



Arbitration Decision

National Grain and Feed Association

February 16, 1995

Arbitration Case Number 1708

Plaintiff: Cargill Inc., Minneapolis, Minn.

Defendant: Zen-Noh Grain Corp., Mandeville, La.

At issue in this arbitration case was whether a contract existed involving high-damage corn and, if so, whether the plaintiff was entitled to damages. This case also was the subject of an oral hearing before the arbitration committee that was requested by the plaintiff, Cargill Inc. In addition, the decision of the original arbitration committee was appealed to the Arbitration Appeals Committee, whose decision is found starting on page four.

Statement of the Case

The plaintiff, Cargill Inc., asserted in its arbitration petition that it had made an enforceable contract with the defendant, Zen-Noh Grain Corp., to purchase six barges of high-damage yellow corn. The plaintiff claimed damages on grounds that the defendant refused to perform its duty to deliver under the alleged contract.

Conversely, the defendant contended that the plaintiff did not make a clear and clean acceptance of its offer to sell the aforementioned six barges, and asserted that the plaintiff merely made a counteroffer to the defendant's original offer. The defendant, therefore, claimed that no damages for non-performance should be awarded to the plaintiff, maintaining that no contract had been entered into by the parties.

On Nov. 2, 1993, the plaintiff contacted the defendant to obtain an offer of high-damage yellow corn. The defendant offered to sell the plaintiff six barges of high-damage corn at -68 December Chicago Board of Trade futures; CIF Cargill; Terre Haute, La.; on the following terms: three days free of demurrage; buyer to assume demurrage thereafter; switching and reconsignment for the seller's account; destination FGIS weights and grades; and barges to average 60 percent damage. Terms also included

discounts for damage, heat damage, foreign material, test weight, and sour and musty odor. After discussing the offer and its terms, the parties agreed that the plaintiff had until 9 a.m., on Nov. 3, 1993 to accept or reject the offer.

On the morning of Nov. 3, 1993, the plaintiff was unable to reach the defendant by telephone because of an undisclosed problem in the communications system. Consequently, at 8:53 a.m., the plaintiff sent a telex to the defendant, stating as follows:

"Your telephone lines have been down. Cannot get through. In reference to your offer of damaged corn at -68 Dec less 1C/point above 5 pct, we would like to buy same subject to further discount amendments. Please call me at...right away!! Regards..."

At 9:05 a.m., the defendant called the plaintiff and confirmed receipt of the plaintiff's telex. Both parties sought clarification of several points regarding the plaintiff's original offer. The defendant wanted to make certain that an 80.6 percent damage barge would be applicable, even though it could result in the average high-damage level exceeding 60 percent. The plaintiff indicated to the defendant that there would be no problem if the barges averaged somewhat over 60 percent. Test weight minimum, foreign material maximum, and heating conditions also were discussed and clarified in the aforementioned telephone conversation between the parties. The plaintiff inquired about heat damage in the barges to be applied by the defendant, and pointed out to the defendant that the plaintiff was not interested in acquiring high-damage corn if it contained excessive heat damage. The defendant assured the plaintiff that heat damage had not been a problem, but offered to

verify this with its elevator's management. The plaintiff also asked if it would be possible to apply the barges on Nov. 9 instead of Nov. 3. The defendant offered to determine if applying the barges on Nov. 9 would be possible.

At approximately 9:30 a.m. on Nov. 3, the defendant phoned the plaintiff to assure it that the defendant had not forgotten the pending transaction and the terms to be clarified. In that conversation, the defendant indicated it had not been able to obtain a response to the Nov. 9 application request. But it did confirm that the barges would have a maximum 2 percent heat damage. The defendant stated it would call back as soon as possible. At no time, in either of these telephone conversations, did the defendant indicate or suggest that the plaintiff had not accepted the defendant's original offer or that the plaintiff had made a counteroffer to replace the defendant's original offer.

At approximately 9:50 a.m. on Nov. 3, the defendant telephoned the plaintiff to advise that the plaintiff's offer no longer was open to acceptance. The defendant stated that its original offer had expired at 9 a.m. on Nov. 3 without a clean and clear acceptance by the plaintiff, and maintained that the new terms posed and questioned by the plaintiff amounted to a counterproposal to the defendant's original offer.

