



# National Grain and Feed Association Arbitration Decision

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Sept. 21, 2000

## Arbitration Case Number 1859

**Plaintiff:** **Cerestar USA Inc., Hammond, Ind.**

**Defendants:** **Cylinder Cooperative Elevator, Cylinder, Iowa;  
Farmers Cooperative Society, Wesley, Iowa; and  
West Bend Elevator Co., West Bend, Iowa**

### Statement of the Case

This dispute<sup>1</sup> involved claims brought by Cerestar USA Inc. (Cerestar), the plaintiff-buyer, against the members of a group known as the Cooperative Production Network (CPN), Ames, Iowa, concerning the purchase of waxy corn. Cylinder Cooperative Elevator, Farmers Cooperative Society and West Bend Elevator Co. (the defendants) were parties<sup>2</sup> to this arbitration case.

Cerestar alleged that in March 1996 it contracted to purchase through CPN a total of 962,500 bushels of 1996-crop yellow waxy corn over an 11-month delivery period. Delivery was to be in 25-car trains supplied by CPN members. CPN had, since 1993, represented a group of cooperative elevators in marketing waxy corn to end-users. The defendants were members of CPN.

Cerestar indicated that it had done business with CPN since 1994 and that the "customary manner of doing business was for CPN to declare the CPN member that would supply a given shipment." Cerestar claimed that 318,585 bushels of waxy corn were not shipped on the 1996 contracts, which

resulted in damages to Cerestar of \$355,050.

Cerestar alleged that in March 1996, CPN's president<sup>3</sup> declared specific CPN member elevators as the suppliers of the 962,500-bushel commitment. Cerestar said that, based upon those representations, it prepared and mailed basis contracts to CPN on April 1, 1996.

Neither CPN nor its individual members issued contract confirmations. All defendants and CPN denied receiving contracts from Cerestar in April 1996. The defendants claimed that contracts were not sent and received until February 1997. CPN's president submitted an affidavit in which he denied receiving contracts in March or April 1996. CPN's president stated that to his knowledge "Cerestar had always sent the contracts directly to the elevators, and I had no reason to believe Cerestar would do something different in 1996." CPN's president further stated that he "never told Cerestar that the various CPN members would definitely ship 11 trains (962,500 bushels) of Waxy Corn...the group would only be shipping 9 trains (787,500 bushels)."

<sup>1</sup> Cerestar's original complaint was dated Sept. 22, 1997, and was received by the NGFA on Sept. 25, 1997. Hagglng over the proper parties to the case delayed the filing of substantive arguments until 1999.

<sup>2</sup> Cerestar also named Cooperative Production Network and Northland Cooperative (Thompson, Iowa) as parties in its original arbitration complaint. Those two parties did not, however, actively participate in the arbitration. Northland Cooperative, a nonmember, filed a "Resistance to Motion for Default Judgment" with NGFA and a separate lawsuit in an Iowa state court after Cerestar filed with NGFA a request for a default judgment against Northland. The National Secretary on Feb. 12, 1999, made a decision to hold Cerestar's request for default judgment "in abeyance pending the issuance of an appropriate court order" or some other resolution. The National Secretary also ruled that "Northland must comply with any court order directing it to proceed with NGFA arbitration within 15 days of such issuance. Otherwise, a default judgment could be issued without further notice."

<sup>3</sup> John Gnadke.

Notwithstanding lack of agreement on whether contracts were sent or received, it was undisputed that Cylinder Cooperative Elevator (Cylinder) shipped three full trains<sup>4</sup> and a fourth train in July 1997. Both Cerestar and Cylinder agreed the fourth train was short 16,843 bushels. Cerestar claimed damages of \$21,628 on this shortage based upon a late-August 1997 buy-in. Cylinder contended that Cerestar should have settled on July 10, 1997.

