National Grain and Feed Association
Arbitration Decision
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August 3, 2005

Arbitration Case Number 2097

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

Defendants: **The Andersons Inc., Maumee, Ohio;**
Perdue Farms Inc., Salisbury, Md.

Statement of the Case

This case involved a complaint filed by R.F. Cunningham and Co., Inc. (Cunningham) against The Andersons Inc. (Andersons) and Perdue Farms Inc. (Perdue) over a disputed demurrage charge of $7,080 resulting from delay in loading 59 private covered hopper rail cars furnished by Perdue.

On April 15, 2003, Cunningham bought two, 65-car unit trains of corn from Andersons f.o.b. Columbus, Ohio. Under the contract (Cunningham contract number P-52539), shipment was to occur for one, 65-car unit train during each half of October 2003. Representatives of both Cunningham and Andersons signed the contract without alterations.

On May 2, 2003, Cunningham – through Palmetto Grain Brokerage Inc. (Palmetto) – sold two, 65-car unit trains of corn to Perdue f.o.b. Columbus, Ohio. Under the contract (Cunningham contract number S-52661), shipment was to occur during the period Oct. 1-Oct. 31, 2003. Representatives of both Perdue and Cunningham also signed this contract without alterations.

In addition, on May 2, 2003, Perdue issued a purchase contract confirmation (Perdue contract number 1068) for the purchase of one, 65-car unit train for last half October 2003, f.o.b. Columbus, Ohio. Representatives of both Perdue and Cunningham signed this contract without alterations.

Contract number 1068 provided under *"Contract Notes"* that, *"Shipper allowed 48 hours after constructive placement to bill the cars. After 48 hours a charge of $20.00 per car per day will apply."*

Perdue forwarded a 59-car train to Gerald Grain at Hamler, Ohio, for this trade. Perdue furnished CSXT tracing records that showed the cars were available for placement on Oct. 15, 2003. Because Gerald Grain had another train on spot loading at that time, it was unable to receive the Perdue train. CSXT placed the empty Perdue train in a siding waiting the loading of the other train.

On Oct. 17, Perdue notified Palmetto that demurrage would apply after 48 hours of constructive placement. Palmetto subsequently so notified Cunningham and Gerald Grain. The train was released at 4:03 p.m. on Oct. 23, 2003. Perdue deducted $7,080 from the settlement for six days demurrage at $20 per car per day for 59 cars. Reflected in Perdue's assessment was that the train was not in contract for actual or constructive placement until Oct. 16 because the contract period was for the last half of October.

Cunningham deducted the $7,080 from its settlement with Andersons. Subsequently, Andersons deducted this amount back from Cunningham in subsequent contracts.

The Decision

The arbitrators concluded that Rule 3(A) of the NGFA Grain Trade Rules applied to this case. NGFA Grain Trade Rule 3(A) provides:

> *"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."

The arbitrators determined that the demurrage terms at issue in this case were stated clearly under *"Contract Notes"* in Perdue's confirmation (contract number 1080), which was signed without dispute by Cunningham's representative. The arbitrators noted that while this case did not involve rail cars owned or leased by Cunningham, Cunningham incorporated a provision comparable to Perdue's in Cunningham's own contracts, which stated under *"General Terms & Conditions"* that, *"When RFC leased hopper cars are used we shall access [sic] demurrage on a Conrail schedule of demurrage."*

The arbitrators consequently concluded that Perdue properly assessed the demurrage charges against Cunningham. The arbitrators also determined that no contractual or other obligation existed upon which Cunningham could assess those demurrage charges against Andersons.

THE AWARD

The arbitrators ordered that Perdue was due the $7,080 for demurrage from Cunningham, and awarded this sum to Perdue.

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

Terry Voss, *Chair*
Senior Vice President, Transportation
Ag Processing Inc.
Omaha, Neb.

James Bareksten
Vice President, Country Services
Cenex Harvest States
Inver Grove Heights, Minn.

James Hegge
General Manager
Gateway Co-op
Galva, Ill.

NGFA Arbitration Appeals Case No. 2097

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

Defendants/Appellees: **The Andersons Inc., Maumee, Ohio;**
Perdue Farms Inc., Salisbury, Md.

The Decision

The Arbitration Appeals Committee individually and collectively reviewed all the evidence submitted in Arbitration Case Number 2097. The Arbitration Appeals Committee also reviewed the findings and conclusions of the original arbitration committee.

The Arbitration Appeals Committee decided that with respect to the contract between R.F. Cunningham & Co. Inc. (Cunningham) and Perdue Farms Inc. (Perdue), Perdue followed the terms of the contract and was proactive in alerting Cunningham to the pertinent terms of the contract. Therefore, the Arbitration Appeals Committee agreed with the conclusion of the original arbitration committee, *"that Perdue properly assessed the demurrage charges against Cunningham."*

The Arbitration Appeals Committee further determined that the contract between Cunningham and The Andersons Inc. (Andersons) was not a mirror image of the contract between Cunningham and Perdue. The contract between Cunningham and Andersons differed relative to charges for demurrage. While Cunningham's contract contained a reference to *"demurrage on a Conrail schedule of demurrage,"* the Arbitration Appeals Committee concluded that Cunningham offered no information or proof relative to the particulars of this outdated demurrage schedule. In addition, the Arbitration Appeals Committee decided that Cunningham presented no verbal or written evidence of notice to Andersons following Perdue's demurrage notice to Cunningham. As a result, Cunningham failed to follow proper "string trade" and trading-partner notice and communications requirements in accordance with the custom of the trade. Because Cunningham was charged demurrage by Perdue, Cunningham sought in turn to pass those charges on to Andersons simply because it was a "string trade." However, the Arbitration Appeals Committee decided that Cunningham failed to demonstrate that it had a contractual right to charge Andersons demurrage and, if it did, what those charges would have been.

Accordingly, the Arbitration Appeals Committee affirmed the original arbitration committee's decision that Perdue was entitled to retain the $7,080 in dispute for demurrage charges against Cunningham.

Submitted with the unanimous consent of the members of the Arbitration Appeals Committee, whose names appear below:

John L. McClenathan, Jr. *Chair*
Vice President - Grain Group
Archer Daniels Midland Co.
Decatur, Ill.

Steve Campbell
Manager, North American Wheat
Louis Dreyfus Corp.
Kansas City, Mo.

Philip Hageman
Hageman and Associates LLC
Surprise, Ariz.

Roger Krueger
Director, Grain Marketing
South Dakota Wheat Growers Association
Aberdeen, S.D.

Donald W. Wenneker
Manager - Cash Grain
Tate and Lyle Ingredients Americas Inc.
Decatur, Ill.