



Arbitration Decision

National Grain and Feed Association

April 23, 1998

Arbitration Case Number 1815

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Jerry Heithoff, Elgin, Neb.

Statement of the Case

This case¹ involved a claim for damages arising from alleged breach of contracts by Jerry Heithoff, the seller. Cargill alleged that Heithoff failed to fulfill the terms of 10 "No Basis Established" contracts² involving a total of 50,000 bushels of U.S. No. 2 yellow corn.

Cargill alleged that on June 26, 1995, Heithoff agreed to sell and deliver 50,000 bushels (5,000 bushels at \$2.81 March 1996 futures reference price and 45,000 bushels at \$2.805 March 1996 futures reference price) of U.S. No. 2 yellow corn to Cargill's Albion, Neb., facility. The contracts specified March 1996 delivery with no basis established, but required the basis to be fixed on or before Feb. 29, 1996.

Heithoff advised Cargill in February 1996 of his desire to roll the contract delivery dates to July 1996. On Feb. 29, 1996, Cargill and Heithoff agreed to amend the contracts with a market-inverse spread adjustment of \$0.115, and the parties agreed to extend the delivery period to July 1996. The deadline for establishing the basis was extended to June 28, 1996. Cargill mailed to Heithoff a "Confirmation of Contract Change" dated Feb. 29, 1996 on each of the 10 contracts. Each confirmation contained the following provision:

"The above covers our understanding of change(s) in terms and conditions of the contract designated. The new terms are to be considered as part of the original contract.

Failure to advise us immediately on receipt of this confirmation will be understood by us as your acceptance of these new terms."

Heithoff did not object to any of the terms at that time.

The evidence showed that subsequent to March 1, 1996, Cargill and Heithoff had several discussions about Heithoff's obligations under the amended contracts. As the deadlines for performance on the amended contracts neared, Cargill said it became concerned about Heithoff's intention to deliver. By letter dated June 24, 1996, Cargill's Albion, Neb., manager advised Heithoff that:

"As you know, your No Basis Established (NBE) contracts for the sale of 50,000 bushels of corn for delivery at Cargill, Albion, Nebraska call for your establishment of basis on or before June 28, 1996. Please advise me prior to June 28, 1996 of your intentions. You must either establish basis and deliver the corn during the contractual delivery period or you must request a contract amendment regarding basis establishment and time of delivery."

In response to Cargill's June 24th letter, Heithoff's attorney advised Cargill that Heithoff denied the existence of any liability on the contracts, and further advised Cargill in writing to "mitigate any alleged damages or loss...in the

¹ This case was arbitrated pursuant to court order issued in *Jerry Heithoff v. Cargill, Incorporated*, Case No. 4:CV96-337, U.S. District Court for the District of Nebraska (March 21, 1997). The court found that the contracts at issue contained "a clear, unambiguous, and all-encompassing arbitration provision."

² Cargill purchase contract numbers 24337, 24338, 24339, 24340, 24341, 24342, 24343, 24344, 24345, and 24346.

manner you deem most appropriate.” Cargill promptly issued invoices to Heithoff for damages based upon the difference between the \$4.70-per-bushel July futures price for U.S. No. 2 corn at market opening on June 26, 1996, minus the adjusted contract price (original futures reference point minus the \$0.115 inverse), plus a \$200-per-contract service fee³ (representing 2 cents per bushel for writing each contract and 2 cents per bushel for amending each contract). Subsequently, Cargill invoiced Heithoff for \$102,475 in damages resulting from the asserted non-performance of the contracts and the demonstrated loss it suffered in the transaction to cover expenses in rolling the futures reference month. Cargill also sought interest on the asserted damages.

Heithoff asserted that he did not fully understand the terms, conditions and workings of the contracts. He also argued that he was fraudulently and negligently enticed into the contracts. Heithoff further asserted that the contracts were off-exchange futures contracts, which are illegal and not enforceable under the federal Commodity Exchange Act. Likewise, Heithoff asserted that he was “before the NGFA due to a clearly erroneous ruling of the United States District Court for the District of Nebraska.” Finally, Heithoff asserted that he was damaged in the sum of \$102,475 by Cargill’s actions and claimed entitlement to attorney fees, costs and an award of punitive damages.

