



National Grain and Feed Association

Arbitration Decision

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March 29, 2007

Arbitration Case Number 2118

Plaintiff: Commodity Specialists Co., Minneapolis, Minn.

Defendant: Interwest Commodities LLC, Dana Point, Calif.

Statement of the Case

This dispute involved a disagreement over which party was responsible for increased freight costs pursuant to three contracts entered into in July 2004 between Commodity Specialists Co. (CSC) and Interwest Commodities LLC (Interwest) for the sale of distillers dried grains (DDGs) from CSC to Interwest.

The contracts provided for shipment of a total of 112 rail cars of DDGs from October 2004 through September 2005. On Sept. 14, 2004, the Burlington Northern Santa Fe Railway (BNSF) published a tariff, to become effective October 2004, which increased the costs of shipping these carloads. CSC and Interwest disputed which party was responsible for these increased costs. CSC sought the amount of the disputed costs that had been invoiced for the first 18 rail cars totaling \$8,210.68, plus interest. CSC also requested direction regarding the remaining 94 cars to be shipped under the contracts.

In reaching their decision, the arbitrators determined that the central issue in this dispute was whether certain changes in the BNSF published public tariffs for DDGs (Standard Transportation Commodity Code (STCC) 20859 – By-Products of Liquor Distilling) constituted a freight rate increase.

The arbitrators thoroughly examined and assessed all of the documents and arguments presented by the parties in this case. The arbitrators focused upon the contracts between the parties, the NGFA Trade Rules, and any normal and customary trade practices that might apply.

In this regard, the arbitrators noted that the initial CSC contract between the parties (CSC contract number S-160601) specifically stated: *"FREIGHT BASED ON DATE OF CONTRACT, AND CURRENT FUEL SURCHARGE. FREIGHT INCREASES SUBSEQUENT TO THIS, AND INCREASES IN FUEL SURCHARGES WILL BE FOR BUYERS ACCOUNT."* The corresponding Interwest purchase confirmation contract

(Interwest contract number 55199) stated: *"THIS PRICE REFLECTS CURRENT FREIGHT RATES AND SURCHARGES. ANY FUTURE INCREASE FOR BUYERS ACCOUNT."*

The arbitrators observed that the subsequent CSC contracts contained provisions similar to CSC contract number S-160601. CSC contract number S-161245 stated: *"ALL FRT INCREASE BEYOND AND ALL FUEL SURCHARGE FOR BUYER ACCOUNT."* CSC contract number S-161617 stated: *"ALL FUTURE FREIGHT INCREASE AND ANY FUEL SURCHARGE FOR BUYER ACCOUNT."* CSC's contracts also included certain additional *"Sales Terms and Conditions."* Item number 10 under the specified conditions provided: *"Any increase in freight rates or any freight surcharges of any similar increase in the cost of transportation between the date of sale and the date of shipment shall be for the account of the Buyer."*

Interwest's contracts also included a statement under *"Terms and Conditions"* that provided: *"Sale price includes any war risk insurance, freight rate and terminal charges as per public tariff in effect on date hereof. Any changes or variation in foregoing items shall be for buyer's account."*

The arbitrators noted that the parties entered into the initial trades under the rates and conditions set forth in BNSF published tariff 4022-K, book 2, section G, p. 1-2, revision 6, item 27230 (effective Oct. 4, 2003). This tariff established that \$3,682 per-car was the freight rate from the state of Minnesota to the state of California for covered hoppers with a code LO mechanical designation. This tariff made no distinction between carrier-owned or shipper-controlled covered hoppers. The tariff did provide under *"General Rules"* that *"Shipments made under rates contained in this rate book are entitled to terminal and transportation services. These services, (which include but are not restricted to, mileage payouts for private hopper*

cars....” At the time of the initial trades between the parties, the BNSF mileage allowance paid for shipper-controlled equipment containing commodities with the 20-859 STCC numbers was 24-cents-per-loaded mile.

The arbitrators also noted that on Sept. 14, 2004, the BNSF published tariff 4022-K, book 2, section G, p. 1-2, revision 7, item 27230 (effective Oct. 4, 2004). Column 1 of this new tariff

provided for an increase to \$4,234 per car for the freight rate from Minnesota to California for “*carrier owned (non-BNSF) covered hoppers, with mechanical designation code LO.*” The new tariff added a column (Column 2) (“*Price applies in shipper controlled covered hoppers, with mechanical designation code LO. Mileage allowance payments will not apply.*”) The new rate from Minnesota to California was \$3,615 per car for shipper-controlled cars under the new column 2.

