National Grain and Feed Association
Arbitration Decision
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December 9, 2024

CASE NUMBER 2882

PLAINTIFF: **HANSEN-MUELLER CO.**
OMAHA, NE

DEFENDANT: **SURESOURCE COMMODITIES, LLC**
PETROLIA, ONTARIO, CANADA

STATEMENT OF THE CASE

This dispute is between Hansen-Mueller Co., a Nebraska Corporation with a facility at the Port of Houston, and SureSource Commodities, a Delaware limited liability company with business in trading organic food and feed. In January 2020, SureSource contacted Hansen-Mueller to inquire about transloading services at the Port of Houston. SureSource planned to import into the United States organic soybeans from Argentina and needed containers of organic soybeans transloaded to railcars.

In June 2020, Hansen-Mueller and SureSource entered into a Transload and Handling Agreement for Hansen-Mueller to transload containers to rail cars at the Port of Houston for a term of three months beginning on July 27.[1] The signed Agreement, dated June 30, did not contain a total quantity or transload schedule. However, when the Agreement was made the parties also agreed that 132 containers would be transloaded into 33 railcars at a rate of 2 to 3 railcars per week. This was memorialized in an email at the time the Agreement was finalized.[2]

Logistics began on schedule pursuant to the Agreement. SureSource shipped containers of organic soybeans, and they began arriving at the Port of Houston on July 26. The containers continued arriving every week or so until September 20. SureSource's railcars began arriving at the Port of Houston on July 30 and continued until 9 cars had arrived. SureSource's shipments to the Port of Houston were adequate to meet the transload schedule. SureSource's ordering of railcars was also sufficient to meet the schedule. However, Hansen-Mueller's execution of transloading the beans onto railcars never met the transload schedule in the Agreement. Only two cars were transloaded in the first 30 days and only five more were transloaded in the second 30-day period. On average, Hansen-Mueller loaded the rail

[1] Section 5 of the Agreement provided for the term to be three months, which meant the Agreement would have ended on October 27 because it began on July 27. However, that same section of the Agreement also stated the term would start on July 27 and end on September 31. When reviewing the potentially inconsistent terms in the Agreement, the Arbitration Committee concludes the intent of both parties was to be three months for the term of the Agreement based upon the agreed shipping schedule.

[2] Memorializing an agreed upon trade by email is a practice consistent with NGFA Grain Trade Rule 3 [Confirmation of Contracts] and Rule 5 [Electronic Communications]. The parties verbally agreed to transloading of 132 containers into 33 railcars at a rate of 2 to 3 per week. An email confirmation was sent by SureSouce to Hansen-Mueller when finalizing the Transloading Agreement.

cars 25 days after the railcars had arrived. Hansen-Mueller does not give a comprehensive explanation as to why it did not meet the schedule.

During September and October, the activities of both parties deviated from the Agreement terms. SureSource requested transloading of trucks instead of railcars, and Hansen-Mueller began transloading the trucks. SureSource also reduced the total number of containers from 132 to 100, and Hansen-Mueller never disputed the reduction. Further, Hansen-Mueller began emptying containers of organic soybeans into its grain bins instead of executing the transload directly from the containers to the railcars or trucks. These changes may have been mutually beneficial and agreeable; however, none are well documented. By October 27, the Agreement had technically terminated, and there were still over 700 tons of organic soybeans in containers or grain bins at the Port of Houston subject to the Agreement. Neither party discussed extending the Agreement or planning a new transload schedule.[3]

At that point, activity under the Agreement had become irregular, and the plan forward was unclear. During October, many containers of organic soybeans were transloaded into trucks. Some containers of organic soybeans were unloaded from containers into Hanen-Mueller's grain storage bins. By the middle of November, Hansen-Mueller unloaded all the remaining containers of organic soybeans into its grain bins for storage.

Around that time, there were also numerous discussions about outstanding invoices, transload documentation, and container per diem fees. Discussions became difficult as Hansen-Mueller requested payment of container per diem fees, which eventually totaled over $350,000. SureSource disputed owing these fees, and Hansen-Mueller stated it would not transload the remaining inventory of organic soybeans until SureSource had paid them.

By mid-December, activity under the Agreement had ceased. All 100 containers of organic soybeans had been either transloaded or emptied into grain bins. 72 of the 100 containers of organic soybeans had been transloaded into 9 railcars and 36 trucks. The other 28 containers (approximately 675 tons) remained in Hansen-Mueller's grain bins at the Port of Houston.

On December 17, Hansen-Mueller's attorney notified SureSource it was in default of the Agreement for nonpayment of expenses. The attorney gave notice of intention to sell SureSource's inventory of organic soybeans to cover the nonpayment. SureSource also engaged legal counsel and sought an injunction to prevent the sale of the soybeans in Hansen-Mueller's grain bins. By April, SureSource agreed to put up $395,000 in escrow; Hansen-Mueller agreed to load the remaining inventory into trucks; and both parties agreed to arbitrate.

