

March 5, 1958

ARBITRATION CASE 1494

COMPLAINANT: INTERSTATE GRAIN CORPORATION - Fort Worth, Texas

RESPONDENT: BALFOUR, GUTHRIE & CO., LTD. - Los Angeles, California

This case concerns the delivery of a car of Yellow Milo by the Respondent to Gordon Suess Grain Company, Los Angeles, for the account of the Complainant, subsequent to which Gordon Suess Grain Company became insolvent and were unable to pay the Complainant's invoice. The Complainant demanded restitution from the Respondent on the grounds that the Respondent did not make delivery by means of an Order/Notify Bill of Lading as stipulated in the Complainant's shipping instructions. The Respondent agrees that because of market decline the Complainant, through his customary brokers in Los Angeles, was pressing for delivery and, therefore, the Respondent delivered to Suess Grain Company the first car he had available in Los Angeles. The Complainant denies this allegation.

The original Arbitration Committee gave a majority decision in favor of the Complainant, with one arbitrator filing a minority opinion in favor of the Respondent. The majority decision was appealed by the Respondent.

The broker's confirmation stipulated: "Draft and all papers to Interstate Grain Corp., Fort Worth, through the Fort Worth National Bank."

The Complainant's confirmation included shipping instructions: "Ship one car to Los Angeles via Deming SP - Order Notify B/L account Interstate Grain Corporation - Notify Suess Grain Company."

The Respondent (seller) invoiced Complainant on March 4, 1957, for car LN 17301 shipped from Plainview, Texas, on February 21, 1957, the last day of the contractual shipping period. Attached to the invoice was: (1) a Plainview Grain Exchange weight certificate dated February 21, 1957; (2) a copy of Los Angeles Grain Exchange grade certificate dated March 1, 1957; and (3) a Straight Bill of Lading showing consignment of the car to the Respondent. The invoice carried the following notation: "Car LN 17301 - February 21st Plainview, Texas, turned to Gordon Suess, Los Angeles, Calif., 3-1-57, via SP Dely. at Los Angeles, Calif., Freight Collect."

The Complainant knew as early as March 7, when it received the Respondent's invoice of March 4, that car LN 17301 had been turned to Gordon Suess, Los Angeles, on March 1 without the Order/Notify Bill of Lading required in the shipping instructions. Despite this

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knowledge, Complainant accepted delivery and on the same day, March 7, invoiced Gordon Sues Grain Company without an Order/Notify Bill of Lading, but noting "Lading Mailed Direct to You". Four days later, March 11, Complainant paid Respondent's invoice in full.

The first error of commission was made by the Respondent in failing to supply an Order/Notify Bill of Lading. In absence of proof that there was an agreement to make delivery to Sues Grain Company without an Order/Notify Bill of Lading, the Complainant would have been justified in refusing payment of Respondent's invoice. It should be noted that there was time between receipt by Complainant of the Respondent's invoice and the payment by the Complainant to the Respondent to ascertain that Sues would not honor the Complainant's invoice, but Complainant did not protest to the Respondent for another twenty-two days, indicating acceptance of delivery and completion of the contract and furthermore precluded the Respondent protecting itself if the delivery was not acceptable.

It is the decision of this Committee that payment of the Respondent's invoice with non-negotiable Bill of Lading attached, and bearing notation that the car had been delivered to Sues, plus the fact of complete silence on the part of the Complainant from March 7 to April 3, constitutes acceptance by the Complainant. It also constitutes acceptance by the Complainant of any credit risk involved. The Complainant, and only the Complainant, was in position to press for payment from Sues. Apparently, the Complainant made no effort to do so, being satisfied to have Sues owe them the money.

The National Committee on Arbitration Appeals is unanimous in its decision in favor of the Respondent and denying to the Complainant any right of recovery from the Respondent.

H. J. Ford Chairman

Fred J. Faber Member

B. Holmgren Member

R. J. [Signature] Member

R. J. [Signature] Member