National Grain and Feed Association

Arbitration Decision

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March 26, 2012

Arbitration Case Number 2490

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

Defendant: **Daniel T. Rogers and Flying Diamond Enterprise, Purdum, Neb.**

Statement of the Case

This dispute involved various contracts between the buyer, Cargill, Inc. (Cargill), and the sellers, Daniel T. Rogers and Flying Diamond Enterprise (Flying Diamond).

Cargill claimed that the parties entered into two contracts for the purchase of U.S. No. 2 yellow corn on Aug. 16, 2007. Contract number 37422 called for 100,000 bushels to be delivered in December 2008, while contract number 37423 specified delivery of 50,000 bushels in July 2008. Cargill produced copies of these contracts, which included signatures on behalf of both parties.

Cargill alleged that on Aug. 29, 2008, Flying Diamond made an unequivocal statement that it would not perform on contract number 37423. Similarly, Cargill alleged that on Nov. 25, 2008, Flying Diamond indicated that it would not perform on contract number 37422. Cargill then allegedly cancelled each contract promptly, issuing a Confirmation of Contract Change, as well as an invoice for each contract. Cargill claimed a total of $95,077.67 in damages as a result of the cancellation of these two contracts (representing the difference between the amount of $113,827.76 due to Cargill for contract number 37423 and the amount of $18,750 due to Flying Diamond for contract number 37422).

In response, Flying Diamond countered that the parties had entered into a marketing agreement in January 2006, under which Cargill agreed to meet with Flying Diamond at its farm once each month for a period of 14 months to advise on marketing decisions and opportunities. Flying Diamond alleged that it paid $1,450 to Cargill under this agreement, but that Cargill only met with Flying Diamond on two occasions during the applicable period.

Flying Diamond further submitted that under the marketing agreement, the parties verbally contracted for 100,000 bushels of corn on Jan. 16, 2007. Flying Diamond stated that it did not receive the applicable written contracts until Aug. 16, 2007 (contract numbers 36234, 36235, 36236 and 36237). Flying Diamond alleged that Cargill subsequently refused to permit "flex" deliveries that would have permitted Flying Diamond to have sold the corn to alternative buyers that were prepared to pay at significantly increased market prices, which resulted in a loss of potential revenue for Flying Diamond of 70 cents per bushel.

Flying Diamond consequently claimed a total of $90,200 in damages against Cargill (representing the $1,450 fee under the marketing agreement, $18,750 due under contract number 37422, and 70 cents per bushel of lost revenue for the 100,000 bushels under contract numbers 36234, 32635, 36236 and 36237).

In reply to Flying Diamond's counterclaim, Cargill produced a copy of the marketing agreement. Cargill submitted that the parties entered into this agreement on Nov. 22, 2005 for the 2006-07 crop year. Cargill argued that this agreement neither required monthly meetings nor provided for Cargill to provide recommendations and advice as was claimed by Flying Diamond. Cargill also produced copies of contract numbers 36234, 36235, 36236 and 36237.

The Decision

The arbitrators noted that both contract numbers 37422 and 37423 were signed by both parties. The arbitrators determined that Flying Diamond failed to perform according to the contract terms, and that Cargill canceled the contracts in accordance with the NGFA Grain Trade Rules and industry standards and practices. Specifically, Cargill's actions were consistent with NGFA Grain Trade Rule 28(A) [Seller's Non-Performance], which states the following in relevant part:

> 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.

Cargill canceled the contracts in accordance with option (3) above.

With respect to damages, however, the arbitrators disagreed with Cargill's assessments for both contracts.

Contract number 37423: In its arguments presented in this case, Cargill claimed damages under contract number 37423 based upon the difference between the market cancellation price and a contract price of $3.31per bushel. However, the contract provided in this case indicated a contract price of $3.71 per bushel – not $3.31 per bushel – and Cargill failed to provide any other documentation or support for a claim of a contract price other than $3.71 per bushel or an implied cash basis of (-)$0.40. Instead of the damages requested by Cargill at $2.34 per bushel, the arbitrators awarded damages at $1.875 per bushel based upon the following calculations:

	$3.71	CH 8 Contract Futures Price
(+)	$0.13	CH/CU spread on June 30, 2008
(=)	$3.84	CU 8 equivalent value
(–)	$5.715	CU 08 Futures price on 8-29-08
(=)	$1.875	Loss due to Cargill per bushel

The arbitrators consequently concluded that the market loss due to Cargill under contract no. 37423 amounted to $93,750.

Contract number 37422: The arbitrators declined to award the cancellation fee assessed by Cargill of 10 cents per bushel under contract number 37422. The contracts did not provide for this fee; nor did it appear to the arbitrators that the fee was warranted based upon the other materials and arguments presented in this case. Therefore, the amount due to Flying Diamond for contract number 37422 was increased to $32,567.33.

The total due to Cargill as a result of the cancellation of these two contracts consequently amount to $61,182.67 (representing the difference between the amount due to Cargill for contract number 37423 and the amount due to Flying Diamond for contract number 37422).

Upon close review of the earlier contracts between the parties and the 2006-07 marketing agreement, the arbitrators determined there was no basis for determining that Cargill had violated the marketing agreement or that Cargill was responsible for the loss of revenue that Flying Diamond claimed it could have realized had Cargill permitted it to sell the contracted grain to alternative buyers.

The Award

The arbitrators consequently awarded $61,182.67 to Cargill. Interest shall accrue on the award at the rate of 3.25 percent pursuant to NGFA Arbitration Rule 8(m) from the date of the cancellation of the last-dated contract (Dec. 3, 2008) until the award is paid in full.

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

Carl Schwinke, *Chair*
Vice President, Grain Supply
Siemer Milling Company
Teutopolis, Ill.

Chris Breedlove
General Manager
Willacy Co-op
Raymondville, Texas

Paul Katovich
Assistant Manager
Central Washington Grain Growers Inc.
Waterville, Wash.