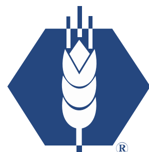

National Grain and Feed Association
Arbitration Decision
www.ngfa.org | www.ngfa.org/decisions

1250 I (Eye) Street, N.W., Suite 1003
Washington, DC 20005-3922

P: (202) 289-0873
F: (202) 289-5388

October 6, 2015

CASE NUMBER 2670

PLAINTIFF: CARGILL, INCORPORATED
MINNEAPOLIS, MINN.

DEFENDANTS: RICK AND DORIS KENNAY
ASHTON, IL

STATEMENT OF THE CASE

Parties in the case:

The plaintiff, Cargill, Incorporated, and the defendants, Rick and Doris Kennay

Contracts in dispute:

The dispute was over the existence and disposition of five contracts:

Contract Date	Cargill Contract #	Bushels	Delivery Period
8/11/10	31614-2	25000	12/01/12-12/31/12
8/11/10	31615-2	25000	12/01/12-12/31/12
9/02/10	31915-1	50000	12/01/12-12/31/12
9/02/10	31916-1	50000	12/01/12-12/31/12
9/02/10	31917-1	50000	12/01/12-12/31/12

Nature of the dispute:

The dispute arose when Cargill attempted to exercise a right to demand adequate assurance as outlined in article 10 of the purchase terms of its standard contract form, which states as follows:

> **10. Adequate Assurance.** Buyer shall have the right, when it has reasonable grounds for insecurity with respect to the performance of the Seller, to demand adequate assurance of the Seller's full 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 receipt of the demand therefor. Seller's failure to provide adequate assurance as demanded by Buyer shall constitute Sellers repudiation of this Contract, and Buyer shall have the right to pursue all legally available remedies, including, without limiting the foregoing, attorney's fees and costs incurring in litigation, arbitration, confirmation and execution.

© Copyright 2015 by National Grain and Feed Association. All rights reserved. Federal copyright law prohibits unauthorized reproduction or transmission by any means, electronic or mechanical, without prior written permission from the publisher, and imposes fines of up to $25,000 for violations.

Cargill made such demand and when the Kennays did not comply, Cargill cancelled the contract and invoiced the Kennays for liquidated damages. The Kennays refused to pay the invoiced amount and the parties are now in arbitration.

Sequence of events leading to the dispute:

The Kennays were regular customers of Cargill making use of Cargill's hybrid cash contract offerings. Both parties acknowledged that they have done in excess of 100 contracts together. Included in the parties' submissions in this case reviewed by the arbitrators were affidavits from the defendants, Rick and Doris Kennay, and affidavits from two Cargill employees (referred to as "JC" and "CP").

The following represents the sequence of events observed by the arbitrators based upon these affidavits:

Rick Kennay: The Kennays had been doing business with Cargill from 2005 to 2012. The Kennays were familiar with and regularly checked their positions on Cargill's website. In the fall of 2011, the Kennays decided that they no longer wished to participate in the Cargill marketing service and they so notified another Cargill employee (referred to as "KB"). The Kennays asked KB to verify all the bushels they were obligated for and to identify any and all outstanding contracts. KB provided the Kennays an "action tracking report," which showed 14 active contracts between the parties that needed to be completed by July 2012. Cargill continued to issue action tracking reports after the CAMS marketing service was verbally cancelled. In January 2012, the Kennays gave written notice to cancel the marketing service with Cargill.

[The arbitrators noted that a copy of the action tracking report was provided in the parties' submissions in this case. The report indicated the 14 contracts mentioned by Rick Kennay in his affidavit, but the arbitrators noted that the title on the report indicated "Corn Cash Sales 2011." All delivery periods listed on the report were 2012 delivery periods but were "old crop" time slots.]

JC: JC met with the Kennays on January 25, 2012. [The arbitrators noted that no mention was made in JC's statement about KB.] JC met with the Kennays to review their positions and discuss marketing opportunities. He reviewed their 2011 crop year contracts with the Kennays. During their conversation, Rick Kennay decided he no longer wanted to use Cargill's CAMS service and ended the meeting. Because Rick Kennay ended the meeting earlier than anticipated, JC stated "we did not review the Kennays' 2012 crop year contracts and I did not share a report listing the contracts that are the subject of this proceeding."

