



# Arbitration Decision

National Grain and Feed Association

September 24, 1992

## Arbitration Case Number 1671

**PLAINTIFF:** Louis Dreyfus Corp., Wilton, Conn.  
**DEFENDANT:** Elders Grain Inc., Overland Park, Kan.

**CROSS-PLAINTIFF:** Elders Grain Inc., Overland Park, Kan.  
**CROSS-DEFENDANT:** Bunge Corp., St. Louis, Mo.

### Statement of the Case

On April 10, 1989, Bunge Corp. loaded the barge RRS 7939 with 55,429 bushels of corn at Hannibal, Ill. Bunge Corp. applied this barge to Elders on a C.I.F. NOLA contract brokered by Gordon P. Rule (broker contract number 10650). Among the terms of the contract were: "loading official grades, destination weights and no probe grade."

Bunge Corp. had barge RRS 7939 tested for aflatoxin by having a sample -- collected from a diverter-type mechanical sampler by the Quincy Grain Inspection Service -- sent to the Southern Illinois Grain Inspection Service. The test results of a mini-column procedure were negative and a thin-layer chromatography test was not recommended.

On April 17, 1989, Elders Grain Inc. sold 115,000 bushels of corn to Louis Dreyfus Corp. through Haug Brokerage Inc. (broker number 34108). Among the terms of the contract were: "Not necessarily applicable, on tow south of Cairo, first official grades and destination weights." Barge RRS 7939 was applied as partial fulfillment of the contract.

On April 20, 1989, barge RRS 7939 arrived at the Cargill Fleet in Terre Haute, La. Louis Dreyfus Corp. had the barge probed and tested immediately for aflatoxin. An in-house test determined that the corn contained 42 parts per billion of aflatoxin. The same day, Louis Dreyfus Corp. submitted a sample to the Federal Grain Inspection Service for testing. FGIS determined that 48 p.p.b. of aflatoxin were present in the corn. The FGIS test results were received late on the afternoon of Friday, April 21, 1989.

On Monday, April 24, 1989, Louis Dreyfus Corp. notified Bunge Corp. by telephone and Elders Grain Inc. by telex of the aflatoxin test results, and requested that the barge be replaced because the corn was unmerchantable as a result of

the aflatoxin level present. If Elders Grain Inc. did not honor its request, Louis Dreyfus Corp. said it would direct FGIS to officially probe and examine the barge. If the results of a subsequent FGIS test were positive for aflatoxin, Louis Dreyfus Corp. said it would reject the barge. Elders Grain Inc. was given until the close of business on April 25, 1989 to respond.

On April 25, Bunge Corp. rejected Louis Dreyfus Corp.'s request through Elders Grain Inc., stating that the barge tested negative for aflatoxin at origin. Louis Dreyfus Corp. then had FGIS probe and test the barge load of corn, which detected the presence of 48 p.p.b. of aflatoxin.

On April 28, Louis Dreyfus Corp. notified Elders Grain Inc. by telex of the results of the FGIS test and requested replacement of the barge because the corn was "unmerchantable" as a result of the aflatoxin level present. On May 3, Bunge Corp. rejected Louis Dreyfus Corp.'s claim through Elders Grain Inc. On May 5, Louis Dreyfus Corp. restated its request, which once again was rejected by Bunge Corp. on May 8.

On May 9, Louis Dreyfus Corp. sold the barge to PS International Ltd. at \$2.20 per bushel. This sale resulted in a claim by Louis Dreyfus Corp. for \$37,992.85, which represented the difference between the advance given to Elders Grain Inc. and the proceeds from the sale of the barge to PS International Ltd. Louis Dreyfus Corp. also claimed interest at 1 percent over the average prime interest rate, as well as reimbursement of arbitration fees.

Bunge Corp. asserted a counterclaim in the amount of \$6,363.29 against Elders Grain Inc. for settlement of barge RRS 7939, plus interest from Aug. 2, 1989 (seven days after invoice date) to date of payment and costs of the arbitration. Elders Grain Inc. asserted a like claim against Louis Dreyfus Corp., based upon the Bunge Corp. claim.