The Decision

The arbitrators, after a thorough review of the submissions made by both parties, arrived at the following conclusions:

- ▶ Heithoff entered into, and signed, the original 10 contracts, representing a total of 50,000 bushels of U.S. No. 2 yellow corn. The contracts clearly stated the terms and conditions of the transaction, and Heithoff negotiated a roll of the first pricing event to a deferred futures contract month.
- ▶ The arbitration provisions contained in each of the contracts⁴ clearly provided for NGFA arbitration, and those arbitration provisions constituted the consent of both parties under Section 3(a)(2) of the NGFA Arbitration Rules to arbitration of any disputes arising from those transactions before the National Grain and Feed Association.
- ▶ The “No-Basis-Established” contracts at issue in this case were legitimate cash forward contracts and an accepted trade practice.
- ▶ The “Confirmation of Contract Change” dated Feb. 29, 1996 and sent by Cargill to Heithoff on each of the 10 contracts showed that the parties agreed to amend the delivery dates, basis deadlines and other terms of the original contracts⁵.
- ▶ Cargill properly inquired of Heithoff as to his intentions regarding contract fulfillment prior to contract expiration.
- ▶ In response to the express instructions from Heithoff’s attorney, Cargill properly mitigated its damages by canceling the defaulted contracts based upon market opening at the earliest available date (the next day session of the Chicago Board of Trade; the reference price being July 1996 futures).
- ▶ Heithoff failed to fulfill the 10 contracts at issue in this case, and was liable for damages caused by his breach of those contracts.

³ Each of the original contracts provided that “NBE service charge in effect to be assessed from time of delivery until basis is fixed. NBE service fee shall be paid by seller to buyer as follows: \$0.02000 per bushel.”

⁴ Each of the contracts contained the following provision: “The parties both agree that the sole remedy for resolution of all disagreements or disputes between the parties arising under this agreement shall be arbitration proceedings under NGFA Arbitration Rules. The decision and award determined by such arbitration shall be final and binding upon both parties.”

⁵ The arbitrators noted that the original purchase contracts signed by Heithoff provided, among other things, that “[t]he undersigned Seller represents and warrants to Buyer that seller is a Merchant with respect to the grain which is the subject matter thereto.” Thus, Heithoff also was bound by the written confirmations of the contract amendments when he failed to immediately object.

The Award

The arbitrators found that Cargill Inc. was owed by Heithoff the amount of \$102,475 in actual damages, plus accrued interest⁶ from the date of default until paid in full. The arbitrators also concluded that the claims asserted by Jerry Heithoff against Cargill Inc. should be, and were, denied.

Determination of damages was as follows:

Original Reference Price:	5,000 bu. \$2.81	45,000 bu. \$2.805
Roll to March:	5,000 bu. -\$.115	45,000 bu. -\$.115
Position Closed (buy-in):	5,000 bu. -\$4.70	45,000 bu. -\$4.70
Total Price Adjustment:	5,000 @ -\$2.005	45,000 @ -\$2.01
Subtotal:	\$10,025.00	90,450.00
Plus Service Fees:	10 @ \$200.00 =	\$2,000.00
Total Charges:	\$10,025.00	
	90,450.00	
	2,000.00	
	\$102,475.00, plus accrued interest	

Therefore, it is ordered that:

Cargill Inc. is awarded a judgment against Jerry Heithoff in the amount of \$102,475, plus compound interest at the rate of 8.5 percent per annum from June 26, 1996 until paid.

Submitted with the unanimous consent and approval of the arbitration committee, whose names are listed below:

Ed H. Mellette, Chairman
President
Wingard & Coker Farm Supply Inc.
Turbeville, S.C.

Michael A. Seyler
President
Colorado Commodities
Greeley, Colo.

Keith Hainy
Grain Division Manager
North Central Farmers Elevator
Ipswich, S.D.

⁶ Said interest shall be computed at a rate of 8.5 percent as represented by the prime rate printed on Jan. 28, 1998 in *The Wall Street Journal* "Money Rates" section.