



National Grain and Feed Association

Arbitration Decision

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December 2, 2010

Arbitration Case Number 2463

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Ron Ortman, Nick Ortman and Ortman Family Farms, Marion, S.D.

Statement of the Case

On April 13, 2006, Ortman Family Farms (Ortman Farms) entered into contract number EMER-AH-44878 with Cargill Inc. (Cargill) for the sale of 35,000 bushels of U.S. No. 2 yellow corn, specifying delivery to Cargill at Emery, S.D., in October 2007. A subsequent amendment dated July 18, 2007 changed the shipment period to July 1-31, 2008. Cargill's contract confirmation and amendment both were signed by Ortman Farms.

Cargill stated that on July 24, 2008, Ortman Farms made what it termed an unequivocal statement to Cargill's farm marketer that Ortman Farms did not have sufficient quantities of grain to deliver, and requested cancellation of the contract. Cargill stated it faxed a contract cancellation letter to Ortman Farms and proposed a payment arrangement for the equity due Cargill to be documented with a promissory note.

Cargill stated on July 25, 2008 that Ortman Farms, by Ron and Nick Ortman, faxed a response letter to Cargill confirming receipt of and acknowledging the cancellation letter, and inquiring about any cancellation fees involved. This event was noted by Cargill's performance marketing leader.

Based upon this communication, Cargill said it proceeded to cancel the contract on July 25, 2008. On Aug. 22, 2008, Cargill sent Ortman Farms a promissory note outlining a payment schedule and terms to which it said the parties had agreed.

Over the next few months, Cargill indicated that it made several attempts, without success, to contact Ortman Farms, both directly and through its attorney, to obtain payment of the equities due Cargill either through the executed promissory note or as an immediate payment.

Cargill also submitted an earlier internal email string dated June 24 and June 25, 2008, indicating that Ortman Farms had been

"heavily overmarketed" (sic) in prior years and was beginning to emerge from the situation for 2008. It was indicated in the email string that Ortman Farms was oversold by the 35,000 bushels represented by the July 2008 contract, and that the only option was to cancel the contract.

Cargill subsequently submitted a request for arbitration with the National Grain and Feed Association (NGFA) to resolve the matter. In doing so, Cargill claimed the following:

- I. That NGFA Trade Rules applied to this dispute by means of a clause in its contract.
- II. That the terms of its contract with Ortman Farms were in question and when Ortman Farms allegedly made an unequivocal statement to Cargill that it did not have sufficient quantities of grain to deliver, Cargill cancelled the contract.
- III. That there was a breach by the seller to perform under the terms of the contract per NGFA Trade Rule 28, *Failure to Perform*, evidenced when Cargill was told by Ortman Farms that it did not have sufficient grain. Upon this notification, Cargill asserted it had a right to cancel the contract.

Cargill sought damages in this dispute in the amount of the contracted 35,000 bushels at the market price difference of \$2.455 per bushel along with cancellation and roll fees, resulting in a balance due Cargill in the amount of \$86,634.95.

Ortman Farms, in its answer to the statement of complaint submitted by Cargill, said that while it agreed to the contract and its terms, it refuted the allegation that it intended to cancel the contract on July 25, 2008. Ortman Farms claimed to have indicated in subsequent conversations with Cargill that it had sufficient grain and wanted to roll the contract to September 2008 delivery.

The Decision

The arbitrators closely reviewed the parties' arguments and submitted documents. The arbitrators concluded that there was indeed a valid contract between Ortman Farms and Cargill. Further, the contract was followed by a confirmation signed by both parties.

It appeared from the documents submitted by both parties that Ortman Farms did indeed contact Cargill via its field marketer on July 24, 2008, indicating to Cargill that Ortman Farms did not intend to deliver upon the contract in question and directing that the contract be canceled. Ortman Farms sought an indication of the cancellation costs and a proposed payment plan. This was confirmed in a letter faxed and received by Ortman Farms on July 24 from Cargill with the proposed payment terms. Ortman Farms confirmed the fax and subsequently faxed a reply on July 25 at 6:26 p.m. to Cargill requesting to see a copy of the detailed promissory note and if there was a cancellation fee involved.

When presented with this determination that the contract would not be performed upon, Cargill applied NGFA Grain Trade Rule 28 to the cancellation procedure. Grain Trade Rule 28, in relevant part, states as follows:

NGFA Grain Trade 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.

In this case, Cargill applied paragraph (3) of Grain Trade Rule 28(A) to cancel the contract.

In documents sent to the arbitrators, there appeared to be some confusion as whether Ortman Farms had indeed indicated that it would be unable to perform on the contract. Under normal trade practice, if a seller has an open contract and has not applied any shipments to the contract well into the delivery period, and the seller further indicates that it wants to cancel the contract, then the buyer without further consideration is to initiate the cancellation process. In this case, since it was late in the delivery period and Ortman Farms indicated that it wanted to cancel, the arbitrators determined that Cargill acted appropriately and with prudence to cancel the contract pursuant to NGFA Trade Rule 28(A)(3) to mitigate market risk to both parties.

Ortman Farms also submitted information in its answer to the complaint that it did indeed have sufficient quantities of grain to satisfy the contract and was waiting upon Cargill to accept delivery. Ortman Farms maintained that Cargill would not allow deliveries against the July 2008 contract for fear that Ortman Farms would not have sufficient quantities of grain for delivery against its September 2008 contract commitment of 100,000 bushels of corn. It was the arbitrators' opinion that under normal trade practice, if Ortman Farms did have sufficient grain, it should have applied delivery of its corn against the July 2008 contract, fulfilled it, and then delivered against the September 2008 contract and settled any shortfall when known by both parties. If there was a question of Cargill's capability to accept delivery of the July 2008-contracted grain as mentioned by Ortman Farms in its submission, then all doubt about performance of the July 2008 contract on its part would have been alleviated at that time.

Based upon the facts presented, the arbitrators agreed with Cargill on the cancellation of the contract. The arbitrators also concurred with Cargill's calculations of the market difference on the cancelled bushels and fees associated with the cancellation.

The Award

The arbitrators awarded the plaintiff, Cargill, its cancellation costs and fees in the full amount requested of \$86,634.95, plus interest calculated at a rate established at 3.25 percent per annum from the time of cancellation on July 28, 2008 until paid.

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.