



National Grain and Feed Association Arbitration Decision

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March 21, 2014

CASE NUMBER 2580

Plaintiff: Dodge City Cooperative Exchange d/b/a Pride Ag Resources
(Dodge City, Kans.)

Defendants: Bee Agriculture Co. (Beeville, Tex.), WB Johnston Grain Co. (Enid, Okla.) and
Archer Daniels Midland Co. (Decatur, Ill.)

STATEMENT OF THE CASE

This dispute involved a transaction that originated as a string trade between the plaintiff and five other parties. Three of those other parties remained in the case as defendants; the other two parties in the transaction were *washed out* and did not participate in these arbitration proceedings.

The original transaction was a broker's contract confirmation consummated on Nov. 5, 2010, for the purchase and sale of sorghum in the quantity of 420,000 bushels based upon a "UP 100 car" or "BN 110 car" shuttle train (contract number 69940). The contract provided for delivery "UP/BN Texas Gulf." Contract 69940 also provided "Buyer's option Center Gulf or Corpus Christi." The shipment period under the contract was April 2011.

The remaining pertinent terms of contract no. 69940, as established by the broker, were as follows:

WEIGHTS: DESTINATION OFF CLASS X

GRADES: FIRST OFFICIAL

TERMS: N.G.F.A. TRADE & ARBITRATION RULES TO APPLY. BUYER TO RECEIVE UNLOAD INCENTIVE IF TRAIN UNLOADS WITHIN TARIFF TIME SPECIFICATIONS ** SELLER TO NOTIFY BUYER 24 HOURS BEFORE TRAIN TO LOAD. BUYER TO GIVE SELLER BILLING DESTINATION OF TRAIN 24 HOURS BEFORE LOADING ** SELLER GTEES THAT ALL GRAIN DELVD UNDER THIS CONTRACT HAS BEEN GROWN IN THE CONTINENTAL U.S. THIS REPRESENTATION MAY BE RELIED UPON BY THE BUYER IN THE RESALE OF THESE COMMODITIES ** SELLER WARRANTS NO WATER WAS APPLIED IN THE HANDLING OF THE GRAIN IN THIS SHIPMENT THROUGH THE SELLER'S LOADING FACILITY FOR ANY PURPOSE EXCEPT WHEN USED AS A CARRIER FOR RESIDUAL INSECTICIDES AT MANUFACTURES RECOMMENDED LEVEL. THIS REPRESENTATION MAY BE RELIED UPON BY BUYER IN THE RESALE OF THESE COMMODITES **

The plaintiff, Dodge City Cooperative Exchange d/b/a Pride Ag Resources ("Pride Ag"), was the original seller under contract 69940. The defendant, Bee Agricultural Co. ("Bee Ag"), was the original buyer under the contract. The defendants, W.B. Johnston Grain Co. ("WBJ") and Archer Daniels Midland Co. ("ADM") were the subsequent buyers in the string. The balance of the string went as follows: Bee Ag as seller; WBJ as buyer; WBJ as seller; ADM as buyer and then to final destination.

Contract number 69940 was used in the trade between Pride Ag and Bee Ag, and again in the trade between Bee Ag and WBJ. Neither Pride Ag, Bee Ag or WBJ provided confirmations of their own; instead, they relied upon the broker's contract confirmation. However, the transaction between WBJ and ADM was governed by a separate purchase contract confirmation.

The central issue in this arbitration case concerned the quality of the sorghum at the time of arrival at destination in Galveston, Texas, and the terms of the original contract between Pride Ag, Bee Ag and WBJ, as well as the terms of the contract between WBJ and the final buyer (ADM).

ADM made the final purchase in this string in April 2011 for the delivery of the 400,000 bushels of sorghum to the Texas Gulf in the “seller’s equipment.” The ADM purchase contract confirmation (contract number 717945) provided for “destination weights” and “first official grades.” Under contract 717945, shipment was to occur between April 13 and April 30, 2011. The ADM purchase contract also included an extensive set of “Standard Terms and Conditions” that the arbitrators determined were relevant to this case. WBJ received and signed confirmation contract number 717945. WBJ neither provided its own contract confirmation nor disputed the terms of the ADM purchase contract.

The train (108 cars) originated out of Pride Ag at Ensign, Kansas. The origin official grades showed 106 cars grading “U.S. NO. 1” sorghum and two cars grading “U.S. NO. 2” sorghum. The actual shipment of the train occurred on April 17, 2011. The train was billed by ADM to its facility in Galveston, Texas.

