Arbitration Case Number 1968

July 27, 2000

Plaintiff:

Cenex Harvest States Cooperatives

Inner Grove Heights, Minn.

Defendant:

McClaskey Feed Co.

Collinsville, Ill.

Statement of the Case

This case involved the purchase of five contracts1 of U.S. No. 2 Oats (non-milling) by McClaskey Feed Co. (McClaskey) from Cenex Harvest States Cooperatives during the period Sept. 25, 1996, through Oct. 24, 1997.

Each of these contracts was for barge shipment CIF/Delivered St Louis. No mention was made of the demurrage rate in any of the grain contracts. Cenex Harvest States issued contract confirmations, some of which were signed by McClaskey. McClaskey did not send confirmations.

Barges were shipped against the contracts, with each of the barges consigned to the order of Harvest States Cooperatives with destination as St Louis, Mo., to notify McClaskey C/O Italgrani.

Six of the barges were unloaded and had demurrage charges at destination. The barge operators billed the demurrage to Cenex Harvest States. Cenex Harvest States paid the demurrage bill of $21,750 and rebilled the same amount to McClaskey. McClaskey denied responsibility for the demurrage. Cenex Harvest States subsequently filed a complaint instituting this arbitration2 and sought reimbursement for the full amount of the demurrage it paid.

The primary issue presented in this case was to determine the responsibility for demurrage on these contracts. The terms of the contracts were for delivery in barge CIF/Delivered St. Louis. Cenex Harvest States argued the demurrage responsibility was "clearly" for the account of McClaskey, as it was "outlined in the sales contracts between CHS and McClaskey." Cenex Harvest States also contended that the parties' contracts were governed by NGFA Barge Trade Rule 8, which provides as follows:

"Rule 8. Demurrage: For barges applied before or after arrival at the destination specified by the contract, the Buyer shall be entitled to such free time and

demurrage terms as specified by the contract. Time to commence the first 7 a.m., Central Time, following: (a) arrival of the barge at the destination specified by the contract; or (b) following notification of application if application is made after arrival of the barge."

McClaskey countered that the "placement rules" contained in NGFA Barge Freight Trading Rule 9 were applicable to the transactions and that the rule required notification of arrival of the barges at destination. NGFA Barge Freight Trading Rule 9 provides, in part, that:

"Rule 9. Placement of Barges: (a) Actual placement is made when a barge is placed in accordance with instructions of the Buyer or the Consignee at the facility in the port specified by or pursuant to the contract.

"(b) Constructive placement may be made by the carrier when actual placement is not possible by placing or holding a barge at a point of the carrier's choice near the specific actual delivery point. In making any subsequent placement of the barge, no additional free time will be allowed. Exception: If a carrier is initially prevented from actual placement or constructive placement because of a condition of the navigation channel, the provision for placement will not be applicable until the condition has been alleviated.

"(c) Placement for loading is considered effective the first 0700 hours, Central Time, after a barge is actually or constructively placed provided the Seller has notified the Buyer of such placement by 1100 hours, Central Time, that day by telephone, confirmed in writing by the end of the next business day. Confirmation is to include the name of the Barge Operator.

"(d) Placement at the unloading port is considered effective the first 0700 hours, Central Time, after a barge is actually or constructively placed, provided the carrier has notified Consignee or Consignee's designated agent of such placement by 1100 hours, Central Time, that day by telephone, confirmed in writing by the end of the next business day."

McClaskey contended that either it or its agent (Italgrani) should have been notified of the barge arrivals. All of the barges were discharged by Italgrani. McClaskey contended that Cenex Harvest States, by failing to notify Italgrani, violated NGFA Barge Freight Trading Rule 9.

The Decision

The arbitrators concluded that it was necessary to determine which NGFA Trade Rules were applicable to these contracts, since the demurrage terms were not addressed in the parties' contracts. Importantly, in this regard, the arbitrators noted that the preamble of the NGFA Barge Trade Rules provides, in relevant part, as follows:

"Preamble: The following rules amend and are a supplement to the Grain Rules and Feed Rules so that such rules so amended apply to shipments of grain as defined by the United States Grain Standards Act, 7 United States Code Sections 71 et. seq., as now existing or hereinafter amended, hay and all feedstuffs including mill products or byproducts, hereinafter referred to as 'feedstuffs' whenever such shipments are designated by contract to be by barge." [Emphasis added.]

