



National Grain and Feed Association

# Arbitration Decision

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## Arbitration Case Number 2143

**Plaintiff:** Bunge Milling Inc., St. Louis, Mo.

**Defendant:** Norfolk Southern Corp., St. Louis, Mo.

### Statement of the Case

This case involved a loss-and-damage claim regarding the alleged presence of foreign substances in a single railcar of corn flour.

The plaintiff, Bunge Milling Inc. (Bunge), initiated this case against the defendant, Norfolk Southern Corp. (NS), involving a railcar placed for loading at Bunge's facility in Danville, Ill., on Nov. 20, 2004. Bunge subsequently loaded the railcar with corn flour for shipment to its customer in Scarborough, Ontario. According to Bunge, on Dec. 21, 2004, its customer discovered chips in the railcar load of corn flour – alleged to be pieces of the railcar lining – after Bunge's customer already had unloaded the corn flour from the railcar and incorporated it into finished products. The customer submitted a claim to Bunge that included: 1) the claims of subsequent buyers; 2) costs of using bagged corn flour while the silo containing the affected flour was cleaned; 3) labor expenses for time spent on the claim; 4) costs related to the manufacture and destruction of finished products into which the contaminated flour had been incorporated; and 5) charges for storage, freight and demurrage. Bunge settled the potential claims with its customer and acquired the

rights to pursue this case against NS, claiming damages of \$134,813.75.

NS denied liability for the interior of the railcar on the basis that it neither owned nor leased the car. In its defense, NS emphasized that the railcar involved was a private car used exclusively by Bunge for at least the preceding 18 months. NS also argued that Bunge was precluded from recovery for damages sought pursuant to the contract between NS and Bunge, as well as the contract between Bunge and its customer.

In the arguments provided to the arbitrators, NS provided documentation stating that CSX Transportation Co. (CSX) leased the car from GATX Rail Corp. (GATX). Bunge stated that the car may have been subject to a lease between GATX and Union Pacific Railroad Co. (UP). Bunge argued that NS was liable for the car that it selected and placed at Bunge's facility. Bunge also disputed NS's arguments that were based on private ownership of the car on grounds that the car nonetheless was under the control of a railroad – whether it be CSX or UP.

### The Decision

The arbitrators recognized the significant amount of work undertaken by both parties to develop their respective arguments in this case. For the reasons to follow, the arbitrators ruled unanimously in favor of NS and denied in full Bunge's claim for \$134,813.75, plus interest, attorneys' fees and other costs.

A key factor in the arbitrators' decision was that Bunge was shipping the affected product under a transportation contract (NS-19064) that incorporated the following terms of NS Conditions of Carriage 1-E:

*“(e) NS's liability will not extend beyond the actual physi-*

*cal loss or damage to the cargo itself, including any costs reasonably incurred in efforts to mitigate the loss or damage.*

*(f) In no event shall NS be liable for any incidental, special, indirect or consequential damages whatsoever (including but not limited to lost profits, business interruption expenses and shipper or consignee's liability to their own customers for liquidated damages or other damages) arising of or related to the services provided under these Conditions of Carriage, even if advised of the possibility of such damages.”*

The arbitrators determined that the shipment involved in this case was governed by the aforementioned terms pursuant to the transportation contract. Further, the arbitrators found that this shipment was not subject to the Carmack Amendment (49 U.S.C. 10709) because of this specific contractual language agreed to by both parties that limited the NS's liability. The arbitrators consequently concluded that NS's liability did not extend beyond the physical loss or damage to the cargo. As such, under these circumstances, only the price of the corn flour transported in the car involved could be considered subject to a loss-and-damage claim – not the consequential damages.

The arbitrators noted that while the parties provided significant information on ownership and control of the railcar, its status still was not completely clear. Nonetheless, based upon the information provided, the arbitrators reached certain determinations. The arbitrators determined that it appeared that the railcar was owned by GATX. Ultimately, it also appeared to the arbitrators, based upon the information provided in the parties' arguments, that the railcar was leased by CSX or UP. It did not appear to the arbitrators that either Bunge or NS had leased the railcar. The arbitrators noted that neither party provided information as to how the car was listed in the Uniform Machine Language Equipment Register (UMLER). The arbitrators further noted that the parties did not provide information regarding whether CSX or UP was being compensated during the shipment, and if so, by what amount and by whom.

In addition, the information provided to the arbitrators indicated that the car had been in ongoing service at Bunge's Danville plant. The arbitrators determined that Bunge had used the car exclusively for at least 18 months prior to the claim; the car had been returned via the reverse route in each instance. The arbitrators concluded that NS certainly was treating the car as if it were a private car, including billing Bunge at the private car rate on the transportation contract governing the shipment. The arbitrators also noted that on all documentation provided by the Canadian National Railway (CN) relative to demurrage charges at destination, CN also referred to this car as "private equipment held on CN tracks."

As such, the arbitrators concluded that while it was clear after the incident that this was not a private car leased by Bunge, it appeared that all parties involved in this case were acting as if it was.

The arbitrators determined that Bunge, as the only shipper to load this car over an extended period of time, had reasonable access as to the condition of the car. Neither Bunge nor NS appeared to have inspected the car. The arbitrators concluded that NS took no action that created the situation of flaking inside the car. Nor was NS necessarily in a position to have knowledge of the car's condition.

Given the totality of the aforementioned facts and circumstances, the arbitrators did not judge NS to be liable for the physical damage allegedly incurred by the specified cargo. As such, NS also was not liable for the demurrage incurred at destination.

## The Award

The arbitrators ruled in favor of NS and awarded no money to either party.

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

**Richard R. Calhoun, Chair**  
Vice President, Grain and Oilseed Supply Chain  
Cargill Inc.  
Minneapolis, Minn.

**Judy Harrower**  
Vice President, Bulk Shipments  
Canadian Pacific Railway  
Calgary, AB, Canada

**Sharon Trudell**  
Vice President, Marketing  
Red River Valley & Western Railroad Co.  
Breckenridge, Minn.