The train arrived in Galveston on April 19 at 11 p.m. ADM began unloading the rail cars immediately upon arrival. The arbitrators considered it important to note that ADM also was loading a vessel at this time and had USDA Federal Grain Inspection Service (FGIS) inspectors on site to perform official inspection and weighing. As soon as ADM began to unload the cars, it said it encountered sour grain. According to ADM, testing conducted both in-house by ADM and through an outside laboratory – and confirmed by FGIS – determined that the sorghum was sample grade due to its odor. ADM unloaded 40 rail cars, none of which were officially sampled prior to unload.

On the morning of April 20, an ADM merchandiser notified WBJ via e-mail that the rail cars were grading sample grade due to sour odor. In the e-mail, ADM’s merchandiser informed WBJ about the 40 unloaded cars. His email stated as follows:

We have stopped unloading cars and will get probed Fed grades on remaining cars. If they come back sample grade we will have to reject the train. WB Johnston will be responsible for the unload incentive, demurrage, and other cost incurred if train does not make grade.

This e-mail was sent at 8:06 am on April 20.

WBJ then passed this e-mail up the string to the other parties. At 12:55 p.m. on April 20, ADM sent another e-mail to WBJ, which indicated that ADM would be rejecting the remaining 68 rail cars (in addition to the 40 cars already unloaded from the 108-car train) based upon the official results of 36 cars that the graded sorghum was sample grade due to sour odor. Various e-mails then were exchanged and passed up and down the string among the parties. ADM ultimately rejected the balance of the train and returned the rail cars to the handling railroad. Demurrage charges now were being incurred on the rejected cars, as well as the unloaded cars.

The parties could not come to an agreement concerning ADM’s right to reject the rail cars. Nor would any of the other parties in the string assume the responsibility of directly negotiating with ADM to resolve the issue. Eventually, on April 25, 2011, assuming to act on behalf of the other parties in the string trade, Pride Ag agreed with ADM to handle the rejected loaded cars based upon the following terms for delivery to Hereford, Texas: 7-cent per-bushel market discount, 10-cent per-bushel sour discount and \$153,340 in ancillary discounts associated with boat costs.

The Parties' Arguments

Pride Ag contended that its contract stipulated destination weights and first official grades, and it complied by providing origin official grades. Pride Ag claimed that no party had the right to reject the rail car loads at destination because the broker confirmation did not indicate that condition was guaranteed upon arrival. Pride Ag also claimed its sale contract was solely with Bee Ag and that ADM's dispute was with WBJ. Pride Ag stated that it only negotiated with ADM on the other parties' behalf to mitigate monetary damages and to locate a destination for the rail cars that were rejected and being held by the BNSF Railroad.

In its arbitration claim, Pride Ag requested final payment and the return of all discounts, charges and adjustments, plus interest. Pride Ag also indicated during oral arguments at the hearing in this case that it intend to file an arbitration action to dispute the ADM charges, even though it had negotiated the discounts and charges on the behalf of others in the string trade.

Bee Ag and WBJ in their filings first asked to be dismissed from the arbitration proceedings on the grounds that they were solely part of the string trade and they would simply be passing any settlement proceeds through the chain. Both WBJ and Bee Ag agreed with Pride Ag that origin official grades were provided and that those should be what governed this transaction.

ADM's position was very different. ADM contended that the sorghum had not met the contract specifications based upon the inspections at destination, conducted through both in-house and outside laboratory testing, as well as by FGIS. ADM argued several points in support of its position. ADM's four main arguments were as follows:

- 1) NGFA Grain Trade Rule 28 allowed the parties to extend or adjust contract terms in the event of a nonconformity by a buyer or seller. ADM stated that it was bound by the remedies under Rule 28, which provide that after the buyer receives notice or determines that the seller will not be able to complete a contract within contract specifications, the seller has three options: 1) agree with the seller upon an extension of the contract; 2) buy in for the account of the seller; or 3) cancel the defaulted portion of the contract at fair market value. ADM asserted that in this case, the sorghum delivered was not merchantable grain. ADM contended that it acted in accordance with Rule 28, upon learning that the sorghum shipped did not meet contract specifications and that the shipper, Pride Ag, finally had agreed to the discounts and charges associated with Rule 28. The arbitrators noted that ADM's merchant did not cite Rule 28 or offer it as a remedy during the email exchanges between the parties. Rather, Rule 28 was cited only in the answer and counterclaim filed by ADM in these proceedings.
- 2) WBJ, Bee Ag and Pride Ag agreed to and accepted ADM's proposal to accept the damaged grain at the Hereford, Texas facility. ADM claimed that renegeing on the agreed-upon discounts and charges ran afoul of the rules that ADM adheres to and would unfairly prejudice ADM.
- 3) The terms of the agreement between ADM and WBJ controlled the outcome of any grade issue between those parties. ADM's contract with WBJ contained "Standard Terms and Conditions," which provided as follows:
 - (5) It is understood that title to the Commodities and the risk of loss of the Commodities pass to Buyer upon acceptance of the Buyer's facility.
 - (10) Buyer reserves the right to reject or apply discounts to the contract price, if the quality of the Commodities is less than required under the contract, or to load the same without the first notifying Seller.

