



# National Grain and Feed Association

# Arbitration Decision

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922  
Phone: (202) 289-0873, FAX: (202) 289-5388, E-Mail: [ngfa@ngfa.org](mailto:ngfa@ngfa.org), Web Site: [www.ngfa.org](http://www.ngfa.org)

November 9, 2006

## Arbitration Case Number 2136

**Plaintiff:** CHS Inc., Inver Grove Heights, Minn.

**Defendant:** Burlington Northern Santa Fe Railway Co., Fort Worth, Texas

### Statement of the Case

This arbitration case involved a claim filed by CHS Inc. against the Burlington Northern Santa Fe Railway Co. (BNSF) for loss of product resulting from a derailment of 34 cars of wheat shipped by CHS via the BNSF.

On Sept. 4, 2004, CHS tendered to BNSF a 109-car wheat train at Shelby, S.D., for delivery to Kalama Export Co. at Kalama, Wash., pursuant to a contract that CHS had with Archer Daniels Midland Co. (ADM). On Sept. 28, 2004, BNSF informed CHS that 34 cars in the 109-car train had derailed. Salvage operations were undertaken, with the last salvaged car being unloaded on Nov. 4, 2004. Subsequent to the unloading of this last car, it was determined that the total loss of grain was 87,243.19 bushels of wheat.

The original contract price between CHS and ADM was \$4.09 per bushel, or 35-cents-per-bushel over the December Minneapolis futures basis. On Nov. 4, 2004 (the date the last car was unloaded), the market had risen and the price of wheat had increased to \$5.53 per bushel – \$1.44 per bushel over the December Minneapolis futures basis.

CHS claimed \$95,095.08 as damages from BNSF for CHS's loss of wheat and inability to fulfill its contract with ADM. CHS further requested that it be awarded its arbitration filing fee, as well as interest on any award. CHS based its claim upon the lost bushels (87,243.19) multiplied by the December Minneapolis futures basis.

BNSF denied liability for the \$95,095.08 and responded by filing a counter claim against CHS in the amount of \$16,339.41, resulting from what it said was a miscalculation in freight charges on the original claim payment.

BNSF initially refused to pay the claim altogether, but BNSF later paid CHS a portion of the claim by paying for the loss at the

original contract price of \$4.09 per bushel. BNSF continued to refuse to pay CHS for the \$1.09-per-bushel increased valuation of the grain (\$0.35 over to \$1.44 over = an increase of \$1.09), which amounted to \$97,095.08.

CHS and BNSF both agreed that an incorrect calculation was made on the freight that was deducted from the original claim and that \$16,339.41 should be refunded to BNSF.

CHS contended that ADM charged CHS a \$95,095.08 premium over contract price to replace the underfill volume of wheat as is customary in the grain industry and as provided under the NGFA Trade Rules. While BNSF did not dispute the calculation of the \$95,095.08 amount, it maintained that CHS must prove that it actually replaced the lost wheat at the cost claimed to receive any form of market value compensation that exceeded the contact price.

CHS's argument was based upon the Carmack Amendment, which states that the carrier's liability "includes all reasonably foreseeable damages resulting from the breach of its contract of carriage, including those resulting from non-delivery of the shipped goods." Air Products & Chemicals v. Ill. Cent. Gulf R.R., 721 F.2d 483, 485 (5<sup>th</sup> Cir. 1983); Nat'l Hispanic Circus Inc. v. Rex Trucking Inc., 414 F.3d 546 (5<sup>th</sup> Cir. 2005).

Meanwhile, BNSF argued that it was not responsible for the underfill, as CHS did not actually replace the grain at the higher price but rather settled the underfill based upon a contract between ADM and CHS and the NGFA Trade Rules, neither of which obligated BNSF as a party. BNSF further contended that its claim policy is to disallow damages for the replacement cost additive on lost goods not actually replaced by the claimant. BNSF asserted that the losses claimed by CHS were "special damages," which were not recoverable because they were not within the reasonable contemplation of the parties at the time of consignment.

## The Decision

The arbitrators noted that the amount of loss and the fact that CHS paid \$97,095.08 to ADM was not disputed by BNSF. The arbitrators also noted that BNSF agreed that “*reasonably foreseeable consequential damages*” are recoverable under the Carmack Amendment. BNSF further agreed that if CHS had paid \$97,095.08 for replacement wheat, then BNSF would have been liable for such charges and the only reason it was not liable for those charges was that the money was paid to ADM for the underfill rather than directly to CHS for replacement wheat.

The arbitrators determined that the Carmack Amendment applied to this case and that, under the Carmack Amendment, BNSF was liable to CHS for the actual loss suffered by CHS as result of the BNSF derailment and failure to deliver the wheat to its final destination.

The arbitrators also determined that while CHS did not actually purchase grain to replace the lost product, it did act appropriately as is the custom of the trade by paying ADM for

the underfill according to NGFA Grain Trade Rule 23. The arbitrators further determined that payment of the underfill to ADM was a reasonably foreseeable consequence of the damages suffered by CHS. While BNSF was not a party to the contract between CHS and ADM, and while BNSF was not subject to NGFA Trade Rules, the arbitrators determined that it was reasonable for BNSF to have known that if it had a derailment and product was lost that it would be required to compensate CHS for its actual loss for not fulfilling its delivery obligation to ADM.

In this case, BNSF admitted that if CHS had paid for the replacement wheat, it would be liable to CHS for such charges. The arbitrators concluded that the custom of the trade is to settle losses with underfills and overfills, and that CHS acted appropriately in its handling of the loss with ADM. CHS’s handling of the underfill amounted to exactly the same dollar value as it would have incurred if CHS had purchased wheat to complete the contract with ADM.

## The Award

The arbitrators ruled in favor of the plaintiff and consequently awarded to CHS a judgment in the amount of \$95,095.08. The arbitrators did not award the plaintiff its filing fee. Nor did the arbitrators grant any interest to the plaintiff.

The arbitrators also ruled in favor of the defendant on its counterclaim, and awarded \$16,339.41 to BNSF.

The resulting total award to the plaintiff was computed as follows:

Award to CHS	=	\$95,095.08
Award to BNSF	=	<u>\$16,339.41</u>
Net Award to CHS	=	\$78,755.67

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

Darrell R. Wallace, *Chair*  
Vice President, Transportation Commodities Group  
Bunge North America Inc.  
St. Louis, Mo.

Tim McNulty  
Director, Agriculture and Food Products  
CSX Transportation Co.  
Jacksonville, Fla.

Stephen Gehrt  
Senior Manager, Bulk  
Canadian National Railway  
Homewood, Ill.