



National Grain and Feed Association

Arbitration Decision

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September 24, 2009

Arbitration Case Number 2211

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: John Burkholder Jr., Holdrege, Neb.

Statement of the Case

This case involved various contracts for different commodities between Cargill Inc. (Cargill), the buyer, and John Burkholder Jr. (Burkholder), the seller.

▶ **Wheat Contract:** This contract, dated April 12, 2006, involved the sale of 40,000 bushels of U.S. No. 1 hard red winter wheat to be delivered in July 2007. According to Cargill, on July 13, 2007, its representative visited Burkholder's farm to inquire about the status of delivery under the contract, which had not begun. On Aug. 6, Cargill wrote to Burkholder advising that based upon non-delivery, it had cancelled the contract as of the close of the market on July 31. In a letter delivered to Cargill on Nov. 15, Burkholder wrote that he had not delivered because of weather and crop conditions. Cargill argued in this case that this was the first communication from Burkholder explaining his failure to deliver on the wheat contract and that, if Burkholder had advised earlier of any extenuating circumstances, Cargill would have made an effort to work with him to avoid cancelling the contract.

Burkholder acknowledged that he had defaulted on the wheat contract, but challenged the basis upon which damages were calculated. Burkholder calculated that the damages owed to Cargill should have been \$59,600, based upon the bid price for the day of cancellation – considerably less than the \$73,600 that Cargill claimed, based upon what it said was the fair market value on July 31.

▶ **Corn Contracts:** These six contracts, dated April 10, 2006, involved a total of 90,000 bushels of U.S. No. 2 yellow corn, with different delivery periods between November 2006 and October 2008. According to Cargill, because of the non-delivery under the wheat contract, it demanded adequate assurance from Burkholder on Jan. 15, 2008, that he

would perform under the corn contracts. Cargill stated that it cancelled the corn contracts, effective Jan. 17, after Burkholder failed to respond.

Burkholder stated that Cargill did not have grounds to demand adequate assurance on the corn contracts, and that Cargill did not provide him with sufficient response time. Burkholder also noted that only two of the six corn contracts were in default as of the date of cancellation. Burkholder further argued that Cargill should have used the dates on which the contracts were breached to determine damages.

▶ **Soybean Contract:** This contract, dated June 28, 2007, was for the sale of 40,000 bushels of U.S. No. 1 yellow soybeans to be delivered in November 2009. There was some question regarding the validity of this contract, as neither of the parties signed the contract or established a price under the contract. On Aug. 13, 2007, Cargill wrote to Burkholder stating that it had "removed the soybean contract from its system," and that despite a claimed loss of \$6,800, Burkholder had no outstanding obligations with respect to the soybean contract.

▶ **Fertilizer Issue:** In this case, Burkholder also presented claims based upon a Cargill representative allegedly encouraging Burkholder to use a controlled-release nitrogen fertilizer. Burkholder stated that the Cargill representative instructed him how to use it and advised him that this type of fertilizer would increase his crop yield. However, according to Burkholder, use of this fertilizer resulted in lower than normal yields. Burkholder claimed a loss of 14,671.4 bushels of corn, and claimed \$62,123.99 in damages, as the result of use of this fertilizer.

The Decision

The arbitrators concluded that four main issues arose out of this case. The arbitrators considered each issue individually and submitted separate rulings on each matter.

▶ **Fertilizer (Burkholder's Counter-Claim):** The arbitrators determined that in the context of this proceeding, the NGFA Arbitration System was not the appropriate venue for resolving the dispute arising from the alleged purchase, sale or application of the fertilizer products. Unlike the grain contracts at issue, there was no indication that the parties both consented to arbitration concerning the fertilizer products by way of a contract clause or otherwise. As such, the arbitrators expressly acknowledged that they were not deciding this claim; instead, the arbitrators deferred upon this claim and determined it would be more appropriately addressed through the civil court system.

