



National Grain and Feed Association

Arbitration Decision

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922

Phone: (202) 289-0873, FAX: (202) 289-5388, E-Mail: ngfa@ngfa.org, Web Site: <http://www.ngfa.org>

December 22, 2004

ARBITRATION CASE NUMBER 2069

Plaintiff: R.F. Cunningham & Co. Inc., Smithtown, N.Y.

Defendant: CSX Transportation Co., Jacksonville, Fla.

STATEMENT OF THE CASE

R.F. Cunningham & Co. Inc. (Cunningham) asserted that CSX Transportation Co. (CSXT) misappropriated two of Cunningham's private rail cars for an extended period of time, and that CSXT should provide compensation to Cunningham for the use of these assets.

CSXT responded that Cunningham failed to prove that Cunningham obtained the appropriate approval (OT-5 approval) from CSXT to run these private cars on the CSXT. CSXT further responded that Cunningham failed to provide documentation that it was the owner or lessee of these cars, and failed to provide documentation establishing the economic value of these assets. CSXT also filed a counterclaim asserting that Cunningham deprived the railroad of supplying its own cars on subsequent movements, and as such should pay the higher railroad-supplied car rate for these movements.

Second, the arbitrators determined that CSXT was not entitled to its counterclaim for higher, railroad-supplied car rates for subsequent movements of these cars. With respect to the subsequent movements, CSXT accepted the billing of these cars with or without knowledge that OT-5 approval had not been obtained on these cars. CSXT could have refused the cars and supplied railroad cars, or it could have required OT-5 approval. In addition, standard industry practice is that the rate for private-car movements should reflect the car costs the railroad would have avoided by using the shipper's cars.

THE AWARD

Thus, the arbitrators denied both Cunningham's claim and CSXT's counterclaim in this case.

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

Diane K. Duren, *Chairperson*
Vice President/General Manager Agricultural Products
Union Pacific Railroad Co.
Omaha, Neb.

Daniel Mack
Vice President Transportation
Cenex Harvest States
St. Paul, Minn.

Larry P. Schwendiman
Senior Merchandiser
Foster Farms
Fresno, Calif.

THE DECISION

The arbitrators determined that industry practice supports the position that if a railroad uses another party's assets for its own economic benefit, which CSXT did in this case, there should be compensation to the owner for the use of those assets. However, the owner of those assets must be able to prove both a right to compensation and the economic losses incurred because of the other party's conversion of its property. The arbitrators determined that Cunningham had the opportunity to provide both, yet it failed to do so. Instead, Cunningham opted to request an arbitrary compensation level based on past history and provided no verification of its economic loss or its rights to such compensation as a lessee of the cars. The arbitrators concluded that despite their opinion that CSXT should pay for the value of the cars' use when misappropriated, without verification of Cunningham's ownership status and economic loss, they had no alternative but to deny Cunningham's claim.