



Arbitration Decision

National Grain and Feed Association

September 15, 1994

Arbitration Case Number 1705

Plaintiff: The American Milling Co., Alton, Ill.

Defendant: Acco Feeds Inc., Dallas, Texas

Statement of the Case

On June 7, 1993, the plaintiff, American Milling Co., sold to the defendant, Acco Feeds Inc., five hopper cars of corn screenings, to be shipped at the rate of one car per week, beginning the week of June 14, 1993.

The plaintiff's Contract Of Sale 6626 specified "corn screenings; cool and sweet and 40 pounds or better; origin weights and inspection." The defendant's contract, issued by Cargill Inc.'s Nutrena Feed Division, number FD1375, specified "corn - cracked," and further indicated that "first official" weights and "destination" inspection were to govern.

No evidence was submitted by either party that the discrepancies between the seller's and buyer's contracts concerning the type of inspection was ever challenged or discussed between the parties. The record submitted did indicate that a total of three cars were shipped on the original contract, and that the remaining two cars were cancelled. No evidence was submitted that any dispute existed between the parties on two of the three cars shipped, nor on the remaining two cars that were cancelled.

The dispute involved one of the three cars shipped (the second of the three), car number NAHX475850. The car in dispute was shipped on schedule, during the second week of the contract, with a bill of lading issued at West Bend, Iowa, on June 22, 1993. The shipper furnished an official weight certificate, an official car inspection certificate and an official grain inspection certificate (official sample-lot inspection) showing a test weight of 43 pounds per bushel. All of these documents were dated June 22, 1993. The car arrived at its destina-

tion -- Mockingbird, Texas -- on July 6, 1993. The aforementioned facts are not disputed by either party.

The plaintiff subsequently furnished a report from the Union Pacific Railroad (Dallas Demurrage District Desk), showing that the car was constructively placed on July 7, 1993, and that demurrage calculations started as of July 7, 1993. The defendant furnished a railroad report agreeing that the car arrived in Mockingbird, Texas, on July 6, 1993, and that on July 21, 1993, the car was on constructive placement; however, the defendant's report provided no evidence of the car's status during the period July 6 - July 21, 1993.

Following the arrival of the car, the defendant did not inspect and did not attempt to unload the car until Aug. 13, 1993 -- 38 days after arrival, and either 37 days after constructive placement (as contended by the plaintiff-seller) or 23 days after constructive placement (as contended by the defendant-buyer).

No evidence was furnished that the defendant ever made any direct contact with the plaintiff during the time the car was sitting at destination, or on the date on which the defendant stated the car was actually placed -- Aug. 13, 1993. The plaintiff furnished a copy of its note, addressed to Clark Springfield of Acco Feeds Inc., dated 1:10 p.m. Aug. 13, 1993, which stated in part: "Don Seale with the Union Pacific Railroad notified me at approximately 11:30 a.m. on August 13, 1993 that you had rejected NAHX475850 back to the railroad. Rejection was based upon car condition, i.e. crack in cover allowing water in compartment...the shipper has taken the position...that this responsibility with regard to condition upon arrival per NGFA trade rule 13(b) has expired..." From this, it appeared that the defendant had

made no direct notification to the plaintiff of any exception or problems.

The plaintiff submitted copies of faxes it sent addressed to Mr. Clark Springfield of Acco Feeds Inc. (Cargill Inc.'s Nutrena Feed Division) over the next few days maintaining the above position, and asking to discuss the matter. The only evidence furnished of a reply from the defendant was a copy of a fax dated Aug. 16, 1993, transmitted at 5:30 p.m., which stated: "*Harold: It's your money, your car, do as you think is best. Please supply me with the name and address of the shipper as I would like to include him in the no-trade update wire that I am sending to all Cargill entities.*"

In this case, the plaintiff sought an order that the defendant pay American Milling's invoice Number 22381, issued on June 28, 1993, in the amount of \$6,404.40, plus interest from the date of the invoice.

In response, the defendant conceded that it failed to abide by NGFA Feed Trade Rule 13(b), which requires notification by noon of the second business day after arrival at final destination of any exceptions to the condition of the car. The defendant argued that its failure to comply with this rule should be excused on two grounds:

- the product loaded in the car failed to meet specifications; and
- the car was defective, since it had a hole in the roof hatch of one compartment.

