



National Grain and Feed Association

Arbitration Decision

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May 23, 2006

Arbitration Case Number 2130

Plaintiff: New Vision Co-op, Worthington, Minn.

Defendant: ConAgra Food Ingredients Inc., Omaha, Neb.

Statement of the Case

On Friday, Nov. 19, 2004, a merchandiser from New Vision Co-op (New Vision) was seeking shuttle train transportation to pick up an outside corn pile at Mountain Lake, Minn. After discussing this situation with a merchandiser from ConAgra Food Ingredients Inc. (ConAgra), it appeared that ConAgra had a 100-car shuttle train available “nearby” and they agreed that New Vision would sell and ConAgra would purchase the corn.

On Nov. 22, 2004, ConAgra issued purchase contract number 37147, which provided for shipment from Nov. 28 – Dec. 4, 2004 at 20-cents under the price for the December 2004 futures month. The contract also provided for the following terms: “FOB Grp 3” delivery; “PNW” (export) specs to apply; First Official grades and First Official weights; “Starlink Tests per Loading Order;” Corn Borer Certificates, and instructions to spot the train at Mountain Lake.

Between Nov. 24 and Dec. 1, numerous conversations occurred between New Vision and ConAgra concerning the arrival of the shuttle, including statements allegedly made by New Vision that a price adjustment to the contract might be necessary if the shuttle were not placed in compliance with the terms of the contract. On Dec. 2, New Vision requested that a substitute shuttle be placed at Mountain Lake. The arbitrators observed that no documentary evidence was submitted in this case of any written confirmations between the parties concerning these conversations.

Contract number 37147 was priced on Nov. 29, 2004, and ConAgra sent a pricing confirmation to New Vision.

On Dec. 9, 2004, a shuttle was placed at Mountain Lake. New Vision commenced loading after 4:30 p.m., and completed loading all 91 loadable cars on Dec. 10 at approximately 6:45 a.m. Sioux City Grain Inspection (Sioux City) provided grading services for the shuttle load. Eighty-two carloads graded U.S. No. 2 yellow corn. Nine carloads graded U.S. No. 3 yellow corn following the detection of foreign material in those loads. New Vision issued the corn borer certificate. At approximately 6:39

a.m. (CST), the 342,818.04-bushel shuttle was billed (on BOL number 121004) and consigned to Kalama Export in Washington state for ConAgra’s account.

At 4:24 p.m., prior to the shuttle being pulled from Mountain Lake by the Union Pacific Railroad, ConAgra re-consigned the shuttle to Burley, Idaho. ConAgra followed all applicable rules and procedures of the railroad, but ConAgra did not notify New Vision of the change. Burley is an intermediate location between Mountain Lake and Kalama.

The shuttle was placed at Burley at approximately 5:30 p.m. (MST) on Dec. 15, and ConAgra commenced unloading. At approximately 9 a.m. on Dec. 16, pursuant to NGFA Grain Trade Rule 13(A), ConAgra notified New Vision by telephone (and subsequently confirmed in writing at about noon on the same day) that ConAgra had unloaded approximately 60 cars but then ceased unloading the shuttle because of the alleged presence of “rocks and debris” in at least 17 cars. ConAgra stated in its written notice that it would hold New Vision responsible for “all costs and damages incurred as a result of the debris and rocks contained in this shuttle.” New Vision’s initial response, referring to NGFA Grain Trade Rule 13(B), was to deny responsibility for the quality of the shipment because the shuttle had been diverted from an “export” destination to an interior destination without notification to New Vision.

On Dec. 16, New Vision signed and returned to ConAgra both the original Nov. 19 purchase contract and the Nov. 29 pricing confirmation. Also on Dec. 16, New Vision requested that Sioux City observe the unloading of the balance of the shuttle at Burley and retrieve “rock samples.” The arbitrators noted that both parties provided documents related to the loading and unloading of the cars at issue. The arbitrators further noted that at some point from Dec. 15-17, New Vision allegedly admitted that, “. . . a portion of the train was inadvertently loaded with pile corn that was not scalped.” Both parties agreed that the debris in the corn unloaded from the cars observed by Sioux City came from the Mountain Lake pile.

