



# National Grain and Feed Association Arbitration Decision

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January 26, 2016

## CASE NUMBER 2713

**PLAINTIFF: SCOULAR CANADA LTD.  
CALGARY, ALBERTA, CANADA**

**DEFENDANT: NORAG RESOURCES, INC.  
PORT HOPE, ONTARIO, CANADA**

### STATEMENT OF THE CASE

This arbitration case developed between two firms that contracted via a broker in August 2013 for shipments of wheat by rail in the fall of 2013 for delivery to Thunder Bay, Ontario. The seller, NorAg Resources Inc. (NorAg), and the buyer, Scoular Canada Ltd. (Scoular), agreed on August 22, 2013, to the sale of 525,000 bushels of No. 2 Canadian Western Red Spring Wheat (13.5% Protein). According to the agreement between the parties (Scoular confirmation #PW1810483/NorAg confirmation #28021/broker's confirmation #BGB 445), the grain was to be shipped in three quantities of 175,000 bushels (or 50 railcars) during each of the months of October, November, and December 2013.

On October 10, 2013, both parties agreed to roll the October portion (50 cars) of the contract to November shipment due to the lack of rail car availability. From November 14 to November 28, 2013, the parties exchanged dialog and concern about acquiring rail cars for loading and shipment to meet the terms of the contract and fulfill the portion due in November. The parties discussed various alternatives, including cancellation of the November portion of the contract and the availability of other rail cars in the market, but none were agreed upon at that time.

On December 3, 2013, Scoular cancelled the October and November portions of the contract at +66 over the Minneapolis December 2013 futures contract. On December 5, 2013, both parties agreed to roll the December portion of the contract from the Minneapolis December futures to the March futures contract at a 15-cent carry. After the parties exchanged further communications concerning performance on the contract in late December 2013, Scoular cancelled the December portion of the contract on January 3, 2014, at +85 over the Minneapolis March 2014 futures contract.

Scoular claimed damages of \$248,500 (plus costs and interest) due to NorAg's default under the contract. Scoular acknowledged that an industry-wide difficulty in obtaining rail cars to ship grain at the time and place of the contract was a significant cause of NorAg's non-performance. Scoular argued, however, that responsibility for delivery of the wheat to Thunder Bay remained with NorAg under the parties' agreement. NorAg claimed that Scoular failed to provide the necessary routing information and terminal authorization in a timely enough fashion for NorAg to order cars for application on the contract. NorAg argued that it was consequently unable to execute upon the contract. NorAg also disputed Scoular's calculation of damages.

## THE DECISION

The arbitrators closely considered the arguments and facts presented by the parties in this case. The arbitrators also reviewed the terms and conditions in the contracts that governed the transactions between the parties. In their analysis and decision in this case, the arbitrators focused and relied heavily upon NorAg's ultimate failure to deliver on any portions of the contract. The arbitrators concluded that a lack of availability of rail cars does not relieve a party with the risk and responsibility of securing them under a contract. The arbitrators determined that neither the contract nor the other materials presented in this case supported NorAg's argument that Scoular failed to provide information or otherwise prevented NorAg from executing the contract.

The arbitrators determined that NGFA Grain Trade Rule 28(A) [Failure to Perform – Seller's Non-Performance] applied in this case. Rule 28(A) states as follows:

If the Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone confirmed by subsequent written communication. The Buyer shall then, at once elect either to: (1) agree with the Seller upon an extension of the contract; or (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

NorAg consequently had the duty to provide notice that it would not be able to complete its contract obligations and Scoular took the appropriate actions to cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

The arbitrators have reviewed the information provided by NorAg and Scoular relying upon the NGFA Grain Trade Rules to guide the processes of their discussions and decision. The arbitrators unanimously determined that Scoular was entitled to damages in this case.

With respect to Scoular's calculation of damages, the arbitrators further decided that Scoular demonstrated sufficient due diligence to demonstrate what its market costs would be resulting from NorAg's non-performance and Scoular's cancellation of the contract under NGFA Grain Trade Rule 28. Scoular presented these values to NorAg for a total of \$126,000 in December 2013, and a total of \$122,500 in January 2014.

## THE AWARD

The arbitrators, therefore, ruled that the invoiced amounts totaling \$248,500 be paid by Nor Ag Resources, Inc. to Scoular Canada Ltd. The arbitrators declined Scoular's request for interest and costs resulting from this arbitration proceeding.

Decided: November 18, 2015

**SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES AND SIGNATURES APPEAR BELOW:**

**Lloyd Heimbecker**, *Chair*  
Western Regional Manager  
Parrish & Heimbecker, Limited  
Lethbridge, AB  
Canada

**Travis Antonsen**  
Producer Marketing Manager  
South Dakota Wheat Growers  
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**Ryan McKnight**  
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