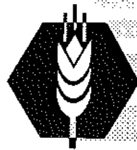

Arbitration Decision

National Grain and Feed Association

August 12, 1999

Arbitration Case Number 1945

Plaintiffs: Cargill Inc., Tampa, Fla; and Cargill Citro-America Inc., Frostproof, Fla.
Defendant: Miracle Feeds Inc., Trenton, Fla.

Statement of the Case

This case was initiated by a complaint dated March 17, 1998 filed by Cargill Inc. and Cargill Citro-America Inc.[1] (collectively referred to as Cargill) alleging that Miracle Feeds Inc.[2] (Miracle) defaulted on contractual obligations to purchase 4,793 tons of citrus pulp pellets. As permitted by the NGFA's Arbitration Rules, the case included an oral hearing at the request of Miracle.

The parties entered into various transactions and contracts during June and July 1996. As a result of Miracle's alleged default, Cargill canceled the outstanding contracts on Dec. 10, 1997 and sought damages in the amount of $187,732, plus interest.

However, Miracle contended that Cargill actually contracted to sell citrus pulp (rather than citrus pulp pellets) to Miracle, and stated that Cargill failed to perform in accordance with the parties' contracts. In addition to requesting that Cargill's claims be denied, Miracle asserted a counterclaim for damages (including lost profits on resales to dairy farmers) against Cargill.

Miracle referenced the NGFA rules in contract confirmations sent to both Cargill Inc.'s Grain Division (Cargill Grain) and Cargill Citro-America Inc. (Citro). Cargill Grain also referenced the NGFA rules in contract confirmations sent to Miracle. In addition, Citro consented to settlement of the dispute pursuant to the NGFA rules and arbitration once the dispute arose. A broker's confirmation relating to the contract with Citro was silent on this issue.

The contracts at issue were as follows:

Contract Between Miracle and Citro

Citro and Miracle on June 27, 1996 – through commodity broker James Dougharty[3] – agreed to the sale and purchase of 15,000 tons of citrus at $94 per ton, f.o.b.-Frostproof, Fla., for the 1996-97 season. The broker's confirmation (dated June 28, 1996) listed the commodity as "citrus pulp" for shipment during November 1996 through June 1997. Neither party objected to the broker's confirmation. Testimony was submitted that both Citro and Miracle sent contract confirmations to each other (dated July 2, 1996). Citro's confirmation referenced the product as "citrus pulp pellets," while Miracle referenced the commodity as "citrus pulp." Both Miracle's witness and the broker testified that they had no record of receiving Citro's confirmation (CFS 01490). Citro's witness conceded that Citro had no record of sending it to the broker.

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[1] Cargill Inc. was and is a NGFA Active member. Cargill Citro-America Inc. is a subsidiary of Cargill Inc. and operates a citrus processing facility in Frostproof, Fla.

[2] Miracle Feeds Inc. (a subsidiary of Furst-McNess Company) is not a NGFA member.

[3] James Dougharty, Bradenton, Fla., who described himself in testimony as an "independent broker of various commodities including livestock grains and feeds."

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Miracle's confirmation was comprised of three documents[4] showing a purchase totaling 15,000 tons. Citro acknowledged receipt of the confirmations, but did not sign or return the documents to Miracle. Nor did Citro object to the terms contained in Miracle's confirmations. Miracle's confirmations provided as follows:

- Confirmation of Purchase (P9607TRE921) for 266 trucks/ 6,118 tons of citrus pulp scattered evenly between 11/15/96 and 6/15/97, f.o.b.-Frost Proof, Fla., or North at $94/ton;
- Confirmation of Purchase (P9607TRE922) for 169 trucks/ 3,882 tons of citrus pulp scattered evenly between 11/15/96 and 6/15/97, f.o.b.-Frost Proof, Fla., or North at $94/ton; and
- Confirmation of Purchase (P9607TRE923) for 218 trucks/ 5,000 tons of citrus pulp scattered between 11/5/96 and 6/ 20/97, f.o.b.-Frost Proof, Fla., or North at 94/ton.

