National Grain and Feed Association
Arbitration Decision

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September 7, 2000

NGFA Arbitration Case Number 1964

Plaintiff: Cenex Harvest States Cooperatives, St. Paul, Minn.

Defendant: Archer Daniels Midland Company, Decatur, Ill.

Statement of the Case

This case involved a contract between Cenex Harvest States Cooperatives ("Harvest States"), the seller, and Archer Daniels Midland Company ("ADM"), the buyer, entered into on July 11, 1997 for 90,000 bushels of U.S. No. 1 yellow soybeans delivered by rail to Lincoln, Neb.

The contract was traded through a broker, D.E. Nelson, Inc. ("Nelson"), Chesterfield, Mo. The broker and both parties issued confirmations of the trade. Neither party signed the broker's nor the other's confirmation. Nor was any evidence submitted that either party objected to the terms contained in any of the confirmations. However, there was a discrepancy between all three confirmations as to the specific duration of the July 1997 shipment period.

Harvest States on July 11, 1997 tendered to ADM "26 cars plus one straggler car to follow" to fulfill its delivery obligation on the 90,000 bushel soybean transaction (Harvest States #780298 and ADM #5580 and Nelson #10855). Each confirmation referenced slightly different shipment dates, as follows: July 11-14, 1997 (Harvest States), July 11-18, 1997 (ADM), and July 1-20, 1997 (Nelson). From the outset, it appeared – and both parties acknowledged – that this tender of "26 cars plus one straggler car to follow" was to fill the 90,000-bushel contract.

ADM on Aug. 4, 1997 applied to the contract a car received from Harvest States that contained 3,323.33 bushels and originated from Herman, Neb. ADM on Aug. 8 applied to the contract part of a car received from Harvest States in the amount of 989.88 bushels. Subsequently, ADM in August and September 1997 sent payments to Harvest States with documentation that ADM had applied the 4,313.21 bushels to the contract.

Harvest States on Oct. 9, 1997, tendered to ADM one "straggler car" out of Jasper, Minn., against the contract. ADM did not accept application of this car to the contract on the grounds that the contract previously had been filled. Harvest States contended that application on the contract called for only bushels exiting Jasper, Minn., and that this was verified by the broker's confirmation. Harvest States claimed its original application of "26 cars with one straggler to follow" constituted the required advice of incomplete shipment under NGFA Grain Trade Rule 10. With ADM's refusal to provide billing instructions, Harvest States proceeded to sell the car for the account of ADM and sent written notification of this fact to ADM. Harvest States claimed to have sold the car at the best market price available on Oct. 10, 1997, which resulted in a loss for Harvest States of $1.725 per bushel compared to the contract price. Harvest States sought damages from ADM of $5,692.50, plus interest, costs and attorneys' fees.

The Decision

According to ADM's submissions, there were conversations between employees of ADM and Harvest States after the shipping period ended and before the "straggler car" was applied on Oct. 9, 1997. ADM contended that Harvest States recognized that the contract had been filled with applications from another origin, and that there would be no future deliveries on the contract. ADM provided documentation that reflected payments to Harvest States for a total of 90,000 bushels against the contract. Harvest States did not dispute the documentation presented in evidence as settlement documentation. Nor did Harvest States submit evidence disputing ADM's position that a Harvest States merchant had, prior to application of the "straggler car," acknowledged that the contract was complete. Given this undisputed situation, the arbitrators were puzzled as to why Harvest States later tendered another car against the contract that already appeared to

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have been settled in full. Had Harvest States disputed the applications by ADM when they were made in August 1997, any resulting losses would have been significantly less.

The arbitrators concluded that the burden to supply the "straggler car" within a reasonable time clearly was Harvest States' responsibility. Regardless of which ending shipment date was used, Harvest States had the obligation to notify ADM that it would be unable to complete shipment within the agreed period. No such notification was given and the liability of Harvest States continued.