On Dec. 17, at 4:45 p.m., ConAgra presented two proposals to New Vision to resolve the contract-quality dispute. In the first option, ConAgra said it would accept the corn from the train with stipulated minimum itemized expenses of \$467,195, for which New Vision would be responsible. In the second option, the train would be rejected, the unloaded corn would be reloaded, and New Vision would be required to dispose of the train and to replace 650,000 bushels of corn (representing unloaded corn, plus corn that was co-mingled within the Burley warehouse), plus some additional costs, including expenses related to freight, weights and grades. New Vision rejected these two options.

On Dec. 20, New Vision's manager visited Burley. During that visit, New Vision and ConAgra purportedly negotiated a resolution to their dispute. According to this purported negotiation, New Vision agreed to purchase 650,000 bushels of corn "F.O.B. the Burley outdoor pile" and to merchandise the corn while assuming the expenses for doing so. Both parties agreed that the quantity to be resold to New Vision was greater than the 342,818.04 bushels shipped by New Vision because at least five storage bins of corn in the Burley facility purportedly also had been "contaminated" during the unloading of the first 59 cars. Also on Dec. 20, ConAgra issued sale contract number 2623, with the following terms included: 650,000 bushels, U.S. No. 2 Corn-Yellow, Shipment 12/20/04 TO 12/20/04, Origin weights, Origin grades, basis "F.O.B." A separate letter, also dated Dec. 20 from ConAgra to New Vision, provided as follows:

"Due to the contamination of the Mountain Lake corn train, previously explained in my letter of December 15, ConAgra is selling back to New Vision Coop the 650,000 bushels (approximate quantity pending actual weights) of corn FOB the Burley temporary grain storage pile at +60 CH. We will exchange futures as of the market close, December 20th at \$2.06 1/2 +60, which gives us an invoice price of \$2.66 1/2. New Vision Coop will wire funds within 24 hours of acknowledgement of purchase. Final reconciliation of purchase will be determined upon the final load-out truck weights."

New Vision's manager was at the Burley facility on Dec. 21 when the transfer of the estimated 650,000 bushels of corn to the temporary storage pad was completed. He requested an opportunity to review the daily position records (DPRs) of the corn in the Burley warehouse. He also requested assurances that the 650,000 bushels were a true representation of the actual quantity of corn that was on the pile. ConAgra declined to provide this information. Rather, ConAgra offered to New Vision the opportunity to estimate the quantity in the pile itself.

New Vision signed contract confirmation 2623 on Dec. 21, and New Vision wired \$1,732,250 to ConAgra. The arbitrators noted that contract number 2623 was written specifically "#2 Corn-Yellow" even though both parties – based upon the

documentation and evidence submitted – apparently had operated under the understanding that the corn in question was in all likelihood not "#2 Corn-Yellow." Because the behavior of both parties supported that assumption and neither party raised the issue in this dispute, the arbitrators determined not to consider it an issue in deciding this case.

From Dec. 21, 2004 to Jan. 11, 2005, there were various communications between New Vision and ConAgra that included requests for DPR information, attempts by New Vision to "sell the corn back" to ConAgra, and queries about ConAgra's interest in providing load-out services. The arbitrators observed that no evidence was presented indicating that any further agreements or transactions occurred between the parties.

From Jan. 11 to Feb. 18, New Vision secured services to load-out the corn. It proceeded to sell, clean, screen and load-out the corn by truck from the temporary pile in Burley. On Feb. 18, New Vision completed loading out this corn. In total, New Vision loaded and shipped 432,452.45 bushels. In addition, 75,789.24 pounds of screenings ("trash and debris") were cleaned from the pile corn before loading, which represented an equivalent amount of 1,353.54 bushels.

In a letter dated Feb. 24 from New Vision to ConAgra, New Vision claimed that it was owed \$44,400 in late charges on contract number 37147. In that letter, New Vision also stated that the parties needed to agree on the underfill quantity and price, and New Vision requested 6 percent interest on the underfill dollars from Dec. 22, 2004. New Vision stated further that it would "load out the remainder of the corn" if agreement on the underfill issues could not be reached.