The Claims:

Hansen-Mueller asserts it adhered to the terms of the Agreement and argues:

- The Agreement was for basic transload services, but SureSource was requesting on-demand and priority logistics.

[3] NGFA Grain Trade Rule 4 [Alteration of Contract] states alteration of contracts must be mutually agreed upon and confirmed in writing (including by electronic means).

- SureSource was responsible for all the logistics that led to the problems with the transload execution.
- The Agreement requires SureSource to pay for all expenses such as per diem fees.

Hansen-Mueller claims $370,820 in container per diem fees and $51,621.58 in legal fees and interest, plus additional interest from June 1, 2021.

SureSource denies owing the container per diem fees and argues:
- Hansen-Mueller failed to perform according to the specific transload schedule in the Agreement.
- Hansen-Mueller's failure to perform caused the container per diem fees to accrue.
- Since the Agreement provided a specific schedule for transloading containers, SureSouce was not requesting on-demand and priority logistics.
- Hansen-Mueller's failure to perform also caused loss of profits through the loss of a customer.

SureSource requests the return of the $395,000 in escrow and that Hansen-Mueller pay the container per diem fees. SureSource counterclaims $56,980.76 in attorney's fees, $175,000 in lost profits from the current transload Agreement, and $1 million in lost future profits due to the loss of a customer.

THE DECISION[4]:

This dispute is primarily about which party is responsible for container per diem charges. Hansen-Mueller argues that the Agreement clearly states the per diem charges are SureSource's responsibility. The Agreement states:

> The Transload Fee shall be inclusive of terminal handling equipment to the Facility and shall pay all freight on inbound and outbound movements. All additional expenses, including but not limited to railcar demurrage, chassis charges, and Grain inspection or grading fees, are to be for the account of Company (SureSource). [Agreement Exhibit "A", 1. Transload Fees.]

From the simple reading of the Agreement, Hansen-Mueller is correct.

However, the Arbitration Committee concludes Hansen-Mueller's transload performance must be also considered. If the transload schedule of the Agreement had been judiciously followed, then per diem charges would have been significantly smaller or non-existent.

Hansen-Mueller's main defense for not executing according to the agreed upon schedule was that SureSure was responsible for logistics. The Arbitration Committee notes two flaws in this argument. First, SureSource's performance of shipping containers to Houston and obtaining railcars for loading met the logistics requirements of the Agreement. Second, the claim that SureSource did not contract for any logistics services is disingenuous. According to the Agreement as quoted above, the Transload Fee included "all freight on inbound and outbound movements." Hansen-Mueller charged SureSouce for this activity and was, therefore, responsible for moving containers from the Port of Houston to Hansen-Mueller's facility and back to the Port of Houston. Pursuant to the Agreement,

[4] The Arbitration Committee's decision is based upon reading of the facts of the case and applying the facts to the terms of the Agreement. Specific NGFA Trade Rules and Arbitration Rules may not expressly govern each aspect of the dispute. NGFA Trade Rules are cited by the Arbitration Committee, nonetheless, to show consistency in this decision with the NGFA Rules in accordance with NGFA Arbitration Rule 1(D) [Contract Interpretation].

Hansen-Mueller was responsible for the logistics it was denying. In addition, outside industry expert statements[5] confirmed that it is usual and customary in the industry for the transload company (Hansen-Mueller in this case) to pick up and return shipping containers.[6]

As an additional defense for not executing under the Agreement, Hanson-Mueller states that SureSource wanted on-demand logistics. However, SureSource's phone calls to Hansen-Mueller urgently requesting the schedule be followed was not an appeal for on-demand logistics. The schedule was clear under the Agreement: 132 containers transloaded to railcars at a rate of 2-3 per week over a period of three months. SureSource shipped containers to the Port of Houston with arrival times consistent with these terms. SureSource also began sending railcars for loading to the Port of Houston with arrivals consistent with these terms.

The Arbitration Committee concludes that Hansen-Mueller is at fault for not following the terms of the Agreement for most of the contract period. However, as of October 27, the Agreement termination date, the contract was not extended. The actions of both parties show that many terms had changed (transloading to trucks, unloading containers to Hansen-Mueller's storage bins, etc.). Neither party sought agreement on a path forward that would provide a mutually approved plan of how to finish executing the Agreement.[7] The result was confusion, finger pointing and arguing. Both parties are at fault for not properly addressing changes in the terms of the Agreement and properly trying to mitigate damages.

The Arbitration Committee concludes that both parties entered into the Agreement in good faith. On this basis, SureSource proceeded to ship containers of organic soybeans from Argentina for Hansen-Mueller to transload into rail cars. By the time it was clear that Hansen-Mueller was not performing, all the containers had shipped, the die was cast, and there was little SureSource could have done beyond encouraging Hansen-Mueller to perform. