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

December 29, 2009

Arbitration Case Number 2217

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

Defendant: **Luke W. Cure, d/b/a Suncure Farms and Gregory Cure, d/b/a Landmark Farms, Wray, Colo**

Statement of the Case

Cargill, Inc. ("Cargill") and various members of the Cure family of eastern Colorado had a long-standing business relationship until the fall of 2007. Prior to that time, Cargill had bought corn with high moisture from various Cure family production entities – Landmark Farms ("Landmark"), Suncure Farms ("Suncure") and Cure Brothers – and sold high-moisture corn to 5 Star Feedlot ("5 Star"), another entity owned by other members of the extended Cure family.

The present dispute involves seven sales contracts by Cure entities to Cargill and one purchase contract by 5 Star from Cargill. These contracts are summarized in the table below:

Contract No.	Seller/ Buyer	Del. Period	Basis	Futures	Quantity
23656	Landmark	1-31 Oct		$3.135	500,000
23134	Landmark	1-31 Oct		$3.135	150,000
23655	Suncure	1-31 Oct		$3.135	500,000
23133	Suncure	1-31 Oct		$3.135	150,000
23117	Landmark	1 O – 30 N		$3.00	250,000
23118	Suncure	1 O – 30 N		$3.00	250,000
24341	Suncure	1 O – 30 N		$3.00	250,000
1039	5 Star		-0.13	$3.4375	500,000

All of the contracts were confirmed and duly signed by authorized representatives of both parties. It should also be noted that all of the Landmark and Suncure sale contracts were a result of Cargill ProPricing™ and Pacer Accumulator™ contracts originally entered into in 2005 and 2006, and rolled forward until the fall of 2007.

As prices for corn began to dramatically rise in the summer and fall of 2007, the parties had a series of discussions relating to the execution of these contracts. Several offers and counter-offers for cancellation of the Landmark and Suncure sale contracts were made, but ultimately there was no agreement reached regarding cancellation.

On Oct. 3 2007, Landmark and Suncure sent identical letters by fax to Cargill requesting a specific destination for delivery of the four contracts with Oct. 1-31 delivery periods. Cargill replied by fax on Oct. 5 that the destination would be 5 Star Feedlot in Idalia, Colo. Cargill also proposed additional conditions for the delivery of the corn to 5 Star, which were not in the original contract confirmations.

Landmark and Suncure replied to Cargill by fax on Oct. 10, 2007, stating that they considered Cargill to be in breach of its obligations as 5 Star did not have adequate purchases from Cargill to allow Landmark and Suncure to deliver the totality of their sales, and because of Cargill's unilateral attempt to add other conditions to the contracts.

Cargill rejected this argument by letters dated Oct. 15, and also informed Landmark and Suncure that a delivery location and schedule would be provided to them by 4 p.m. local time on Oct. 15, 2007. Cargill also sent letters that same date asking for assurance of adequate performance to be provided by Landmark and Suncure by close of business on Oct. 17, stating that absent such assurance, Cargill would consider them to be in default of their obligations under the contracts.

No deliveries were made and no assurances or margins were provided to Cargill. Thus, Cargill priced the contracts to the market on Oct. 18, 2007, and issued the appropriate debit notes to Landmark and Suncure.

There were no further discussions or correspondence between any of the parties until Nov. 9, 2007, when Cargill asked for adequate

assurance of performance from Landmark and Suncure for the contracts with Oct. 1-Nov. 30 delivery periods by the close of business Nov. 13, 2007.

No shipments were made and no assurances or margins were given to Cargill. Thus, Cargill priced the contracts to the market of Nov. 14, 2007 and issued the appropriate debit notes to Landmark and Suncure.

Majority Decision

The arbitration committee ("committee") carefully reviewed all of the written evidence from both parties, as well as the testimony presented at the oral hearing which was held in Kansas City, Mo., on Sept. 16, 2009. Because of the complexity of the case, several issues were put forth for the committee to decide. Unfortunately, the committee could not find unanimous agreement on all of the issues. As such, this opinion will set out the issues where there was unanimous agreement and issues for which there was a majority opinion.

