



National Grain and Feed Association Arbitration Decision

www.ngfa.org | www.ngfa.org/decisions

1250 I (Eye) Street, N.W., Suite 1003
Washington, DC 20005-3922

P: (202) 289-0873
F: (202) 289-5388

July 24, 2015

CASE NUMBER 2594

**PLAINTIFF: ARLAN STELLO AND CARMEN STELLO
MINDORO, WI**

**DEFENDANT: CARGILL, INCORPORATED
MINNEAPOLIS, MN**

STATEMENT OF THE CASE

The plaintiffs, Arlan and Carmen Stello (Stello), entered into nine “No Basis Established” (NBE) contracts with the defendant, Cargill, Incorporated, in June through November 2007, for a total of 220,000 bushels of U.S. No. 2 Yellow Corn for delivery to Cargill’s facility in La Crosse, Wis. in December 2009. Stello signed all the NBE contracts and returned them to Cargill. According to the contract terms, the seller is allowed two forward rolls during the duration of the NBE contracts. Stello and Cargill rolled the futures price forward once and rolled the delivery period forward once. All the applicable delivery and pricing addendums were signed by both parties and returned to Cargill.

Cargill also offered a “Cargill AgHorizons Focal Point Grain Contract Addendum” (Focal Point Addendum), which allowed the seller to choose a starting futures price and a final Focal Point price. If the final Focal Point price was higher than the starting price, the applicable cash contract price would be amended to the higher price, less service charges. If the final Focal Point price was lower than the starting price, the contract was amended to the lower price, less service charges. The time allowed for the seller to choose a final Focal Point price was also specified in the Focal Point Addendum.

Stello and Cargill entered into a Focal Point Addendum for each of the nine NBE corn contracts on July 7, 2008, with the final Focal Point price established on July 16, 2008. Neither of these July 2008 Focal Point Addendums – nor a separate Focal Point Addendum for soybeans entered into between the parties in March 2008 – specifically contained a “Downside Price Protection” clause.

However, Cargill claimed that Stello was already familiar with the Downside Price Protection mechanism, including that he had personally experienced a financial gain from a “10% stop” in the March 2008 soybean Focal Point Addendum. Based upon the arguments submitted by Stello and Cargill, the arbitrators concluded that Stello was familiar with the Focal Point Addendum terms, including the Downside Price Protection mechanism.

On Oct. 1, 2008, Stello and Cargill communicated about entering into a new Focal Point Addendum on each of the nine NBE corn contracts. The parties disagreed whether this conversation occurred over the telephone or in Cargill’s La Crosse office. During this conversation, the inclusion of a specific Downside Price Protection clause in the new addendums was discussed. Stello claimed that they wished to enter into new addendums, but did not want the Downside Price Protection clause included. Cargill

argued that it consistently refused to agree to a Focal Point Addendum without the Downside Price Protection clause.

According to Cargill, Stello was bullish with respect to corn prices leading him to initiate these new Focal Point Addendums. Cargill also claimed that Stello relented and agreed to the contract terms including the Downside Price Protection clause, despite his initial objections. Stello, however, consistently claimed that they would only enter into the Focal Point Addendum if the Downside Price Protection clause was omitted. According to Cargill's records, a Focal Point Addendum was entered into Cargill's system at 12:51 pm on Oct. 1, 2008 for the nine NBE contracts. The initial Focal Point Price was set at \$5.47-per bushel with a Downside Price Protection stop loss at \$4.93-per bushel. On Oct. 2, 2008, Cargill sent a new Focal Point Addendum for each of the NBE contracts to Stello, which included a Downside Price Protection clause.

According to Cargill's records, CBOT futures prices during this period were:

CZ2009	10/01/2008	5.3700	5.3650
CZ2009	10/02/2008	5.0950	5.0850
CZ2009	10/03/2008	5.1100	5.1050
CZ2009	10/06/2008	4.8100	4.8100
CZ2009	10/07/2008	4.6550	4.6400
CZ2009	10/08/2008	4.7700	4.5725

Mr. Stello contacted the Cargill office again on Oct. 3, 2008 to ask if the Focal Point Addendums could be written without the Downside Price Protection clause. Cargill confirmed that Mr. Stello made this request; however, Cargill maintained that the clause was required and that the Focal Point Addendums confirmed on Oct. 2, 2008, would remain in effect. Stello received the Focal Point Addendums, but did not sign or return them to Cargill.

