



National Grain and Feed Association

# Arbitration Decision

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## Arbitration Case Number 2604

**Plaintiff:** Bunge Oils Inc., St. Louis, Mo.

**Defendant:** Norfolk Southern Corp., Norfolk, Va.

### Statement of the Case

This dispute involved a railcar loaded by Bunge Oils Inc. ("Bunge") with food-grade vegetable oil shortening at Chattanooga, Tenn. for shipment to Gentry, Ark. by the Norfolk Southern Corp. ("NS").

Bunge claimed that on Feb. 5, 2011, its employee loaded the railcar at Bunge's facility in Chattanooga and that the railcar was sealed with a dome cover, gasket, bolts and cable seals. Bunge stated that on Feb. 7, it released the railcar (number ULTX 665386) to the NS pursuant to bill of lading number 1029668. According to Bunge, it was informed by the NS on Feb. 10, that the railcar was leaking product at its rail yard at Birmingham, Ala. The railcar was then examined by another Bunge employee, who confirmed that it was leaking product and noted that bolts were loosened, the dome gasket was displaced, one seal was cut and another seal was missing.

Bunge subsequently determined that because the product had been potentially exposed to contaminants, it was no longer usable as a food ingredient. Bunge stated it was able to mitigate some of its losses by salvaging and selling the product to an outside buyer as boiler fuel. Bunge claimed it incurred costs for: cleaning the railcar, additional transportation charges, and lost profits from the sale of the product. On May 15, 2011, Bunge submitted a claim to the NS for damages totaling \$74,289.60. Bunge argued that its claim was based upon the provisions

of 49 U.S.C.A. §11706, commonly known as the Carmack Amendment, which generally stands for the proposition that carriers are liable for loss to the property they transport.

The NS denied Bunge's claim on August 5, 2011. The NS argued that the parties had entered into a contract, which governed the transportation of the railcar at issue in this case, and that this contract provided that all shipments were governed by the NS's Conditions of Carriage. The NS referred in its arguments to Rule 520 of its Conditions of Carriage, which stated: "*In determining the extent, if any, of NS's responsibility as a common carrier for loss, damage or liability to a shipment, the absence of or damage to a seal without physical evidence of contamination, loss or theft does not establish injury, loss or damage to a shipment.*"

In their arguments, the parties disputed various contentions and underlying facts, including at what point the leakage was visible. The parties also disputed the content of conversations alleged to have taken place between their representatives, including concessions that the NS alleged were made by a Bunge representative. Specifically, the NS claimed that Bunge's representative indicated after inspecting the car that the bolts used to fasten the dome cover were loose and had not been fastened properly by Bunge after loading the car.

### The Decision

Consistent with their mandate, the arbitrators reviewed and weighed the facts specific to this case in the form forwarded as evidence by each party. After careful and thorough review and deliberation, the arbitrators ruled unanimously in favor of the NS.

Central to this conclusion was the arbitrators' determination that Bunge failed to fully meet its burden of proof on two issues: (a) that the railcar in question was indeed properly secured, sealed and fully ready for safe transport at the time it

was picked up by the carrier; and (b) that the goods contained in the railcar were tendered in good condition.

There are several key factual issues that the arbitrators decided made it difficult to determine with sufficient certainty that the conditions, which led to the product exiting the railcar, occurred while the car was in the control of the NS.

(a) *The condition and location of the manway gasket.* It was reported in Bunge's Verified First Argument that the Bunge employee (who climbed on top of the railcar at the destination to investigate the cause of the leaking product) found, among other things, that: "the dome gasket was lying off to the side of the dome." The arbitrators determined that there was no evidence that an unauthorized person removed and damaged the gasket. The arbitrators believed it more likely the gasket was placed in that manner by the loader at origin.

(b) *Timeline of events and accessibility of railcar at origin.* Facts indicate that the railcar was loaded on Saturday, Feb 5, 2011, and billed out to the NS on Monday Feb 7, 2011. Should someone have attempted an "unauthorized entry into the car for a sinister purpose or a random act of violence," as stated in Bunge's Verified First Argument, the arbitrators determined this very well could have occurred while the car was still at Bunge's origin facility between the time it was loaded and when it was lifted (picked up) by the NS crew. There is no indication that the condition or position of the manway "dome" cover, gasket, securing bolts, and seals were verified by Bunge at the actual time the car was lifted. The arbitrators agreed that if unauthorized access had actually been the cause of the conditions leading to the release of product, that access could have as easily been executed at the loading facility as in an active rail yard or while the train was on route.

(c) The arbitrators noted that both Exhibits B and C of Bunge's First Argument are purported to have been signed by the same Bunge employee who loaded the railcar at origin. However, the arbitrators were not convinced that the signatures on these two documents were, in fact, from the same person. While the arbitrators did not profess to be experts in this area, based upon plain observation and comparison of the signatures on the two documents, the arbitrators determined that concerns regarding the validity of the documents were established by the signature discrepancies as presented in the parties' arguments.

Two of the arbitrators questioned why Bunge's Exhibit C was not recorded under oath. They determined that the details contained in this written statement were central to the claim, but because this statement was not notarized (as were all other after-the-fact statements presented by Bunge), its evidentiary value was diminished as the certificate of the employee that sealed the car could not be confirmed. It must be noted that the arbitrators were not unanimous on this last particular point; rather, two of the three arbitrators were aligned in support of this position.

The arbitrators concluded that Bunge failed to prove that the actions that led to its alleged damages occurred while the railcar was in the NS's control. Concerning the parties' legal arguments, the arbitrators determined that even if the actions leading to the product leaking from the railcar happened while in control of the NS, Bunge's argument to the effect that the Carmack Amendment (and in particular the application of 21 U.S.C. Section 342(a)(4) under the Carmack Amendment that provides proof that the product was held under unsanitary conditions is adequate evidence of damage) governs the dispute – and not the signed contract between the parties that would require evidence of actual damage – was not persuasive to the arbitrators.

## The Award

Regardless of whether the product was "contaminated," the arbitrators agreed with Bunge that given current food safety requirements, the condition upon arrival of this railcar would lead a receiver to deem the product unfit for human consumption. However, in the absence of more definitive evidence, the arbitrators determined that they could not conclude that fault for the condition of the car at destination lies with the NS.

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

**William Krueger, Chair**  
CEO  
Lansing Trade Group LLC  
Overland Park, Kans.

**Michael G. Adams**  
General Manager, Marketing – Grain  
Canadian Pacific Railway  
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**Paul E. Hammes**  
Vice President, General Manager  
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