I. Personal Liability of Luke Cure, Tyson Cure and Gregory Cure

The committee reviewed the contract confirmations submitted by both parties and concluded that the seven contracts in question were made between Cargill and Landmark (three contracts) and Suncure (four contracts). After reviewing further evidence presented as to the corporate structure of Landmark and Suncure, the committee has determined that there is no personal liability for Luke W. Cure, Tyson Cure and Gregory Cure with regard to these particular contracts. Thus, Cargill's claims against these individuals are dismissed in their entirety.

II. Validity of the Contracts

The committee has determined from a review of the evidence that the seven contracts at issue were validly made and confirmed in accordance with NGFA Grain Trade Rule 3. It should be noted that neither party disputed the validity or accuracy of the confirmations presented in evidence, nor did they dispute the jurisdiction of the NGFA to arbitrate these disputes.

III. Breach of the October Delivery Contracts (500,000 Bushels)

When Landmark and Suncure requested a specific destination from Cargill on Oct. 3 for their sales of 1.3 million bushels of high-moisture corn, Cargill responded with a destination of 5 Star Feedlot in Idalia, Colo. At that time, Cargill already had entered into a sale of 500,000 bushels to 5 Star at $3.3075 per bushel.

The committee unanimously concluded that this declaration was valid for the 500,000 bushels which were sold to 5 Star. As such, Landmark and Suncure were obligated to deliver 500,000 bushels to 5 Star within the contractual delivery period. Landmark and Suncure made no deliveries to 5 Star at any time and, thus, were in breach of their delivery obligations.

However, neither party invoked any of the options afforded by NGFA Grain Trade Rule 28 at this time, and the committee was left to find an equitable method for calculating damages resulting from this breach. In previous dealings between the parties, the basis for Cargill purchases from Cure entities was set at $0.025 per bushel, less than the basis set for Cargill sales to 5 Star. Using that formula, the basis for the initial 500,000 bushels of Landmark and Suncure sales would have been $-0.1550 per bushel, resulting in an imputed cash price of $2.98/bushel ($3.135–0.155).

Thus, if Landmark and Suncure had performed on the first 500,000 bushels of sales to Cargill by delivering to 5 Star, Cargill would have realized a gain on the transactions of:

500,000 bu. x ($3.3075 - $2.98 per bu.) = $163,750

A majority of the committee determined that this represents a reasonable calculation of the damages due Cargill as a result of Landmark's and Suncure's failure to deliver.

IV. Breach of the October Delivery Contracts (800,000 Bushels)

For the balance of the October delivery contracts, a majority of the committee could find no credible evidence that Cargill ever provided a valid delivery destination to Landmark and Suncure and, thus, was in breach of its obligation to provide a destination for shipment of the goods.

The letters issued by Landmark and Suncure on Oct. 3 and 5 were sufficient to fulfill the requirements of NGFA Grain Trade Rule 28(B). However, in this event, none of the options presented in this rule were exercised by Landmark or Suncure. Since the market value was higher at the time of breach than the sales contract price, exercising the option to cancel at fair market value would lead to Cargill profiting from its own breach under some interpretations of NGFA Grain Trade Rule 28. Since this would be contrary to established principles of law and equity, a majority of the committee has concluded that Landmark and Suncure were correct in their actions and were excused from performance on the balance of these contracts.

A majority of the committee also concluded that Cargill's claim for damages relating to these contracts, $578,500, is denied.

V. Breach of the October/November Delivery Contracts

The parties also had three contracts which called for delivery to be made during the period Oct. 1-Nov. 30, 2007. Landmark and Suncure sent no notices regarding these contracts, as their original notices only referenced those sales contracts with October delivery periods as referenced above. Landmark and Suncure made no deliveries on these contracts at any time.

By their actions, the committee unanimously found that Landmark and Suncure were in breach of their obligations to deliver, and, in particular, were in direct contravention of NGFA Grain Trade Rule 28(C), under which failure to perform on one contract is not grounds for rescission of any other contracts.

The committee unanimously concluded that Cargill's claim for $585,625 was proper and correct as the measure of damages for the breach of their obligations by Landmark and Suncure.

VI. Landmark and Suncure Counterclaims

Both Landmark and Suncure have presented counterclaims involving market losses relating to sales of high moisture corn and field losses concerning yield reductions due to drying of the corn in the field. The committee has unanimously concluded to deny these claims in their entirety.

VII. Administrative Costs and Attorney's Fees

The committee unanimously concluded that each party shall pay its own costs and attorney's fees.

The Award

Therefore, the committee, by majority decision, awarded damages to Cargill as follows:

1. From Landmark:

Contract Numbers 23656 and 23134	$ 81,875.00
Contract Numbers 23117	$186,875.00
Total	$268,750.00

2. From Suncure:

Contracts Numbers 23133 and 23655	$ 81,875.00
Contract Number 23118	$186,875.00
Contract Number 24341	$211,875.00
Total	$480,625.00

Plus interest on both amounts at 6 percent per annum accruing beginning on the date of this decision until payment is made.

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

J. Stephen Lucas
President
Jayhawker Consulting Co. LLC
Trumbull, Conn.

Roger Fray
Vice President, Grain
West Central Cooperative
Ralston, Iowa

Minority Decision

Failure to Deliver October Contracts:

The majority of the committee reached an agreement on the amount owed to Cargill by Suncure Farms and Landmark Farms for the cancellation of the Oct. 1-31, 2007 high-moisture corn contracts. Both Suncure and Landmark were legitimate farming operations that had sold Cargill corn since at least 2004. In prior years, the high-moisture corn was purchased by Cargill, and then at a later date the corn was sold to 5 Star Feed Lot (an entity owned by the Cure family).

At the oral hearing on this case, Cargill employees testified that in the fall of 2007, all of the high-moisture corn was harvested by the end of September because of the dry fall. Suncure and Landmark never made an attempt to deliver corn on their contracts to 5 Star Feed Lot. At an Oct. 12, 2007 meeting, Greg Cure indicated to Cargill in his affidavit, "the corn was no longer available to Cargill as a result of the change in terms and conditions of the contract."

The committee and all parties involved in this case agreed the contracts were valid. I agree that no evidence was provided by Cargill verifying that delivery instructions were faxed to Suncure and Landmark on Oct. 15, 2007. This would constitute a failure to perform by Cargill, as the buyer of the corn. As I interpret the NGFA Trade Rules, Suncure and Landmark should have notified Cargill on Oct. 16, 2007 of their failure to perform and bought back based upon the Chicago futures, relying upon NGFA Trade Rule 28 [Failure to Perform], which states, in relevant part, as follows:

(B) **Buyer's Non Performance**

…If the Buyer fails to notify the Seller of his inability to complete his contract, as provided above, the liability of the Buyer shall continue until the Seller, by the exercise of due diligence, can determine whether the Buyer has defaulted. In such case it shall then be the duty of the Seller, after giving notice to the Buyer to complete the contract, at once to:

…2) sell out for the account of the Buyer, using due diligence, the defaulted portion of the contract.

I do not conclude that Cargill profited from its own non-performance because, at the time, Suncure and Landmark sold Cargill the high moisture corn, Cargill included those purchases in its position and used a type of hedging to protect its risk. However, Suncure and Landmark walked away from the lower price contracts and were able to sell their corn based upon a higher futures market price.

With the information provided by both parties, I conclude Suncure and Landmark had no intention of delivering the corn because of the price increase in the Chicago corn futures. I would award Cargill the entire cancellation fees for the October contracts of $289,250 from Landmark and $289,250 from Suncure.

Submitted with the consent of the arbitrator whose name appear below:

David B. Gordon, *Chair*
General Manager
Northwest Grain Growers Inc.
Walla Walla, Wash.