On March 1, ConAgra issued purchase contract number 11016 to New Vision for 216,194.65 bushels of "#2 Corn-Yellow" at \$2.7700/bushel (+64 CH). This contract also provided for F.O.B.-Burley; destination weights and grades; shipment on March 1, 2005, and "Peavey Schedule of Discounts to Apply." This contract apparently was intended to govern the underfill of contract number 2623. New Vision never signed this contract.

On March 2, New Vision sent to ConAgra an invoice for \$605,750.16 itemized as follows: "Underfill on Contract 2623: 216,194.65 bus. @ \$2.77 per bushel [totaling] \$598,859.18 [plus] Interest 70 days @ 6.0% [totaling] \$6,890.98."

On March 11, ConAgra wire-transferred \$501,674.07 to New Vision with a letter and itemized summary of "deductions" totaling \$97,185.11, which ConAgra claimed represented the sum due to it from New Vision for expenses related to the shipment of "adulterated and unmerchantable grain." The deductions claimed by ConAgra in the amount included: the market difference for buying-in truck sale contracts to local feeders; labor; grain inspection services; equipment repairs; railroad unload incentives; travel expenses; shuttle freight and trip incentives; truck weighing charges; grain storage charges and temporary pad repair expenses.

In this arbitration case, New Vision submitted three claims:

1. Late charges of \$44,400 on contract number 37147 (\$0.03 per day x 4 days x 370,000 bushels).
2. \$170,075.05 incurred to merchandise corn purchased on contract number 2623:
Market Value Difference: \$93,293.39
Cleaning Agri Source: 5,859.77

Cleaning Gregerson: 68,848.46
Misc. Expenses: 2,073.43

3. \$129,593.68 related to the underfill (contract number 11016):
Market Value Difference: \$21,619.40
Trash Bushels: 3,898.19
Interest: 6,890.98
ConAgra Deductions: 97,185.11

The Decision

The arbitrators noted that the NGFA Grain Trade Rules strongly encourage buyers and sellers to document all details of their transactions in writing. [For example, see NGFA Grain Trade Rules 1, 3, and 4.] The arbitrators observed that failure by both parties to clearly document the terms of their transactions caused much of this dispute. The arbitrators concluded that had New Vision simply loaded and shipped the corn according to the original contract specifications, it is most probable that the dispute could have been avoided entirely.

The arbitrators considered the three claims, in turn, submitted by New Vision:

Claim No. 1: New Vision claimed that it was due late charges based upon NGFA Grain Trade Rule 28(B) [Buyer's Non-performance]. Both parties agreed that there was almost daily communication about the shuttle's location and whether it would arrive within the specified contract shipment period. New Vision argued that it mentioned "late charges" on several occasions, but the arbitrators noted that nothing in that regard was communicated to ConAgra in writing. The arbitrators also observed that when the shuttle arrived on Dec. 9 (five days after the stated shipment period), New Vision loaded and billed the shuttle and invoiced ConAgra at the contract price. Had New Vision experienced harm as a result of ConAgra's alleged non-performance, then New Vision had every opportunity to exercise its rights and obligations under NGFA Grain Trade Rule 28(B) to either: 1) agree to an extension; 2) sell out the defaulted portion of the contract, with due diligence; or 3) cancel the defaulted portion of the contract. The arbitrators determined that New Vision did none of these.

The arbitrators also concluded that New Vision had the opportunity to invoice ConAgra for late charges, but did not do so. New Vision further could have given ConAgra notice of late charges when New Vision signed the original contract confirmation on Dec. 16, 2004, yet it declined to do so. The arbitrators decided that the fact that New Vision loaded, shipped, billed and invoiced the shuttle without any written reference to late charges indicated that New Vision tacitly agreed to an extension of the shipment period for contract number 37147. The arbitrators concluded that by all its actions, New Vision considered this to be a consummated trade, and the arbitrators determined there to be no legitimate basis for late charges.