## The Majority Decision

This dispute involved the obligations of each party in a barge transaction with respect to aflatoxin. Louis Dreyfus Corp. stated that its contract confirmation addressed the seller's obligation to provide corn that met the aflatoxin guidelines set by the Food and Drug Administration for human consumption (20 p.p.b. aflatoxin) for corn shipped in interstate commerce. Louis Dreyfus Corp. further stated that because Elders Grain Inc. did not object to Louis Dreyfus Corp.'s contract, it should be considered part of the agreement.

However, Elders Grain Inc.'s contract with Louis Dreyfus Corp. made no mention of this obligation to provide corn suitable for human consumption. Further, the broker's contract in this trade did not address this matter. Because there is a discrepancy between contracts -- and according to NGFA Grain Trade Rules the broker's contract is binding -- the human-consumption term in Louis Dreyfus Corp.'s confirmation could not be considered part of the trade. Therefore, Louis Dreyfus Corp. could not reject the barge for this reason.

But there is an implied obligation on Bunge Corp.'s part to supply corn that can be shipped in interstate commerce at the time of shipment. The practice of the C.I.F. NOLA market is that most barges cross state lines. All parties concerned should have been aware of this fact and accepted the obligations it entails.

There then is the obligation to ship corn whose aflatoxin content is within acceptable levels at the time of shipment. However, because title passed to Elders Grain Inc. when it received the bill of lading, risk from that time forward passed to Elders Grain Inc. Likewise, risk passed to Louis Dreyfus Corp. when the barge was reconsigned from Elders Grain Inc.

Bunge Corp. fulfilled its obligation by having the barge tested for aflatoxin by a diverter-type mechanical sampler, and having the collected sample submitted by the inspection agency to an independent lab at the time of barge loading. The barge tested negative for aflatoxin when title passed.

Elders Grain Inc.'s obligation also was fulfilled by Bunge Corp.'s actions. Louis Dreyfus Corp. bought the barge from Elders Grain Inc. in the CIF NOLA NNA (not necessarily applicable) market. Thus, this buyer (Louis Dreyfus Corp.) assumed the risks of origin grade and condition as part of the usual terms in this market. [Note: It should be clear that this is the custom of the trade and an awareness of the negative origin test only would have reinforced with Louis Dreyfus Corp. that it bore the destination quality risk. Further, Bunge had no contractual obligation to submit the results to the buyer when the barge was applied.]

Therefore, Louis Dreyfus Corp. had no grounds to reject the barge RRS 7939. The majority of the arbitrators found in favor of the defendant Bunge Corp., and Elders Grain Inc. on

its counter-claim, in the amount of \$6,363.29 for final settlement on barge RRS 7939, plus interest from Aug. 2, 1989 to time of payment at 11.29 percent per annum.

Submitted with the consent and approval of the arbitration committee members whose names are listed below.

**Mark L. Palmquist, Chairman**  
Harvest States Cooperatives  
St. Paul, Minn.

**Chad Burlet**  
J. Aron and Co.  
New York, N.Y.

## Minority Opinion

In the opinion of this arbitrator, this case involved more than the obligations of each party concerning a barge shipment containing aflatoxin. Instead, the dispute must be viewed in light of the time period during which the events occurred. Seen in this way, the case involved a "battle of the contracts."

There were two central issues: 1) How are conflicting contracts addressed by the NGFA Trade Rules?; and 2) How do the NGFA Trade Rules address the Uniform Commercial Code's concept of "the benefit of the bargain"?

Regarding the first issue, NGFA Grain Trade Rule 6 addresses contracts and Grain Trade Rule 40 addresses brokers. The majority of arbitrators in this case accepted the notion that the clause is not binding upon the seller under the Grain Trade Rules because: 1) the seller (Elders Grain Inc.) did not reference the human consumption clause included in the buyer's (Louis Dreyfus Corp.'s) contract; 2) the broker's contract also was silent, and 3) Louis Dreyfus Corp. did not object to the discrepancy in a timely manner.

The custom and usage of the trade for many years has recognized that brokers' contracts address the bare bones of the transaction without specifying the myriad detail contained in the contracts between the seller and buyer. (Parenthetically, this suggests that Grain Trade Rule 40 may warrant amendment to fit more nearly the custom and usage of the trade).

The majority of the arbitrators in this case found the broker's contract discrepancy to be relevant and controlling. However, this arbitrator would have adhered to the custom and usage of the trade, ignored the broker's contract and looked only to the contracts between the principals.

