



National Grain and Feed Association

Arbitration Decision

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April 4, 2005

Arbitration Case Number 2090

Plaintiff: J.D. Heiskell Co., Elkhorn, Neb.

Defendant: ConAgra Trade Group Inc., Omaha, Neb.

Statement of the Case

This case involved the sale of two, 75-car Union Pacific Railroad (“UP”) unit trains for the last half of February 2004 from J.D. Heiskell Co. (“Heiskell”) to ConAgra Trade Group Inc. (“ConAgra”).

The trade was executed through Trade West Brokerage Co. (“Trade West”) as the broker. All the parties’ contracts provided that the grain was “sold track,” and that “FOB Group 3” and “UP origins” applied as conditions under the contracts.

The last day in February 2004 was Sunday, Feb. 29. The trains applied by Heiskell on Monday, March 1, consequently were within the contract period pursuant to NGFA Grain Trade Rule 18.¹ Consequently, the applicability of these trains to the contracts was not at issue in this case.

However, Heiskell alleged that ConAgra’s payment for the trains was deficient in the amount of \$3,382. After Heiskell

inquired about the reason for the deficiency, Heiskell stated that ConAgra informed it that the short payment was attributable to an increase of 1 percent (from 2½ percent to 3½ percent) in fuel surcharges imposed by the UP, which became effective March 1, 2004.

All three participants in this trade – Heiskell, ConAgra and Trade West – confirmed the transactions in writing. Both Heiskell’s and Trade West’s confirmations were silent as to responsibility for freight increases. ConAgra’s confirmations stated as follows:

“This Contract is made on the basis of freight rates in effect on the date hereof. Any increase in freight rates taking effect before the full performance of this Contract shall be for the account of the Seller unless otherwise adjusted and agreed upon between the parties at the time of the affected shipment.”

The Decision

The arbitrators determined that there were other differences in the terms of the contract confirmations between the parties. The arbitrators concluded that applicable to this case was NGFA Grain Trade Rule 3(A), which states:

“Both the Buyer and Seller shall send a written confirmation, each to the other, not later than the close of the business day following the date of trade, or an agreed amendment, setting forth the specifications as agreed upon in the original articles of trade, or an agreed

amendment. Upon receipt of said confirmation, the parties shall carefully check all specifications therein and, upon finding any material differences, shall immediately notify the other party to the contract, by telephone and confirm by written communication. In the case of minor differences, notification may be by either telephone or written communication.”

The arbitrators determined that neither Heiskell nor ConAgra presented any evidence that either had notified the

¹ NGFA Grain Trade Rule 18 provides: “Unless otherwise agreed, when the last day of the contract falls on Saturday, Sunday or legal holiday, shipment may be made on the next business day.”

other of any differences after receiving contract confirmations from each other, as required by NGFA Grain Trade Rule 3(A).

The arbitrators further referred to NGFA Grain Trade Rule 3(C), which states:

“When a trade is made through a broker, it shall be the duty of the broker to send a written confirmation not later than the close of the business day following the date of trade to each of the principals setting forth the specifications of the trade. Upon receipt of said confirmation, the parties shall carefully check all specifications therein, and upon finding any differences, shall immediately give notice to the other party to the contract and to the broker. If either party fails to give such notice, the terms and specifications contained in the confirmation issued by the broker shall govern the contract.”

Consequently, the arbitrators concluded that the terms of the confirmations of Trade West – the broker in this case – applied to the issues in dispute. Trade West’s confirmations stated that the sale was made, *“Track, UP origin, Group 3.”* Trade West’s confirmations also provided that, *“Buyer to pay freight.”*

The arbitrators then referred to NGFA Grain Trade Rule 6(A), which provides that in the case of a f.o.b.-origin or f.o.b.-basing point contract, title and risk of loss or damage passes to the buyer at the time and place of shipment. The arbitrators determined that Heiskell performed within the terms of the trade as defined by Trade West’s confirmations; that freight was to be paid by the buyer (ConAgra) from the point of loading; that fuel surcharges are considered part of freight costs; and that, therefore, ConAgra should have paid Heiskell in full.

The Award

The arbitrators awarded the amount of the payment deficiency – \$3,382 – to Heiskell, to be paid by ConAgra.

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

Neill C. McKinstry, *Chair*

Manager, Market Development and Transportation
The Andersons Inc.
Maumee, Ohio

John J. Cassidy

Vice President, Grain Operations
Perdue Farms Inc.
Salisbury, Md.

Donald Ludwig

Manager/Partner
Elkhart Grain Co.
Elkhart, Ill.