National Grain and Feed Association
Arbitration Decision

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November 22, 2005

Arbitration Case Number 2052

Plaintiff: **Ag Processing Inc., Omaha, Neb.**

Defendants: **Union Pacific Railroad Co., Omaha, Neb.**

Statement of the Case

This dispute involved a rail car shipment of partially hydrogenated soybean oil from Ag Processing Inc. ("AGP") to its customer, Ventura Foods LLC ("Ventura"), by the Union Pacific Railroad Co. ("UP").

Ventura rejected the shipment after it was observed that security seals were missing and four of the six bolts on the hatch cover were loose on the rail car at issue. UP ultimately sold the cargo to another customer for $21,833, and remitted those proceeds to AGP. AGP argued that it was owed an additional $10,832.16 for the original full value of the cargo.

According to AGP, on Feb. 15, 2002, one of its employees signed a report attesting to the securing of the hatch cover and affixing of the cable security seals (AGP seal numbers 637869, 637870, 637871), and a second employee signed another report also indicating the affixed security seals. AGP further claimed that a third employee visually inspected the seals before preparation of the bill of lading, and that the bill of lading noted the affixed seals and was accepted by UP on Feb. 16. According to AGP, the car actually was placed at Ventura's secured facility on March 7 at 2:36 a.m., and Ventura's crew detected the missing seals and loose bolts when it came on duty at 7 a.m. that same day.

UP argued that AGP failed to prove that the seals were affixed when UP acquired possession of the car and, alternatively (if they were affixed at one time), that AGP failed to prove they were not removed after delivery to Ventura. UP also claimed that since evidence was not provided that the hatch actually was opened or that the cargo was, in fact, contaminated, the cargo was improperly rejected. According to UP, AGP was obligated – and failed – to prove that the cargo actually was contaminated when reaching its destination (i.e. the mere possibility of contamination was not sufficient), and that tests should have been conducted demonstrating actual contamination.

AGP countered that Ventura properly rejected the shipment, and that proof of actual contamination was unnecessary to sustain a loss-and-damage claim if the shipment was rendered commercially unusable as a food-grade product. AGP further argued that there is no generic test to indicate contamination, and numerous tests would be necessary to detect the many possible contaminations, which would create a burden and cost that exceeded the value of the cargo.

Both parties asserted extensive arguments based upon the applicable statutory and other legal authorities and requirements, which were thoroughly reviewed by the arbitrators. The parties also disputed the impact of AGP's use of a 1/16th-inch cable seal. UP argued that this seal was inadequate and constituted improper packaging because a seal of this strength and type was too easily subject to tampering. AGP asserted that prior to this shipment, UP had not required or advised shippers not to use these seals, and that UP settled a prior claim with AGP based upon a missing seal under the same circumstances. AGP further stated that this seal was adequate because rail car seals primarily are intended to alert parties to the possibility of contamination or tampering.

The Decision

The arbitrators thoroughly examined and assessed all the documents and arguments presented by the parties. Their unanimous decision was based upon the following conclusions that were specific to the circumstances in this case:

1. AGP documented that it properly loaded and secured the car with seals prior to its release to UP. AGP acted in a reasonable and customarily accepted manner. UP offered no evidence refuting that the car was properly sealed and released.

2. UP accepted the car as a sealed food-grade product, and knew or had reason to know that it would be rejected if it were delivered with a broken or missing seal.

3. The normal and customary practices of the trade support AGP's claims. The expectation of delivery of rail cars containing food-grade products in a sealed-and-secured manner is an industry standard. Further, UP's prior settlement of a rail car dispute that presented identical circumstances with AGP indicated a policy and course of conduct between the parties such that it was reasonable for AGP to expect a comparable approach with regard to the shipment at issue in this case.

4. The weight of the evidence supported that removal of the seals and tampering with the hatch cover occurred while the car was under UP's control.

The Award

The arbitrators, unanimously, decided in favor of AGP, and ordered UP to pay $10,832.16 to AGP.

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

Jeffrey Edwards, *Chairperson*
Managing Partner
J & J Commodities
Greenville, N.C.

William A. Strawn
President
Ohio Central Railroad System
Coshocton, Ohio

Chris Wheeler
Director of Purchasing
Southeastern Mills Inc.
Rome, Ga.

November 22, 2005

Arbitration Appeals Case Number 2052

Appellant: Union Pacific Railroad Co., Omaha, Neb.

Appellee: Ag Processing Inc., Omaha, Neb.

