



May 1, 2019

## CASE NUMBER 2815

**PLAINTIFF: ATTEBURY GRAIN, LLC**  
**AMARILLO, TX**

**DEFENDANT: US COMMODITIES, LLC**  
**MINNEAPOLIS, MN**

### STATEMENT OF THE CASE

On October 1, 2014, Attebury Grain, LLC (“Attebury”) and US Commodities, LLC (“USC”) entered into a multiple service agreement, which provided for various services by Attebury including the transloading of cottonseed from trucks to warehouse storage, and then to gondola railcars and outbound trucks. The multiple service agreement was to commence on October 1, 2014, and terminate on September 30, 2015. The multiple service agreement was subsequently renewed on May 1, 2015, to commence on October 1, 2015, and terminate on September 30, 2016.

The contract details the functions of the agreement and specifically provides for NGFA Arbitration in the event of a dispute. The contract also defines railroad demurrage terms as follows: *“The Supplier [Attebury] will be responsible and pay for all demurrage caused by the Supplier’s inability to load the Product in a timely manner. All other demurrage charges are for the Customer’s [USC’s] account.”*

The dispute between Attebury and USC focuses upon demurrage charges that accumulated from railcars sitting on track at Attebury’s facility and on track owned by the BNSF Railway Company.

Upon renewal of the contract between the two parties, USC began sending gondola railcars to Attebury, which in turn loaded the cars with cottonseed and shipped them to USC destinations. USC contacted Attebury in September of 2015, requesting that the cottonseed be loaded instead onto boxcars. Attebury agreed to a “trial loading” of five boxcars at a higher per-ton premium rate than for the gondola cars. Attebury also informed USC that it would need further approval to send additional railcars. USC ordered the five boxcars for the trial. USC subsequently ordered additional boxcars in December after notifying Attebury by email.

In January 2016, a heavy snow storm hit the Lubbock, TX area and created havoc for the Attebury transloading facility. This havoc resulted in a backlog of railcars on both Attebury and BNSF track. Attebury requested that USC stop sending boxcars, and Attebury continued to load the boxcars that USC had already ordered to be sent to Attebury. According to its demurrage calculations, Attebury continued to unload cars that had stockpiled through February 8, 2016. Attebury invoiced USC for the demurrage charges on November 15, 2016. On June 6, 2017, Attebury officially filed the paperwork with NGFA for its arbitration claim against USC regarding this dispute over demurrage and interest associated with transloading the railcars in Lubbock, TX, for the amount of \$192,000 plus interest. Attebury claims that USC failed to provide appropriate rail conveyance (gondolas) for load out pursuant to the contract by sending non-conforming cars (boxcars) to Attebury without prior approval.

Attebury claims that the consequential demurrage costs were caused by the non-conforming cars and late payment should be for the account of USC. Attebury's claim for damages totaling \$192,000 consists of two primary components: \$52,725 for private car storage on Attebury track and \$139,275 in private car storage on BNSF track.

USC responds to Attebury's claims, stating: 1) Attebury's complaint was not filed in a timely fashion pursuant to NGFA Arbitration Rule 1(E); 2) Attebury waived its claims by failing to give timely notice of the alleged breach; 3) pursuant to the contract, the demurrage was for the account of Attebury because of its failure to load the conveyance in a timely fashion; and 4) Attebury agreed to service the boxcars at a premium over servicing of the gondola cars.

## THE DECISION

The arbitrators determined that given the filing dates associated with this arbitration case, their first item of business was to review the terms of NGFA Arbitration Rule 1(E), which states: "*The original arbitration complaint must be filed with the NGFA Secretary within 12 months after a claim arises, or within 12 months after the expiration date for performance of the contract(s) involved, whichever occurs last.*" The arbitrators concluded that this rule would determine their analysis and ruling in this arbitration case.

The arbitrators unanimously decided that Attebury failed to file its arbitration complaint with the NGFA Secretary in a timely manner pursuant to NGFA Arbitration Rule 1(E). The termination date of the multiple service agreement between the parties was September 30, 2016. However, the agreement provided for multiple services to be performed, invoiced and paid for at various times during the dealings between the parties, triggering different end dates for arbitration filing purposes. The agreement also contained a requirement that any party complaining of a breach by the other party was required to send written notice within five days of the breach.

On February 8, 2016, the last boxcar, which Attebury claims is at issue in this dispute, left its Lubbock facility. Under the contract, Attebury had until February 13, 2016 (5 days) to inform USC that USC was not fulfilling its obligations under the contract and Attebury considered USC to be in default. The arbitrators concluded that Attebury had 12 months from this date to file an arbitration complaint and the filing deadline was consequently on February 13, 2017. Therefore, Attebury's complaint, which was not filed until June 2017, was untimely.

It was consequently the unanimous decision of the arbitrators that the case between Attebury Grain, LLC and US Commodities, LLC be dismissed.

## THE AWARD

Accordingly, there will be no award issued to either party in this arbitration.

Decided: April 1, 2019

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

**Ed Ide, Chair**  
General Manager – MidSouth Region  
CGB Enterprises  
St. Louis, MO

**Terry Bline**  
Manager  
Roanoke Farmers Association  
Roanoke, IL

**Andrew Swerlein**  
President and CEO  
Luckey Farmers Inc.  
Woodville, OH