ADM argued that it did not accept any of the rail cars at issue at final destination. ADM further argued that it had under the contract reserved the right to reject the sorghum or apply discounts given that the quality of the sorghum was less than required under the contract.

- 4) Grain delivered must be merchantable sorghum fit for sale to domestic and foreign buyers. In this context, again, ADM asserted that the sorghum delivered was not merchantable because it graded sample grade due to a sour odor.

ADM, in its answer and counterclaim, further requested an additional \$175,000 to dispose of the 160,000 bushels of sorghum from the 40 rail cars that it unloaded.

THE DECISION

The arbitrators noted that the number of parties in this dispute added to the complexity and detail involved in the case. The arbitrators also referenced the broker confirmation used as the controlling contractual agreement between Pride Ag, Bee Ag and WBJ, as well as the purchase contract between ADM and WBJ, which WBJ signed and did not dispute. The arbitrators closely reviewed the terms and implications of each of the contracts, confirmations and other materials presented in the case. Both the ADM contract confirmation and the broker confirmation provided that the NGFA Trade Rules applied, as well as the right to arbitrate using the NGFA arbitration system.

Consequently, the arbitrators referred to the NGFA Grain Trade Rule that applied most significantly to this dispute: NGFA Grain Trade Rule 13 [Condition Guaranteed on Arrival of Rail Cars], which states:

(A) If grain is sold with condition guaranteed on arrival at destination, and the destination is provided in the billing instructions, the Buyer shall ascertain the condition and official grade of the grain. The Buyer shall report to the shipper by a telephone call placed not later than 12 noon of the next business day after arrival of the car of grain at the destination.

If the Buyer fails to ascertain and report the condition and official grade as provided above, he shall waive all rights under the guarantee for that portion of the contract. Diversion of the shipment by the Buyer to a point beyond the original destination shall constitute an acceptance of the grain and a waiver of the guarantee.

The arbitrators concluded that clearly in this case, ADM failed to comply on all counts with respect to Rule 13. ADM stated that its contract, in Section 10 of the “Standard Terms and Conditions,” provided ADM the right to execute this provision.

ADM began to unload the train immediately upon arrival at Galveston on April 19, at 11 p.m. (as confirmed in ADM’s own filings). Forty rail cars were unloaded at the time, but these were not officially sampled, as required by Rule 13.

The arbitrators further referred to paragraph (C) of NGFA Grain Trade Rule 10 [Inspection], which states: “The term ‘official inspection’ without specifying class shall mean Class A Official Inspection.” The arbitrators concluded that this rule requires inspection and sampling by an official inspector. They determined that ADM had the ability to do this, particularly given that FGIS was on site for a vessel loading according to statements by ADM during the oral hearing conducted under these arbitration proceedings.

The arbitrators determined that ADM failed to follow Rule 13 by failing to contact WBJ as required and by failing to obtain and report official results of an inspection by 12 noon the next business day. The train arrived on Tuesday, April 19. ADM officially rejected the sorghum via e-mail on the 20th, at 12:55 pm. The arbitrators noted that this was, again, plainly not within the time limit required under Rule 13.

The arbitrators also considered ADM's contention that it did not accept title to the grain. However, NGFA Grain Trade Rule 6 [Passing of Title as Well as Risk of Loss and/or Damage] states in pertinent part:

Title, as well as risk of loss and/or damage, passes to the Buyer as follows: ... (B) On delivered contracts: (1) By rail, when the conveyance is constructively placed or otherwise made available at the Buyer's original destination.

The arbitrators concluded that under this rule, title clearly had passed given that ADM started unloading and did ultimately unload 40 cars upon arrival of the train.