In subsequent telephone conversations and telexes, both parties reiterated their positions. The plaintiff maintained it had fully accepted all of the terms of the defendant's original offer, and merely was seeking clarification of the original offer's terms as is customary in the grain trade. The defendant countered that the plaintiff had not accepted the terms of its original offer within the stipulated time.

At the plaintiff's request, the defendant sent a telex to the plaintiff on Nov. 8 that contained the terms of an alternative offer for high-damage corn. This offer was similar in all material terms to the Nov. 3 offer, but the price was now -33 CBOT December futures.

The plaintiff sought \$121,800 in damages calculated as follows:

	\$0.35	(difference between the Nov. 3 and Nov. 8 offers)
x	58,000	(average bushels per barge)
x	.6	(numbers of barges)
	<hr/>	
	\$121,800	

The Decision

Even though subsequent questions concerning the offer's terms were raised and responded to following the 9 a.m. Nov. 3 "deadline," the arbitrators believed both parties had acted as if they had made a trade. The parties spoke to each other twice after the 9 a.m., deadline. In neither conversation did the defendant state or suggest that the parties' efforts to enter into a contract had failed either because its original offer had expired, or the plaintiff had not accepted the defendant's original offer, or the plaintiff had attempted to make a counteroffer. In the first two telephone conversations on Nov. 3, it was the arbitrators' finding that the defendant's conduct and actions were consistent with its acknowledgment that the plaintiff had accepted the terms of the defendant's original offer, and that the plaintiff merely was seeking clarification of certain terms. However, it should be noted that neither party sent a confirmation of sale or purchase or a contract to the other.

Despite the failure to exchange contracts or confirmations, it was the unanimous decision of the arbitrators that a meeting of the minds and acceptance of the original offer had occurred between the two parties, and that an oral contract was perfected between 8:53 a.m. and 9:50 a.m. on Nov. 3, 1993. The arbitrators take this opportunity, however, to suggest to all grain merchants that disputes of this type can be avoided by using clear, unequivocal and simple terms or language to make offers and to indicate acceptance to constitute a trade or enforceable contract.

Elementary principles of contractual damage provide -- to the extent that monetary damages can do so -- that a plaintiff should be placed in the same circumstance as if the contract had been performed. Compensatory damages are measured by the difference between the value of the promised performance and the costs to the plaintiff to perform. The plaintiff assumes the legal obligation, however, to act reasonably to mitigate the defendant's damages incurred in not having performed on a contract. Damages must be proven with certainty and not speculation. These concepts are embodied in NGFA Grain Trade Rule 10, which, pertinent to this case, provides as follows:

"Incomplete Shipment or Delivery. Seller's Conveyance: If the Seller fails to notify the Buyer of his inability to complete his contract, as above provided, the liability of the Seller shall continue until the Buyer, b the exercise of

due diligence, can determine whether the Seller has defaulted. If so, the Buyer shall immediately (a) agree with the Seller upon an extension of the contract to cover the deficit; (b) after having given notice to the Seller to complete the contract, the Buyer, by the exercise of due diligence, will buy-in for the account of the Seller the defaulted portion of the contract; or (c) after having given notice to the Seller to complete the contract, the Buyer will cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day....The word "notice," as used in this rule[,] shall mean verbal communication when possible, and in all cases by wire or other rapid written communication."

The defendant sent no notice to the plaintiff conveying its intent or inability to perform on the contract. Nor was there evidence presented by the plaintiff that it sent any requisite notice to the defendant, as required by NGFA Grain Trade Rule 10. And there was no evidence presented by the plaintiff that it exercised any of the options provided under these circumstances under NGFA Grain Trade Rule 10. Further, the arbitrators did not agree with the plaintiff that a single lapsed offer, made by the defendant six days later on Nov. 8, constituted proof of fair market value as defined and required under NGFA Grain Trade Rule 10.