West Bend Elevator Co. (West Bend) claimed that it did not receive any contracts from Cerestar until February 1997, when it received two 25-car train contracts. West Bend said that it signed one contract and notified Cerestar that it was not responsible for a second train. Both Cerestar and West Bend agreed that the train shipped by West Bend in June 1997 was short 12,397 bushels.

Farmers Cooperative Society claimed that it first received a contract from Cerestar on Feb. 13, 1997. Farmers Cooperative Society contended that it immediately notified CPN that Farmers "would not be able to fill the contract." Farmers Cooperative Society said it also notified Cerestar no later than Feb. 28, 1997. Farmers Cooperative Society denied any liability to Cerestar.

Cerestar's contracts provided, among other things, on the front side as follows:

*"It is expressly understood that the time of shipment can only be extended by mutual consent of both parties, and that neither party has authority to extend the shipment period for any amount of time without the specific, prior consent of the other."* [Emphasis in original.] Numbered item 6 of Cerestar's contract terms provided: *"In that it is expressly agreed that the time of shipment can only be extended by mutual consent, seller has an obligation to make shipment of the quality & quantity of grain defined hereunder within the contracted period, and has no authority to extend the shipment period for any amount of time without buyer's express, prior permission. In the event that seller fails to make timely shipment, the buyer without further notice may choose to cancel the contract, or may buy in grain of equivalent grade and quantity for the account of seller, and shall notify seller of its action by 1700 hours ct of the following business day. The seller agrees to remit on demand settlement in full of the expenses incurred by buyer to remedy such breach of contract."* [Emphasis in original.]

The arbitrators noted that each Cerestar contract contained an express provision referencing the NGFA Grain Trade Rules and expressly provided for NGFA arbitration of any disputes. All of the defendants, except West Bend, were nonmembers of the NGFA.

## The Decision

The arbitrators first arrived at the following general conclusions applicable to this case:

- ▶ The prior dealings between the parties had been extremely casual.
- ▶ Cerestar and CPN had a course of dealing in which CPN coordinated the sale and shipment of waxy corn among its members to Cerestar. CPN received a fee for this service. CPN, therefore, acted as the agent of its member cooperatives in transactions with Cerestar.
- ▶ It was not uncommon for CPN to switch shipments or reallocate contracts among its members.
- ▶ Insufficient information was available to the arbitrators to determine the exact nature of the relationship between CPN and its members. However, the evidence did show that CPN's president did make contractual commitments on behalf of CPN's member elevators. This was not disputed by any of the parties.

▶ Both Cerestar and CPN were at fault for failing to send written contract confirmations, failing to monitor returned confirmations and failing to provide proper documentation of contract changes.

▶ Cerestar suspected that there was a waxy corn shortage as early as November 1996.

**Cerestar's Claims Against Cylinder:** The arbitrators concluded that the evidence established that Cylinder did contract with Cerestar to deliver four full trains and was short 16,843 bushels on the last train, which was unloaded on July 10, 1997. Cerestar should have settled the underfill on the day after the date of unload, in accordance with NGFA Grain Trade Rule 12(c)<sup>5</sup>, which provides as follows:

**"Rail:** In the absence of a clearly stipulated applicable tolerance in the confirmation of the quantity traded, it shall be understood that any underfill or overfill on rail grain shall be

<sup>4</sup> Cerestar contended that it had four contracts with Cylinder, each for 87,500 bushels. Cerestar contended, and Cylinder agreed, that three full shipments were made in December 1996, April 1997, May 1997.

<sup>5</sup> This rule is now embodied in NGFA Grain Trade Rule 23(B).

settled at the market value at the close of the first business day following the date of load or unload whichever weight is applicable of the last car in fulfillment of the contract.”

Cylinder had requested Cerestar settle the underfill per the NGFA Grain Trade Rules. However, Cerestar did not agree and unilaterally chose to keep the balance open until late August 1997. Lacking any other evidence as to the fair market value, the arbitrators used the July 10, 1997 value submitted by Cylinder and determined that Cerestar was entitled to \$10,943.36 in damages. The arbitrators did not find it appropriate to award interest in addition to the damages.