The arbitrators particularly were troubled by the timeliness of the "straggler car" application. The contract confirmations issued in this case did not address the situation; nor did the NGFA Trade Rules. Therefore, the arbitrators relied upon trade custom/practices to resolve the issue. A "straggler car" application almost three months after the original shipment billing date appeared to the arbitrators to be somewhat unreasonable. The arbitrators concluded that trade practice generally favors a 10- to 15-day "straggler car" application time limit. Likewise, railroad tariff rules generally protect the shipper on the original shipment rate for 15 days after the original shipment billing date on fill cars for unit train shipments furnished short[1]. Both the NGFA Trade Rules and general trade custom/practices are intended to protect and preserve the reasonable spirit of commerce. Any other interpretation would provide abusive trading opportunities for those trying to stretch the limits.

While each party disseminated a confirmation of the original trade, a broker[2] also was involved. NGFA Grain Trade Rule 6(b) expressly addresses trades made through a broker as follows:

"When a trade is made through a broker, it shall be the duty of the broker ... to send a written confirmation to each of the principals ... setting forth the specifications of the trade as made by him. Upon receipt of said confirmation, the parties thereto shall carefully check all specifications named therein, and upon finding any differences, shall immediately notify the other party to the contract, and the broker, by telephone and confirm by written communication. In default of such notice, the contract shall be filled in accordance with the terms of the confirmation issued by the broker."

The broker's confirmation had the notation "BN origins X Jasper to apply." Harvest States argued that this language required all cars applied to the contract to originate from Jasper, Minn. However, in reviewing the broker's confirmation, the committee concluded that the notation on the broker's contract of "X Jasper" appeared more for descriptive purposes rather than to mean "Guaranteed Jasper, Minn., origin." Indeed, Harvest States' own contract confirmation had no reference to application "exit Jasper."

The arbitrators concluded that the evidence showed that the more reasonable and prudent course was taken by ADM in its handling of the contract applications. The original tender of "26 cars plus one straggler car to follow" was made and accepted. Harvest States contended the original tender was notification of late shipment under NGFA Grain Trade Rule 10. However, the committee concluded that Harvest States' tender on July 11, 1997, of "26 cars with one straggler car to follow" was not notification under NGFA Grain Trade Rule 10 that Harvest States would be unable to complete the contract within the shipment period. According to the broker's confirmation, the applicable shipment period was July 1-20, 1997. Harvest States had time remaining on the contract when the original application was made, and it still had an obligation to notify ADM that the contract would not be completed within the specified period. Under NGFA Grain Trade Rule 10, *"[I]f the seller fails to notify the Buyer of his inability to complete his contract...the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted."* The arbitrators concluded that ADM acted reasonably and exercised due diligence under NGFA Grain Trade Rule 10 in applying other origins to fulfill the contract when the "straggler car" failed to arrive within a reasonable time.

Consequently, the arbitrators concluded that the evidence submitted in this case showed that the contract was completed when ADM on Aug. 4 and Aug. 8, 1997, made applications of Harvest States' cars to meet the 4,313.21 bushels remaining on the contract. ADM made payment to Harvest States consistent with those applications. The "straggler" car tendered by Harvest States almost three months after the original shipment application was clearly outside of the contract terms and not applicable to the disputed contract. Thus, the arbitrators found that the claims asserted by Cenex Harvest States Cooperatives should be denied based upon the evidence presented.

The Award

It therefore was ordered that:

- The claims for damages asserted by Cenex Harvest States Cooperatives against Archer Daniels Midland Company are denied; and
- Each party is to pay its own attorney fees and costs.

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

Ed Laur, *Chairman*
Vice President
Attebury Grain Inc.
Amarillo, Texas

Thomas Coyle
General Manager
Chicago & Illinois River
Marketing LLC
Chicago, Ill.

Robert P. Erwin Jr.
Secretary and General Counsel
Bartlett and Co.
Kansas City, Mo.

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[1] *See e.g., BNSF tariff 4022-J, item 12215, "Furnishing Cars for Unit Train Shipments."*

[2] *Both parties were and are NGFA Active members. While the broker in this particular case was not a NGFA member, the broker's confirmation also referenced the NGFA rules.*