In addition, relying upon NGFA Grain Trade Rule 13(B), New Vision claimed that ConAgra assumed all risk of grain quality on the shuttle when it "diverted" the shuttle to Burley in place of the original destination at Kalama. Because Burley is located between Mountain Lake and Kalama, the arbitrators determined that ConAgra complied with NGFA Grain Trade Rule 13(B). The arbitrators concluded that none of the issues in dispute in this arbitration were incidental to, or caused by, the diversion. In its answer, ConAgra claimed that all risks were transferred to New Vision because the shipment was mislabeled with regard to content. However, the arbitrators concluded that ConAgra was responsible for issues from this shipment related to Idaho state law because ConAgra re-consigned the shuttle to Idaho without notifying New Vision.

Claim No. 2: This concerned the claim that contract number 2623 was entered into by New Vision because it knew that it had misrepresented the quality of corn loaded on contract number 37147. New Vision claimed that there was never a "meeting of the minds" on contract number 2623. The arbitrators observed, however, that New Vision signed ConAgra's contract confirmation, and New Vision neither issued its own purchase contract nor stated on either the sale or confirmation contracts that quantity was "contingent on DPR confirmation of bushels." The arbitrators concluded that New Vision failed to demonstrate the validity of this claim by failing to document this condition in writing. [See NGFA Grain Trade Rules 1, 3(A) and 3(B).]

When New Vision and ConAgra agreed to and signed contract number 2623, they acknowledged that this contract was their agreement regarding any issues with contract number 37147. The arbitrators decided that rather than accepting ConAgra's offer for a resolution, New Vision "bought back" the problem. When New Vision purchased 650,000 bushels of corn, the purchase was "as is," thereby New Vision assumed the costs associated with this approach. In this arbitration case, New Vision requested relief for costs representing the market differential (\$93,293.93), cleaning of the corn (\$5,859.77 and \$68,848.68), and miscellaneous expenses (\$2,073.43). The arbitrators concluded that there was no basis for New Vision now to claim that ConAgra was liable for these costs.

Claim No. 3: Contract number 11016 was designed to address the substantial underfill of ConAgra contract number 2623. New Vision provided evidence that it had requested DPR information from ConAgra on numerous occasions. Both parties agreed that the 650,000 bushels were “estimated.” However, the arbitrators determined nonetheless that the overestimate of the bushels by 50 percent was material. The arbitrators concluded that simple calculations based upon the DPR – by either party – would have resulted in much more accurate contract terms. New Vision claimed that it was owed for “market difference” on the price of contract number 11016. Contract number 2623 and contract number 11016 were both “truck” contracts, and should reflect the value of “truck corn” F.O.B. Burley on Feb. 18, 2005. The arbitrators determined that no conclusive evidence was submitted that established the real value of “truck corn” at Burley on Feb. 18, 2005. New Vision invoiced ConAgra at +64CH and the arbitrators determined that this was, in fact, the negotiated price of the underfill.

New Vision bought the corn “as is.” The arbitrators decided that in doing so, New Vision assumed the risk that the corn might contain “trash and debris,” and any value, or cost thereof, would be for New Vision’s account.

New Vision claimed “interest” from ConAgra. The arbitrators decided that the underfill was material, and New Vision was due interest.

New Vision also claimed that ConAgra had no basis for any of the deductions that totaled \$97,185.11. The arbitrators determined that while ConAgra had followed good trade practices in many respects, ConAgra largely did not document its damage claims or deductions in an adequate and timely manner. ConAgra did notify New Vision promptly upon the discovery of adulterated corn on contract number 37147, and ConAgra did minimize the cost of buying-in sales contracts that were affected negatively by the problem with contract number 37147, according to NGFA Grain Trade Rule 28(A)(2).

Both parties also agreed to unload the balance of the shuttle (contract number 37147), and the arbitrators determined that this most probably involved additional labor costs in the amount of \$793.80, as claimed by ConAgra. Because both parties agreed to move the approximately 650,000 bushels of corn to the Burley temporary pile, the arbitrators approved the deduction for \$210 in “freight.”