Further, the majority in this case examined only the contract between Louis Dreyfus Corp. and Elders Grain Inc. The undersigned arbitrator would have looked at both the contract between the claimant, Louis Dreyfus Corp., and the respondent, Elders Grain Inc., and the underlying contract between the respondent, Elders Grain Inc., and the respondent, Bunge Corp. While the Louis Dreyfus Corp. purchase confirmation issued to Elders Grain Inc. included an interstate

commerce provision (which implies merchantability) and a Food and Drug Administration provision, the Elders Grain Inc. sale contract to Louis Dreyfus was silent, as, of course, was the Haug broker contract. While the Elders Grain Inc. purchase contract issued to Bunge Corp. contained both an FDA and an unmerchantable provision, the Bunge Corp. sales contract to Elders Grain Inc., was silent, as was the Gordon Rule brokers contract.

The rejection of the shipment was based upon the claim that the barge was unmerchantable.

In their statement of the case, the majority of the arbitrators in this decision relied extensively on the testing for aflatoxin by Bunge Corp. based upon a submitted sample. It was significant that this evidence arose only after the barge had been rejected. The timetable of this case was significant. On April 20, 1989, the barge arrived in Louisiana and Louis Dreyfus Corp. submitted a sample for testing to the Federal Grain Inspection Service. On April 21, FGIS notified Louis Dreyfus Corp. that the shipment contained 48 p.p.b. aflatoxin, and Louis Dreyfus Corp. advised Bunge Corp. of this fact. On Monday, April 24, 1989, Louis Dreyfus Corp. similarly advised Elders Grain Inc. On April 26, 1989, FGIS probed the barge and redetermined the presence of 48 p.p.b. aflatoxin. On April 25, 1989, Bunge notified Elders that the origin sample tested "negative" on a sample submitted by the inspection agency. On April 26, 1989, Elders Grain Inc. notified Louis Dreyfus Corp. of this negative aflatoxin test result.

Where Elders Grain Inc. had asked Bunge for essentially the same protection that Louis Dreyfus Corp. had asked from Elders Grain Inc., this arbitrator believed Elders Grain Inc. could not claim to be unaware or innocent. Had Bunge Corp. provided the negative test results prior to being confronted with the evidence of contamination, Elders Grain Inc.'s argument would have been strengthened.

Thus, on the issue of the conflict of contracts, the undersigned arbitrator would not have allowed a seller either to "hide" behind a broker's contract or make a claim of conflict of contracts when that seller purchased the identical product that it sold under contract provisions substantially the same as those it disclaimed.

As to the second issue -- the Uniform Commercial Code's "benefit of the bargain" concept -- when entering into the

contract between Elders Grain Inc. and Louis Dreyfus Corp., following the custom of the trade, what more could Louis Dreyfus Corp. have done to protect itself to obtain the benefit of the bargain? While FDA's guidelines for aflatoxin allow different levels for different intended uses of the contaminated commodity, the custom and usage of the trade assumes that, unless otherwise specified by contract, the 20 p.p.b. aflatoxin action level applies. This performance standard was contained in the FDA clause of the Louis Dreyfus Corp. contract to Elders Grain Inc. and the Elders Grain Inc. contract to Bunge Corp. Denying this claim would deprive Louis Dreyfus Corp. of the benefit of the bargain. Elders Grain Inc. did nothing to try to mitigate its loss, although Louis Dreyfus Corp. gave it ample opportunity to do so.

While not precedent-setting, it is significant to note that in Arbitration Case Number 1663, Louis Dreyfus Corp. under somewhat similar circumstances lost an aflatoxin arbitration case because it "did not inspect the barge in a timely manner." Thus, in that case the arbitrators avoided the hard issues of conflict of contracts and merchantability. This case appears to be a perfect opportunity to draw more distinct lines on these vexing questions.

In the opinion of this arbitrator, Elders Grain Inc. played little or no role other than as a broker/merchant in this case. I concurred in Louis Dreyfus Corp.'s rebuttal that the NGFA Trade Rules should address string transactions more comprehensively, since such transactions are fertile grounds for contract conflicts and result in gross unfairness when an award does not flow from the injured party to the one inflicting the injury. This is not to say that every string transaction conflict should be between only the shipper and receiver, since each case must stand upon its facts, with timeliness of shipment, complaint and testing all bearing upon the results.

