



Arbitration Decision

National Grain and Feed Association

February 12, 1998

Arbitration Case Number 1846

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Peavey Co., Minneapolis, Minn.

Statement of the Case

This case involved a barge application dispute that was directly related to a contract dispute.

In November 1996 and March 1997, Cargill Inc. (Cargill), the seller, and Peavey Co. (Peavey), the buyer, entered into barge contracts for U.S. No. 2 yellow corn basis C.I.F. NOLA for April 1997 shipment. Both contracts were traded through a broker, James T. Dunn Co. The broker and both parties issued confirmations. There was no evidence that, upon receipt of the confirmation of the trades, either party refuted any of the conditions listed on the broker's contract confirmation or each other's contract confirmations. Neither party signed the other's contract confirmation. Both Cargill and Peavey were at the time, and continue to be, NGFA Active members.

On April 11, 1997, Peavey sent a fax to Cargill stating:

"Re: Barges. Peavey will not accept any corn or bean barges from mile 857.6 on the Mississippi River to 615.1 on the Mississippi River. Due to high water and flood conditions, these waters are closed to all navigation, as of April 10, 1997. The USCG¹ has put that area in a safety zone and declared as non-navigable."

USCG Memo #922 was attached to the Peavey fax.

Subsequently, on April 11, 1997, Cargill sent the following response to Peavey via telefax: "This is to acknowledge receipt of your telefax dated April 11, 1997, in which

you advised that Peavey will not accept any corn or bean barges from Mile 857.6 on the Mississippi River to Mile 615.1 on the Mississippi River.

"This advice coupled with the likelihood that flood conditions will affect barge traffic through the delivery period of all of our outstanding contracts creates reasonable grounds for insecurity with respect to your performance of our outstanding C.I.F. sales contracts. Attached to this communication is a list of our outstanding contracts and delivery periods. Cargill hereby demands from Peavey adequate assurance of due performance of these contracts, and requests that you advise us of your intent promptly.

"Should you fail to provide adequate assurance of your performance within a reasonable time, Cargill will respond to your repudiation of the contracts by exercising its right to resell the grain and invoice Peavey for the difference between the contract price and the resale price, together with our incidental damages. If you fail to pay the invoice in accord with the terms set forth on the invoice, we will promptly commence an NGFA arbitration proceeding to recover our damages."

Subsequently, on April 14, 1997, Cargill applied six barges to the two contracts. Peavey rejected the barge applications. Peavey stated that the barges were in the U.S. Coast Guard safety zone, and that because of high water and flood conditions, these waters are closed to all navigation as of April 10, 1997, as per the U.S. Coast Guard Memo

¹ USCG is the commonly used acronym for the United States Coast Guard.

© Copyright 1998 by National Grain and Feed Association. All rights reserved. Federal copyright law prohibits unauthorized reproduction or transmission by any means, electronic or mechanical, without prior written permission from the publisher, and imposes fines of up to \$25,000 for violations.

922. Cargill issued (via written notification) a 3 p.m. April 14, 1997 deadline for Peavey to accept application of the barges. When the deadline expired, Cargill offered the barges for sale, via a broker, to the highest bidder. The barges were sold on April 14, 1997, at \$0.15 per bushel over Chicago May corn option CIF NOLA.

On May 6, 1997, Peavey notified Cargill that there remained an outstanding balance of grain owed to Peavey for April shipment.

On May 7, 1997, Peavey sent notification that Cargill would be held accountable for the unshipped portions of the contracts. That same day, prior to expiration of April bill of ladings, Peavey purchased an April shipment barge in the open market at \$0.215 over Chicago July corn. With the Chicago May and Chicago July corn spread trading at a \$0.025 inverse, this established a fair market price of \$0.19 per bushel over Chicago May corn.

Cargill's Claim

The plaintiff, Cargill, claimed damages in the amount of \$22,129.40. Cargill maintained that it fulfilled its obligations under the two C.I.F. contracts, as issued by the broker. Cargill asserted it complied with NGFA Trade Rules with its actions on April 14, 1997. Further, Cargill argued that Peavey's rejection of the barges was a unilateral effort to rewrite the terms of the C.I.F. contracts. NGFA Grain

Trade Rule 41 prohibits Peavey from altering the contract "without the expressed consent of both the Buyer and the Seller," Cargill said. Cargill also argued that custom and practice of the trade supported its position. Cargill submitted testimony which it said showed that others in the trade were applying barges in the safety zone and requiring billing instructions during the period at issue.

