



National Grain and Feed Association

Arbitration Decision

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July 1, 2010

Arbitration Case Number 2365

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Hebert Farms Partnership, Opelousas, La.

Statement of the Case

This case concerned six contracts – four of which involved the sale of soybeans and two of which involved the sale of soft red winter wheat – between the buyer, Cargill Inc. (“Cargill”), and the seller, Hebert Farms Partnership (“Hebert Farms”).

Cargill submitted this arbitration claim, alleging that Hebert failed to perform on the two initial contracts, which Cargill said led to its cancellation of the four subsequent contracts involved in this case.

Both parties acknowledged the existence of each of these contracts, and signed copies of all six contracts were supplied to the arbitrators with the parties’ arguments submitted in this case. Both parties also agreed that NGFA had jurisdiction to arbitrate this matter, as each of the contracts contained the following provision:

NGFA Trade and Arbitration Rules. Unless otherwise provided herein, this Contract and all other grain contracts by and between Buyer and Seller, shall be subject to the Trade Rules of the National Grain and Feed Association (NGFA), which Trade Rules are incorporated herein by reference. The parties agree that the sole forum for resolution of all disagreements or disputes between the parties arising under any grain contract between Buyer and Seller or relating to the formation of any grain contract between Buyer and Seller shall be arbitration proceedings before NGFA pursuant to NGFA Arbitration rules. The decision and award determined by such arbitration shall be final and binding upon both parties and judgment upon the award may be entered in any court having jurisdiction thereof. Copies of the NGFA Trade and Arbitration Rules are available from Buyer upon request and are available at www.ngfa.org. In addition to any damages otherwise

provided by law, Buyer shall be entitled to recovery of its attorney’s fees and costs. *[Emphasis in original.]*

In March and May 2007, the parties entered into the six different contracts for the sale of soybeans and winter wheat. All of the contracts were “basis open” or “futures fixed” contracts. Delivery periods ranged between October through November 2007 and October through November 2009.

Given the claims in Cargill’s arbitration complaint arising from the first two contracts were distinct from the claims arising under the subsequent four contracts, the arbitrators examined these two sets of contracts separately.

Contract number 28460 involved the purchase of 10,000 bushels of U.S. No. 1 yellow soybeans for delivery October through November 2007. Contract number 28694 involved the purchase of 20,000 bushels of U.S. No. 2 soft red winter wheat for delivery May through June 2008.

Cargill alleged Hebert Farms failed to perform under these two contracts, and instead delivered the same commodities to Cargill’s competitors after market prices increased significantly.

On or about Oct. 29, 2007, Cargill rejected one load of soybeans delivered to its facility by Hebert Farms under contract number 28460. Cargill stated that no further deliveries were applied against this contract. Cargill also stated that it communicated with Hebert Farms on numerous occasions in mid-November 2007 concerning contract number 28460, and maintained it became clear at that time that Hebert Farms had sold the contracted production to a competitor. Cargill also asserted that at that time, both parties agreed upon a settlement, but said

Hebert Farms subsequently failed to pay the agreed-upon settlement. On Dec. 28, 2007, Cargill said it cancelled contract number 28460 at fair market value and sent the cancellation confirmation to Hebert Farms via U.S. mail after not receiving either the settlement payment or delivery of the contracted soybeans.

Cargill further alleged that Hebert Farms failed to deliver soft red winter wheat in satisfaction of contract number 28694. Cargill stated that on June 8, 2008, it sent a representative to Hebert Farms. According to Cargill, during this visit it was agreed that Hebert Farms would pay the cancellation costs for contract number 28460 on June 13, and in exchange, Cargill would roll the delivery period under contract number 28694 to allow Hebert Farms to deliver under the contract. Cargill alleged that during telephone conversations after June 13, Hebert Farms reneged, stating that it would not be fulfilling its contractual obligations. On June 30, Cargill cancelled contract number 28694 and sent the cancellation confirmation to Hebert Farms via U.S. mail.