Rick Kennay: Prior to July 2012, the Kennays delivered all corn that was shown on the action report as due. [The arbitrators noted that Cargill did not deny this.] Several times prior to July, Kennay asked KB if there was any more grain that needed to be delivered. On August 28, 2012, Kennay received a call from KB indicating that they still had contracts to fill. During this call, KB did not know how much grain was involved in those contracts or at what price. On August 29, 2012, Kennay called Cargill and was told by KB that the quantity was 200,000 bushels but that KB did not know the price. On August 30 and 31, the Kennays delivered additional bushels of corn that were not committed to a contract for which they received payment of $280,739.42.

Rick Kennay: On September 5, 2012, KB and CP arrived at his home at 10:00 AM. At this meeting, CP told the Kennays that they owed Cargill 200,000 bushels of corn at $6.70-per bushel. Kennay told CP that he did not have 200,000 bushels of corn available but that he would be harvesting soon. Kennay also asked for verification of signed contracts for the transactions in dispute since they did not appear on the January 2012 tracking report that had been provided by Cargill.

CP: CP denied that Kennay showed him the January report and that Kennay told him that he would be harvesting soon. CP's statement was silent as to whether Kennay was told that he owed 200,000 bushels of corn at $6.70-per bushel to Cargill. CP agreed with Kennay that he requested copies of the contracts in question. CP stated he delivered copies of those contracts the following day.

Rick Kennay: He agreed those contracts were delivered at some point within the next two weeks but he was not at home to know exactly when they were delivered. On September 6, 2012 (the following day), Cargill stopped payment on a check # 805090769 in the amount of $280,739.42 for the corn that had been delivered outside of the marketing program in dispute in this case. [The arbitrators noted the statements of Cargill's representatives are silent as to the disposition of this check.] Kennay stated that at no point did he tell Cargill he was unable to perform on the contracts or that he refused to perform under the contracts; rather, he simply wanted documentation that the contracts did in fact exist. On September 21, 2012, Kennay asked CP again for clarification on the price of the contracts because the $5.00 price was different from the $6.70 that he had been quoted in the September 5 meeting. On this occasion, CP told Kennay the price was $6.09-per bushel. [The arbitrators noted CP's statement did not address the question of whether or not he quoted these figures to Kennay.]

CP: On October 1, 2012, Cargill sent a demand for adequate assurance to the Kennays. On October 5, the Kennays, through their attorney responded questioning whether Cargill had reasonable grounds for insecurity. In their response, the Kennays requested that Cargill provide proof that the contracts in question existed so that liability could be determined. The Kennays stated that if the contracts existed, they would be honored. The Kennays' attorney's letter also made reference to the check that had been stopped and called into question the actions taken by Cargill while threatening legal action regarding the stopped check.

The arbitrators noted that subsequently on October 10, 2012, Cargill relied upon the Kennays' alleged failure to provide adequate assurance and cancelled the contracts and invoiced the Kennays for $309,125.00 in damages. On January 21, 2013, the Kennays filed suit against Cargill to recover monies from the check on which payment had been stopped. On February 7, 2013, Cargill submitted another check for $280,738.42 and the Kennays withdrew the lawsuit.

The contracts produced as evidence to the arbitrators are describable as follows:

Contracts numbered 31614 and 31615 were DiversiPro™ Contracts providing for 25,000 bushels to be delivered in December 2011 and 25,000 bushels to be delivered in December 2012. Under the contract Purchase terms there is a "Set Off" clause that allows the buyer "to set off any debts and/or claims" of the seller. The contracts also included a "ProPricing™ DiversiPro™ Select Addendum" with a "Target Futures Price" of $5.00. The addendum describes the pricing mechanism of the contracts. One of the two contracts contained an amendment to delay delivery of the 2011 bushels to August of 2012. Both contracts contained addendums indicating that a Call Spread between Dec 2012 6.60 Calls and Dec 2012

7.60 Calls was executed. The arbitrators determined that based upon the copies of these two contracts provided in this case they could not determine whether a Futures Price had been established, and if it had been at what price. The arbitrators further noted that it had not been alleged that a Futures Price was established.