The Decision

The arbitrators determined that no NGFA Trade Rules or industry standard trade practices directly applied to the central issues in this case.

The arbitrators considered CSC’s request of reimbursement from Interwest for the mileage allowances that the BNSF stopped paying after the Sept. 14, 2004 tariff took effect. CSC’s claim for the cancelled mileage allowances amounted to approximately \$456.15. The arbitrators observed that neither CSC’s nor Interwest’s contracts specified that shipments would be in “carrier-owned” or “shipper-controlled” covered hopper cars. Therefore, the arbitrators concluded that Interwest should not be required to reimburse CSC for the cancelled mileage allowances.

In addition, because the contracts did not specifically require “carrier-owned” or “shipper-owned” rail cars, the arbitrators decided that the reduced rate that was introduced in the new column 2 of the Sept. 14, 2004 tariff for shipper-controlled cars could not reasonably be expected to apply to the trades being disputed in this case. Therefore, the arbitrators determined that the higher rate in column 1 of the Sept. 14, 2004 tariff applied.

The arbitrators consequently determined that the Sept. 14, 2004 tariff change effectively resulted in an increase in the freight rates that applied to the shipments in this case by \$552 (or approximately 15 percent) per car. The arbitrators further concluded that, according to the terms of the contracts, those increased freight rates were the responsibility of the buyer.

The Award

Therefore, the arbitrators ordered that Interwest make payment to CSC in the amount that CSC has requested, which was \$8,210.68 on the initial 18 carloads. The arbitrators also concluded that Interwest should pay to CSC the freight increase claimed by CSC, which is \$456.15 per car on the remaining 94 carloads represented in the contracts.

The arbitrators denied all other claims by the parties.

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

Lynn A. Hiser, *Chair*
Director, Transportation America
Tate and Lyle Ingredients Americas Inc.
Decatur, Ill.

Brandon Witte
Commodity Trader
Archer Daniels Midland Co.
Milwaukee, Wis.

Tim Thompson
Director of Business Development
Cereal Byproducts Co.
St. Louis, Mo.

Arbitration Appeals Case Number 2118

Appellant: Commodity Specialists Co., Minneapolis, Minn.

Appellee: Interwest Commodities LLC, Dana Point, Calif.

Statement of the Case

This case was originally decided in an arbitration finding in favor of Commodity Specialists Co. (CSC) against Interwest Commodities LLC (Interwest), and Interwest subsequently appealed that decision.

The facts in the case are set out in the “statement of the case” written by the original arbitration committee. In its appeal, Interwest did not dispute the facts, but contended that the arbitrators erred in concluding that the revised tariffs published by the Burlington Northern Santa Fe Railroad (BNSF) constituted a “freight increase.”

The arbitration appeals committee considered the materials submitted in the original arbitration case, together with the additional briefs submitted by the appellant and the appellee. In its deliberations, the arbitration appeals committee focused on two questions: 1) In this transaction, did the buyer (Interwest) assume the risk of a freight increase; and 2) was the revised tariff, published by the BNSF on Sept. 14, 2004, a “freight increase” falling within the terms and intent of the contracts involved?

The Decision

In regard to the first question, the appeals committee determined that the buyer, Interwest, did in fact assume risk. First of all, CSC offered Interwest a choice of two options: a contract price which shifted the risk of all future freight rate increases to the seller, CSC; or alternatively, a lower contract price, with Interwest assuming the risk (and responsibility for payment) of any future price increases. Interwest chose the lower delivered price, and the contracts, issued by both parties, plainly stated that any future increase in freight tariffs, or any “similar increase,” over and above a 3 percent increase specified in two of the contracts was for the account of the buyer, in this case Interwest. The parties to the case have not disputed this fact; the dispute is whether the revised BNSF Tariff was, in fact, a “freight increase” falling within the terms of the contracts.