The defendant stated that it complied with NGFA Feed Trade Rule 6, which provides that claims for damage or shortage are to be made within 30 days after arrival, and that "*American Milling should not benefit from Cargill's (Acco Feed's) noncompliance with (rule 13(b)'s) technical requirement.*"

The defendant requested that either: 1) American Milling Co. be instructed to accept the rejection of the car and cancel its invoice; or 2) that judgment be entered in favor of Cargill Inc. in the amount of \$1,535, to cover the cost of disposing of the contents of the car. In support of this second item, the defendant submitted a bid of a cost of \$200 for unloading the car, and a freight charge of \$1,325 to move the car to Justin, Texas, where the contractor was located. This documentation was pro-

vided in a Jan. 10, 1994 letter from Clark Springfield of the Acco Feeds Division to Sheila Hagen of the Cargill Inc. Law Department. No other evidence was presented by either side as to the actual final disposition of the car.

In its surrebuttal, the defendant did state that it had "*upon unloading of this material, tested the other two compartments not only by sampling with a ten foot probe, as allegedly done by American Milling's designee (which would have only resulted in testing the top half of the rail car), but also by pulling samples from the bottom of the car, in order to assure that the sample was representative.*" From this, it may be inferred that the defendant did in fact unload at least two of the three compartments of this car. The plaintiff stated, in a letter dated Dec. 3, 1993, that the car "*has remained a partial load at destination for five months.*" No evidence was offered by the defendant to refute this statement.

The defendant contended that the corn screenings weighed only 35 pounds per bushel, rather than the 43-pound test weight appearing on the official inspection certificate provided by the plaintiff. However, in the defendant's original answer, no documentation was provided to support the contention that the material tested only 35 pounds per bushel. In the defendant's surrebuttal, the statement is made that: "*Acco called in Ed Willis, an employee of the Amarillo Grain Exchange, who is licensed by the F.G.I.S. as an inspector, to confirm these results. Both Acco and Mr. Willis found the test weight to be 35 pounds. As corn screenings are a non-standardized grain, Mr. Willis did not issue a certificate. Based on the above, the entire amount of commodity in this car was completely unacceptable.*"

The plaintiff submitted to the Arbitration Committee a copy of a destination inspection of freight equipment, by the Missouri Pacific Railroad, that had been furnished to it by the defendant. This inspection report showed that the number one roof hatch "*has hole approximately 8 inches by 8 inches.*" The report further stated the following: "*[V]ery old defect - had been taped - tape faded - frayed and no longer sticking - angle iron edge broken - break rusted. Car should not have been loaded.*"

In its surrebuttal, the defendant stated: "*Acco does not desire to change the arbitration rules, but only expects that they be interpreted on a case-by-case basis so as not to allow an unjust request.*"

Findings of the Arbitration Committee

In considering the aforementioned facts and assertions, the arbitration committee noted that Cargill's contract was silent as to quality, although it subsequently alleged a failure of the plaintiff to meet quality specifications. Both parties either failed to note the difference between the contracts concerning the type of inspection grades that would govern (origin or destination), or failed to take any action to reconcile this discrepancy. However, no evidence was presented that there was any dispute regarding the two cars that apparently were shipped and accepted, leading the arbitrators to surmise that the plaintiff's product and grades were satisfactory to the defendant in these two instances.

The defendant cited NGFA Feed Trade Rule 6 as a defense. Whether the buyer complied with this rule depends upon the date of arrival of the car. Both parties furnished evidence showing that the car arrived on July 6, 1993. While the plaintiff contended (and furnished evidence) that constructive placement was made on July 7, 1993, the defendant contended that constructive placement was not made until July 21, 1993. However, the plaintiff contended that the defendant failed to show why, if the car arrived on July 6, 1993, it was not constructively placed until July 21, 1993.

From the evidence submitted, the arbitrators concluded that the car was constructively placed on July 7, 1993, and that the report furnished by the defendant merely indicates that the car continued to be on constructive placement as of July 21, 1993. With a constructive placement date of July 7, 1993, the buyer failed to conform to NGFA Feed Trade Rule 6, since notification was not made until 38 days after arrival (arrival is defined in NGFA Feed Trade Rule 25 as "*the first 7:00 A.M. after the car is placed or reported to the buyer as available for the buyer's instructions.*").