Contracts numbered 31915, 31916 and 31917 were MktPros ™ contracts each providing for delivery of 50,000 bushels in December 2012. The pricing mechanism under the contracts provided for Cargill to hedge these bushels on a discretionary basis between January 3, 2011 and September 14, 2012, with the seller having the right to step in and price any unpriced portion of the contract prior to the end of the pricing period. In the copies of the contracts presented to the arbitrators there was no evidence of the futures price that had been established for these three contracts.

Cargill did provide an "Open Contracts Report" dated October 18, 2012, which included all five contracts on the report. The report indicated that for contracts 31614 and 31615, no futures price was shown and the option spread was still open. For contracts 31915, 31916 and 31917, a futures price of $6.7025 was shown.

THE DECISION

Based on the arguments of the parties and the documentation presented, the arbitrators concluded that Cargill lacked reasonable grounds to demand adequate assurance in this case. At the time Cargill issued its demand for adequate assurance it was already holding $280,738.42 of the Kennays' funds. Based upon the evidence produced by Cargill, there were 50,000 bushels of corn contracted with no price established, and a debit for an option spread that was still open. Also, there were 150,000 bushels of corn contracted that had not reached the end of the pricing period, which Cargill later claimed contained an underlying futures price of $6.7025. The day the contracts were cancelled the futures deficit amounted to $0.665-per bushel for a total amount of $99,750.

The arbitrators determined that the $280,738.42 was improperly withheld by Cargill, in that Cargill stopped payment three weeks before it demanded adequate assurance on the contracts in dispute, and these contracts were not due for delivery until December of that year. Given that the funds were returned immediately after the filing of the Kennays' lawsuit, the arbitrators noted that Cargill recognized its withholding of those funds was improper. The Kennays repeatedly asked for documentation that the contracts existed and it was provided to them. However, the arbitrators concluded that they could find no evidence that the Kennays were advised of the pricing of the contracts. Based upon the contract documentation presented in this case, the pricing may not yet have been completed.

Given that Cargill held funds in the amount of $280,738.42 and that the contracts in dispute were not due for delivery for another two months, the arbitrators determined that the contracts should not have been deemed to be repudiated by the Kennays and that Cargill was premature in cancelling the contracts.

The arbitrators also questioned the prudence of Cargill's failure to establish with the Kennays what their remaining obligations were when the Kennays resigned from the Cargill marketing program in January 2012. Since the pricing periods for most of these bushels were barely half complete many of these bushels were likely still unpriced. Had Cargill taken the opportunity to establish what positions existed,

they would have been in a position to cancel those contracts at a time when the monetary damages for either party were much less, should the Kennays have wanted to make that choice.

THE AWARD

The arbitrators determined that Cargill acted improperly in cancelling the contracts. However, in canceling the contracts they suffered a monetary loss and the Kennays benefited a monetary gain from that cancelation. Unfortunately, in the evidence provided to the arbitrators, pricing for the five contracts was omitted. Thus, the arbitrators were unable to determine the amount of those damages and so none are awarded. The arbitrators determined that the stop payment of the check in September 2012 was without grounds and awarded interest to the Kennays on those funds at a rate of 3.25% (based upon the Prime Rate at the relevant time) from September 6, 2012 to February 7, 2013 for a total of $3,849.57. Therefore, Cargill was ordered to pay $3,849.57 to the Kennays.

Decided: August 28, 2015

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

John Fletcher, *Chair*
General Manager
Central Missouri
AGRISerivce LLC
Marshall, MO 65340

Brian Leydens
Grain Division Manager
Starke County Farm Bureau
Co-op
Hamlet, IN 46532

Heath Barnes
CEO
Whitgro Inc.
Saint John, WA 99171