National Grain and Feed Association

Arbitration Decision

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December 2, 2010

Arbitration Case Number 2401

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: F.L. Wilson Inc., Terre Haute, Ind.

Statement of the Case

Fred Wilson, on behalf of F. L. Wilson, Inc. (Wilson), and Cargill Inc. (Cargill), entered into contract number PARI-AH-24889 on March 7, 2006 for a multi-year sale of 60,000 bushels per year of U.S. No. 1 yellow corn, Paris Innovasure™, to be delivered in equal quantities to Cargill between Jan. 1 and March 31 in each of three consecutive years beginning in 2007 and ending in 2009.

The contract also included an addendum by Cargill tied to a Cargill Ag Horizons On-Farm Storage Addendum with a futures reference month of Chicago Board of Trade (CBOT) "Corn March 2009" at a maximum price of $2.55 per bushel. Cargill sent and received signed contracts and addendum confirmations. The contract language also indicated on the front page, "Rules to Govern: NGFA." The contract also contained Section 1 of the Purchase Terms on the reverse side, titled "NGFA Trade and Arbitration Rules."

The claim by Cargill concerned the last delivery of 60,000 bushels, scheduled between Jan. 1, and March 31, 2009. Discussions had occurred between Wilson and Cargill's field marketer during the prior summer of 2008 about the potential shortfall in production, and therefore execution of the contract, by Wilson because of flooding in the area.

Cargill asserted that on Aug. 29, 2008 at 2:45 p.m., Wilson made an "unequivocal statement" by voicemail to cancel the contract, indicating he was unable to make any deliveries in satisfaction of the contract and wanted to "just put a resolution to this thing." Wilson also indicated in this voicemail he thought the closing price was $6.04 per bushel.

Cargill also stated that on Sept. 3, 2008, its farm market representative received a call from Wilson who wanted to know his options to pay back the cancellation amount. Wilson allegedly told the Cargill field marketer that his insurance company was doing an audit on his claim. Cargill presented a copy of an internal email, dated Sept. 3, 2008 at 1:56 p.m., from the farm market representative to his trading group summarizing the conversations with Wilson.

Cargill, allegedly acting upon the notification from Wilson to cancel the contract, did in fact cancel the contract, and on Sept. 8, 2008 issued an invoice (number 248896) for the contract cancellation of 60,000 bushels at a market difference of $3.47 per bushel, which totaled $208,200.

Wilson claimed that in the summer of 2008, he discussed the status of his crop production with the Cargill farm marketer because he knew he had lost a significant portion of his crop production to flooding. He said he was interested in invoking the "Act of God" provision exception as explained by the Cargill field marketer at the time the contract was signed. He inquired about carrying the delivery obligation over to the next crop year, but said he found Cargill's proposed carrying charge of $1 per bushel excessive. He requested and received a personal meeting with the field marketer to discuss his options. Copies of the transcription of the taped conversation were provided by Wilson in his "Answer to the Complaint."

He further claimed that the Aug. 29 voicemail message to Cargill pertained to the possibility of a cancellation, as well as to discuss what price the cancellation settlement would be based upon.

Wilson also claimed that he had subsequent conversations with the Cargill field marketer regarding the status of his crop and possible resolution of the contract.

On Nov. 13, 2008, Wilson sent a letter to the Cargill field marketer regarding the status of his harvest. He wrote of the possibility of delivering corn, but indicated he did not know what quantity he would have to deliver.

In a Dec. 4, 2008 letter (received by Cargill on Dec. 9, 2008), Wilson mentioned that he was not able to deliver any food-grade corn and, therefore, was cancelling the contract at $3.38 per bushel. He sent a check (number 12568) in the amount of $49,800 to cover the difference. The memo section of the check indicated "Paid in full Cancel – 60K Contract."

On Dec. 11, Cargill's Tuscola, Ill., office sent the check back to Wilson with a letter explaining that it was not willing to accept partial payment on the cancellation. The Cargill performance marketing leader who responded to Wilson also indicated that Cargill acted in good faith in accommodating Wilson (inferred to mean to 'delay' payment) while he settled his insurance claim. Enclosed was a copy of the original invoice number 248896, dated Sept. 8, 2008.

On Dec. 20, 2008, Wilson sent a letter to Cargill's, Tuscola, Ill., office indicating that it was never his intention to cancel the contract on Aug. 29, 2008.

On Dec. 29, 2008, Cargill responded to Wilson that it had a tape recording of the Aug. 29, 2008, voicemail indicating his request to cancel his contract, as well as the conversations (before and after this call) in which he discussed his crop failure. Cargill said it deemed that the contract had been cancelled based upon these actions by Wilson.

On Jan. 22, 2009, Cargill filed a request for arbitration with the NGFA to resolve the dispute.

