



National Grain and Feed Association

Arbitration Decision

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December 29, 2008

Arbitration Case Number 2195

Plaintiff: FGDI LLC, Bowling Green, Ohio

Defendant: Coshocton Grain Co., Coshocton, Ohio

Statement of the Case

This case concerned a dispute over final pricing and settlement of an underfill involving a 75-car unit train shipment of soybeans.

On Nov. 30, 2006, FGDI LLC, Bowling Green, Ohio, (FGDI) purchased through a broker from Coshocton Grain Co., Coshocton, Ohio, (Coshocton) a 75-car unit train (247,500 bushels of soybeans) "FOB Coshocton Oh." The contract terms called for origin official grades and destination official weights to apply, using buyer's equipment and the buyer paying freight for first-half December 2006 shipment. Neither party raised any issues about any contract terms in their written testimony in this arbitration.

The 75-car unit train was loaded and billed on Dec. 12, 2006 to FGDI, care of the Georgia Port Authority. Upon receiving the usual loading documents from the shipper, FGDI wired the customary 90 percent advance payment to Coshocton. Unloading was completed on Dec. 20, 2006. Upon receipt of the original unloading weight certificate from the Georgia Port Authority on Jan. 5, 2007, FGDI issued a check for final payment that same day. The check for final payment cleared FGDI's bank on Jan. 11, 2007.

The net quantity of soybeans unloaded from the Dec. 12 shipment was 239,709.1 bushels, resulting in a contract underfill of 5,290.9 bushels. The cash basis for the underfill was the basis at the close of business on Dec. 21, 2006 – the day after the train was unloaded – pursuant to NGFA Grain Trade Rule 23(B)(1). Neither FGDI nor Coshocton took issue with any of the aforementioned facts.

FGDI's Complaint: Shortly after receiving the final payment accounting and check from FGDI, an independent contract

merchandiser with trading authority on behalf of Coshocton contacted an FGDI merchant questioning a deduction for dead freight withheld from the settlement check. FGDI's merchant responded that it was customary for the freight payer to take a dead-freight deduction on under-loaded cars. Coshocton's representative then questioned the destination weights. FGDI submitted as "Exhibit I" a spreadsheet comparing origin to destination weights on a car-by-car basis that it claimed had been sent to Coshocton. This spreadsheet showed that the destination weights were heavier than Coshocton's origin weights. FGDI's merchant then allegedly advised Coshocton's agent of the need to settle the underfill, and was advised by Coshocton's agent that he would check into the matter and follow up.

According to FGDI, Coshocton did not respond regarding the underfill. FGDI allegedly continued to attempt to communicate with Coshocton about this matter throughout the spring and summer of 2007. Coshocton provided various reasons as to why it was unable to retrieve the documentation needed to verify the underfill. On Feb. 1, 2008, FGDI unilaterally set an underfill price after it deemed that further attempts to communicate with Coshocton on the matter no longer were warranted.

Coshocton's Response and Counterclaim: In response, Coshocton stated that "NGFA Grain Trade Rule 23(B) should have been used to settle any underfill." In addition, Coshocton maintained that the final settlement issued by FGDI to Coshocton, dated Jan. 5, 2007, failed to indicate that there was an underfill issue to address. Coshocton stated that FGDI should have raised the issue of the underfill before making final settlement and final payment. Based upon NGFA Grain Trade Rule 23, Coshocton asserted a counterclaim in the amount of \$621.68, based upon the following calculations:

SF 2007 price	\$6.5025	as of Dec. 21, 2006
Cash basis	<u>-\$0.1500</u>	as of Dec. 21, 2006
Underfill price	\$6.3525	

Contracted price	\$6.4700
Difference	\$0.1175
Underfilled bushels	<u>5,290.9</u>
Due COSHOCTON	\$621.68

Coshocton’s representative stated that he had multiple discussions with FGDI’s merchant in the early months of 2007. Coshocton also claimed that FGDI’s merchant combined discussions about two separate contracts, and that the conversations in January were related to a different unit shipment that

Coshocton sold to a different buyer that subsequently sold it to FGDI.

Coshocton stated that the first time it ever saw “FGDI Exhibit I” was when received in connection with this arbitration case. According to Coshocton, June 2007 was the first time FGDI raised the issue of pricing an underfill on the contract at issue in this case. The transaction then had been deemed completed and closed, Coshocton said, and the files were in storage. Coshocton’s representative agreed that he received multiple telephone calls from FGDI and that it responded each time that the files had not been located and that he could not concede to the FGDI demands (presumably, referring to the demand to price out the underfill).

The Decision

The soybean unit-train shipment at issue in this case completed unloading on Dec. 20, 2006, leaving an underfill of 5,290.9 bushels for which the cash basis was to be set as of Dec. 21. The arbitrators noted that this was the core issue on which the parties had a difference of opinion, and that both parties claimed that NGFA Grain Trade Rule 23(B) supported their respective positions.

