



National Grain and Feed Association

Arbitration Decision

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December 3, 2009

Arbitration Case Number 2431

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Metsker Farms, Lawrence, Kan.

Factual and Procedural Background

The plaintiff, Cargill Inc. (Cargill), requested the entry of a default judgment in the amount of \$15,240.00 against the defendant, Metsker Farms. The default judgment was granted for the reasons set forth below.

Cargill submitted an arbitration complaint dated April 8, 2009 to the National Grain and Feed Association (NGFA). The complaint alleged that Metsker Farms failed to perform on duly signed Cargill contract nos. 73235, 74614, and 80923 for delivery of #1 hard red winter wheat.

The front of each contract stated, “**Rules to Govern: NGFA,**” and each contract stated the following under “PURCHASE TERMS:”

1. **NGFA Trade and Arbitration Rules.** Unless otherwise provided herein, this Contract 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 this Contract or relating to the formation of this Contract 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. (Emphasis in Original.)

Acting upon Cargill’s complaint, the NGFA prepared an arbitration services contract and submitted it to Cargill for execution. By certified mail dated April 15, 2009, the NGFA also sent to Metsker Farms a letter providing notice of these proceedings with copies of Cargill’s complaint and attachments, as well as the NGFA Trade Rules and Arbitration Rules. The certified mail return receipt

confirmed that this mailing to Metsker Farms was signed for and received on April 23, 2009.

Upon receipt of the duly executed arbitration services contract from Cargill, the NGFA then sent it with accompanying correspondence to Metsker Farms by certified mail on April 28, 2009. The certified mail return receipt confirmed that this mailing to Metsker Farms was signed for and received on May 7, 2009.

On May 15, 2009, Philip Metsker contacted the NGFA by telephone and email on behalf of Metsker Farms with contact information for the defendant’s counsel.

On June 15, 2009, the NGFA sent to defendant’s counsel another letter by Federal Express delivery. Federal Express confirmed that this mailing was delivered on June 17, 2009. The NGFA’s letters of April 28 and June 15, 2009 to Metsker Farms and its counsel specifically provided notice that Sections 5(c) and (d) of the NGFA Arbitration Rules required that the signed contract be returned within fifteen (15) days.

On June 18, 2009, defendant’s counsel contacted the NGFA by telephone and indicated that she would be providing a written response.

After not receiving any further response from Metsker Farms or its counsel, or any indication that a response was forthcoming, the NGFA sent yet another notice on July 24, 2009 by Federal Express delivery. This notice further specifically stated as follows:

NGFA Arbitration Rules 5(d) and (e) provide for the entry of a default judgment when a party fails to execute the arbitration contract and pay the service fee within fifteen (15) days. Based upon the lack of any response from you thus far, we must anticipate that you do not intend to respond. ***This is our last***

attempt to elicit a response from you. A default judgment may be entered against you at any time, which the Plaintiff may enforce in a court of law. [Emphasis in original.]

Federal Express confirmed that this mailing was delivered to defendant's counsel on July 28, 2009.

On July 29, 2009, defendant's counsel sent a letter to NGFA with various requests, which NGFA attempted to accommodate with a response dated Aug. 5, 2009. By letter dated Aug. 11, 2009, defendant's counsel requested "the opportunity to view the original contract" signed by Phillip Metsker and the

"confirmation of receipt" of the NGFA's April 28 mailing to the defendant. Copies of the contract between the parties had already been provided more than once to the defendant. Nonetheless, by letter dated Aug. 26, Cargill advised that it would permit the defendant to view the original copy of the contract, as signed by Philip Metsker, at Cargill's Topeka, Kansas office. Cargill also provided contact information by which this could be arranged between the parties. By letter dated Aug. 24, NGFA also provided a copy of the confirmation of receipt requested. NGFA also advised that the rules did not permit further delay of the process.

NGFA did not hear further from the defendant or its counsel.

Default Judgment

The NGFA established jurisdiction over this matter pursuant to the express terms of the contracts and by way of Cargill's status as a NGFA active member.

Cargill properly and in a timely manner filed its complaint under NGFA Arbitration Rules Section 5(a). Pursuant to Section 5(b), the NGFA then submitted an arbitration services contract to the parties. Section 5(d) states that, "it shall be the duty of both parties to complete the contract for arbitration within fifteen (15) days from the date the party receives the contract from the National Secretary." Cargill properly executed and returned the arbitration services contract. Metsker Farms refused to comply with the NGFA Arbitration Rules, and refused to properly respond to any requests from the NGFA for the executed contract.

NGFA Arbitration Rule Section 5(e) provides for the following:

Where a party fails to pay the arbitration service fee and/or fails to execute the contract for arbitration, the National

Secretary may without further submissions by the parties enter a default judgment or such other relief as the National Secretary deems appropriate.

As it appeared that Metsker Farms made a conscious decision to disregard these arbitration proceedings, pursuant to Section 5(e) of the NGFA Arbitration Rules, the National Secretary found that entry of default judgment against Metsker Farms was proper and warranted.

Therefore, on Nov. 12, 2009, NGFA entered a default judgment against the defendant. The defendant was also advised that NGFA Arbitration Rule Section 5(e) sets forth the requirements and conditions under which, "[a]ny party against whom a default judgment has been entered under this provision may apply for vacation of the default judgment within fifteen (15) days of entry of the default judgment." In this case, the defendant did not apply to vacate the default judgment pursuant to Section 5(e).

The Award

THEREFORE, IT IS ORDERED THAT:

1. Cargill Inc. is awarded judgment against Metsker Farms for \$15,240.
2. Interest on the judgment shall accrue at the statutory rate available for judgments in the applicable jurisdiction from this date until paid in full. This award is not intended to preclude the plaintiff from pursuing an additional award for interest, legal fees or costs in a court of law.

Dated: November 12, 2009

NATIONAL GRAIN AND FEED ASSOCIATION

By: **Charles M. Delacruz**
National Secretary