On Oct. 15 and 16, 2008, Cargill cancelled contract number 28693 for 10,000 bushels of U.S. No. 1 yellow soybeans and contract number 28489 for 10,000 bushels of U.S. No. 1 yellow soybeans, respectively, based upon Hebert Farms' alleged non-performance on the first two contracts discussed previously (contract numbers 28460 and 28694). On Nov. 4, Cargill similarly cancelled contract number 28695 for 5,000 bushels of soft red winter wheat and contract number 28696 for 5,000 bushels of U.S. No. 1 yellow soybeans, based upon non-performance on the initial two contracts.

Hebert Farms did not dispute the chronology of events concerning the aforementioned contracts between the parties. Nor did it dispute the existence and validity of these contracts.

Hebert Farms stated that it, indeed, attempted to deliver three truck loads of soybeans to Cargill on Oct. 29, 2007 in satisfaction of contract number 28460, but that this delivery was rejected by Cargill for quality reasons. Hebert Farms maintained that upon rejection of this delivery by Cargill, Hebert Farms informed Cargill that if these soybeans were rejected, then Hebert Farms would not be able to fulfill the contract. Hebert Farms also argued that while the contract called for delivery of U.S. No. 1 soybeans – it alleged that all Cargill purchase contracts for soybeans are for U.S. No. 1 – Cargill did not in actuality expect delivery of U.S. No. 1 soybeans. To the contrary, Hebert Farms alleged that Cargill routinely accepts grain with higher damage than permitted for that grade factor. Hebert Farms also alleged that Cargill unilaterally sets damage limits in an unpredictable manner based upon its own requirements on a daily basis.

Hebert Farms also argued that because its employee informed Cargill that it would not have additional soybeans available for delivery if these deliveries were rejected, that this rejection should have constituted termination of the contract.

Hebert Farms further argued that certain language contained in the Cargill “purchase contracts” gave it, as the seller, the ability to roll the contracts to a different futures month up to five times. Hebert Farms claimed that Cargill refused to roll Hebert Farm's soft red winter wheat contract, despite a contractual obligation to do so. Because of Cargill's alleged refusal to roll the contract, Hebert Farms said it refused to deliver wheat in satisfaction of contract number 28694.

The Decision

In their review of this case, the arbitrators referred significantly to Paragraph (A) [Seller's Non-Performance] of NGFA Grain Trade Rule 28 [Failure to Perform], which reads:

If the Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone and confirmed in writing. The Buyer shall then, at once elect either to:

- (1) agree with the Seller upon an extension of the contract; or
- (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or
- (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

If the Seller fails to notify the Buyer of his inability to complete his contract, as provided above, the liability of the seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the seller has defaulted. In such case it shall then be the duty of the Buyer, after giving notice to the Seller to complete the contract, at once to: ...

- (1) agree with the Seller upon an extension of the contract; or
- (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or
- (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

The arbitrators examined this case in the two separate groupings of contracts set forth above. First, the arbitrators reviewed the initial soybean contract (number 28460) and the initial wheat contract (number 28694). Then, as a second group, the arbitrators reviewed the additional four contracts (numbers 28693, 28489, 28695 and 28696).

Contract Number 28460: With respect to this contract, the arbitrators observed that Hebert Farms failed to deliver the contracted amount of 10,000 bushels of soybeans. Hebert Farms attempted to deliver upon this contract but the delivery was rejected for quality reasons. The arbitrators determined that Cargill was well within its rights to establish discounts or rejection levels for any deliveries that exceeded the contracted quality. Hebert Farms' delivery did not meet the contracted minimum quality standards. Hebert Farms also made no additional attempts to deliver upon this contract with other grain that may have met the contracted quality or pay the discounts for a minimum quality that would have been accepted on this contract.

