



Arbitration Decision

National Grain and Feed Association

July 16, 1998

Arbitration Case Number 1795

[Editor's Note: This publication contains the decision rendered by the original arbitration committee (pages 1-2) and an arbitration appeals committee decision (pages 3-6)]

Plaintiff: AGRI Grain Marketing, Des Moines, Iowa

Defendant: The American Milling Co., dba Granite Grain Co., Cahokia, Ill.

Statement of the Case

AGRI Grain Marketing (AGM), the plaintiff, and The American Milling Co., dba Granite Grain Co. (American) entered into a put-through agreement¹ for "heavy grain" in November 1995 for a fixed term commencing on Dec. 15, 1995.

The agreement set forth the number (minimums and maximums) of railcars that would be put through American's Pekin, Ill., facility. Under the parties' agreement, American was not obligated to store any grain. Instead, American was to direct-transfer AGM's grain from railcars to barges supplied by AGM. The agreement set forth the put-through charges which AGM would pay to American, including the charges for official weights to be provided by American. In addition, American warranted that no shrink would be caused by it. In the event shrink attributable to American did occur in excess of 0.2 percent, American agreed to compensate AGM at fair market value on the date the barge was unloaded.

AGM sent 3,406 railcars to American for transfer to barges between December 1995 and March 1996. At the end of that period, AGM claimed an excess shrink of 201,907 bushels of corn and 14,583 bushels of soybeans. AGM asserted that it was due \$875,863, plus interest at

the rate of 8 percent from May 31, 1996. In response to the arbitration complaint filed by AGM, American asserted a counterclaim against AGM in the amount of \$22,215.14, plus interest at the rate of 8 percent from invoice date, on four unpaid invoices.

While the parties' put-through agreement provided that AGM would be compensated at fair market value in the event shrink attributable to American occurred in excess of 0.2 percent, the agreement was silent on the issue of which party's weights would determine shrink.

Further, subsequent to entering into the written agreement, AGM agreed to accept certified weights in lieu of official weights on the railcars being unloaded by American. The railcars were weighed by the Illinois Midland Railroad on in-motion scales located in a railyard near American's facility. Upon loading the grain directly onto barges from the railcars, American supplied AGM with an estimated load or draft weight for each barge. The evidence showed that American provided AGM with both railcar unload weights and barge draft weights in a timely manner.

¹ Both parties were and are currently NGFA Active members. In addition, the put-through agreement expressly provided that "[d]isputes arising between the parties shall be settled by arbitration procedures under the rules of NGFA."

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American loaded 199 corn barges and 23 soybean barges during the period at issue. At destination, official unload weights on the barges were provided to AGM by various receiving elevators. AGM contended that it discovered in April 1996 that there had been a significant

amount of shrink of both corn and soybeans. AGM based its conclusions on the differences between the certified weights reported on the railcars prior to unloading at the Pekin facility and the official barge unload weights at destination².

The Decision

The arbitrators concluded that the evidence demonstrated that both parties conducted themselves as if any shrink for purposes of the agreement would be determined by differences between the certified railcar weights obtained prior to unload and the barge draft weights obtained at barge loading at the Pekin facility³.

Indeed, AGM did not provide American with any destination barge weights until 144 days after the first barge arrived at the Gulf. Trade custom as to notification regarding destination weights on barge shipments is set forth in NGFA Barge Trade Rule 2(g)(1). That rule makes it clear that a party relying on destination weights must promptly notify the original shipper of the final unload weights. Since the parties did not expressly address this issue in their put-through agreement, the arbitrators concluded that AGM (even if it believed that official barge

unload weights were applicable) could not prevail on its claims of discrepancies made up to 144 days after unloading a barge at destination⁴. Had AGM provided American with ongoing and timely notification of discrepancies between the barge unload weights and the other weights, steps could have been taken during the period to determine the cause or causes of the discrepancies.

Evidence also was submitted in this case regarding a prior put-through agreement between the parties that apparently was performed in a manner satisfactory to both. AGM did not advise American of official destination weights on barges until the issues presented in this dispute arose. Thus, the parties' past business relationships did not establish a course of dealing to use official barge unload weights for purposes of grain shrinkage under the put-through agreement.

The Award

The arbitrators concluded that the claims of AGRI Grain Marketing, the plaintiff, were not allowable under the parties' put-through agreement. Therefore, AGRI Grain Marketing's claims were denied.

There was no dispute that AGRI Grain Marketing owed American the sums on unpaid invoices as asserted in American's counterclaim. Therefore, AGRI Grain Marketing was ordered to pay The American Milling Co. the sum of \$22,215.44, plus compound interest at the rate of 8 percent from March 31, 1996 until paid.

