



National Grain and Feed Association

# Arbitration Decision

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December 3, 2009

## Arbitration Case Number 2201

**Plaintiff: West Plains Co., Kansas City, Mo.**

**Defendant: Basik Five Trust and Bruce Popken, Elma, Iowa**

### Statement of the Case

West Plains Co. (West Plains) sought damages against Basik Five Trust (Basik Five) and its general manager, Bruce Popken, for alleged breach of contract for organic corn, claiming total damages of \$11,610.08.

West Plains' claimed damages consisted of \$1,417.58 for 493.926 bushels of contracted organic yellow corn from a railcar that allegedly arrived and unloaded light at destination, as well as \$10,192.50 for buying-in the balance of the contract after Basik Five allegedly refused to load additional rail cars against the open contract balance.

On Nov. 7, 2006, West Plains entered into a purchase contract for seven railcars (24,850 bushels) of organic yellow corn from Basik Five, through its managing partner, Bruce Popken. The contract provided for shipment from November 2006 through March 2007, "*Del. Basis/FOB Point: loaded rail Charles City, IA.*" The contract also stated, "*Weight to Govern: First Official*" and "*Grades to Govern: First Official.*"

In accordance with this contract, Basik Five on Jan. 29, 2007 loaded a railcar with 3,544.64 bushels of organic yellow corn at Charles City, Iowa. In transit, 493.926 bushels were lost such that when reaching its destination at Lakeview Organic Grain in Penn Yan, N.Y., the railcar had only 3,050.714 bushels remaining. Representatives from both Lakeview Organic Grain and Finger Lakes Railway Corp. verified that the railcar leaked corn during transit because of an unsealed hopper. Cedar American Rail Holdings Inc., on behalf of the railroad carriers involved, also stated in a letter that "the product loss from this car was the result of improper loading and securement." The railroad denied West Plains' claim for damages because it determined that the loss and damages were the responsibility of the party that loaded the grain.

Referencing NGFA Grain Trade Rule 16, West Plains maintained that the duty to load grain onto railcars is the responsibility of the shipper. West Plains also cited NGFA Grain Trade Rule 6, which states, in relevant part: "*Title, as well as risk of loss and/or damage, passes to the Buyer as follows: (A) On f.o.b. origin or f.o.b. basing point contracts, at the time and place of shipment. The time of shipment is the moment that the carrier accepts the appropriate shipping document....*" West Plains further asserted that in this case, the two parties specifically agreed and contractually provided that risk of loss for shipped corn would not transfer to West Plains until the corn was "loaded" properly. Hence, West Plains argued that since the corn allegedly was not loaded properly, risk of loss never transferred to West Plains and that Basik Five was liable for the corn lost during shipment.

In addition, West Plains referred to contract terms – "*loaded rail Charles City, IA* – and asserted that industry standards and NGFA Trade Rules indicate that the seller has the burden to arrange and pay for the loading of grain contained in the contract. According to West Plains' interpretation, this burden remains until the seller properly and completely has loaded the shipment. West Plains further maintained that Basik Five understood it bore this responsibility, as it hired and paid a third party to load, seal and certify the railcar. Further, West Plains argued that it used the phrase "*f.o.b. loaded*" in its contracts to distinctly clarify that the risk of loss for any shipments remained with the seller until the seller had properly loaded and sealed the equipment.

West Plains made payment to Basik Five for the 3,050.714 bushels at the contracted price of \$5.40 per bushel, less \$568.48 for losses attributed to the lost quantity from the railcar and \$15.25 for check-off-related charges, resulting in a total claim of \$15,890.13 for this railcar.

Given that five rail cars previously had been successfully loaded and delivered in satisfaction of this contract, the remaining open contract balance stood at 3,893.215 bushels. Following payment for these five previously delivered railcars by West Plains to Basik Five, an argument ensued between the two parties about who was responsible for the lost grain in transit. No agreement was reached, and on March 29, 2007, Basik Five sent a letter to West Plains providing notification that the balance of the contract was cancelled for alleged breach of contract for non-payment of the full purchase price for grain shipped previously. West Plains, citing NGFA Grain Trade Rule 28(A)(2), optioned to cover the cancelled portion of the contract and “*buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract.*”

On April 9, 2007, West Plains allegedly purchased similar organic corn from another party at the price of \$7.90 per bushel, resulting in a \$2.50-per-bushel higher price differential. This price increase reflected the rapidly changing market conditions at the time. West Plains stated that its purchase from this alternative seller required West Plains to transport these bushels via truck from the seller’s location in Raymond, Minn., to the rail facility in Balaton, Minn., at a cost of 25 cents per bushel. West Plains stated that it also incurred an additional fee of 12 cents per bushel to load the corn onto railcars. Finally, West Plains said it incurred \$436.55 in higher freight charges to ship the corn from Balaton, Minn. to Chicago, Ill., (where West Plains’ obligation to ship on its sale contract resided), rather than from Charles City, Iowa, the origin shipping point under the contract with Basik Five. Total claimed damages by West Plains for buying-in these bushels consequently totaled \$11,610.08.

Basik Five responded that West Plains was the party to first breach the contract, and, therefore, West Plains could not claim that the contract continued in force for its benefit after its own initial breach. Basik Five also maintained that its obligation was to deliver the contracted grain to the elevator in Charles City, Iowa, upon the request of West Plains, which had arranged for the railcar to be placed there for loading. Basik Five stated that this arrangement related to transportation

signified the place where ownership, and subsequent risk of loss, was transferred to the buyer.