Further, the arbitrators determined that Cargill was not obligated to cancel this contract based solely upon the statements allegedly made by Hebert Farms' employee. Hebert Farms was obligated to inform Cargill officially of its inability to perform in accordance with NGFA Grain Trade Rule 28(A). The arbitrators concluded that since no such notification was given by Hebert Farms, its liability continued under Grain Trade Rule 28. Cargill then attempted through due diligence to determine the default status of this contract with Hebert Farms through various telephone calls and personal visits, which culminated in the alleged potential financial settlement that ultimately was not executed upon. At that point, Cargill cancelled contract number 28460 at fair market value in accordance with the NGFA Rules.

Contract Number 28694: The arbitrators observed that Hebert Farms failed to deliver upon this contract for 20,000 bushels of U.S. No. 2 soft red winter wheat. Hebert Farms argued that the language under the price amendment gave it the right to roll this contract up to five times.

The provision at issue in this contract read as follows:

Price Amendment

The Unpriced Basis Price Amendment term is as follows. Seller has the right to amend the futures contract month and year set forth above, subject to the following conditions. Seller must notify buyer of its desire to amend on or before the Pricing Deadline. The basis will then be adjusted by the difference between (a) the futures price in the month and year stated in this

contract and (b) the futures price in the month and year stated in the amendment. If the new futures price is higher ("carry") than the one stated in the Contract, the adjustment will be downward. If the new futures price is lower ("inverse") than the one stated in the Contract, the adjustment will be upward. The Seller may amend the futures contract month and year for the entire quantity under this Contract a maximum of five times.

The arbitrators determined that it was clear – consistent with the standards in the sale and purchase of grain – that this provision could not be read to apply to a futures fixed or a basis open contract (such as the contract pertinent to this case), and that it only can be read to apply to a basis fixed or no futures established contract. The arbitrators concluded that the inclusion of this provision in the contract clearly was an error in the use of contract templates, and that it could not be read to be relevant in this dispute.

Given the disputes regarding delivery on the first contract for soybeans and rolling of the second contract for wheat, the arbitrators determined that Hebert Farms did not deliver on either contract. The arbitrators decided that Cargill complied with all applicable trading rules and practices pertaining to contract cancellation, notification and calculation of damages.

Contract Numbers 28693, 28489, 28695, 28696: Concerning these contracts cancelled by Cargill, Hebert Farms argued that Cargill did not have the right to cancel them in advance of the delivery period.

However, as Cargill pointed out, a significant amount of financial damage already had been created, given Hebert Farms' non-performance on the first two contracts. Therefore, the arbitrators concluded that it was reasonable for Cargill to anticipate that Hebert Farms would not deliver on the balance of these contracts. Hence, the arbitrators concurred, pursuant to the NGFA Trade Rules, it was Cargill's responsibility to limit and minimize potential damages under these contracts to the extent possible, given the reasonable expectation that Hebert Farms similarly would not fulfill its obligations under these subsequent contracts.

The arbitrators considered the potential monetary damages to Hebert Farms for cancellation of these four contracts, and determined Hebert Farms was in the position to resell the production contracted to Cargill without incurring any damages. Any monies owed to Cargill based upon these cancellations were immediately recoverable by Hebert Farms by reselling to another buyer, as the basis level had not been set and Cargill did not impose additional cancellation costs.

The Award

The arbitrators consequently awarded judgment to Cargill against Hebert Farms in the amounts listed below:

Contract Number 28460:	\$68,700.00
Contract Number 28694:	\$37,500.00
Contract Number 28693:	\$ 0.00
Contract Number 28489:	\$ 0.00
Contract Number 28695:	\$ 5,862.50
Contract Number 28696:	\$ 7,787.50
Attorney Fees and Costs:	<u>\$11,674.99</u>
Total Damages:	\$131,524.99

The arbitrators further ordered that Hebert Farms pay interest on this award at a rate of 4.5% from the date of this award until paid in full pursuant to NGFA Arbitration Rule 8 (m).

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

Myron G. Jepson, *Chair*
General Manager
James Valley Grain LLC
Oakes, N.D.

Lee Klemen
Area Manager
DeBruce Grain Elevator
Amarillo, Texas

John Ruplinger
Grain Merchandiser
South Dakota Wheat Growers Association
Aberdeen, S.D.