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

Martin H. Bailey, *Chairman*
General Manager
Farmers Elevator Co.
Oakville, Ind.

John Case
President
Atwood-Kellogg Co.
Minneapolis, Minn.

Dan Hardy
Grain Manager
Bruce Oakley Inc.
North Little Rock, Ark.

² The arbitrators noted that official weights and certified weights clearly are different types of weights. *See* NGFA Grain Trade Rule 4.A.1 and 4.A.2. NGFA Barge Trade Rule 2 clarifies that those definitions apply to barge transactions involving grain.

³ The arbitrators also concluded that it is a common trade practice to trade grain on barge draft weights.

⁴ The undisputed evidence showed that American provided AGM with the railcar-certified weights and the origin barge draft weights within 48 hours of obtaining such weights. The differences between these weights obtained at the Pekin facility were less than 0.2 percent.

Appeal Decision

Arbitration Case Number 1795

Appellant: AGRI Grain Marketing, Des Moines, Iowa

Appellee: The American Milling Co., dba Granite Grain Co., Cahokia, Ill.

The Arbitration Appeals Committee, individually and collectively, carefully reviewed the findings and conclusions of the original arbitrators, along with the arguments and evidence submitted by the parties.

The five-member Arbitration Appeals Committee agreed on several facts pertaining to the arguments and evidence, but could not reach a unanimous decision for the final conclusion. Thus, after extended analysis and discussion, a majority opinion and a minority opinion were submitted by the Arbitration Appeals Committee.

Statement of the Case (Five-member Appeal Committee)

This arbitration case involved a disagreement between AGRI Grain Marketing (AGM) and The American Milling Co. (American) in the calculation of a disputed shrink in excess of a stated allowable tolerance (0.2 percent) that occurred during the term of a put-through agreement (PTA). The case did not involve a traditional purchase/sale transaction wherein, at some point in time, both parties to the dispute had title (ownership) to the commodity. The PTA was clear on the fact that the grain was to remain the sole and exclusive property of AGM.

The two parties entered into a PTA in which American was to unload railcars into barges for AGM for a stipulated fee per short ton based upon the rail car unload weights furnished by American. The PTA required American to furnish AGM an official weight certificate. However, the two parties agreed orally to change the PTA to allow for a certified weight certificate to replace the official certificate for rail car weights. Neither party notified the other in writing of the weight change, even though the PTA specifically stated that it could be amended only by a written document signed by duly authorized representatives of each of the parties. The railcars were weighed on an "in-motion" rail scale by the Illinois Midland Railroad and a certified weight certificate was issued by the Central Illinois Inspection Service on behalf of American. Although, both parties agreed orally to the issuance and acceptance of a "certified weight" and a "Certified Weight Certificate," there was never a written amendment to clarify the definition of "Certified Weight."

American transferred 3,406 railcars into 222 barges supplied by AGM between December 1995 and March 1996. After each barge was loaded, American furnished AGM with an estimated weight obtained by barge draft readings (from tables supplied by AGM) and draft measurements.

The PTA contained a paragraph defining how shrink would be valued. But it did not contain any language defining how the amount of shrink would be calculated. The PTA did not specify if the origin barge estimated (draft) weight, the destination barge weight (official, certified or other), or the inland rail shipping elevator weight was to be used to calculate the amount of shrink in comparison with the "in-motion" rail scale. Paragraph (5) of the PTA was the complete statement referencing shrink. [Note: The acronym GGC is a reference to American.]:

"(5) Shrink. GGC warrants no shrink will be caused by GGC. In the event shrink attributable to GGC occurs in excess of 2/10%, AGM will be compensated at fair market value on date of barge unload."

The origin barge draft weights in comparison with the "in-motion" rail car unload certified weights were within the 0.2 percent tolerance allowed in the PTA. The destination barge weights (215 barges had official weights, seven had certified weights) in comparison with the "in-motion" rail car unload certified weights showed a difference (shrink) of 1.47 percent for the soybean barges and 2.05 percent for the corn barges. The differ-

ence (shrink – the “in-motion” rail car unload weights were a greater amount than the destination barge weights) less the 0.2 percent tolerance was 14,583 bushels of soybeans and 201,907 bushels of corn. AGM (in its arguments) contended the destination barge weights were the “intended” weight to be used for shrink calculation.¹

AGM further contended the “in-motion” rail car scale was inaccurate and produced weights in excess of the actual weight. To demonstrate this point, AGM submitted the origin (original) rail elevator shipping weights on four unit trains for a comparison with the “in-motion” rail scale.