Contract Between Miracle and Cargill Grain

Subsequently, Miracle and Cargill Grain on July 11, 1996 entered into a contract for the sale by Cargill Grain to Miracle of 12,000 tons of citrus at $95 per ton. Both parties sent confirmations of the transaction. Cargill Grain's confirmation (contract number 69747) referenced "bulk citrus pulp pellets," while Miracle's stated "citrus pulp." Miracle again confirmed the transaction via three contract confirmations:

- Confirmation of Purchase (P9607TRE945) for 174 trucks/ 4,000 tons of citrus pulp for shipment 11/15/96 – 10/17/97;
- Confirmation of Purchase (P9607TRE946) for 87 trucks/ 2,000 tons of citrus pulp for shipment 11/1/96 – 6/15/97; and
- Confirmation of Purchase (P9607TRE947) for 260 trucks/ 6,000 tons of citrus pulp for shipment 11/15/96 – 6/15/97.

All three Miracle confirmations called for a price basis of South-Florida, while the Cargill contract called for price basis FOB-Central-Florida.

The Decision

Miracle Feeds Inc. requested that an oral hearing be held in this case in accordance with Section 8(f) of the NGFA Arbitration Rules. The hearing was conducted on Dec. 3, 1998 in Chicago, Ill.

Prior to entering into the first transaction at issue in this case, Miracle's regional manager and the broker on June 20, 1996 toured Citro's Frostproof, Fla., processing facility. The evidence showed that Miracle purchased some initial product from Citro the following day. While there was not complete agreement among the parties as to the representations made and conversations occurring during that inspection tour, the evidence showed that the actual product provided to Miracle was citrus pulp rather than citrus pulp pellets.

The arbitrators concluded that the 15,000-ton contract between Citro and Miracle was for "citrus pulp" rather than "citrus pulp pellets." The confirmations sent by both the broker (Dougharty) and Miracle were in agreement on this issue. Trade practice, as reflected in NGFA Feed Trade Rule 2(b), is that:

> *"Upon receipt of said confirmation [from the broker], the parties 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 wire or telephone, and confirm in writing.* ***Lacking such notice the contract shall be filled in accordance with the terms of the confirmation issued by the broker.****"* [Emphasis added.]

See also, NGFA Feed Trade Rule 15(d).

In this case, Citro failed to notify either the broker or the other party[5].

The evidence (including Cargill's own testimony) also established that Cargill Grain's trade with Miracle for 12,000 tons of product arose from the earlier trade with Citro and related to the same product produced by Citro at the Frostproof, Fla., facility[6]. Moreover, Miracle consistently described the product as citrus pulp when it sent confirmations to Citro and Cargill Grain. Neither Citro nor Cargill objected to the "citrus pulp" term when used by the broker or Miracle.

The broker's written and oral testimony clearly demonstrated that citrus pulp and citrus pulp pellets are two different products in the domestic marketplace. The arbitrators placed considerable weight on the broker's knowledge of the domestic marketplace. The broker, for example, testified that: "I'd say the vast majority of dairy producers in the state of Florida

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[4] *Miracle explained that it broke the transaction into three confirmations rather than one because its computer system "would not allow the entry of such a large number of shipments."*

[5] *Citro's witness acknowledged that he did not know that, under the NGFA Trade Rules, he should have contacted the broker to discuss any discrepancy on a contract confirmation.*

[6] *The testimony showed that Cargill Grain's representatives initiated contact with Miracle based upon a referral from Citro.*

prefer the bulk pellet blend....There's very little interest in the domestic market in straight pellets." Miracle also submitted written evidence from a dairy nutritionist[7], who stated, among other things, that:

> "There is a significant difference between citrus pulp and citrus pulp pellets. Citrus pulp is a flaky product which provides dairy cows with a high degree of effective fiber. This fiber helps digestion and helps maintain a high degree of butterfat percentage in cows. Citrus pulp pellets, on the other hand, is (sic) citrus pulp that is processed into a hard, small pellet which is denser than citrus pulp. Pellets do not have the same effective fiber content as citrus pulp, and is not as good for our dairy cows. Occasionally, citrus pulp will include some pellets to add weight to a shipment no more than 20 percent by weight. However, a straight order of citrus pulp pellets is a different product than citrus pulp."

The arbitrators concluded that Miracle's evidence and arguments were consistent with the Association of American Feed Control Official's (AAFCO) definitions of various "citrus products," which are incorporated by reference into the NGFA Feed Trade Rules (Preamble and Rule 16). Specifically, "**dried citrus pulp**" is defined[8] by AAFCO as "...the ground peel, residue of the inside portions, and occasional cull fruits of the citrus family which have been dried, **producing a <u>coarse, flaky product.</u>**" [Emphasis added.]