The Decision

The arbitrators closely reviewed the parties' arguments and documents submitted by both the plaintiff and the defendant. The arbitrators concluded that there was a contract between Wilson and Cargill for 60,000 bushels of corn to be delivered each year, with delivery periods of Jan. 1 through March 31 of 2007, 2008 and 2009 for Innovasure™ corn, with an attendant On Farm Storage Agreement. These documents were signed by both parties indicating that they understood the terms of the contract.

While there were many conversations between the two parties over the course of late summer 2008, there was significant concern expressed by Wilson that he had suffered a production shortfall on the 60,000 bushel contract due for January 1 to March 31, 2009 delivery. He mentioned several times in the documents that there would be a crop insurance claim. He also indicated that he did not want to roll the contract forward. He called Cargill requesting that the contract be cancelled. At this point, NGFA Grain Trade Rule 28 takes effect, as shown below in relevant part:

> **Rule 28. Failure to Perform**
>
> (A) **Seller's Non-Performance**
> 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.

When he called Cargill electing to cancel the contract (in accordance with NGFA Grain Trade Rule 28 (A)(3)), Cargill did so and invoiced Wilson for the difference using a buy-in futures price of $6.02 per bushel. Since Wilson did not follow-up with a written confirmation as required under this NGFA trade rule, the arbitrators concluded there was sufficient direction and intent by him to cancel per his instructions. While Wilson indicated in his "Answer to Complaint and First Argument" that Cargill should have received a written confirmation of cancellation from Wilson, the arbitrators affirmed that in normal trade practice and protocol, producers often do not do so. The arbitrators agreed that there was sufficient direction and intent to cancel the contract, and found that Cargill acted within the NGFA Trade Rules.

Wilson contended that the contract should have been subject to an "Act of God" exception. Item 3 of the Purchase Terms of the contract clearly stated the following:

> **Buyer's Excuse from Performance**. Buyer shall not be liable for any prevention or delay in performance resulting in whole or in part, directly or indirectly, from fires, floods, or other acts of God; …or any other circumstance beyond Buyer's control.

The arbitrators agreed that Cargill contract term Item 3 addressed and excused any claims of Cargill's liability subject to an "Act of God," and found Wilson's claim to be without merit, since he had agreed to and signed the terms of the contract in this transaction.

Wilson also contended that Cargill's field marketer represented interpretations and opinion as to the market direction, policies, remedies and what Cargill could incur in this case of crop failure caused by an "Act of God." However, Item 7 of Cargill's contract terms stated:

> **Buyer Information.** Seller acknowledges that Seller is solely responsible for the marketing and pricing of the commodity and is entering into this Contract with full knowledge and understanding of the risks inherent in Seller's business and decisions. Any statements, information, opinions or advice provided to Seller by Buyer's employees are provided solely for informational purposes and without guarantee, express or implied, on Buyer's part. Seller understands and agrees that any statements, information, opinions, or advice expressed by Buyer shall in no way operate to create any managerial or fiduciary obligation between Buyer and Seller.

The arbitrators agreed that Cargill's Contract Term Item 7 addressed and excused any issue regarding opinions expressed by its field marketers, and found Wilson's claim to be without merit since he had agreed to and signed the terms of the contract in this transaction.

The Award

While the defendant submitted much information to the NGFA arbitrators, it was very clear to the arbitrators that the contract was cancelled based on his voicemail of Aug. 29, 2008 and the subsequent confirming conversation with Cargill's field marketer on Sept. 3, 2008 concerning the lack of production on Wilson's part. Therefore, the arbitrators found in favor of Cargill in this case.

It was unclear to the arbitrators based upon submitted documents as to when an actual order to cancel the futures portion of the contract was executed by Cargill. In this case, the arbitrators reverted to NGFA Grain Trade Rule 28(A)(3), which addresses the cancellation price method as follows: "…cancel the defaulted portion of the contract at fair market value on the close of the market the next business day."

Since the message came to Cargill after the close of the CBOT futures market trading session on Aug. 29, 2008, the cancellation date and time, therefore, per this rule, was the close of the next CBOT trading session, which in this case was Sept. 2, 2008. In researching the closing settlement on that day, CBOT March 2009 corn (CH2009) futures settled at $5.88 per bushel, rather than the $6.02 per bushel buy-in price applied by Cargill. There also was no record of $6.02 per bushel trading for that CBOT session. The arbitrators also could not ascertain if there was a cancellation fee included in the buy-in price calculation, so the CH2009 futures price was used solely for this calculation.

Therefore, the arbitrators awarded Cargill $199,800 (60,000 bushels x ($5.88-2.55)). Cargill also requested interest, and the arbitrators agreed that interest shall be calculated at the rate of 3.25 percent per annum from Sept. 8, 2008 until paid in full. The arbitrators denied any other fees or charges requested by Cargill.

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Joseph A. Brocklesby, *Chair*
Manager, Grain Origination
CGB Enterprises
Mandeville, La.

Doug R. Cropp
Grain Division Manager
Landmark Services Cooperative
Evansville, Wis.

Kyle L. Jones
Grain Department Manager
Farmers Cooperative Association
Brule, Neb.