In answer to the second question – whether the new tariff, in fact, is a “freight increase” – the appeals committee determined that it was. While the new tariff was a radical change from past industry practices in that it established two different tariff levels – a published tariff for equipment owned by railroads (other than BNSF) and a lower published tariff for shipper-controlled equipment – the net effect was in fact additional shipping costs. Under the old tariff, both railroad-owned equipment (when available) and shipper-controlled equipment, moved under the same general tariff, with the shipper-owned equipment eligible to receive a mileage allowance rebate from the

railroad. Under the new tariff, the mileage allowance rebate was eliminated, and was replaced with a two-tier tariff, one (the higher) applying to equipment owned by railroads other than BNSF, and the other (the lower) applying to shipper-owned equipment. If shipments were made in railroad-owned equipment, the new tariff was clearly a substantial freight increase. If shipments were made in shipper-controlled equipment, the amount listed as the per-car rate was similar in both the old and the new tariffs. However, because the railroad no longer provided a mileage reimbursement to the shipper, for shipper-owned equipment under the rules of the new tariff, the new tariff resulted in a “*de facto*” freight increase. Under the old system, Interwest would have been responsible for the published tariff, but would not have been eligible to collect the offsetting mileage allowance, for shipments made in privately owned cars. Using this logic, it would not seem that Interwest should be eligible to receive the lower published tariff for privately owned equipment, as opposed to the higher tariff for railroad-owned equipment. Under the prior arrangement, railroads were compensating owners of private equipment through a mileage allowance; under the new system, railroads were compensating owners of privately owned equipment through a lower tariff. For Interwest to contend that it was due the lower rate applying to privately owned equipment when they did not own the equipment being used seemed neither logical nor fair.

The arbitrators further noted that the contracts were silent on the type of equipment which was to be used. This being the case, the buyer, Interwest, assumed the risk and would have been liable for the higher tariff had all shipments been made in railroad-owned equipment. Indeed, of the 112 cars in the total contracts, five were shipped in railroad-owned equipment, and Interwest paid the increased rate on those cars.

It was further noted that the parties referred to an opinion by Andrew P. Goldstein, asking whether the tariff changes were or were not a freight increase. Mr. Goldstein referred to 49 U.S.C. Chapter 10745, which requires railroads to compensate shippers who furnish transportation facilities, such as cars. Under

this, Mr. Goldstein contended that these costs must be taken into account when determining "freight." Whether or not the cancellation of mileage allowances was lawful or unlawful was not an issue in this case, but may be subject to future arbitration or litigation between shippers and railroads. The issue in this case was whether the tariff changes did or did not constitute a "freight increase."

The arbitration appeals committee concluded that the tariff changes did, in fact, constitute a "freight increase." As a result, under the terms of the contracts, CSC was entitled to collect the costs of the freight increase from Interwest.

The Award

In determining the amount of the freight increase for which Interwest was liable, the arbitration appeals committee took the tariff per car at the time of the contracts, which was \$3,682, and subtracted this from the new tariff of \$4,234 per car to arrive at a freight increase of \$552 per car.

CSC Contract S-160601 was for 24 cars, based on the current freight rates and current fuel surcharges; the two subsequent contracts from CSC, Numbers S-161245 and S-161617, contained a provision that CSC was responsible for a 3 percent freight increase. Based upon this, Interwest would owe the tariff increase of \$552 per car on the 24 cars in the first contract, and \$441.54 for the 88 cars in the second and third contracts (\$552 less \$110.46 for the 3 percent credit contained in the contracts). This would be a total of \$52,103.52. From this, Interwest can be given credit for the five cars shipped in railroad-owned equipment, on which it has already paid the increased freight charges. Giving credit for this, at \$552 per car, the appeals committee determined, unanimously, that the net amount due from Interwest to CSC would be \$49,343.52.

The appeals committee also considered the requests of the parties for attorney fees and interest. On this issue, a majority of the appeals committee decided that Interwest owed to CSC interest, at the published prime rate (effective on the date this case was filed), from 30 days after the date on which CSC billed Interwest, until the time Interwest makes actual payment to CSC.

Additionally, a majority of the appeals committee concluded that Interwest should reimburse CSC for the cost of CSC's arbitration filing fees. The filing fees amount to \$1,446.33, and the amount of the interest was \$814.78 through Feb. 1, 2007,

with interest accruing at the rate of \$1.18 per day thereafter, until paid.

The arbitration appeals committee denied all other claims by the parties.

Submitted with the majority consent as to interest and filing fees, and the unanimous consent in all other respects, of the arbitrators, whose names appear below:

Edward P. Milbank

President
Milbank Mills, Inc.
Chillicothe, Mo.

John C. Anderson

Chief Executive Officer
Ritzville Warehouse Co.
Ritzville, Wash.

Steve Campbell

Vice President
Louis Dreyfus Corp.
Kansas City, Mo.

Steve Colthurst

Procurement Manager
Land O'Lakes Purina Feed LLC
Bellevue, Wash.

Philip L. Hageman

Hageman and Associates, LLC
Surprise, Ariz.