American (in its arguments) asserted the origin draft barge weights were to be used to calculate shrink.² In addition, American filed a counter-claim against AGM in the amount of \$22,215.14, plus 8 percent interest for four unpaid invoices for transfer fees.

AGM did not notify American of the unload destination barge weights until 144 days after the first barge was unloaded. AGM admitted it received the destination barge weights within 30 to 60 days after the barges were unloaded. In addition, American submitted evidence to show that 84 of the 199 corn barges were unloaded within 20 days or less of loading, while another 41 barges were unloaded within 15 days of loading by American.

Majority Decision

The majority (four members) of the Arbitration Appeals Committee reached its decision after extensive in-depth analysis of the parties’ arguments and evidence presented in this case. The foundation of this case was a PTA between two parties where American (appellee) was hired to perform a service to transfer grain from railcars to barges for AGM (appellant), which retained complete title, control and management of the grain inventory during rail and barge transport.

The question in this case for the Arbitration Appeals Committee was to determine the method and points of comparison to calculate the amount of shrink, if any shrink occurred. The parties to the PTA clearly had defined a method to value shrink. But they did not clearly define a method to calculate the amount of shrink and the two scales to be used for a comparison. This created a contract condition for the Arbitration Appeals Committee to attempt to resolve. At the end of analysis, the committee decided to focus on the specific content and substance of the PTA and not attempt to interpret trade practice, the unknown and the differences of intention expressed between the parties in the arguments that remained silent in the PTA.

In final evaluation, the Arbitration Appeals Committee determined the AGM evidence did not prove the “in-

motion” rail scale was defective or provided inaccurate weights. It was the responsibility of American to provide accurate weights and with the use of a third party (Illinois Midland Railroad and Central Illinois Inspection Service), it promptly furnished rail car unload certified weight certificates to AGM. The specific purpose of barge draft weights was not contained in the PTA, and therefore did not offer the committee a weight for comparison with the “in-motion” rail scales to calculate the amount of shrink. Further, although the PTA did use the barge unload date to determine market value for shrink, it was not specific to the purpose of unload barge weights. The committee agreed with AGM’s argument that AGM should not be barred from recovering damages for failing to immediately realize the existence of shrink.

However, the evidence presented did not allow a definite conclusion to be reached as to why or how the shrink (weight difference) occurred and who should be responsible. The PTA contained a specific requirement for disputes between the parties to be settled by arbitration procedures under the rules of the NGFA, but it was silent on any reference to the inclusion of NGFA Trade Rules. In addition, the evidence did not prove the accuracy of the “in-motion” rail scale and the evidence could not clearly connect the weight difference with the other scales in the grain trading inventory management

¹ The minority opinion noted that using the market value as stipulated in the shrink clause, the appellee (The American Milling Co.) owed the appellant (AGRI Grain Marketing) \$875,863, plus 8 percent interest.

² The minority opinion noted that the appellee (The American Milling Co.) asserted that no moneys were due to the appellant (AGRI Grain Marketing) since the origin estimated barge weight versus the certified rail car weight were within the PTA’s allowable tolerance of 0.2 percent.

transportation system and procedures to conclusively determine if the "in-motion" rail scale was defective. The committee, under the circumstances and with the evidence presented, could not make a decision regarding the inaccuracy of the "in-motion" rail scale. Further, it was beyond the scope of this case for the committee to issue an opinion on the quality of the certified weight certificate or the quality of the weight issued from an "in-motion" rail scale that both parties agreed to use for their individual or collective purposes.

In its final conclusion on the evidence and on the above rationale, the majority of the Arbitration Appeals Committee decided that the Appellant, AGM should not be awarded its claim for \$875,863, plus interest. The majority of this committee supported the original Arbitration Committee's decision to award American \$22,215.44, plus interest at 8 percent for unpaid invoices for performed services.

Submitted with the consent and approval of the following members of the Arbitration Appeals Committee for this case, whose names are listed below:

Philip Hageman, Acting Chairman
Vice President
Parrish & Heimbecker Inc.
Brown City, Mich.

Richard McWard
Vice President
Bunge Corp.
St. Louis, Mo.

Steve Nail
President and Chief Executive Officer
Farmers Grain Terminal Inc.
Greenville, Miss.

Robert Pegan
Executive Vice President
Central States Enterprises Inc.
Heathrow, Fla.

Minority Opinion

This arbitrator reviewed the evidence in this case, as well as the original decision of the arbitration committee, and concluded that the two parties definitely intended to settle any shrink that occurred during the contract period.