#### **Cerestar's Claims Against West Bend Elevator Co.:**

Testimony was submitted by both CPN's president and West Bend Elevator Co. that West Bend's commitment to Cerestar was for only one train.

The arbitrators concluded that West Bend had contracted to ship one train and was short 12,397 bushels on that contract. The underfill on the June 1997 train should have been settled basis the market the day after unload, pursuant to NGFA Grain Trade Rule 12(c). The evidence submitted showed that Cerestar would not agree to do so, and unilaterally chose to keep the balance open until late August 1997. Lacking any other evidence as to the fair market value, the arbitrators used the value submitted by West Bend and determined that Cerestar was entitled to \$6,446.44 in damages. The arbitrators did not find it appropriate to award interest in addition to the damages.

**Cerestar's Claims Against Farmers Cooperative Society:** The arbitrators concluded that the evidence presented was insufficient to establish that a contract or “meeting of the

minds” occurred between Cerestar and Farmers Cooperative Society on any quantity of waxy corn for the period in question.

The confirmation rule<sup>6</sup> set forth in the NGFA Trade Rules contemplates the sending of a confirmation in those situations where parties have reached an oral agreement. Farmers Cooperative Society submitted evidence that, upon receiving a contract from Cerestar, it promptly notified CPN that a contract did not exist. Farmers Cooperative Society also directly notified Cerestar a few days later. Therefore, the arbitrators concluded that no contract existed to be confirmed or breached, and that Farmers Cooperative Society had no obligation to Cerestar.

**Other Issues:** The arbitrators concluded that Cerestar, through its past course of business dealings with CPN and its members, reasonably could have expected CPN to perform on commitments made to Cerestar.

Indeed, the evidence tended to show that CPN may have led Cerestar to believe that up to 11 trains of waxy corn would be shipped to Cerestar by CPN's members. But Cerestar never received clear and firm confirmation from CPN as to the proper identification of which CPN members would be assuming responsibility for the promised shipments. While CPN was not a participating party in the arbitration, the arbitrators concluded that the evidence demonstrated that CPN, as the middleman in the parties' trading relationship, also had responsibilities to both Cerestar and CPN members<sup>7</sup> to communicate clearly commitments or promises being made. Thus, CPN's conduct also contributed to the confusion that ensued.

### **The Award**

Therefore, it was ordered that:

- ◆ Cerestar USA Inc. is granted a judgment in the amount of \$10,943.36 against Cylinder Cooperative Elevator. No interest shall accrue on said judgment if paid within 15 days of receipt of this decision. If not paid within that period, compound interest shall accrue thereafter at the rate of 9 percent per annum;
- ◆ Cerestar USA Inc. is granted a judgment in the amount of \$6,446.44 against West Bend Elevator Co. No interest shall accrue on said judgment if paid within 15 days of receipt of this decision. If not paid within that period, compound interest shall accrue thereafter at the rate of 9 percent per annum; and

- ◆ Cerestar USA Inc.'s claims asserted against Farmers Cooperative Society of Wesley, Iowa, are denied.
- ◆ Each party shall pay its own attorney fees and costs.

Submitted with the unanimous consent of the arbitrators, whose names are listed below:

**James W. Keistler, Chairman**  
Merchandising Manager  
Twomey Co.  
Smithshire, Ill.

**Todd Gerdes**  
Specialty Grains Mktg. Manager  
Aurora Cooperative Elevator Co.  
Aurora, Neb.

**Jay O'Neil**  
General Mgr., Trans. Group  
Bartlett and Co.  
Kansas City, Mo.

<sup>6</sup> The rule was then designated Grain Trade Rule 6. The current rules embody substantively identical language in NGFA Grain Trade Rule 3.

<sup>7</sup> CPN clearly acted as an agent for its members. The exact nature of that relationship was not established as part of this arbitration case.