



NATIONAL GRAIN AND FEED ASSOCIATION

Arbitration Decisions

March 28, 1985

Arbitration Case Number 1615

Plaintiff: Agra Land Inc., Lansing, Mich.

Defendant: Continental Grain Co., Chicago, Ill.

Statement of the Case

On Nov. 1, 1983 Agra Land Inc., the plaintiff, sold Continental Grain Co., the defendant, a 100-car Norfolk and Western corn train through a broker, James Mayer and Associates. The broker contract, signed by both parties, called for the following terms that were relevant to the case: "F.O.B. Ohio N&W export train loading point. Train is to be loaded in accordance with effective N&W export train tariff. Seller's option to load at Saginaw, Mich., Indiana or Illinois N&W export train loading points at usual freight differential."

Two 100-car Norfolk and Western train tariffs existed at the time of the trade -- 4307-E that had been in effect for some time, and 4339-A that was issued Sept. 20, 1983 with an effective date of Oct. 1, 1983. Tariff 4339-A contained two key changes: 1) a reduction in the base rate charged in carrier equipment from Ohio train loading stations to Norfolk, Va. only; and 2) a reduction in the number of trips required to achieve the lowest possible rate.

Originally, Michigan points were not included in tariff 4339-A. Subsequently, supplement #1 was issued Oct. 3, 1983, effective Oct. 14, to include the Michigan points at the previous rates.

The plaintiff claimed it was not aware of the existence of tariff 4339-A, supplement #1, when the trade was made; that it was not received by the plaintiff until Nov. 7. The plaintiff claimed that the train was traded under the provisions of N&W tariff 4307-E, which was in effect at the time of the trade. The plaintiff stated the broker contract supported its claim. The plaintiff also stated that it was not aware the defendant was operating this train under tariff 4339-A until shipping instructions were given on Nov. 8, 1983. The plaintiff claimed the defendant chose to operate its train under a different and separate tariff, which afforded the defendant a generally lower rate structure but resulted in an abnormally higher freight differential when loaded at Saginaw, Mich.

The plaintiff sought a refund of \$7,753.42, plus interest of 2 percent over New York prime rate. This represented the difference between \$2.40 per ton (\$23,856.67) charged by the defendant as the freight differential between the Ohio rate-basing point and the loading point under tariff 4339-A. This compared to \$1.62 per ton (\$16,103.25) under tariff 4307-E.

The Decision

After reviewing all documents presented, the arbitration panel concluded that the key issue in this case was whether the defendant had a right to use tariff 4339-A, supplements #1 and #2, as the governing tariff for this trade.

The panel believed the plaintiff, a well-established grain firm in the state of Michigan knowledgeable in Norfolk and Western train shipping, should have known of the existence of N&W train tariff 4339-A, supplement #1. It was a published tariff definitely in effect at the time of the trade.

The broker contract did not refer to a named tariff, only that the train was to be loaded in accordance with the effective Norfolk and Western export train tariff. The term "usual differential" would not necessarily confirm an established differential.

Since the trade was made F.O.B. an Ohio rate-basing point, the panel believed the defendant had a right to move the train from that point to destination under provisions of the effective tariff that was of greatest benefit to it. The committee also believed it is a common practice for the buyer to advise the shipper of what tariff to protect at billing time and not at the time of the trade.

The Award

The arbitration panel unanimously found in favor of the defendant, Continental Grain Co. Since the plaintiff's claim of \$7,753.42 was for a refund, no monetary transaction was required.

Submitted with the consent and approval of the arbitration panel, whose names are listed below:

Morris W. Champion, chairman
The Early & Daniel Co. Inc.
Beach Grove, Ind.

Fred Ashner
Bunge Corp.
New York, N.Y.

Steve Cavanaugh
Indiana Grain Cooperative
Indianapolis, Ind.