On Oct. 6, 2008, the price on CZ2009 corn traded below the \$4.93-per bushel stop loss referenced in the Focal Point Addendums. Stello was informed on Oct. 7, 2008 that the Focal Point Addendum was priced according to Downside Price Protection terms. Cargill calculated its losses at 66-cents-per bushel (\$5.47-\$4.81) plus a .03-per bushel service fee, for a total loss of \$151,800 (69-cents-per bushel for the 220,000 bushels under the open NBE contracts with Stello). Cargill withheld this amount from Stello.

THE DECISION

The dispute in this case centered on the Focal Point Addendums of Oct. 1, 2008. All the other NBE contracts, forward rolls, delivery period changes as well as the prior Focal Point contracts and corresponding final pricing addendums were signed by both parties. All of the grain under those contracts was delivered at the time and place specified by the final terms of those contracts. The October 2008 Focal Point Addendums provided under item "1. Pricing (C)" that "Downside price protection is required on all Focal Point contracts."

Stello claimed in this case that their objections to the inclusion of item 1.(C) was the reason the Focal Point Addendums were not agreed upon by the parties. Cargill argued that Stello agreed to the standard terms in a strong desire to establish and benefit from the Focal Point pricing formula.

The use of sophisticated pricing methods, the size of the transactions, and the time periods involved in the contracts between Stello and Cargill demonstrated a high level of understanding and communication

between the parties. When using market-based pricing methods in volatile trading periods, the timing of the transaction is critical to the details of the addendum. This is especially true with the pricing methods under the Focal Point Addendums. Because neither party in this case agreed about what transpired on Oct. 1, 2008, the arbitrators looked to evidence of common trade practices that would support either side.

The arbitrators noted an entry in Cargill's system at a specific time that was consistent with any conversation that would have occurred on that date. This entry was also consistent with trade practices for risk management, and the timing and price level noted was within the price information provided. It would not be in conformity with trade practice, or prudent for any grain merchandiser, to enter any transaction of this size and level of sophistication into an accounting system without having approval of the counterparty. Also in support of this argument were the submitted handwritten notes of Cargill's originator. The arbitrators felt that this provided substantial evidence to support Cargill's description of events.

Given the circumstances and weight of the evidence, the arbitrators unanimously concluded that Cargill and Stello had mutually agreed to enter into the Focal Point Addendums on Oct. 1, 2008.

THE AWARD

In their award, the arbitrators determined that they were not provided with support to clearly establish the amount of damages under the Downside Price Protection mechanism. In their arguments and submissions, the parties referred on several occasions to 10% of the Initial Focal Point and a stop loss price of \$4.93-per bushel.

Therefore, the arbitrators awarded damages to Stello in the amount of \$26,400 for the 12-cents per bushel difference between the Final Focal Point Price of \$4.81 and the stop loss price \$4.93 for the 220,000 bushels in dispute. No attorneys' fees or other costs were awarded for either party.

Decided: March 21, 2014

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Joe Smith, *Chair*
Merchandising Manager
Arizona Grain
Casa Grande, AZ

Kim Behr
Director, Grain
Merchandising and Logistics
Trupointe Cooperative Inc.
Botkins, OH

Lori Goetzinger
Director of Grain
Merchandising
West Central Cooperative
Ralston, IA



National Grain and Feed Association Arbitration Decision

www.ngfa.org | www.ngfa.org/decisions

1250 I (Eye) Street, N.W., Suite 1003
Washington, DC 20005-3922

P: (202) 289-0873
F: (202) 289-5388

July 24, 2015

APPEAL CASE NUMBER 2594

**PLINTIFFS/APPELLANTS: ARLAN STELL AND CARMEN STELLO
MINDORO, WI**

**DEFENDANT/APPELLEE: CARGILL, INCORPORATED
MINNEAPOLIS, MN**

DECISION OF THE APPEALS COMMITTEE

This case was originally decided in favor of the defendant, Cargill, Incorporated. The plaintiffs, Arlan Stello and Carmen Stello (Stello), subsequently appealed the decision.

The Arbitration Appeals Committee individually and collectively reviewed all the arguments and supporting exhibits in the original case file of Arbitration Case 2594 along with the Statement of Case, the Decision, and Award of the original Arbitration Committee. The Appeals Committee also reviewed the Notice of Appeal and Reply as well as the appeal briefs filed by both parties.

