



December 23, 2014

## CASE NUMBER 2662

**Plaintiff:** Barry Nowatzke and Nowatzke Farms, Michigan City, IN.

**Defendant:** Cargill, Incorporated, Minneapolis, MN

### STATEMENT OF THE CASE

This case concerned whether the plaintiffs, Barry Nowatzke and Nowatzke Farms (collectively, “Nowatzke Farms”), and Cargill, Incorporated (“Cargill”) entered into an agreement for three contracts for U.S. No. 2 Yellow Corn. Specifically, the purchase contracts at issue were:

- **BURN-AH-105968** – Dated June 7, 2012, for 5,000 bushels at \$5.05 per bushel with a delivery period of Oct. 1 - Nov. 30, 2012
- **BURN-AH-105984** – Dated June 19, 2012, for 5,000 bushels at \$5.25 per bushel with a delivery period of Oct. 1 - Nov. 30, 2012
- **BURN-AH-106007** – Dated June 25, 2012, for 3,000 bushels at \$5.50 per bushel with a delivery period of Nov. 1 - Nov. 30, 2012

It was undisputed that Cargill issued written confirmations for these purchase contracts, which were subsequently received by Nowatzke Farms. It was further undisputed that Cargill followed up in writing to Nowatzke Farms concerning the three contracts. Also undisputed was that Cargill sent a representative to Nowatzke Farms to meet with the plaintiffs regarding these contracts.

On Oct. 17, 2012, Cargill issued a demand for adequate assurances to Nowatzke Farms. Cargill then cancelled all three contracts on Oct. 23, when according to Cargill it became clear that Nowatzke Farms did not intend to deliver grain to fulfill the contract terms. Cargill subsequently deducted \$33,140 from the balance it owed Nowatzke Farms for a separate previous contract (contract number BURN-AH-105645, dated March 15, 2012, for the delivery of 3,000 bushels of U.S. No. 1 Yellow Soybeans).

Nowatzke Farms alleged that it did not enter into the three later contracts because of a change in weather and seasonal conditions. Nowatzke Farms stated that it did not sign the contract confirmations sent by Cargill. Nowatzke Farms maintained that in not signing the contracts, as it had in the past with other contracts with Cargill, there was no intent to perform and, therefore, the three contracts in this dispute were not valid. Nowatzke Farms argued that, consequently, Cargill did not have the right to deduct the fair market value for non-performance from an October settlement on monies due Nowatzke Farms for those three contracts.

Cargill denied Nowatzke Farms’ claims and argued that Nowatzke Farms verbally agreed to the contracts and that Cargill sent written confirmations in accordance with NGFA Grain Trade Rule 3.

Cargill stated further that it suffered money damages as a result of those contract cancellations, which were properly deducted from the funds due Nowatzke Farms

## THE DECISION

The arbitrators concluded that Nowatzke Farms and Cargill did, in fact, enter into a binding verbal agreement for each of the three contracts that were subsequently confirmed in writing.

Paragraph (B) of NGFA Grain Trade Rule 3 [Confirmation of Contracts] states as follows:

If either the Buyer or 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.

Paragraph (A) of NGFA Grain Trade Rule 3 further defines the method of communication (which is referred to in paragraph (B)) for a party upon “finding any differences” in a contract confirmation as “rapid written communication or by telephone confirmed by subsequent written communication.”

Therefore, the arbitrators concluded that it was the responsibility of Nowatzke Farms to notify Cargill of any “differences” or objections in writing upon receipt of the confirmations pursuant to the rule. The arbitrators determined that Nowatzke Farms failed to do so based upon their close review of the facts, arguments and documentation provided by the parties in this case. Cargill claimed that when its representative met with Nowatzke Farms the parties discussed cancelling some of the contracts but ultimately decided not to cancel them. Cargill also claimed that by telephone Nowatzke Farms had insisted it did not want to cancel the contracts at issue. Cargill argued that during various conversations, Nowatzke Farms did not contest the written contract confirmations or deny that they were valid. Although Nowatzke Farms now disputes Cargill’s claims and argues that the contract confirmations were not valid, the evidence and submissions presented by the parties failed to indicate that Nowatzke Farms had provided the notice required under the rules. The arbitrators were not persuaded that the requirements of the rules for notification in this case should be disregarded because Nowatzke Farms in other instances had signed contract confirmations with Cargill.

The arbitrators further noted the “PURCHASE TERMS” on each of the purchase contract confirmations, which specifically stated: “Failure to advise Buyer immediately of any discrepancies, objections to or disagreement with such terms and conditions shall constitute acceptance of these terms and conditions.”

The arbitrators also concluded that Cargill properly exercised its right to cancel those contracts and offset that amount against funds due Nowatzke Farms pursuant to section 12 of the “PURCHASE TERMS” on each contract, which stated as follows:

12. Set Off. Without limiting Buyer’s right to pursue any and all other rights and remedies available to it, it is expressly agreed that, to the fullest extent permissible by law, this Contract is subject to the Buyer’s right to set off any debts and/or claims against Seller.

## THE AWARD

The arbitrators awarded no damages to either party in the case. Nowatzke Farms' claims against Cargill related to contract BURN-AH-105645 were denied.

Decided: October 16, 2014

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

**Randy Ward**, *Chair*  
Merchandising Manager  
Pendleton Grain Growers  
Pendleton, OR

**Steven D. Burbrink**  
Director of Business Development  
CGB Enterprises Inc.  
Mandeville, LA

**Philip Farrell**  
Grain Division Manager  
Elburn Cooperative Co.  
Sycamore, IL