▶ **Wheat Contract:** The arbitrators concluded that in this instance, the contract for 40,000 bushels of wheat for delivery in July 2007 was agreed upon between Cargill and Burkholder. Burkholder did not deliver any bushels under this contract and acknowledged his nonperformance as the seller. What was disputed was the manner in which Cargill had calculated damages resulting from the contract cancellation. The arbitrators determined that Burkholder failed to notify Cargill of his inability to perform on the contract as required by NGFA Grain Trade Rule 28 (A), which states: "*If the Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone and confirmed in writing.*" After exercising due diligence, Cargill elected to cancel the contract due to seller's non-performance and used as a guideline NGFA Trade Rule 30 (B), which states: "*the Buyer shall have the privilege of establishing a fair market value for the purpose of determining any loss properly chargeable to the Seller.*" According to the facts presented, the arbitrators concluded that Cargill acted within its rights to cancel the contract using the fair market value as established. Therefore, the arbitrators granted Cargill's request for damages in the amount of \$73,600.

▶ **Corn Contracts:** Burkholder agreed to deliver a total of 90,000 bushels of corn to Cargill as evidenced by the separate corn contracts. Both parties acknowledged the contracts and agreed to their validity. Of the total corn contracted, 60,000 bushels were due for delivery between November 2007 and March 2008. The balance of 30,000 bushels was due in October 2008. Burkholder failed to deliver against the first two contracts due in November and December 2007. Based upon Burkholder's recent failure to perform on the wheat contract, Cargill notified Burkholder that it was demanding adequate assurance of Burkholder's ability to perform on the remaining

corn contracts. Cargill's contracts permitted it to demand adequate assurance from the seller, and included a written policy regarding the timing in which said assurance was to be provided.

The arbitrators concluded that Cargill was justified in its concerns regarding deliveries under the outstanding contracts, and acted prudently to demand adequate assurance from Burkholder. The arbitrators noted that Cargill did not specifically follow the timing provisions in its policy regarding demands for adequate assurance; but because Burkholder never objected to or made any effort to meet or respond to Cargill's demand for adequate assurance, the arbitrators believed Cargill remained within its rights to cancel the outstanding corn contracts with Burkholder, including those for future delivery. The arbitrators determined that Cargill's basis for cancelling the contracts was based properly on NGFA Grain Trade Rule 28(A) (referring to buyer's exercise of due diligence to determine that seller had defaulted and elected to buy-in for the account of the seller). Therefore, the arbitrators awarded \$131,650 in damages to Cargill related to the corn contracts.

▶ **Soybean Contract:** The arbitrators recognized that significant confusion existed for all parties in relation to this contract. Cargill sent a contract confirmation to Burkholder indicating a purchase of soybeans at \$8.70 per bushel. Burkholder did not sign and return the contract as he had for previous contracts. In addition, Burkholder stated that he subsequently called Cargill's office to set the price at \$9.15 per bushel. Burkholder argued that no contract was initiated at \$8.70 per bushel because the CBOT time and sales report did not reflect any future sales that would have enabled Cargill to make a purchase of cash grain. Also, since Burkholder said he did not believe the contract price had been set at \$8.70 per bushel, he concluded that he was in a position to sell soybeans at the higher price of \$9.15 per bushel.

The arbitrators determined that as it related to the futures transaction, there was no requirement that a hedge be placed before an interested party could enter into a contract to purchase or sell cash grain. Therefore, the arbitrators concluded that this was not a factor in determining whether a contract existed. However, because Burkholder openly expressed that he was not agreeable to the price of \$8.70 per bushel and never signed the contract confirmation, the arbitrators determined it was the proper course of action for Cargill to cancel the contract. Since Cargill did not request damages for the cancellation, there was no award to be made on behalf of either party. Finally, with regard to Burkholder's desire to sell the soybeans at \$9.15 per bushel, the arbitrators determined that the parties were free to accept or reject any offers to sell grain that they so chose, but that in this case, no trade was ever acknowledged or confirmed as had been customary between the two parties.

The Award

The arbitrators awarded a total of \$205,250 to Cargill Inc.

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

Chad J. Nagel, *Chair*
Manager of Trading
Wye Mills Grain
Wye Mills, Md.

Robert E. Burkhardt
Chief Financial Officer
Max Yield Cooperative
West Bend, Iowa

Mike Nickolas
Grain Marketing Manager
North Central Farmers Elevator
Ipswich, S.D.