The arbitrators determined that overturning origin official grades is a serious matter that requires the buyer to follow and adhere to the NGFA Trade Rules and use official means prescribed by the NGFA Trade Rules to accomplish that end result. In this case, the arbitrators concluded, ADM cited many rules but failed to follow the key rules that would allow it to overturn the official origin grades obtained by the shipper.

THE AWARD

The arbitrators noted that no official destination weights were provided for the final settlement of this 108-car train. Therefore, the arbitrators referred to the origin weights provided for final settlement affecting all parties.

The arbitrators ruled as follows:

- Bee Ag is to immediately return to Pride Ag the \$210,912 (the charges based upon the 7-cent per bushel market discount, 10-cent per bushel sour discount and ancillary discounts for boat costs).
- ADM is to final settle to WBJ the remaining 10 percent and overfill based on the origin weights provided in this arbitration case. Interest will incur on the sorghum final only for the remaining 10 percent and overfill.
- WBJ then is to final settle the 10 percent and overfill to Bee Ag. Bee Ag, in turn, will final settle to Pride Ag based on the same instructions.
- ADM also is to reimburse \$283,807.52 of additional freight charges and the BNSF demurrage charges of \$25,500 directly to Pride Ag. No interest will be assessed on this amount.

Interest also will apply to the case based on a rate of 3.25 percent from the date of unload of April 20, 2011 to the date of this decision.

Decided: May 6, 2013

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

Bruce Sutherland, *Chair*
Vice President
Michigan Agricultural
Commodities
Lansing, MI

Randy Fardelmann
Senior Corn Merchandiser
Perdue Grain & Oilseed LLC
Salisbury, MD

Cameron Gregg
Vice President
Western Trade Group,
Interstate Commodities Inc.
Omaha, NE

March 21, 2014

ARBITRATION APPEAL CASE NUMBER 2580

Appellant/Defendant: Archer Daniels Midland Co. (Decatur, Ill.)

Appellee/Plaintiff: Dodge City Cooperative Exchange d/b/a Pride Ag Resources
(Dodge City, Kans.)

Other Defendants: Bee Agriculture Co. (Beeville, Tex.)
WB Johnston Grain Co. (Enid, Okla.)

DECISION OF THE APPEALS COMMITTEE

This case was originally decided in favor of the plaintiff, Dodge City Cooperative Exchange d/b/a Pride Ag Resources (Pride Ag), against the string of defendants, which included the ultimate receiver of the grain involved in the dispute – Archer Daniels Midland Co. (ADM). Subsequently, ADM appealed the original arbitration committee’s decision.

The undersigned arbitration appeals committee then, individually and collectively, reviewed all the arguments, supporting record, and exhibits pertaining to this case along with the findings and conclusions of the original arbitration committee. The appeals committee also reviewed the briefs filed in conjunction with this appeal.

The central issue presented in both the original proceeding and this appeal was whether the *first official grades* provided to the string should govern the grain quality requirements of the trade(s) in the string, in light of the condition of the grain evidenced at destination.

The arbitration appeals committee determined that the evidence presented by the parties demonstrated that all contracts specified “Grades: First Official.” None of the contracts contained any language referring to or resembling such terms as “Condition Guaranteed on Arrival” nor did any “merchantable” clause survive the Official Grades requirement in the contracts. The arbitration appeals committee concluded that when Pride Ag complied with Official Grades, that condition of the trade was met.

Thus, neither contract terms nor the NGFA Trade Rules permitted ADM to reject the carloads of milo at issue in this dispute.

ADM also appealed on the basis that the parties had negotiated a resolution at the time the cars were “rejected” at destination. However, the evidence in the record of the case demonstrated that the claimed “negotiated resolution” constituted an effort to mitigate damages, not a valid settlement agreement.

Therefore, the arbitration appeals committee affirmed the award of the original arbitration committee.

Decided: March 10, 2014

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

Roger Krueger, *Chair*
Senior Vice President, Grain
South Dakota Wheat Growers
Association
Aberdeen, SD

James Banachowski
VP, Eastern Region,
Grain and Ethanol Group
The Andersons Inc.
Maumee, OH

Steve Campbell
Executive Vice President – Head
of North America, Grains
Louis Dreyfus Commodities
Kansas City, MO

Jeff Edwards
Vice President
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Dean O'Harris
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Parrish & Heimbecker Inc.
Buckeye, AZ