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

May 3, 2012

Arbitration Case Number 2440

Plaintiff: F.W. Cobs Co. Inc., St. Albens Bay, Vt.

Defendant: Cropp Cooperative d/b/a Organic Valley Family of Farms, LaFarge, Wis.

Statement of the Case

At issue in this case were two alleged contracts numbered 08882 and 08884 involving the sale of organic feedstuffs by F. W. Cobs Co. Inc. ("Cobs") to Cropp Cooperative d/b/a Organic Valley Family of Farms ("Organic Valley"). Cobs claimed valid contracts were entered into with Organic Valley, which later refused delivery of the feedstuffs, resulting in significant financial loss to Cobs. Organic Valley contended no agreement had been reached and, therefore, neither contract was valid.

The contracts in question referenced NGFA Arbitration as the sole remedy and both parties agreed that NGFA had jurisdiction to arbitrate this dispute.

Cobs and Organic Valley had a 17-month, $1.3 million history of business transactions dating from May 2007 through September 2008.

Both parties acknowledged that on July 18, 2008, an e-mail was sent by Cobs to Organic Valley proposing pricing, delivery period and delivery method. On July 24, a verbal conversation occurred between Cobs and Organic Valley. Neither party submitted transcripts or notes from that conversation, the content of which was disputed. On July 25, Cobs e-mailed the disputed contracts to Organic Valley. On August 6, at 3:02 p.m. EDT, another representative for Organic Valley replied by email to the July 18 proposal asking, "Is this pricing sheet still the pricing you and Lowell are talking about? Can I get Certified Analysis and the contract and I will get that signed and back to you." Cobs replied at 5 p.m. with the contracts and asking if anything else was needed. At 6:13 p.m., Organic Valley responded asking for analysis and a product ingredient list in order to generate labels for the products. On August 13, Cobs sent tags and original contracts with ingredient listings for the tags.

Organic Valley claimed that multiple telephone conversations occurred between July 24 and September 11, but no supporting documentation or transcript was provided to the arbitrators. On August 21, Cobs e-mailed Organic Valley indicating a railcar was loaded and asking for the return of the contract and ship-to information. On August 23, Cobs asked again for ship-to information. Organic Valley's reply on August 25 asked which product was loaded. The next documented communication was dated September 11 from Organic Valley rejecting the contracts because they were "overpriced by about $60/ton." Cobs responded with an e-mail on September 12 detailing its position and ultimatum that Organic Valley would need to supply shipping instructions before September 16, at noon, or the contract would be considered breached.

Organic Valley's first defense was that there was never an acceptance of the proposal, so there could not have been a trade or a contract. Organic Valley's second defense was that the ingredient descriptions were not specific enough and, therefore, were not commodities applicable to contracting.

The Decision

The arbitrators, in reviewing available information provided by the parties involved in this case, found that Organic Valley never notified Cobs that it disputed the contracts or terms. The arbitrators viewed Organic Valley's response on July 18 asking for the contracts and stating, "I will get that signed and back to you" as proof of acceptance of the contracts. None of the documentation provided indicated Organic Valley's refusal of contracts or dispute of their terms until September 11. The contract terms clearly stated, "Upon receipt of this contract, the Buyer shall check all specifications herein and shall give written notice to Seller of any differences from the original order within 24 hours. If buyer fails to provide such notice, the terms in this contract shall govern."

Further, the arbitrators found to be invalid Organic Valley's assertion that the product descriptions were not specific enough as to qualify for contracts, as no documented communication from Organic Valley disputed the descriptions. Documentation indicated that Organic Valley was sufficiently familiar with the products as to eventually reject the contracts based upon price. Cobs also submitted invoices from third parties with similar product names.

The contracts stated that the buyer was responsible for market differences for inability to perform.

The arbitrators ruled that an offer was made by F.W. Cobs and accepted by Organic Valley. Further, the arbitrators found that Organic Valley was in default on contract numbers 0882 and 0884 and, therefore, was liable for the market difference of the products.

