Arbitration Decisions

June 8, 1950

CASE NO. 1450
PLAINTIFF - NORTHERN SUPPLY CO., AMERY, WIS.
DEFENDANT - EAGLE ROLLER MILL CO., NEW ULM, MINN.

The first committee drawn from the members of The Arbitration Panel to consider this case was composed of Mr. Ralph H. Brown, Early and Daniel Co., Cincinnati, Ohio, Chairman; Mr. Dean K. Webster, Jr., H. K. Webster Co., Lawrence, Mass. and Mr. Charles Flanley, Flanley Grain Co., Sioux City, Ia. The decision of The Committee on Arbitration Appeals follows:

"This case involves the liability under an order for three cars of bran and two cars of middlings, taken by salesman for the Defendant on March 9, 1949 for the Plaintiff. The amount involved is $1,035.00.

"This trade started when the buyer executed a contract and delivered his confirmation to the seller's agent, the salesman. The salesman told the buyer he would put shipping dates on the shipping directions and would mail them in with the contract when he got back to Minneapolis that evening. The salesman went beyond this and promptly telegraphed his report of the sale and the shipping dates to his principal.

"Up to this point everything was proper and businesslike: The Plaintiff had agreed to buy; the Defendant's salesman had agreed to sell; the terms were clearly understood by both parties; the contract was signed and delivered to the Defendant's agent; the Defendant was notified immediately of the sale by telegram; all that remained was for the Defendant to act upon the following protective clause in his contract. 'This contract is subject to confirmation by the seller at New Ulm, Minnesota.'

"We do not see how it can be denied that the next move was up to the Defendant. There was a meeting of the minds between Plaintiff and Defendant's agent. The Plaintiff was committed by the contract he had signed; the Defendant had only to say 'yes' or 'no' and that, promptly.

"The Defendant recognized this obligation and telegraphed his refusal immediately. Everything was in order, up to this crucial point. Then he made the mistake of sending the telegram to his salesman instead of to the Plaintiff. He could just as easily have sent it to the Plaintiff, in which case there would have been no misunderstanding, no loss and no arbitration.

"In sending telegram to his salesman, the Defendant made the salesman his agent in the matter of 'confirming' the transaction. His negligence in failing to inform the Plaintiff, directly and unmistakably, then became the Defendant's own negligence.

"It is our belief that a buyer is entitled to assume that a salesman is in frequent close touch with his principals; that barring unusual and unforeseen developments, the salesman's contracts are nearly always accepted. Acceptance is the *usual* course of events; rejection is *unusual*. The Plaintiff has testified, without contradiction by the Defendant, that the Defendants 'usually are slow in

getting out their confirmations and there have been times that cars from them have been in here and unloaded and paid for before their written confirmation came through for our signature.'

"The Defendant's actions and his habit of doing business show clearly that in his own mind there was no need of confirming promptly when he *accepted* a contract but that he had an obligation to telegraph immediately when he was *not going to accept one.*

"We are convinced that the protective language 'subject to confirmation by the seller' must be interpreted to mean more than a narrow definition of the word 'confirmation' might indicate. Until the buyer hears from the seller, he is bound by a contract not voidable on his part. Therefore, we construe the words 'subject to confirmation' to impose an obligation upon the seller parallel to that imposed by Rule 2(a): namely, that if the seller finds the confirmation signed by the buyer to be unacceptable, he 'shall immediately notify the other party to the contract, by wire or telephone, and confirm in writing.....'

"This interpretation eliminates the untenable proposition that if a seller *accepts* a contract made by his salesman, he confirms it; if he rejects the contract, he can simply remain silent. There is no equity in this procedure, and it is contrary to all custom. In this case, the Defendant intended to do the right thing, but he failed through the carelessness of his agent. The Plaintiff, relying upon past experience with the Defendant, had no reason to suppose that the 'meeting of the minds' between him and the Defendant's salesman did not extend to the Defendant, himself.

"Actually, the Plaintiff did not need to receive another written confirmation from the Defendant, as he already had one, written by the salesman. He had only to be advised if the Defendant wished to *cancel* it.

"Our decision, therefore, is that there existed a 'meeting of the minds' between the Plaintiff and the Defendant through his agent, the salesman; but that such a conditional contract is subject to cancellation by the Defendant by *affirmative* prompt action on his part; that the Defendant, through negligence, failed to take such affirmative action; and that the 'meeting of the minds' between the Plaintiff and the Defendant's agent became a contract thereby.

"We believe this to be in accord with the principle behind Rule 2(a): i.e. that if a party to a contract finds something wrong with a confirmation as written by the other party he must immediately notify the other party. Otherwise the contract stands accepted as written, even though there may have been no 'meeting of the minds' as to its specifications. In a conditional contract like this one, we believe the same reasoning applies as to its entire validity.

"The Plaintiff knew by March 18 that the Defendant refused to ship the order. It is the opinion of the majority of this Committee that had Plaintiff used due diligence in closing the contract, half of this loss could have been avoided, which would have reduced the amount to $517.50. This amount we award to the Plaintiff. The cost of this arbitration is to be divided equally between Plaintiff and Defendant."

MINORITY DECISION

"The minority of this Committee agrees that this case is fairly stated in the majority decision and that the arguments are clearly set forth and those details are not here repeated.

"We believe there is no difference of opinion with regard to the status of this transaction up to the time the order was reported to the Eagle Roller Mill Company. At the time the order was reported to them at New Ulm, Minnesota, the situation was this: The buyer was on notice that the order *had to be accepted by the seller to become a contract.* The *seller* immediately *rejected* the order: Certainly to that point there *had been no meeting of the minds* of *buyer* and *seller.*

"Then what happened was the seller instructed his salesman to notify the buyer that the order was rejected. Plaintiff introduced evidence that the salesman did

notify Defendant that his order was rejected, but this is denied by Defendant who claims he was not notified by his associate who, according to the salesman, received the message. The buyer did nothing about it from the 9th to the 18th. In an endeavor to avoid loss in situations of this kind, Rule 2(a) provides - ' It shall be the duty of both buyer and seller, *not later than the close of business day* following date of trade, to mail, *each to the other*, a confirmation in writing (the buyer a confirmation of purchase and the seller a confirmation of sale), setting forth the specifications as agreed upon in the original articles of trade.....'

"Neither buyer nor seller complied with this rule, even though buyer testified that it was his usual custom to mail confirmations and offered no good reason for not doing so in this case. There is considerable testimony regarding the action taken by the seller to notify the buyer of seller's rejection of the order and there is denial that buyer received that notice. The fact remains that the *minds of buyer* and *seller never met* and it is the minority decision of this Committee that without a meeting of minds there could be no contract and, therefore, there should be no penalty."

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