general agreement on key terms, the question of the timing of the confirmation was not crucial to this decision.

■ The arbitrators were not convinced that the fumonisin contamination was likely to have occurred after delivery of the corn screenings. The committee believed it was reasonable to assume that the fumonisin was present at the time of shipment.

■ The arbitrators agreed that Cargill Inc. did not inform ADM/Growmark Inc. about the quality problem regarding the corn screenings within a reasonable period of time after the fumonisin contamination became known to Cargill, Inc. Although the difficulty in testing for fumonisin would make strict adherence to Grain Trade Rule 13 (b) impractical, waiting almost two months after detection to notify the other party — as occurred in this case — clearly is unreasonable notification.

■ The arbitrators believed that given overwhelming documentation and publicity regarding the risk of feeding corn screenings to horses, doing so should not be considered to be an "ordinary" use for screenings. Used in an "ordinary" manner, screenings containing fumonisin did not make them unfit "for the purposes of being fed to animals" and the screenings therefore, were merchantable.

The committee, therefore, found in favor of the defendant, ADM/Growmark Inc., and awarded no damages.

Submitted with the consent and approval of the arbitration committee, whose names appear below:

John E. Wood, *Chairman*
The Pillsbury Co.
Overland Park, Kan.

Larry Alley
Wendland's Farm Products Inc.
Temple, Texas

Clifford Byers
Auglaize Farmers Co-op Inc.
Wapakoneta, Ohio