



Arbitration Decision

National Grain and Feed Association

August 29, 1991

Arbitration Case Number 1672

Plaintiff: Danvers Farmers Elevator, Danvers, Ill.
Defendant: Midwest Marine Management Co., St. Louis, Mo.

Statement of the Case

This dispute involved two barge affreightment transactions.

Concerning the first contract, the plaintiff, Danvers Farmers Elevator, on Sept. 7, 1989 purchased from the defendant, Midwest Marine Management Co., through a broker, Advance Trading Inc., Bloomington, Ill., one barge affreightment for delivery in December 1989, Illinois River, excluding Chicago, at 140 percent of tariff. Danvers Farmers Elevator did not issue a confirmation of purchase. Midwest issued a confirmation of sale and the broker issued both parties a contract confirmation noting the following:

"Payment: Invoice net upon cancellation"
"Conditions: Subject to: The National Grain and Feed Association Trade Rules. No Application. Cancellation by first week in December."

Handwritten notations on various confirmations show: "1,400 tons, Peoria Rate Base" and "Cancellation by Dec. 15."

On Sept. 19, 1989, Danvers Farmers Elevator made another purchase, through broker Advance Trading Inc., from Midwest Marine Management Co. of two barge affreightments for last half of October 1989, Illinois River, excluding Chicago, at 182 1/2 percent of tariff. Danvers did not issue a purchase confirmation. Midwest issued a sales confirmation and the broker issued a contract to the parties noting, in particular:

"Quantity: Two barges, 1,400 ton each"
"Price: Peoria Rate Base"
"Payment: Invoice net upon cancellation"
"Condition: Subject to: The National Grain and Feed Association Rules. No Application, Cancellation by Oct. 20, 1989."

On Oct. 20, 1989, Midwest Marine Management Co. issued to Danvers Farmers Elevator an amendment for the first contract noting: "The contract period changes from 1as (sic) half October to December" and "The rate changes from 182 1/2 percent to 137 1/2 percent."

On Nov. 30, 1989, Midwest Marine Management Co. issued another amendment for the two sales confirmation stating, "The cancellation date changes from Dec. 1, 1989 to Dec. 15, 1989," and "The rates remain unchanged."

Under the provisions of NGFA Barge Freight Trading Rule 14, the plaintiff, Danvers Farmers Elevator made claim against the defendant, Midwest Marine Management Co. for nonperformance, and demanded \$18,518.50 less \$4,208.75 paid by Midwest Marine Management Co. on or about Feb. 10, 1990 or \$14,309.75 net. The claim was based upon a barge freight value of 230 percent of tariff established on Jan. 8, 1990. Midwest Marine Management Co. sought recovery from Danvers Farmers Elevator of the \$4,208.75 it paid Danvers in error, plus interest.

The Decision

The arbitrators found no evidence whereby Danvers Farmers Elevator provided notice to Midwest Marine Management Co. for actual/constructive placement of barges at a specific origin point on the Illinois River during the time period of the contracts. The arbitrators believed each party entered into a paper transaction with no intention of actual performance, i.e. the broker's contract stated, "No application" and, by stating that any invoicing for market difference would be, "Invoice net upon cancellation." Because the parties originally agreed to "No application," the provisions of NGFA Barge

Market determination was undoubtedly difficult, but other contract cancellations did occur in late December 1989 and early January 1990.

The Award

To determine the barge freight market, the appeals committee considered that Midwest Marine Management Co. had cancelled four barges with other customers at 195 percent on Dec. 26, 1989 and purchased three barges on Jan. 4, 1990 at 230 percent and decided to use the average of 212.5 percent to calculate the award.

The award to the Appellant, Danvers Farmer Elevator, is as follows:

1. Barge(1400 short ton)	Bought at 140 percent	
	<u>Sold at 212 1/2 percent</u>	
	72.5 percent x 4.81=	\$ 4882.15
2. Barge(2800 short ton)	Bought at 137 1/2 percent	
	<u>Sold at 212 1/2 percent</u>	
	75 percent x 4.81=	10,101.00
Net cancellation difference due Danvers:		14,983.15
Previous payment to Danvers:		4,208.75
Balance due Danvers:		\$10,774.40

The appeals panel also awarded interest at 10 percent per annum from Feb. 9, 1990 (30 days after invoiced) until paid.

Submitted with the consent and majority approval of the Arbitration Appeals Committee whose names appear below.

L. Scott Hackett
General Mills Inc.
Minneapolis, Minn.

Dan B. Miller
Kokomo Grain Co. Inc.
Kokomo, Ind.

DeVan C. Janssen
Consolidated Grain
and Barge Co.
St. Louis, Mo.

Robert W. Obrock
Mid-States Terminals Inc.
Toledo, Ohio

Minority Opinion

As a member of the Arbitration Appeals Committee that reviewed this case, it was my opinion that the original decision of the arbitration committee should be affirmed.