For these reasons, the arbitrators unanimously found that the plaintiff did not follow the procedures provided as remedies in this circumstance in NGFA Grain Trade Rule 10. Thus, the arbitrators unanimously found that the plaintiff was entitled to no damages; and none were awarded.

The plaintiff contended in its argument, which it reiterated at the oral hearing, that the expenses of the oral hearing should be borne by the party hereto that did not prevail. NGFA Arbitration Rules 8(g) through 8(j), however, cover the expense procedures for oral hearings in an arbitration. The arbitrators unanimously found that the arbitration rules require the party that requests an oral hearing -- in this case the plaintiff -- to bear all of the expenses enumerated in the arbitration rules that are incurred in an oral hearing.

Submitted with the unanimous consent and approval of the arbitration committee, whose names are listed below:

Larry D. Stenberg, Chairman
Countrymark Cooperative Inc.
Indianapolis, Ind.

Rodman Kober
Continental Grain Co.
Chicago, Ill.

J. Stephen Lucas
Louis Dreyfus Corp.
Wilton, Conn.

Arbitration Appeals Case Number 1708

Appellant: Cargill Inc., Minneapolis, Minn.

Appellee: Zen-Noh Grain Corp., Mandeville, La.

The Arbitration Appeals Committee, individually and collectively, reviewed all evidence submitted in Arbitration Case Number 1708. It also reviewed the findings of the original arbitrators.

In its deliberations, the Arbitration Appeals Committee considered the following:

On Nov. 2, 1993, the appellee, Zen-Noh Grain Corp., offered six barges of high-damage in-port corn. This offer was firm overnight until 9 a.m. on Nov. 3, 1993. With the exception that the damage had to average 60 percent, there were no minimums or maximums on any quality factor.

The firm's overnight offer contained sufficient specifications that it could have been booked, thus constituting a trade between the two parties.

At 8:53 a.m., as a result of telephone problems, the appellant, Cargill Inc., sent a telex to the appellee in which the appellant, in part, stated: "In reference to your offer of damaged corn at -68 Dec, less 1 cent/point above 5 pct., we would like to buy same subject to further discount amendments."

At 9:05-9:10 a.m., the appellee telephoned the appellant to discuss the overnight offer and the telex. Several things were discussed, including a slight increase in the average damage level and maximums, minimums and limitations on several factors. Also in this phone call, the appellant made the following statement: "I again pointed out that Cargill was not interested in the grain if it had excess heat damage." Also discussed was whether application could be delayed six days.

At 9:25-9:30 a.m., the appellee telephoned the appellant. The subsequent discussion encompassed a limit on heat damage and a delay in application of the barges for six days.

At 9:45-9:50 a.m., the appellee telephoned the appellant and stated: "that the offer was no longer valid since the original offer had expired at 9 CST."

The Decision

The issue in the case was whether the appellant and the appellee had entered into an oral contract regarding six in-port barges of damaged corn.

The appellant contended that the previously referenced telex constituted sufficient language to affirm acceptance of the appellee's oral offer that was to expire at 9 a.m. on Nov. 3, 1993. Because the parties continued to negotiate in two subsequent telephone conversations after the telex was sent and the 9 a.m. expiration date passed, as discussed previously, the Arbitration Appeals Committee unanimously agreed that the telex, regardless of its ambiguous content, was preempted by further negotiations.

A clear and concise offer and subsequent unequivocal acceptance was not confirmed in any of the evidence, including affidavits and oral testimony.

Therefore, the Arbitration Appeals Committee unanimously agreed to reverse the decision of the original arbitration committee, and found that there was not an oral contract or trade. Damages were not awarded since a binding contractual agreement never was consummated.

Submitted with the consent and approval of the Arbitration Appeals Committee, whose names are listed below:

John McClenathan, Chairman
GROWMARK, Inc.
Bloomington, Ill.

Donald J. Cameron
Cameron Brokerage Co.
Charlotte, N.C.

Scott Hackett
General Mills Inc.
Minneapolis, Minn.

Tommy D. Couch
Ohio River Grain Partnership
Cincinnati, Ohio

Richard McWard
Bunge Corp.
St. Louis, Mo.