Other testimony during the oral hearing established that the Citro and Cargill Grain representatives involved in negotiating the contracts were more familiar with the export market than the domestic market. Indeed, the oral testimony showed that the trade between Cargill Grain and Miracle was the first domestic citrus product trade for the Cargill Grain merchant involved. In fact, a Cargill witness acknowledged that both Miracle and the broker had more experience in the domestic market.

There is no question that both Cargill and Miracle were at fault in failing to pay more attention to detail when exchanging the initial contractual documents. Nevertheless, the testimony also showed that Cargill referenced "citrus pulp pellets" even when selling "loose pulp" to Miracle. The invoices for the first two truckloads of product purchased by Miracle from Citro referenced citrus pulp pellets, even though Citro's witness agreed that Miracle was buying "loose pulp" inspected by Miracle's representative during an inspection tour of the Citro facility. Citro's explanation was that its billing system was not set up to correctly reference the product actually sold.

Cargill made much ado about the fact that Miracle's representative signed the Cargill Grain confirmation while Cargill Grain did not sign the Miracle confirmations. Of course, as has been noted previously, Cargill Grain did not object to Miracle's confirmation. The arbitrators concluded that the signature issue was not a controlling factor given the clear conflict in terms. Likewise, the testimony revealed that it was Cargill Grain's policy not to sign confirmations in any event. Cargill Grain's merchandiser said he did not notice that the Miracle confirmations referred to citrus pulp versus citrus pulp pellets "at the time." He also conceded that "it wasn't called to my attention that it was a citrus pulp term until well after the fact – until I was drawn into these proceedings."

Based upon the written and oral testimony, the arbitrators concluded that the contract entered into between Cargill Grain and Miracle was for citrus pulp rather than citrus pulp pellets based upon the totality of the parties' conduct and the intended use of the product in the domestic feed marketplace. Under the evidence presented, there could be no doubt that Miracle could properly assume that it was purchasing the same product from both Citro and Cargill Grain. Indeed, Cargill Grain's manager testified that Cargill treated the two contracts as one and "did not differentiate performance on one versus performance on the other."

The arbitrators also noted that while the parties agreed on the total tonnage remaining unshipped under the two contracts, Miracle and Cargill disagreed on the allocation between the two contracts. Miracle contended the remaining tonnage was allocable to the Citro contract. This discrepancy resulted partly from the fact that, as Cargill's witness testified, Cargill intentionally applied later shipments to the Citro contract "to reduce potential liability that we would have in a – in any action we would have involving the Citro contract." The arbitrators concluded that the equitable result was to resolve any doubts on this issue in favor of Miracle, given that Cargill treated the contracts as a single transaction.

This case involved testimony from witnesses (both in written and oral statements) that was directly contradictory on some key factual issues. The arbitrators concluded that some of these differences were attributable to the parties simply talking past each other. The evidence showed that both parties missed opportunities to settle these contractual matters in a more timely and productive manner. Consequently, the arbitrators concluded that Cargill and Miracle each should bear responsibility for their own losses.

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[7] *Don Shumaker, dairy nutritionist for Aurora Dairies Corporation.*

[8] *Association of American Feed Control Officials Inc.,* ***Official Publication****, Feed Ingredient Definitions, pages 183-288, at page 199, (1999).*

The Award

Therefore, it was ordered, adjudged and decreed that:

- the claims for damages asserted by Cargill Inc. and Cargill Citro-America Inc. against Miracle Feeds Inc. are denied;
- the counterclaims for lost profits and other damages asserted by Miracle Feeds Inc. against Cargill Inc. and Cargill Citro-America Inc. are denied; and
- the oral hearing expenses of $6,500 are assessed as a cost owed by Miracle Feeds Inc., which requested the oral hearing. The deposit of $6,000 previously paid by Miracle Feeds Inc. to the National Grain and Feed Association is applied as a credit against the oral hearing expenses.

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

Michael F. Malecha, *Chairman*
Manager, Byproducts and Feed Ingredients
Kraft/Oscar Mayer Foods
Madison, Wis.

Joseph Garber
Nutrition and Analytical Services Coordinator
Wenger's Feed Mill Inc.
Rheems, Pa.

John Skelley
President
Arizona Grain Inc.
Casa Grande, Ariz.