The significant delay in off-loading the shuttle resulted in the loss of ConAgra’s \$9,100 unload incentive. The arbitrators concluded that New Vision was accountable for this cost. However, while ConAgra deducted \$30,000 for shuttle freight and shuttle trip expenses, the arbitrators decided that ConAgra did not provide sufficient evidence that it was actually harmed as a result of the issue arising out of contract number 37147, nor did ConAgra provide evidence that the invoice submitted as

evidence was ever paid by ConAgra. The arbitrators further concluded that ConAgra should have included this issue as part of contract number 2623.

ConAgra made a significant deduction from New Vision’s invoice for items that were not part of any documented contract or agreement between the parties. ConAgra deducted funds for storage and pad repair expense, yet these items were not part of any contract between ConAgra and New Vision. Nor was a copy of the invoice for pile repairs sufficient evidence that the purported damage was the result of activity by New Vision, or that the given invoice was even ever paid by ConAgra. The arbitrators failed to see any basis for deducting storage charges on 650,000 bushels that were not in ConAgra’s DPR report. The arbitrators concluded that there was no documented agreement concerning any expenses associated with the use of the Burley temporary grain pile.

Certain travel expenses by a ConAgra representative were in direct response to the situation caused by New Vision’s loading of off-quality corn on contract 37147. The arbitrators decided that New Vision was accountable for expenses related to the first trip by this individual as follows:

Delta Air 12/16	\$254.10
Avis 12/18	166.72
Holiday Inn 12/18	99.68
Skywest 12/18	15.98
Perkins 12/17	21.70
Best Western 12/17	65.87
Chevron 12/18	28.59
Delta Air 12/17	349.18
NWA 12/16	577.92
Ampco Parking 12/18	63.00
Hertz 12/18	105.43
Subtotal allowed	\$1,748.17

But the arbitrators decided that ConAgra had failed to show the need for subsequent trips by this same individual. ConAgra also failed to provide documentation regarding any mutual agreement with New Vision concerning these expenses. The arbitrators determined that, similarly, there was no mutual agreement, written confirmation, or other sufficient justification to award expenses for pile reclaim supervision and travel.

The arbitrators concluded that it is customary trade practice for the party requesting grain inspection services to pay for those services. There being no clear evidence that charges for inspection services were otherwise agreed upon, the arbitrators determined that each party should bear the cost for inspection services that they requested.

The arbitrators also decided that ConAgra made deductions for expenses (equipment repairs), evidence of which was submitted to New Vision much too late for there to be mutual agreement on those expenses.

The following summarizes deductions awarded to ConAgra by the arbitrators:

Contract Buy-In:	\$18,523.00	Tom Arndt Time/Travel (see above):	1,748.17
Temporary Labor:	793.80	Shuttle Frt and Trip Incentive:	-
ID Grain Inspection:	-	Sioux City Inspection T&E:	832.02
Freight on Rejected Loads:	-	ConAgra Time/Travel to Supervise Pile:	-
Freight to Move Corn from Elevator to Pile:	210.00	Truck Weigh Charge:	-
Bedke Invoice for Bearings:	-	Grain Storage:	-
Dairy Feed Invoice for Mill Repair:	-	Pad Repair Expense:	-
Lost Unload Incentive:	9,100.00	Subtotal Allowed:	\$31,206.99

The Award

Claim No. 1: The arbitrators determined that there was no basis for New Vision's claim for \$44,400.

Claim No. 2: The arbitrators determined that there was no basis for New Vision's claim for \$170,075.05.

Claim No. 3: The arbitrators determined that ConAgra's deduction of \$65,978.12 was without any basis in either the NGFA Trade Rules or in any of the agreed-upon contract terms. There was also a material overstatement of the bushels under contract number 2623 for which New Vision was owed interest of \$7,371.70. (Interest from Dec. 23 through and including March 11; 79 days x 6 percent).

Therefore, it was ordered that:

New Vision Co-op is awarded a net judgment from ConAgra of \$73,349.82.

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

Martin Rossol, *Chair*

Manager of Facility Originations
The Andersons
Maumee, Ohio

Jeff Bechard

President
AgMark LLC
Beloit, Kan.

Mark Stoller

General Manager
Madison Farmers Elevator Co.
Madison, S.D.