



NATIONAL GRAIN AND FEED ASSOCIATION

# Arbitration Decisions

May 21, 1982

ARBITRATION 1564

Plaintiff: Oles Grain Company, Amarillo, Texas

Defendant: Continental Grain Company, Kansas City, Missouri

Two hopper cars of wheat, SFLC 800900 and AT 304350, sold by Oles Grain Company basis first official weights and first official grades were rejected by Continental Grain Company on the basis of a submitted sample obtained from a diapered sample prior to unloading the cars. Both cars graded #2 Hard Red Winter Wheat, Dockage 0.5% on the first official grade. Continental Grain Company rejected the two cars after they were diapered in which case the bottom hatches were slightly opened and samples were submitted for official grade. These samples were graded sample grade on account of an unknown foreign substance.

Oles Grain Company sought damages as follows:

1. Refund for cleaning cars @ \$500.00 per car. \$ 1,000.00
2. Refund for loss in weight from first official weights to destination official weights plus charges for extra grades and extra weighing charges. 403.27
3. Interest on \$1,403.27 from 3/18/81 to date of settlement of claim.
4. Possible charges of demurrage and/or switching charges if charged to Oles Grain Company.

## Majority Decision

The cost of cleaning those cars and other costs resulting from the diapering process was to be borne equally by each party. Therefore, Continental Grain Company was to refund to Oles Grain Company the sum of \$701.64. That sum represents one half the cleaning charges plus one half the other charges incurred. The request for interest and other charges by Oles Grain Company was rejected. The charge of deceptive loading made by Continental Grain was rejected.

The cars, although sold on first official weights and grades, did contain a foreign substance in the gate area of the cars. However, the diapering process did not give proof that there was enough unknown foreign substance in the cars to cause them to grade sample grade. That process takes a sample from one selected portion of the car and the sample is not applied to the entire car therefore it was not a representative sample of the car. In many instances where that process is used the only unknown

substance in the car is that stuck in the gate area which is no guarantee that the car is sample grade. That has been the case with cars that have been known to have been washed prior to loading with the residue settling in the gate area and the cars subsequently rejected on the basis of the diapered sample thus reflecting an incorrect grade on the car.

/s/ Gabe Anderson, Chairman  
Sherley Grain Company  
Bovina, Texas

/s/ Harvey Myers  
Stonington Grain Co.  
Stonington, Illinois

### Minority Opinion

Action of the plaintiff was based on two propositions contained in the Oles Grain Company letter of argument dated May 18, 1981 and further correspondence June 19, 1981.

The first proposition that first official grades governed is correct until it was found that there was material in the car that could not be reached with normal sampling procedures. Unfortunately for the position of the Plaintiff, when the unknown foreign substance was found beyond the reach of the standard probe, the shipper is involved in a situation of deceptive loading of grain quite outside the normal province of Class A grade determination. In that situation and situations similar to it, the deceptive loading is not intentional. The term deceptive is used only to describe the condition that placed the container under that area of regulations. The governing regulation in this case then became regulation 26.116 of the U.S. Grain Standards Act further clarified by Notice #66 dated June 24, 1977 issued by the U.S.D.A. / F.G.I.S. The emphasis in that notice on the responsibility of the shipper was clear.

The second Plaintiff proposition was that the contract was breached by the defendant because the FGIS confirmation of the unknown foreign substance in the sample taken from the bottom of the car was not part of any contract agreements on quality determination and none were applicable other than first official grades in the contract. Once again in the case of deceptive loading a broader application of U.S. Grain Standards and regulations are necessarily involved to determine true quality.

From the standpoint of logic: Unknown foreign substance was found in the cars confirmed by official inspection personnel. The receiver of the grain reaped no benefit in the handling of the cars. The clear facts are that the railroad furnishing the car could be responsible for the unknown foreign substance in the container; or the shipper could be responsible for the substance in the container; but under no circumstance of logic is there a way that the receiver of the grain who stands waiting for the grain could be held responsible for unknown foreign substance in the grain. The shipper and railroad might share responsibility and cost but it is not reasonable that the waiting receiver should share costs of clearing the unknown foreign substance from the containers so they may be tendered on contract.

/s/ Frank Hemmen  
Cargill, Inc.  
Channelview, Texas

DECISION OF ARBITRATION APPEALS COMMITTEE

ARBITRATION CASE NUMBER 1564

Appellant: Continental Grain Company, Kansas City, Missouri

Appellee: Oles Grain Company, Amarillo, Texas

The Arbitration Appeals Committee individually reviewed all written evidence submitted in Arbitration Case Number 1564, and reviewed the findings and conclusions of the original arbitration committee. After due deliberation, the Arbitration Appeals Committee unanimously finds as follows:

1. The conflict between Oles Grain Company (OGC), Appellee, and Continental Grain Company (CGC), Appellant, stems from whether or not first official grades as specified in the original contract should govern final settlement, notwithstanding the destination inspection which found an unknown foreign substance. The Arbitration Committee (Majority) basically found in favor of OGC, but suggested a "sharing" formula between the two parties. The minority opinion found in favor of Continental (CGC) and assessed all additional charges against OGC. We reverse the majority decision, and support the minority point of view.
2. While (OGC) is correct when they state that under most conditions the basic contract between the parties should prevail, we conclude that federal law and appropriate regulations such as 26.116 of the U.S. Grain Standards Act, and as further explained by Notice #66 dated June 24, 1977 (U.S.D.A.) does not have to be included in a basic contract. In this case, both custom of the trade and existing law is the responsibility of both parties. It is clear that the railroad and the shipper share the responsibility of shipping grain in clean cars and to put the same burden, in whole or in part, upon the receiver would be in conflict with the purpose of the regulations stated under the U.S. Grain Standards Act.
3. We find no conflict with carrying out the mandate of the original contract with the implied responsibility by a shipper that he also comply with existing federal law and custom of the trade, though not specifically mentioned in the basic contract.
4. The Arbitration Appeals Committee reverses the findings of the original decision by the majority of the Arbitration Committee and finds in favor of the Appellant (CGC). All costs in connection with the cleaning, grading and weighing are to be paid by the Appellee, (OGC).

James Donnelly, Chairman  
R. F. Cunningham & Co., Inc.  
Melville, New York

/s/ Charles H. Holmquist  
Holmquist Elevator Co.  
Omaha, Nebraska

/s/ Richard Goldberg  
Goldberg Feed & Grain  
West Fargo, North Dakota

/s/ Royce S. Ramsland  
Quaker Oats Co.  
Chicago, Illinois

/s/ W. C. Theis  
Simonds-Shields-Theis Grain Co.  
Kansas City, Missouri