For these reasons, the undersigned arbitrator found in favor of Louis Dreyfus Corp. against Elders Grain Inc., and held Elders Grain Inc. harmless by Bunge Corp.

Further, I would provide interest at the prime New York rate as it fluctuated since the dispute arose, not at the rate in effect at the time of occurrence. And I would hold each party responsible for its own legal, consulting and arbitration fees, since the facts in this case were not sufficiently egregious to warrant deviating from the American system of each party bearing its own fees and costs.

**Donald M. Mennel**  
The Mennel Milling Co.  
Fostoria, Ohio

# Arbitration Appeals Case Number 1671

**APPELLANT:** Louis Dreyfus Corp., Wilton, Conn.  
**APPELLEE:** Elders Grain Co., Kansas City, Mo.

**CROSS APPELLANT:** Elders Grain Co., Kansas City, Mo.  
**CROSS APPELLEE:** Bunge Corp., St. Louis, Mo.

The Arbitration Appeals Committee, individually and collectively, reviewed all evidence submitted in Arbitration Case Number 1671. It also reviewed the findings of the original arbitrators.

In its deliberations the Arbitration Appeals Committee considered the following:

There was a difference between the trade confirmations of the involved parties. Since a broker was involved, the broker's confirmation governed. The broker's confirmation contained minimal information -- apparently reflecting what was actually spoken to in the trade.

No condition was guaranteed upon arrival and no reference was made to whether the contract was based on origin or destination aflatoxin testing and, if aflatoxin testing was required, whether a specific type of testing was necessary.

The barge corn was traded on the basis of CIF NOLA -- not necessarily applicable. NGFA Barge Trade Rule 10 states that title, as well as risk of loss and/or damage, passes to the buyer on CIF contracts at the time and place of shipment. That occurs when the carrier issues a validated bill of lading in accordance with a seller's instructions or when a seller gives the buyer's instructions to the carrier. At the time of transfer of title and risk of loss, the barge showed a negative aflatoxin level.

An aflatoxin test was obtained at origin which showed the corn was aflatoxin-negative, indicating the grain could be introduced into interstate commerce for any purpose.

No custom of the trade existed as to whether a destination aflatoxin test superseded an origin aflatoxin test. The buyer had the right to test for aflatoxin at destination; but that did not, per se, override the independent aflatoxin test result at origin.

The standard permissible aflatoxin level is 20 p.p.b. even though higher levels are allowable for certain specific uses by the Food and Drug Administration.

There is the possibility that the level of aflatoxin can change during shipment. This was reflected in comments contained on the FGIS Inspection Certificate: "This analysis reflects the aflatoxin level at the time test was performed and may not reflect the level at a future date."

The parties involved in the transaction were knowledgeable traders, none of which was at a disadvantage to include in the contract a specific term if they so desired, such as "subject to destination aflatoxin testing."

## The Decision

The Arbitration Appeals Committee unanimously affirmed the majority decision of the original arbitrators in favor of the appellee, Elders Grain Co.

The Arbitration Appeals Committee would not have so ruled in the absence of an origin aflatoxin test, assuming a destination aflatoxin test had been obtained based upon official sampling and testing within five calendar days of arrival of the barge at destination. This is not to imply that the buyer had the right to invoke NGFA Barge Trade Rule 2(i), in general. The panel's conclusion was based upon the fact that since five days is the maximum time allowed when Barge Trade Rule 2(i) is applicable, the same five days should apply to an aflatoxin analysis.

Submitted with the consent and approval of the Arbitration Appeals Committee, whose names are listed below:

**John McClenathan**, *Chairman*  
GROWMARK, Inc.  
Bloomington, Ill.

**Tommy D. Couch**  
The E & D Grain Marketing Co. Inc.  
Cincinnati, Ohio

**Donald Schmidt**  
Walla Walla Grain Growers Inc.  
Walla Walla, Wash.

**Scott Hackett**  
General Mills Inc.  
Minneapolis, Minn.

**Wellington White**  
O.H. Kruse Grain & Milling  
Ontario, Calif.