NGFA Grain Trade Rule 23 [Overfill and Underfill Grain on Bushel Contracts] (B) [Rail] provides:

“(1) Market Value: For rail overfills and underfills, “market value” shall mean the basis at the close of the first business day following date of load or unload, whichever weight is applicable. The flat price shall be established at the time of overfill or underfill becomes known by both parties to the contract.”

The arbitrators concluded that Coshocton was correct concerning the first provision of Rule 23 regarding “market value” with respect to the reference to “basis” at the close of the day after unload. However, the arbitrators also concluded that Coshocton’s argument was inconsistent with the remainder of Rule 23, which provides for the establishment of the flat price at the time the underfill became known by both parties.

The arbitrators observed that Coshocton’s representative agreed that FGDI had contacted him in January 2007, but stated that the conversation pertained to a problem involving a different unit-train shipment, and that the first time Coshocton was made aware of an underfill issue was in June 2007. The arbitrators recognized that some miscommunications and imperfect recollection could be factors in the current confusion between the parties regarding the nature of the January 2007 communications. However, the arbitrators noted that Coshocton received final settlement with a check that cleared FGDI’s bank on Thursday, Jan. 11, 2007, drawing a logical

assumption that the check reached Coshocton’s offices on or about Jan. 8-10.

Based upon this assumption and the undisputed testimony that there was a discussion about load-versus-unload weights and light-loaded cars, the arbitrators determined that Coshocton was informed about an underfill issue by Jan. 10, at the latest. The arbitrators determined that the statements provided by certain individuals indicating no knowledge of having received or seen the documents comparing load and unload weights prior to receiving the arbitration documents were irrelevant to this case. The arbitrators concluded that by issuing final settlement and payment immediately upon receipt of unload documentation, FGDI did not “wash out” the underfill nor imply that the contract was closed. This is not an uncommon practice in the industry. No information was provided to indicate that it was FGDI’s practice – nor that it intended in this case – to wash the contracted bushels at contract price at the time of final settlement.

By the admission of Coshocton’s representative, FGDI made multiple attempts to price the underfill contract, and to the best of his knowledge that Coshocton considered the transaction closed and the records were in storage. Grain Trade Rule 23(B)(1) states, in relevant part, that, “The flat price shall be established at the time the underfill becomes known to both parties.” The arbitrators determined that in trade practice, this is the time at which both parties agree on the basis and the quantity of the underfill. Because of the many communications initiated by FGDI, it was obvious that there never was a meeting of the minds. Therefore, the underfill still existed and needed to be priced out.

Coshocton’s non-responsiveness to FGDI did not absolve it of responsibility in this matter. Therefore, the arbitrators concluded that FGDI was within its rights to unilaterally price out this underfill on Feb. 1, 2008.

The Award

The arbitrators noted certain exceptions with the basis calculations relied upon by FGDI in determining its damages.

1. The cash basis for Dec. 21, 2006, as indicated on the FGDI statement, was -18 SF07, and as indicated on the Coshocton statement it was -15 SFO7. Trade custom under these circumstances is to split the difference; hence the basis was set at -.165 SF07.
2. The underfill became known on Jan. 10, 2007. Pursuant to the second paragraph of NGFA Grain Trade Rule 23(B)(1) (“Overfills and underfills shall be settled on a basis over or under the futures month currently used for the majority of cash trades.”), the SF7 – SH7 spread for Dec. 21, 2006 is to be used, not the spread on the last day of December.

<u>Final Pricing</u>		<u>Net Basis</u>	<u>FuturesMonth</u>
Basis Dec. 21, 2006	-0.165	\$ (0.165)	SF7
Spread SF7 to SH7 on Dec. 21,06	-0.155	\$ (0.320)	SH7
Spread SH7 to SK7 end Feb. 07	-0.145	\$ (0.465)	SK7
Spread SK7 to SN7 end April 07	-0.145	\$ (0.610)	SN7
Spread SN7 to SQ7 end June 07	-0.06	\$ (0.670)	SQ7
Spread SQ7 to SU 7 end July 07	-0.07	\$ (0.740)	SU7
Spread SU7 to SX7 end Aug. 07	-0.145	\$ (0.885)	SX7
Spread SX7 to SF8 end Oct. 07	-0.155	\$ (1.040)	SF8
Spread SF8 to SH8 end Dec. 07	-0.15	\$ (1.190)	SH8
 <u>Final price</u>			
Futures	SH8	\$ 12.870	
Basis	SH8	\$ (1.190)	
Underfill Price		\$ 11.680	
Contract Price		\$ 6.470	
Total Due FGDI		\$ 5.210	
Quantity of Underfill	5290.9		
		\$27,565.59	

Based upon these revised calculations, FGDI was awarded \$27,565.59, plus 7.25 percent annual interest from Feb. 15, 2008 until the date payment is made.

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

Dan Treinen, Chair

Vice President
Columbia Grain Inc.
Great Falls, Mont.

Jason Selking

Merchandising Manager
Consolidated Grain and Barge Co.
Fayette, Iowa

Ed Sims

Manager
Kenton Grain Co.
Kenton, Tenn.