The significant components of the dispute were detailed in the original Arbitration Committee's Statement of the Case. The fundamental question is whether or not Stello agreed to enter into the disputed Focal Point Addendums on October 1, 2008. This dispute presents a classic "he said, she said" disagreement.

In its review of this central question, the Appeals Committee closely considered the documentation provided in the case record as well as the arguments and testimony submitted by the parties. The testimony of Cargill's grain buyer, the grain buyer's handwritten notes taken at the time of the transactions in dispute, Cargill's internal systems usage documentation related to the Focal Point Addendums, and the documentation related to the ongoing communications between the parties were all consistent with Cargill's position that the parties had agreed to enter into the Focal Point Addendums.

Stello denied in their argument that they had agreed to enter into the Focal Point Addendums on October 1, 2008. However, the balance of the proof submitted by the parties in this case did not support Stello's position. It was particularly troubling to the Appeals Committee with respect to Stello's claim that according to their own submission in this case, on October 2, 2008, Mr. Stello told Cargill "... not to sell him out, according to the Downside Price Protection clause . . ." The Appeals Committee concluded that if, in fact, Stello had not entered into the Focal Point Addendums, Mr. Stello's verbal expressions to Cargill should have been to consistently from the beginning reject Cargill's position that the parties had ever agreed upon the Focal Point Addendums.

Stello referred to NGFA Grain Trade Rules 3 and 4. These rules provide in pertinent part as follows:

NGFA Grain Trade Rule 3. Confirmation of Contracts

(A) Both the Buyer and Seller shall send a written confirmation, each to the other, not later than the close of the business day following the date of trade, or an agreed amendment, setting forth the specifications as agreed upon in the original articles of trade, or an agreed amendment. Upon receipt of said confirmation, the parties shall carefully check all specifications therein and, upon finding any differences, shall immediately notify the other party to the contract by rapid written communication, or by telephone confirmed by subsequent written communication.

(B) If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party, as described in Rule 3(A), of any disagreement with the confirmation received.

...

NGFA Grain Trade Rule 4. Alteration of Contracts

The specifications of a contract cannot be altered or amended without the express consent of both the Buyer and the Seller. Any alteration mutually agreed upon between Buyer and Seller must be immediately confirmed by written communication by both parties.

Stello argued that applying NGFA Grain Trade Rules 3 in this case would preclude enforcement of the Focal Point Addendums because, according to Stello, they notified Cargill of their issues with the written confirmations when they received them from Cargill. Stello also claimed that NGFA Grain Trade rule 4 required that both Cargill and Stello confirm in writing in order for the alteration to be legally binding.

In its analysis of this case, the Appeals Committee, first and foremost, undertook its primary purpose to determine the fundamental question in this dispute, namely, was there an agreement to enter into the Focal Point Addendums? For the reasons stated above and by the original Arbitration Committee, the Appeals Committee concluded that there was an original agreement between the parties. Further, changes in pricing and market conditions that were the crux of the original disagreement occurred before the parties had the opportunity to react to each other's written confirmations. Thus, with respect to the impact of subsequent written confirmations, the Appeals Committee concluded that in the particular circumstances in this case, by the time the written confirmations of that original agreement would have been subsequently exchanged the market conditions were such that the resulting potential damage had already transpired and the written confirmations themselves were moot. In this case, that Stello was then expressing concerns related to the written confirmations does not lead to a conclusion that the agreements were not valid when originally agreed upon.

The Appeals Committee further noted that under the NGFA Grain Trade Rules simply objecting by telephone to another party's written confirmation and/or failing to sign and return the other party's confirmation alone does not constitute a viable rejection of the oral agreement that preceded the confirmation. Although Stello may have failed to appropriately respond and follow up with respect to the subsequent written confirmations of the Focal Point Addendums that they disputed, this was not a

determining factor in the decision of the Appeals Committee given the timing of the market conditions underlying the original agreement.

Therefore, the Appeals Committee affirmed the decision of the original Arbitration Committee, and concurred with the award issued in the original decision.

Decided: July 2, 2015

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE APPEAL ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Roger Krueger, *Chair*
Senior Vice President, Grain
South Dakota Wheat
Growers Association
Aberdeen, SD

Jim Banachowski
Vice President, Eastern Region
The Andersons Inc.
Maumee, OH

Edward Milbank
President
Milbank Mills Inc.
Chillicothe, MO

Steven Nail
President & CEO
Farmers Grain Terminal Inc.
Greenville, MS

Steve Young
Grain Merchandiser
Grainland Cooperative
Holyoke, CO