



NATIONAL GRAIN AND FEED ASSOCIATION

Arbitration Decisions

December 23, 1985

ARBITRATION CASE NUMBER 1619 I & II

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Montana Merchandising, Inc., Great Falls, Mont.

Cross-Plaintiff: Montana Merchandising Inc., Great Falls, Mont.

Cross-Defendant: Archer Daniels Midland Co., Minneapolis, Minn.

Statement of the Case

On Feb. 1, 1984, the plaintiff, Cargill Inc., sold 172,000 bushels of durum wheat to the defendant/third-party plaintiff, Montana Merchandising Inc. The transaction basing point was F.O.B. Minot, N.D., for shipment first half of March. On March 1, 1984, Montana Merchandising sold third-party defendant, Archer Daniels Midland Co., 172,000 bushels of durum wheat delivered Superior, Wis., for last-half March shipment. All contracts were for settlement basis destination official weights and grades.

On March 16, Cargill tendered a 52-car unit train against the contract and ultimately received billing to ADM's elevator in Superior, Wis. The train arrived at the destination on March 20, 1984. The entire shipment was rejected by ADM on March 21, 1984 because excessive levels of insecticide were found in preliminary tests by ADM and subsequently by the State of Wisconsin Inspections Department, the local FGIS-designated agency. The State of Wisconsin Inspections Department refused to sample the cars when its tests showed unsafe levels of carbon tetrachloride residues in the grain. The state conducted two tests: 1) An ambient air test that showed negligible or no residue levels in each of the 52 cars; and 2) An "in-the-grain-mass" test that found dangerously high levels of fumigant residue.

Therein lies the heart of this dispute. The plaintiff believed the state of Wisconsin acted improperly by not basing its decision on the ambient air tests, which ultimately made it impossible to obtain settlement grades. Further, the plaintiff thought that the resulting costs it was forced to absorb alone were unfair, and further that the defendants breached the contract terms by not providing a destination where official grades were available. ADM and the state of Wisconsin believed the ambient air test results were not reasonable since the cars had been open for some time prior to the tests and in fact there were wind conditions prevalent of up to 30 miles per hour.

On March 22, all three parties agreed that ADM and Cargill should work directly to resolve the dispute. ADM proposed three alternatives: 1) Cancel the contract; 2) Extend the shipping period to allow for aeration; 3) Extend the shipping period to allow for replacement shipment.

On March 23, Cargill notified ADM that it had arranged for power aeration of the cars even though it maintained that the testing method had been incorrect and that it had properly fumigated the shipment at origin to the extent that

placarding the cars had not been necessary and in fact had not been done. Cargill said it had fumigated part of the shipment in-store at origin one week before the train was loaded. On March 29, Cargill requested that ADM settle basis origin grades or have the cars sampled by a disinterested party and submit those samples to the state of Wisconsin for inspection. Cargill had discontinued the aeration process, as fumigant residue levels were not changing. Demurrage charges were accruing during this period.

ADM refused Cargill's offer and again offered the three previously named alternatives. On April 2, all three parties agreed to an outright cancellation of the contract. None of the three cancellation confirmations contained the precondition of liability for demurrage, switching, incidentals, etc. On April 4, Cargill had the train switched to its facilities in Duluth, Minn., where the shipment apparently was unloaded. On April 5, Cargill notified Montana Merchandising and ADM that it considered the train rejection a breach of contract and would hold one or both parties liable for damages. Thereafter, Cargill initiated this arbitration and as plaintiff sought the following damages plus interest:

Switching Charges.....	\$20,800.00	Pesticide Inspection Fees.....	\$240.00	
Demurrage.....	16,640.00	Aeration Expense.....	<u>\$2,500.00</u>	
			Total.....	\$40,180.00

The Decision

Part of the evidence made available to this panel consisted of excerpts from Environmental Protection Agency and Occupational Safety and Health Administration regulations concerning fumigant exposure limits for safe working environments. Documentation of the policies of the State of Wisconsin Inspections Department also was provided, which explained the department's interpretation of the regulations and demonstrated that it acted in accordance with its publicly available procedures in effect at the time of this incident.

The plaintiff and the State of Wisconsin Inspections Department disagreed concerning the proper methods of determining when a work environment is unsafe. While the plaintiff did not provide proof of having properly fumigated the grain at origin, this panel can only assume that it did. This panel cannot sit in judgment of the inspection department's procedures. Nor can it address the question of proper or improper fumigation at origin. It can only decide if the shipment rejection was or was not a breach of contract and where incurred cost liabilities are properly distributed. While the panel assumed Cargill properly fumigated the shipment, the fact remains that the presence of such fumigant -- as determined by the official inspection agency -- precluded the availability of the official grades to which all parties were entitled. The fact that Montana Merchandising took title to the grain at origin still was subject to the official grade that was unavailable because of the plaintiff's action, as determined by the official agency. While the plaintiff did not agree with the inspections department's finding of fumigant residue levels, it recognized the official nature of that finding when it took its three courses of action, namely: 1) began aeration procedures; 2) suggested settlement basis unofficial samples or origin grades; and 3) agreed to cancel the contract and divert the shipment.

The plaintiff acted responsibly, swiftly moving to mitigate costs. However, the pesticide origin being an undisputed fact and the magnitude of its presence, as determined by the official inspection agency, were given considerable weight by this panel.

The arbitration panel unanimously decided in favor of Montana Merchandising Inc. and ADM. Since the plaintiff initiated this action for recovery of costs, no monetary award or interest assessment is required.

Submitted with the consent and approval of the arbitration panel, whose names are listed below:

Dale Salonen, chairman
Lauhoff Division of Bunge Corp.
Danville, Ill.

John Case
Kellogg Commission Co.
Minneapolis, Minn.

Scott Hackett
General Mills Inc.
Minneapolis, Minn.