National Grain and Feed Association

Arbitration Decision

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January 18, 2007

Arbitration Case Number 2123

Plaintiff: **South Dakota Wheat Growers Association, Aberdeen, S.D.**

Defendant: **Crossroads Cooperative Association, Sidney, Neb.**

Statement of the Case

This dispute concerned a secondary rail freight contract and associated pricing mechanism involving a Burlington Northern Santa Fe Railway (BNSF) 110-car shuttle train that South Dakota Wheat Growers Association (SDWG) sold and subsequently tendered to Crossroads Cooperative Association (Crossroads).

The broker's contract (number 35093) (dated April 1, 2004) that applied to this trade included provisions for *"**TIME OF SHIPMENT:** Last half of April, 2004"* and *"**PRICE:** $100.00 per car under tariff."* The contract also stipulated *"**TERMS:** … a.) Trip incentive for the account of the seller. b) There is no fuel surcharge protection. … g.) Rate date, time of shipment."*

The arbitrators noted that the parties did not dispute that SDWG applied a shuttle to Crossroads within the permitted contract time period, and that the train was accepted and loaded by Crossroads. The arbitrators determined that at issue in this case was whether the "locked rate" – or the tariff differential applied under the contract between SDWG and Crossroads – was appropriate.

SDWG argued that because the train had a "locked rate," which entitled it to the lowest tariff rate available during the one-year duration span, Crossroads was liable for any rate differentials from the lock date to the load date, plus the applicable fuel surcharge and less the $100-per car credit for the contract value. SDWG argued that the *"Term g.) Rate date, time of shipment"* referred to the BNSF tariff rate that existed at the time the shuttle trip in the contract was actually shipped. SDWG further contended that the terms were "generic" in re-sale shuttles to cover tariff-rate changes imposed by the BNSF and to allow sellers of year-long shuttle trips to collect spreads against tariff increases in contracted shipment slots.

SDWG claimed $16,459.98 in damages as follows:

Car Type	Car Car#	Lowest Rate	4/27/04 Rate	$ difference	3.5% fuel surcharge	Total
Small	26	$3,725	$3,975	$6,500	$227.50	$6,727.50
Large	74	$4,053	$4,325	$20,128	$704.48	$20,832.48
Car cost	111	($100)				($11,100.00)
					Net Due:	$16,459.98

SDWG also requested $2,274.43 in interest on the unpaid balance through March 31, 2005, for a total claim of $18,734.41, plus reimbursement of arbitration filing expenses of $587.34.

Crossroads denied it was responsible under the contract for paying any tariff spread differentials to SDWG. Crossroads argued that under the contract, the rate that applied in this case was the contract rate. Crossroads stated that it was owed for the $100 discount to the tariff for the 111 applied cars based upon the "express and unambiguous terms" within the contract. Crossroads argued that the locked rate was immaterial and not its responsibility, as Crossroads billed under a separate confidential contract rate with the carrier. The arbitrators noted that, importantly, Crossroads also submitted that the broker's terms omitted a reference or obligation to honor earlier variances from the rate at time of shipment, and that the rate lock was the sole issue in dispute. On this basis, Crossroads submitted its own counter-claim for $11,100, representing the contract rate of $100-under-tariff per car for the 111-car shuttle. Crossroads also requested interest in the amount of $2,238.85, plus reimbursement of arbitration filing expenses amounting to $587.34.

In its final argument, Crossroads submitted that "if" SDWG were to prevail in this case, the damages claimed were incorrect and needed to be recalculated, as the correct rate lock date actually resulted in a net payment from Crossroads to SDWG of $7,236.06.

The Decision

In deciding this case, the arbitrators first examined the fundamental applications of NGFA's Trade Rules and Arbitration Rules, including those related to contract confirmation, execution and performance, as well as the timely filing of disputes. The arbitrators noted that the parties did not raise issues in this regard. Nor did the arbitrators observe any omissions in this regard in their own review of these issues in this case. The arbitrators consequently proceeded to assess the materials submitted by the parties, which included extensive documentation and both rebuttal and surrebuttal arguments.

The arbitrators determined that resolution of the case required reliance upon trade practices. In that regard, the arbitrators noted that the terms applied in this case had not been used extensively in the trade, as BNSF shuttles with rate locks had not been offered for an extended period of time. The arbitrators also concluded that to their knowledge, the BNSF was the only Class I railroad offering this pricing mechanism prior to the emergence of this dispute. The arbitrators decided that "trade practices" add a burden of clarity to contract terms, and as the broker's contract prevails the panel was required to interpret carefully the broker's contract terms to confirm consistency with trade practice. Importantly, the arbitrators believed that "trade practices" also add a burden of timely interpretation and confirmation between buyers and sellers.

The arbitrators concluded that the material reference in the brokers' contract – "Rate date, time of shipment" – applied to the train at issue within this contract, as well as to its spread between application date to tariff rates in effect as of the lock date for the same move. The arbitrators decided that the "rate date" in this instance represented an independent calculation from actual rates, and did not necessarily relate to the actual rate paid for a movement, whether under contract or tariff, except within the shipper's internal calculations.

The arbitrators determined that in this instance, the user of the train – Crossroads – still had and in fact utilized its contract rate, but that the attached locked rate within this contract in effect still was Crossroads' responsibility, regardless of whether the spread resulted in a positive or negative number. It was not a foregone conclusion that the user of such a train must assume a penalty for the rate, but that was the outcome in this situation.

The arbitrators observed that Crossroads acknowledged that, as an internal matter with its own representative agent, Crossroads considered the rate lock before confirming the trade with SDWG, but "agreed that whether the lock was transferred to Crossroads or not was irrelevant due to the fact that Crossroads would be using its contract freight rates…." The arbitrators concluded that it was at this time that Crossroads or its agent should have confirmed any assumption with SDWG that there would be no price adjustment based upon the lock alone.

The Award

The arbitrators unanimously ruled in favor of the plaintiff, SDWG, in the amount of $7,236.06, plus $1,193.95 in interest to March 31, 2005, for a total award of $8,430.01, to be paid promptly by the defendant, Crossroads. The arbitrators declined to reimburse either party for arbitration filing expenses.

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

Roger Fray, *Chair*
Executive Vice President, Grain
West Central Cooperative
Ralston, Iowa

Rob Love
Corn Merchandiser
J.D. Heiskell Holdings LLC
Elkhorn, Neb.

Mike Vaupel
Merchandising Manager
ADM Grain Company
Overland Park, Kan.