Their dispute is being arbitrated because the shrink clause (included verbatim in above Statement of the Case) in the PTA was silent as to how the shrink would be calculated. Whether it was inadvertently omitted, or whether the two parties had a meeting of the minds without the subsequent reduction to writing is the dilemma.

During the term of the PTA, both parties had the loading barge draft estimated weights. However, neither party's action would suggest any urgency in obtaining

the barge destination weights and/or unload dates, even though the shrink clause in the agreement required the use of the barge unload date for determination of market value for any shrink in excess of the tolerance.

The primary initiative in the review and conclusion of this case was to ascertain what weight was "intended" by the two parties to be compared to the certified rail car weight for the calculation of shrink, since the PTA was silent on the barge weight issue even though it clearly outlined how shrink would be valued. Since a barge draft weight is only an estimate of the actual weight in a barge (and is used only occasionally in daily commerce for settlement purposes), there were only two actual weight certificates issued for comparison in the determination of shrink: 1) the origin certified rail car weight; and 2) the destination (official 215 barges, certified seven barges) weights.³

³ Since the put-through agreement (PTA) required unresolved disputes to be heard by the NGFA Arbitration System and both parties were and continue to be Active members of the NGFA, this arbitration appeals committee member concluded that the NGFA Grain Trade Rules were incorporated by "custom of the trade" usage and that the definition of "certified weight" therein was intended. Further, the appellee (The American Milling Co.) incorporated the Grain Trade Rules by reference in its written arguments. This arbitration appeals committee member concluded that the underlying circumstances surrounding the accuracy, reliability and other potential definitions of the term "certified weight" were outside the scope of this case. Both disputants agreed orally to the acceptance of a "certified weight" and a "certified weight" certificate was issued. There was no reference to "Class I" or "Class II" certification as defined in the NGFA Grain Trade Rules.

The Minority Decision

This arbitrator concluded that since the "shrink clause" in the PTA stipulated that the day of unload market was to be used to value whatever shrink that did occur, that would suggest that the unload weight was intended to be used to calculate the amount of the shrink. Although the PTA was not a purchase/sale transaction, the foregoing is analogous to the method of settlement of overfills/underfills in daily commerce involving barge-lot commodity trading (market the day after unload is used). And this method is consistent with the NGFA Barge Trade Rules. Trade custom is to value quantities over or under a stipulated contractual amount as expeditiously as practical to reduce the impact of market volatility

between the dates of quantification and valuation.

The appellant contended that the destination weights were the weights to be compared to the railcar certified weights for shrink. Yet it failed to see the urgency of notifying the appellee of the destination weights in a timely manner so as to allow the appellee the ability to undertake actions to mitigate the potential damages or debate the issue of their use early in the PTA period. The appellee claimed that had it known the destination weights in a timely manner, the maximum owed to the appellant using the destination weight and the fair market value the day of unload would have been \$80,195.28.

The Minority's Proposed Award

This arbitrator would award the decision to the appellant in this case, but would deny the appellant's claim in the amount of \$875,863, plus interest, because of its negligence in following timely and reasonable documentation (weight certificates) exchange procedures required by trade practice.

Instead, this arbitrator would award the appellant \$80,195.28 – the amount that would have been due had both parties acted in a prudent and reasonable business manner. Since the appellee was only a transferor of the grain and soybeans and never had title, it was not the shipper; therefore, NGFA Barge Trade Rule 2(g)(1) regarding weight certificate documentation was not applicable in this case as the appellee asserted. However, custom of the trade, due to market volatility, dictates that it was the responsibility of the appellant to monitor (and report to the appellee in a timely manner) the destination barge weights since, per its arguments, these weights were to be used along with the unload date to settle any shrink.

The appellant's espousals in the evidence suggests that it was proceeding under the terms of the agreement as if the destination weight for the barges (versus the rail car weight) would be used to define shrink. However, its actions during the term of the PTA were less than what normal trade custom would consider reasonable.

This arbitrator concurs in awarding the appellee's counterclaim of \$22,215.14, plus interest for unpaid invoices. Further, this arbitrator would direct that the appellee be ordered to pay to the appellant the net of the two above amounts (\$57,980.14), plus interest at 8 percent per annum beginning March 31, 1996 until date of payment.

This member of the arbitration appeals committee would like to stress to NGFA members, and the entire industry, the urgency and importance of including the proper language in any original contracting document so as to clearly and succinctly delineate the intent of the contractual participants. Cases of this nature and magnitude require an enormous amount of individual and collective time and effort to reconstruct what the arbitrators reasonably and collectively believe was the "probable intent" of the parties involved.

Submitted by the arbitrator whose name is listed below:

Tommy D. Couch
Director, Grains- East Region
Farmland Industries Inc.
Florence, Ky.