By contrast, the preamble of the NGFA Barge Freight Trading Rules (Affreightment) provides that those rules "govern all disputes of a financial, mercantile or commercial character connected with transactions in the purchase and/or sale of barge transportation and in the carriage of bulk commodities by barge." [Emphasis added.]

The arbitrators concluded that each of the contracts were for the sale of a commodity (the oats) and that each shipment by barge was made in fulfillment of the contracts. All barges were shipped to the destination requested by McClaskey (the buyer), and the contents of each barge were discharged by the buyer and or its designated agent.

The arbitrators also concluded that the normal procedure for this type of

transaction is for a barge to be loaded and then for the shipper to supply this information to the buyer. The buyer then informs the seller of the destination (billing instructions). McClaskey's submissions confirmed that this procedure was followed, when it stated that: "At the time of application, McClaskey Feed had every reason to believe that CHS had notified Italgrani, as instructed, and that the barges were being unloaded within the allowed free days."

McClaskey later argued application on some of the barges was not made until after arrival and then listed the dates of invoices for the specific barges involved. However, an invoice is not necessary for application to take place. The arbitrators, based upon the evidence provided, found that the proper procedures were followed for application.

Likewise, the arbitrators concluded that the applicable rules in this situation were the NGFA Barge Trade Rules because the applicable contracts were grain contracts. Thus, the demurrage provisions set forth in NGFA Barge Trade Rule 8 governed the contracts. The arbitrators found that all barges were applied and billed per the parties' contractual obligations and in accordance with Barge Trade Rule 8. Demurrage responsibility in this case began at the first 7 a.m., Central Time, the day after arrival of the barge.

Cenex Harvest States provided demurrage bills with three different demurrage schedules and some bills calculated time at loading for destination demurrage responsibility. The contracts did not specify a demurrage schedule and the NGFA Trade Rules are silent on this matter as well. The arbitrators concluded that both parties were at fault for failing to contractually address the demurrage issue in the grain contracts.

Nevertheless, McClaskey was the party with the ultimate responsibility for demurrage under the facts presented. The lack of uniformity in the demurrage schedules reflected the use of different barge carriers, each of which had differing freight contract terms. Cenex Harvest States, under the terms of the grain contracts, sold McClaskey grain that also was subject to preexisting barge freight contracts. As such, Cenex Harvest States acted as McClaskey's agent in booking the barge freight. At a minimum, Cenex Harvest States could have done a better job of communicating the actions it took in booking the freight. Consequently, while the arbitrators found for Cenex Harvest States on the matter of reimbursement for demurrage, they concluded that Cenex Harvest States should not be awarded prejudgment interest.

The Award

Therefore, it was ordered that:

Cenex Harvest States Cooperatives is awarded a judgment in the amount of $21,750 against McClaskey Feed Co.;

no interest shall be owed on the judgment if paid by McClaskey Feed Co. within 15 days of receipt of notice of this decision from the National Secretary. If not paid within that time period, compound interest on the judgment is awarded at the rate of 8.5 percent per annum from May 1, 2000 until all amounts are paid in full;

all other claims arising from these transactions are denied; and

each party is to pay its own costs.

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

William L. Schieber, Chairman

Export Manager

Bartlett and Co.

Kansas City, Mo.

Joseph M. Guenley

Vice President, Trading

and Transportation

Agrex Inc.

Overland Park, Kan.

David Houts

Director, Grain Marketing

Central Soya Co. Inc.

Fort Wayne, Ind.

1 Cenex Harvest States Contract Confirmation Numbers 735360, 750319, 789634, 799898 and 801390.

2 Cenex Harvest States Cooperatives was and is a NGFA Active member. McClaskey Feed Co. is not a NGFA member, but consented to NGFA arbitration by executing the National Grain and Feed Association Contract for Arbitration. The Cenex Harvest States confirmation terms included a provision that stated: "To the extent not inconsistent with the terms of this contract, this contract is subject to the rules and regulations of the Minneapolis Grain Exchange and the rules of the National Grain and Feed Association....The Buyer and Seller agree that all disputes and controversies between them under this contract shall be settled by arbitration in accordance with the rules and regulations of the Minneapolis Grain Exchange and hereby consent to its jurisdiction."