The Award

NGFA Feed Trade Rule 19 *[Default on the Shipping Schedule and/or the Contract Shipping Period]* allows, in relevant part, for "(B)(2) sell-out, for the Buyer's account, the defaulted portion of the shipments; or (3) cancel the defaulted portion of the shipments at fair market value based on the day this option is exercised." It also states that, "If the Buyer defaults on the contract, he shall be liable for all the reasonable costs and expenses as shall have been incurred to and including the day the Seller elects one of the three options." Additionally, NGFA Feed Trade Rule 28(M) provides the following definition for "selling-out:"

Where the phrase "sell-out" is used in these rules, it shall mean an actual sale of feed of like kind and quantity on the open market, provided that when this is not feasible or would result in undue penalty to the Buyer, the Seller shall have the privilege of establishing a fair market value for the purpose of determining any loss properly chargeable to the buyer.

Cobs did not provide proof of selling out the product to a third party, but did provide proof of trades for organic grains and screenings applicable to the contracts. As only one car was loaded, the arbitrators ruled that only the cost of that car was applicable to this case. Cobs did not provide proof of storage charges; therefore, the arbitrators disallowed that claim.

Pursuant to NGFA Feed Trade Rules 19 and 28, the arbitrators awarded to F. W. Cobs:

Organic mixed grains:	$73,621.68
Organic ground screenings:	$75,836.53
One (1) Private leased railcar:	$ 750.00
Demurrage:	$ 1,550.00
Total Damages:	$151,758.21

Interest rate of 3.25 percent shall apply to this award from the date of ruling until paid in full.

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

Steve Young, *Chair*
Grain Merchandiser
Grainland Cooperative
Holyoke, Colo.

Tim Krehbiel
Vice President
Lortscher Agri Service Inc.
Bern, Kan.

Gail Ortegren
Vice President, Grain
Cooperative Producers Inc.
Hastings, Neb.

Arbitration Appeals Case Number 2440

Plaintiff/Appellee: **F.W. Cobs Co. Inc., St. Albens Bay, Vt.**

Defendant/Appellant: **Cropp Cooperative d/b/a Organic Valley Family of Farms LaFarge, Wis.**

The Decision

This case originally was decided in favor of F.W. Cobs Co. Inc. (F.W. Cobs) against Organic Valley Family of Farms (Organic Valley) by the original Arbitration Committee. Organic Valley subsequently appealed the decision.

The Arbitration Appeals Committee then individually and collectively reviewed all the arguments and supporting exhibits of Arbitration Case 2440, along with the findings and conclusions of the original arbitrators. The Appeals Committee further reviewed the briefs of the appellant and appellee filed in this case, and also convened to hear the presentation of oral arguments by the parties.

The statement of the case as presented by the original arbitration committee detailed the essential facts involved. The essence of the case (and the appeal) was whether a contract existed between F.W. Cobs and Organic Valley.

The Arbitration Appeals Committee determined that the evidence presented showed that an agreement (contract) existed, despite poor contract confirmation procedures by both parties. Organic Valley also appealed the calculation of damages by the original committee. NGFA Arbitration Rules, Section 6(a)(4) states:

> (a) In preparing either side of a case for submission to a National Arbitration Committee a party will be expected to furnish:
>
> (4) Proof of market difference when there is any probability of the market difference affecting the rights of the parties to the case, either because of discounts for grade, delay in shipment, or non-fulfillment of contract. The proof of market difference might be the price bulletin of the market to which the grain in question was shipped, or intended to be shipped, of those dates on which the price is to be established; but in case it is necessary to establish such difference in a market where no price bulletin is regularly issued, affidavits by disinterested persons should be furnished. (Emphasis added).

Neither party to this dispute submitted price bulletins or affidavits detailing proof of market difference for "those dates on which the price is to be established." The evidence presented by F.W. Cobs to determine damages (fair market value) was less definitive than market bulletins or affidavits, yet it was the best submitted evidence of proof of market difference. The Arbitration Appeals Committee reviewed the available evidence of fair market value, and the assessment of damages.

The Award

For these reasons, the Arbitration Appeals Committee affirmed the decision and award of the original Arbitration Panel.

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

Roger Krueger, *Chair*
Vice President, Grain Marketing
South Dakota Wheat Growers Association
Aberdeen, S.D.

Jim Banachowski
Director of Commodity Trading
The Andersons Inc.
Maumee, Ohio

Sharon Clark
Vice President, Transportation
Perdue AgriBusiness Inc.
Salisbury, Md.

Jeff Edwards
Vice President
J&J Commodities A Division of Abbitt's Inc.
Greenville, N.C.

Dean O'Harris
Commodity Manager
Parrish & Heimbecker Inc.
Oxford, Mich.