National Grain and Feed Association

Arbitration Decision

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922
Phone: (202) 289-0873, FAX: (202) 289-5388, E-Mail: ngfa@ngfa.org, Web Site: www.ngfa.org

July 1, 2010

Arbitration Case Number 2346

Plaintiff: **Cargill Inc., Minneapolis, Minn.**

Defendant: **W&J Harlan Farms, Terre Haute, Ind.**

Statement of the Case

This case concerned an agreement between Cargill Inc. (Cargill), as the buyer, and W&J Harlan Farms (Harlan Farms), as the seller, for the sale and delivery of 45,000 bushels of corn each year over the course of three consecutive years.

The specific contract in question in this case was contract number PARI-AH-24854, dated March 1, 2006, which called for deliveries of 15,000 bushels of corn for each of three separate shipment periods between Jan. 1 and March 31, 2009. The contract was signed by both parties, and neither party disputed its legitimacy. The following statement incorporated on the back of the contract under *"**PURCHASE TERMS**"* dictated that NGFA Arbitration and Trade Rules would apply in the event of a dispute between the parties:

> **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.]*

The contracted price for 45,000 bushels for delivery in crop year 2008/2009 was a futures only contract, with no basis established. The futures price was $2.50 per bushel using the March 2009 CBOT corn futures contract.

Cargill alleged that on or about June 17, 2008, it received notice from Harlan Farms of what Cargill said it understood to be unequivocal communication that the seller would be unable to deliver under the contract. Acting upon this information, and under NGFA Trade Rule 28(A) [Seller's Non-Performance], Cargill elected to: *"…(3) cancel the defaulted portion of* the *contract at fair market value based on the close of the market the next business day."*

In a letter dated June 18, 2008, Cargill notified Harlan Farms of this cancellation. In the same letter, Cargill detailed the alleged damages resulting from this cancellation. Harlan Farms confirmed receipt of the cancellation notice pursuant to NGFA Grain Trade Rule 3(B) [Confirmation of Contracts], which states:

> If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party, as described in Rule 3(A), of any disagreement with the confirmation received.

Harlan Farms denied in its arguments in this case that its statements allegedly made on or about June 17, 2008, constituted an unequivocal revocation of its intent to perform in satisfaction of the contract, pursuant to the NGFA Trade Rules. Harlan Farms also stated that it was told by Cargill of an "Act of God" clause that would excuse non-delivery of one year's

production in the event of natural disaster (such as flooding, which in this case allegedly occurred). Harlan Farms further relied upon points of law as a defense to argue that it had no duty to contest cancellation of the contract.

In its rebuttal, Cargill relied upon a clause provided in its Exhibit A, *"Additional Terms and Conditions for Innovasure™ Corn Purchase Contract,"* to support its claim of damages for the cancellation. The clause stated as follows:

> **Termination.** …In the event that Seller's performance is reasonably prevented by any of the following Acts of God: **fire, flood, drought, hail, wind, or frost,** then Seller may cancel up to a maximum of the actual bushel quantity that cannot be delivered in accordance with this Agreement due to the Act of God, but a cancellation fee equal to the difference between contract price and market price (as of the cancellation date). [Emphasis in original.]

The Decision

Harlan Farms denied that its statements, allegedly made on June 17, constituted an unequivocal statement of its *"Failure to Perform"* its contractual obligations pursuant to the NGFA Trade Rules. However, the arbitrators found that Harlan Farms did not submit any documentation in this case to indicate that it disagreed with the notice of cancellation issued by Cargill at the time. The arbitrators also observed that Harlan Farms admitted that on or about June 17, it was contacted by Cargill's representative to obtain an answer in response to Cargill's offer to carry the contract to the following production year for a fee of $1 per bushel.

The arbitrators determined that Harlan Farms' defenses relied upon many terms or conditions not incorporated in the original contract. For instance, Harlan Farms stated that it was told of an "Act of God" clause that would excuse non-delivery of one year's production in case of natural disaster if delivery of an equivalent quantity was made in the subsequent crop year. However, the arbitrators were unable to find these terms in the original signed contract.

Harlan Farms further relied upon points of law to argue that it had no duty to contest the cancellation of the contract. However, the arbitrators determined that since the NGFA Trade Rules applied to all disputes that could arise under the contract, Harlan Farms had a duty to act if it disagreed with the cancellation notice pursuant to NGFA Grain Trade Rule 3, which stipulates that the confirming party's communication will be binding upon both parties unless a reply to that contract confirmation is provided.

With respect to the provision in Exhibit A to Cargill's rebuttal (*Additional Terms and Conditions for Innovasure™ Corn Purchase Contract)*, Harlan Farms denied the relevance of this document and the arbitrators were unable to determine whether it ever was received by Harlan Farms, as there were no signatures by either party nor were there areas in which to sign or acknowledge receipt of this document. Consequently, the arbitrators excluded this document as a factor in their decision. The arbitrators determined that Exhibit A did not materially affect a determination of whether damages were incurred (and if so, how they would be calculated) for the benefit of either party as a result of the cancellation. In any event, damages, if any, would be calculated by taking the futures price that was on the contract and comparing that to the futures price on the day the cancellation was issued.

The arbitrators concluded that the buyer, Cargill, did in fact receive information that reasonably would lead it to conclude that the seller would not be able to perform in satisfaction of the corn contract, and determined that Cargill acted accordingly pursuant to the NGFA Trade Rules [specifically, NGFA Grain Trade Rule 28(A)(3)], when it cancelled the defaulted portion of the contract at fair market value based upon the market close the next business day. The arbitrators also concluded that Cargill acted in accordance with NGFA Grain Trade Rule 3 by providing notice of the cancellation on the next business day.

The arbitrators decided that Harlan Farms did not act in accordance with NGFA Grain Trade Rule 3, as it was obligated to contest the cancellation of the contract if it disagreed, and to make assurances to the buyer that it was, in fact, ready and able to make delivery according to the contract terms and conditions.

The arbitrators further concluded that the signed contract did not provide for an "Act of God" provision, and that Harlan Farms was obligated under the contract terms and NGFA Trade Rules, either to accept Cargill's offer to roll the contract forward to the next marketing year for a fee, or accept the cancelation of the contract. Consequently, the arbitrators declined any claim or award to Harlan Farms in its counter claim for damages and fees.

The Award

The arbitrators consequently awarded to Cargill judgment against Harlan Farms for $238,050 in damages. The arbitrators further ordered that Harlan Farms pay interest on the judgment, which shall accrue from the date of this decision until the award is paid in full at the rate of 5% per annum, 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 Kleman
Area Manager
DeBruce Grain Elevator
Amarillo, Texas

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