It clearly was not the intention of either party to enter into a contract for affreightment. Rather, as evidenced by the written contracts and by the actions of both parties, they intended to create a contractual instrument that

would be a measure of the value of Illinois River barge freight. It was, in fact, intended to be a substitute for barge freight. Unfortunately, the contract terms were seriously deficient for accomplishing their intended purpose. In particular, and very significantly, the contracts were silent regarding dispute resolution in the event the parties could not agree on fair market value for the purpose of pricing contract cancellations. This was indeed a serious oversight.

The situation was then significantly complicated by the parties' failure to exercise in a timely manner their rights on Dec. 16, 1989, after the "drop-dead" cancellation date of Dec. 15, 1989 had passed.

It is the view of this committee member that since these contracts were not contracts for transportation—but rather were risk-shifting instruments—that "custom-of-trade" and not the Trade Rules should be relied upon to resolve this dispute.

The problem for Danvers Farmers Elevator and Midwest Marine Management Co. was to define the value of the contracts. That was not an easy task, since the underlying market that these contracts were expected to parallel was not active and rich with transactions for barge freight during the affected time period. Rather, most transactions were for guaranteed performance during a very tight time frame or were for "on-station" equipment.

Accordingly, since Danvers Farmers Elevator Co. believed itself the aggrieved party, trade practice would dictate that on Dec. 16, 1989 that it pass notice of default to Midwest Marine. Then, the next day Danvers Farmers Elevator Co. should have:

- attempted to discover a representative bona fide transaction that replicated the contract terms in the barge freight market; or
- executed a bona fide representative transaction.

Either action would have established the market without question. In this situation, Danvers Farmers Elevator's failure to definitively define the market on or about Dec. 16, 1989, led me to conclude that Danvers failed to satisfactorily identify its damages, if any.

Accordingly, Danvers' appeal should be denied and the original decision of the arbitration committee should be affirmed.

Paul Krug, Acting Chairman
Continental Grain Co.
Chicago, Ill.

Freight Trading Rule 14 addressing failure to place are not applicable to this arbitration matter.

It is not the arbitrators' responsibility to determine the values for cancellation from the time the initial contracts were entered into and Dec. 15, the last day agreed upon for cancellation.

The Award

The committee denied Danvers Farmers Elevator's claim against Midwest Marine Management Co. The committee found Midwest Marine Management Co.'s payment to Danvers Farmers Elevator in February, almost

two months after the last date for cancellation, to be in error and awarded the \$4,208.75 to Midwest Marine Management without interest.

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

William Schmidt Jr., *Chairman*
Bunge Corp.
St. Louis, Mo.

Stephen Logsdon
Gabe Logsdon & Sons Inc.
Canton, Mo.

Peter Hubbard
Midland Enterprises Inc.
Cincinnati, Ohio

Arbitration Appeals Case Number 1672

APPELLANT: Danvers Farmers Elevator, Danvers, Ill.
APPELLEE: Midwest Marine Management Co., St. Louis, Mo.

Majority Opinion

The Arbitration Appeals Committee individually and collectively reviewed all the evidence submitted in arbitration case number 1672 and reviewed the findings and conclusions of the original arbitration committee.

The Arbitration Appeals Committee, by majority, voted to reverse the findings of the original arbitration committee and to make an award to the plaintiff (appellant) Danvers Farmers Elevator.

The majority of the Arbitration Appeals Committee agreed with the original arbitration committee that Barge Freight Trading Rule 14, addressing failure to place a barge, is not applicable to the facts in this case. However, the Arbitration Appeals Committee believed that the trade practice between these parties, when in default, was to: 1) extend the contract period; or, 2) after giving notice, then cancel the contracts at a fair market value.

The majority of the appeals committee found that both parties contractually agreed to a barge freight contract with no expectation of actual placement, but with the expectation that the value of the contract would parallel the value of the physical barge freight market.

The amended contracts called for cancellation by Dec. 15, 1989, with the net (difference between the originally contracted rate and the cancellation rate) to be paid when invoiced.

Because of the extreme river conditions of low water and ice and the varying barge freight quotes depending upon location and the ability of the barge(s) to move, the parties were unable to agree upon a cancellation rate. By their action, both parties apparently agreed to extend the contract period until Danvers Farmers Elevator, through a broker, formally declared Midwest Marine Management Co. in default on Dec. 29, 1989.

Danvers Farmers Elevator invoiced Midwest Marine Management Co. on Jan. 8, 1990, for the difference between the original rates and 230 percent of tariff which Danvers claimed be the then-current market. The invoice was refused by Midwest, which claimed the market was not defined. During the arbitration process, Midwest argued the contracts were vague and unenforceable.

The appeals committee believed these contracts were enforceable and a barge freight market determination for contract cancellation must be made. Otherwise, the contracting party who is disadvantaged by a subsequent market would simply deny his contractual liability.