The Decision

This case was filed by Ag Processing Inc. (AGP) against the Union Pacific Railroad Co. (UP) on May 20, 2003. Both parties submitted their filings to the original arbitration committee, and following the receipt of all arguments and supporting evidence from both parties, the original arbitration committee issued a unanimous opinion in favor of AGP, and against UP, in the amount of $10,832.16.

Subsequently, the defendant, UP, filed a notice of appeal of the original arbitration committee's decision. In conformity with the Arbitration Appeal Rules of the National Grain and Feed Association, an arbitration appeals committee was selected. The appellant, UP, subsequently requested an oral hearing.

After both parties filed their appeal briefs, an oral hearing was conducted on Aug. 16, 2005. At the oral hearing, both parties stipulated to the following five points:

1. That the arbitration appeals committee was duly constituted, and that the members were acceptable to all parties.

2. That, heretofore, all filings and procedures in the case had conformed to the Arbitration Rules of the National Grain and Feed Association (NGFA).

3. That the NGFA National Secretary had satisfactorily complied with the duties and responsibilities placed upon him under the NGFA Arbitration Rules.

4. That the complaint, and all other documents, exhibits and related materials heretofore filed with the NGFA National Secretary by the parties involved in the dispute under the NGFA Arbitration Rules were properly considered a part of the hearing record.

5. That the procedures and terms governing the oral appeal hearing, previously provided by the NGFA National Secretary to the parties, were accepted without qualification.

The arbitration appeals committee noted that the NGFA Arbitration Rules specifically prohibit the introduction of any new evidence at an oral hearing. Further, the rules indicate that the arbitrators are to base their judgement upon the facts and evidence previously submitted by the parties to the dispute, and that in interpreting the relevance and intent of these documents, the arbitrators may rely upon customary practices of the trade.

Majority Decision

Upon careful consideration of the written record previously submitted by the parties, together with the comments made at the oral hearing, the arbitration appeals committee was unable to reach any conclusion indicating that the prior unanimous decision of the original arbitrators should be overturned. Consequently, the arbitration appeals committee affirmed the original decision of the arbitration appeals panel, and ordered that UP pay the claim of AGP, in the amount of $10,832.16.

The arbitration appeals committee further wished to reiterate the statement found in the original arbitration decision: namely, that the arbitrators' unanimous decision was "*based upon the*

following conclusions that were specific to the circumstances in this case." It is not the function of an arbitration committee to set policy or to decide whether existing contracts, rules, tariffs or trade practices are fair or unfair; rather, the arbitration appeals committee determined that it was its function to make a decision based upon the specific facts that apply to any particular dispute, and to apply and to interpret the rules, contracts and trade customs as they existed at the time of the dispute, and not as they may or may not be amended subsequently.

The appeals committee sought to emphasize that each arbitration case must be decided based upon the facts specific to that case, and that no arbitration decision should be expected to determine an industry standard for liability. Rather, the arbitration appeals committee concluded that the marketplace, through individual contracts, tariffs, notices, rates, disclosures and trade practices, should set policy. Further, the arbitration appeals committee stated that each party to a transaction should be fully aware, in advance, of their respective responsibilities and potential liabilities.

The Award

Therefore, the decision of the original arbitration committee, based upon the facts specific to this particular case, hereby was affirmed.

Submitted by the arbitrators, whose names appear below:

Edward P. Milbank, *Chair*
President
Milbank Mills Inc.
Chillicothe, Mo.

Mike R. Bilovesky
Vice President of Marketing
Kansas City Southern Railway
Kansas City, Mo.

John C. Anderson
Chief Executive Officer
Ritzville Warehouse Co.
Ritzville, Wash.

Janet M. Weiss
General Manager for Grain
Canadian Pacific Railway
Winnipeg, Manitoba, Canada

Minority Decision

While I agree that the preponderance of the evidence in this case was in AGP's favor, I am concerned that the responsibility for the potential contamination of the product shipped cannot be determined with a high degree of certainty.

Further, I am concerned that with this decision – even though we are making the distinction that each subsequent case will stand on its own merits and that NGFA Arbitration decisions do not set binding precedent – receivers of food-grade rail shipments may assume that they have only minimal incentives to mitigate losses in cases of potential contamination. I also believe there should be some shared financial responsibility in this case, as we are unable to determine with a high degree of certainty the responsibility for the possible contamination. In this instance, I would have awarded AGP 75 percent of the claimed amount of its loss.

Submitted by the arbitrator whose name is listed below:

Lynn A. Anderson
Senior Vice President - Marketing
Cedar American Rail Holdings Inc.
Sioux Falls, S.D.