Peavey's Defense

In response, Peavey argued that standard terms on the back of both principals' contracts, though not on the broker's confirmation, should relieve Peavey of its obligation to otherwise accept barges in the safety zone. Peavey's standardized pre-printed terms included the following statement:

"Buyers performance hereunder, or any delay in such performance, including the acceptance of deliveries of grain on the date or dates specified, shall be excused where such failure to perform or delay is attributable to any cause or reason beyond Buyer's control, including without limitation lack of available storage space, equipment break-

down, labor trouble, governmental regulations, transportation difficulties, embargoes, acts of God, or any other cause of the like or different character beyond Buyer's control."

Peavey contended that Cargill's standard pre-printed terms on the back of its contract confirmations contained "much of the same, if not all, these similar terms and conditions" as Peavey's contract confirmations. Consequently, Peavey argued that the pre-printed terms contained on the parties' contract confirmations resulted in an agreement that was in addition to the terms specified on the broker's contract.

The Decision

The arbitrators found in favor of Cargill, based upon the facts presented. NGFA Grain Trade Rule 6(b) provides that brokers have a duty to send written confirmations of trades to both principals "setting forth the specifications of the trade as made by him." NGFA Grain Trade Rule 6(b) further provides that:

"Upon receipt of said confirmation, the parties thereto shall carefully check all specifications named therein, and upon finding any differences, shall immediately notify the other party to the contract, and the broker, by telephone and confirm by written communication. In default of such notice, the contract shall be filled in accordance with the terms of the confirmation issued by the broker."

The broker's contract confirmation in this case did not contain any of the language that Peavey said relieved it of its obligation to accept barges in the U.S. Coast Guard safety zone. Although the arbitrators agreed that the principals could agree to terms outside of the broker's confirmation, there must be a meeting of the minds if this is the case. In this instance, there was no evidence that the two contractual parties ever discussed any of the extra terms that were listed on the back of each others' confirmations. Hence, the arbitrators concluded that there was no meeting of the minds as to these additional terms. Both parties, however, as NGFA Active members were bound to follow the NGFA Trade Rules to the extent the broker's contract did not alter those rules. [See the Preambles to

each set of the NGFA Trade Rules and NGFA Bylaws, Art. II, Sec. 3(f).]

The plaintiff complied with all the terms on the broker's C.I.F. contract and with the NGFA Trade Rules with respect to the barge applications. The defendant, by refusing to accept application and thereby refusing to issue billing instructions as per NGFA Barge Trade Rule 7(f), failed to honor its contractual obligations.

It was not explicitly stated in the contracts nor in the NGFA Barge Trade Rules what remedies the seller has should the buyer refuse to issue billing instructions per NGFA Barge Trade Rule 7(f). However, the plaintiff's actions in terms of liquidating and mitigating damages appeared consistent with NGFA Grain Trade Rule 7(e), which pertains to a buyer failing to issue billing instructions for grain sold by truck or rail. The arbitrators also concluded that the plaintiff's liquidation actions were consistent with the custom of the trade.

The Award

The arbitrators awarded the plaintiff, Cargill Inc., damages in the amount of \$22,129.40, plus interest at the prime rate of 8.5 percent. The calculation was based on the difference in the contract price and the liquidation price multiplied by the unshipped balance on each contract. Interest is to be calculated from April 14, 1997 until paid.

Submitted with the unanimous consent and approval of the arbitrators, whose names are listed below.

Broker Contract	Unshipped Bushels	Contact Basis	Liquidation Basis	Amount Due
8483	150,916	\$.26+CK	\$.15+CK	\$16,600.76
22145	184,288	\$.18+CK	\$.15+CK	<u>\$ 5,528.64</u>
				\$22,129.40

It therefore was ordered that Cargill Inc. be awarded judgment against Peavey Co. in the amount of \$22,129.40, plus compound interest at the rate of 8.5 percent per annum from April 14, 1997 until paid in full.

Tim Gallagher, Chairman
Feed Grains Trader/Export Trader
Bunge Corp.
St. Louis, Mo.

Gene McEntee
Office Manager
Colusa Elevator Co.
Nauvoo, Ill.

Donald Wencker
Manager, Cash Grain
A.E. Staley Manufacturing Co.
Decatur, Ill.