



National Grain and Feed Association

Arbitration Decision

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May 3, 2012

Arbitration Case Number 2430

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Ertel Farms Inc., Osgood, Ind.

Statement of the Case

This case involved a dispute about the cancellation of three contracts for delivery of corn by Ertel Farms (Ertel) to Cargill Inc. (Cargill). Ertel entered into three corn contracts with Cargill for delivery to Cargill's Cincinnati River Road, Ind., facility. Each was a "No Basis Established" contract specifying delivery in the fall of 2007. The chain of events associated with each contract was as follows:

Contract Number 37784

- Dec. 12, 2005: Created for December 2007 delivery with futures established at \$2.60/bu. Dec 2007 CBOT.
- Dec. 3, 2007: Contract was amended to change shipment period to March 2008.
- March 19, 2008: Contract was amended to change shipment period to July 2008.
- June 30, 2008: Contract was amended to change shipment period to September 2008, with futures established at \$3.135 Sept 2008 CBOT.

Contract Number 39646

- April 3, 2006: Created for November 2007 delivery with futures established at \$2.85/bu. Dec 2007 CBOT.
- Dec. 3, 2007: Contract was amended to change shipment period to March 2008.
- March 19, 2008: Contract was amended to change shipment period to July 2008.
- June 30, 2008: Contract was amended to change shipment period to Sep 2008, with futures established at \$3.3875/bu. Sept 2008 CBOT.

Contract Number 39712

- April 6, 2006: Created for Nov 2007 delivery, with futures established at \$2.90/bu. Dec 2007 CBOT.

- Dec. 3, 2007: Contract was amended to change shipment period to March 2008.
- March 19, 2008: Contract was amended to change shipment period to July 2008.
- June 30, 2008: Contract was amended to change shipment period to September 2008, with futures established at \$3.4375/bu. Sept 2008 CBOT.

Neither party disputed the existence of the contracts or the amendments thereto. Both parties signed all contracts and amendments. Each of the contracts referenced the NGFA Trade Rules as the governing rules for the contracts.

On July 2, 2008, Cargill sent to Ertel a "Demand for Adequate Assurance" (Demand Letter) with respect to several contracts that included the disputed contracts, and some additional outstanding contracts between the parties that subsequently were resolved.

Paragraph 10 of the Purchase Terms of Cargill's contract included the following clause:

Buyer shall have the right, when it has reasonable grounds for insecurity with respect to the performance of Seller, to demand adequate assurance of Seller's performance. As adequate assurance, Buyer may demand payment from Seller up to an amount equal to the difference between the Contract price and the then prevailing market price for the commodity hereunder. Seller shall provide such adequate assurance within 48 hours of the receipt of the demand therefor. Seller's failure to provide adequate assurance as demanded by Buyer shall constitute Seller's repudiation of this Contract, and Buyer shall have the right to pursue all legally available remedies, including but not limited to recovery of its losses and damages.

Cargill alleged that Ertel's communications, by and through its president, Keith Ertel, to Cargill included mention that he (a) was dissatisfied with the contracts; (b) did not believe the contracts existed; (c) wanted to cancel some contracts; (d) did not intend to deliver on the Contracts due in July; and (e) failed to respond to Cargill's numerous attempts to contact him regarding delivery under the contracts.

The Demand Letter was sent on July 2, 2008. On or about July 8, 2008, Cargill cancelled the contracts and requested damages of

\$115,950 – less an offset of funds due to Ertel from delivery of other grain in July 2008 with a value of \$63,659.64 – for a total due Cargill of \$52,290.36.

Ertel claimed that Cargill did not have "reasonable grounds" to send the Demand Letter, and subsequently to cancel the three corn contracts in question. Ertel also claimed the parties mutually had agreed to cancel contracts in December 2007, and Cargill was due \$50,050 from that cancellation.

The Decision

At the core of this arbitration was whether Cargill had "reasonable grounds" to cancel the contracts with Ertel. This phrase is not used or defined in the NGFA Trade Rules, but rather is a Cargill contract term. Therefore, there is no definition in the NGFA Trade Rules of what constitutes "reasonable grounds" upon which to request a demand letter.

The arbitrators examined the five reasons listed by Cargill as to why it believed it had reasonable grounds to request the Demand Letter:

- 1) Ertel was dissatisfied with the contracts.
- 2) Ertel did not believe that the contract existed.
- 3) Ertel wanted to cancel some contracts.
- 4) Ertel did not intend to deliver the contracts due in July.
- 5) Ertel failed to respond to Cargill's numerous attempts to contact Ertel regarding delivery under the contracts.

As the arbitrators analyzed the five reasons enunciated by Cargill, they were not convinced that they constituted reasonable grounds for issuing a demand letter for the following reasons:

- 1) The seller being dissatisfied with a contract is not a reasonable ground to demand adequate assurance. Market

prices had increased substantially during the intervening period, so the producer logically would be dissatisfied, but not necessarily unwilling to fulfill the contract.

- 2) The contracts were signed by Ertel, as were the three amendments to each of the contracts, so Ertel would not have been able to claim that the contracts did not exist.
- 3) Cargill and Ertel had a previous history of canceling contracts, so that did not seem like a reasonable ground to require adequate assurance.
- 4) It was true that Ertel did not intend to deliver on the disputed contracts in July because on June 30, three days before the demand letter was written, the delivery period had been rolled from July to September and the amendment had been signed by both Cargill and Ertel. There were other contracts also outstanding; but they were delivered upon in July.
- 5) There was no record of letters, logs of telephone calls, or emails noting that contact had been attempted by Cargill with Ertel. The only email presented to the arbitrators was dated July 7, and at that time, according to the Cargill representative writing the email, Ertel confirmed he would be delivering on the two other July contracts.

The Award

Based upon the arbitrators' decision that Cargill canceled the three disputed contracts without "reasonable grounds," the arbitrators found in favor of Ertel. Ertel had claimed the following damages:

Proceeds Cargill was holding from Ertel as potential offset of damages:	\$113,709.64
Amount due Cargill from cancellation of previous contracts:	- 50,050.00
Amount to be returned to Ertel farms:	\$ 63,659.64

Therefore, the arbitrators unanimously awarded to Ertel Farms \$63,659.64, plus interest from July 7, 2008 until paid at the rate of 3.25 percent pursuant to Arbitration Rule 8(m).

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.