Further, Basik Five argued that the contract was void under Iowa state law and could not be enforced under NGFA arbitration because West Plains did not have a valid Iowa Grain Dealer’s license when the contract was written (a fact for which West Plains offered explanations, but did not dispute). Basik Five provided references to Iowa state and court case law to support its argument that the contract was void in the absence of West Plains possessing a valid Iowa grain dealer’s license. On these grounds, Basik Five questioned whether an unlicensed grain dealer legally could fulfill the consideration it had provided for the seller’s contractual promise. Given these circumstances, according to Basik Five, the contract with West Plains was invalid and unenforceable under Iowa state law. Basik Five further argued that the arbitrators appointed by the NGFA would not have jurisdiction to rule on this matter. Basik Five never cashed the check from West Plains for the five railcars previously delivered, viewing it as partial payment on the grain delivered.

Basik Five and its manager, Bruce Popken, subsequently brought suit against West Plains in the Howard County District Court, Cresco, Iowa. The court granted West Plains’ request to arbitrate this matter before NGFA Arbitration, based upon the contract terms between the parties. The order stayed further court proceedings to permit the arbitrators to address this dispute.

Basik Five requested that West Plains pay \$19,137.60, together with legal fees associated with this arbitration case, as well as the cost of state court proceedings. Alternatively, Basik Five asked the arbitrators to remand this case to the Howard County District Court in Iowa to determine what sums were owed by West Plains to Basik Five.

West Plains requested that Basik Five pay \$11,610.08, plus interest from March 31, 2007, as well as costs and reasonable attorney’s fees associated with this case.

## The Decision

The arbitrators determined that the point at which the risk of loss was transferred from one party to the other for the railcar loaded for West Plains by Basik Five at Charles City, Iowa, was the core issue involved in this case. The NGFA’s Trade Rules are explicit on this question. Specifically, NGFA Grain Trade Rule 6 states: “*Title, as well as risk of loss and/or damage passes to the Buyer as follows: (A) On f.o.b. origin or f.o.b. basing point contracts, at the time and place of shipment. The time of shipment is the moment that the carrier accepts the appropriate shipping document.*”

The arbitrators concluded that “*appropriate shipping document(s)*” under the rule encompasses certifications and documents related to loading and proper sealing of rail hopper cars. Based upon the multiple statements by independent third parties submitted in the case, the arbitrators determined that the obligation to properly seal the rail hopper car at issue in this case had not been met fully, as the bottom gate of one hopper allowed grain to leak during transit. Further, the arbitrators concluded that since this obligation was that of the party that shipped the grain and the party that paid for the work, this risk of loss was

the responsibility of Basik Five and its agents. The fees associated with these agents' services were paid for by Basik Five; therefore, the arbitrators determined that losses related to the diligence and quality of their services (or lack thereof) was the responsibility of Basik Five – not West Plains.

The arbitrators also found that, notwithstanding any dispute regarding responsibility for the loss of grain during transit, Basik Five at that point did not have the right to cancel the remaining balance of the contract. Instead, Basik Five should have continued to perform on the remaining balance of the contract and later sought resolution of the disputed "short" payment on the railcar in question. Therefore, the arbitrators found that West Plains was within its rights to buy-in the remaining balance for Basik Five's account under NGFA Grain Trade Rule 28(A) [Seller's Non-Performance], which provides under these circumstances that a buyer may elect to "(2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract."

The arbitrators noted that no evidence was provided to indicate that West Plains' purchase of organic yellow corn to buy-in Basik Five's open balance was not performed using due diligence. These damages properly included transportation costs to equate an over-Chicago basing point transaction, matching the original sales contract.

Concerning the legitimacy of the contract itself and the arbitrators' authority to decide issues presented in this case under the NGFA Trade Rules, the arbitrators concluded that the evidence presented by Basik Five did not demonstrate that this contract should be unenforceable. To the contrary, the circumstances indicated that had the remaining balance of the contract been executed without dispute, the enforceability and validity of the contract would not be in question, as Basik Five had accepted payment for railcars shipped previously under the same contract.

The arbitrators did not address issues raised on further actions that might be taken in a court of law, including with respect to the enforcement of this decision. The arbitrators defer to the courts on whatsoever such actions might be taken. In so doing, the arbitrators noted the long-standing history of the NGFA Arbitration System as a method for properly resolving disputes involving grain and feed transactions utilizing qualified professionals well-versed in the related rules and trade customs.

The arbitrators decided that any and all statements that attempted to separate Bruce Popken from Basik Five, and assess any individual liability on Mr. Popken's part, were without merit. Bruce Popken was representing Basik Five and the arbitrators found no evidence of excessive negligence attributable to him personally.

## The Award

The arbitrators awarded West Plains Co. full payment of \$11,610.08 against Basik Five. However, given that Basik Five had not cashed West Plains Co's check for the disputed railcar, the arbitrators did not award interest against Basik Five. All claims for reimbursement of legal fees associated with these proceedings and any legal hearings before any Iowa court are denied.

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

**Michael J. Carmichael**, *Chair*  
Senior Trader  
Bunge North America Inc.  
St. Louis, Mo.

**Randy K. Broady**  
Grain Originations Manager  
Advanced Agri-Solutions Co-op Inc.  
Botkins, Ohio

**Harold W. Clark**  
Manager  
Hillsdale Elevator Co.  
Hillsdale, Ill.