Both parties agreed that the buyer failed to honor NGFA Feed Trade Rule 13(b), and in accordance with this rule, "*the seller's liability ceases at the expiration of such time.*"

NGFA Feed Trade Rule 30 addresses quality. While neither party cited this rule, the arbitrators noted that the plaintiff exercised due diligence, through an official inspection certificate, to ensure that the shipment com-

plied with the quality terms of its sale contract. The same trade rule states that if the buyer verifies that the shipment does not comply with contract terms, "*he shall notify the seller by telephone, facsimile, or wire not later than 12:00 Noon Central Time the next business day. After serving such notice, the buyer shall, within one business day thereafter, advise the seller by telephone, facsimile, or wire, which of the following options he elects to exercise: (1) reject the shipment and (a) cancel the rejected portion of the contract at fair market value of the contracted feedstuff as of the date of the rejection or (b) schedule a replacement shipment; (2) accept the shipment under mutually acceptable conditions.*" No evidence was submitted that the defendant made any attempt to comply with this rule, nor attempted to mitigate damages, in accordance with NGFA Feed Trade Rule 13(c).

The record submitted by the parties indicated that the defendant did unload at least two compartments of a three-compartment hopper car. While the defendant contended that the material unloaded weighed only 35 pounds per bushel, no evidence was submitted of any attempt to settle the matter "*under mutually acceptable conditions*" as required by NGFA Feed Trade Rule 30.

A further issue involved in this case, although not raised by either party, is the continued idling of the rail car in question. Apparently, five months after shipment, at least one compartment of the car had not been unloaded, and the car continued to sit idle. What has happened since that date was not disclosed to the arbitrators. No request was made by plaintiff for any damages in connection with the loss of use of the car, and no claim was made by the defendant for demurrage charges. The arbitrators noted that a situation of this nature creates added costs, damages and further deterioration of product -- for all involved.

It is regrettable that, once the dispute arose, the problem was compounded by the failure of both parties to take prompt action to minimize damage. Historically, in cases involving damage disputes or quality problems, both sides have acted promptly to mitigate damages for all involved; the arbitration committee wishes to go on record as noting the desirability of this practice. Further, it wishes to express its hope that in the future, any parties involved in a quality or damage dispute will act promptly and cooperatively to minimize the damages for all concerned.

The Decision

The arbitration committee ruled in favor of the plaintiff, the American Milling Co., and against the defendant, Acco Feeds Inc. (Cargill Inc., Nutrena Feed Division).

In arriving at this decision, the arbitrators took into consideration the defendant's admitted failure to abide by NGFA Feed Trade Rule 13(b). The arbitrators believe that NGFA Feed Trade Rule 13(b) has served the industry well in avoiding disputes such as this, and in mitigating damages. The arbitrators further believe that the defendant reasonably could have inspected the car, had it made the effort to do so. In any event, if the defendant did not wish to abide by NGFA Feed Trade Rule 13(b), it should have clearly excluded this rule from the terms of its contract, which it failed to do.

Contrary to the assertion of the defendant, the arbitration committee does not believe that this rule is a "technicality." Rather, it is a rule that has served an important purpose in preventing damage. In this case, the car was not unloaded until 38 days after its arrival at destination; compliance with NGFA Feed Trade Rule 13(b) clearly would have indicated whether any damage occurred in transit (as contended by the defendant) or after arrival at destination (as contended by the plaintiff).

Further, it did not appear that the defendant complied with either NGFA Feed Trade Rule 6 (shortage and/or damage) or NGFA Feed Trade Rule 30 (default on quality).

Finally, the evidence clearly showed that the defendant did unload at least part of the car; there was no indication that this product was reloaded into the car by the defendant. For the plaintiff to ask to be paid a reasonable price for product that the defendant apparently unloaded and kept is not, in the defendant's words, an "unjust request."

The Award

The arbitrators awarded the amount of the American Milling Co.'s invoice number 22381, \$6,404.40, plus interest at the current New York Prime Rate, from the date of constructive placement, July 7, 1993, until paid.

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

Edward P. Millbank, Chairman
Milbank Mills Inc.
Chillicothe, Mo.

Hank Northcutt
Cactus Feeders Inc.
Amarillo, Texas

Randy Liville
The Scoular Co.
Overland Park, Kan.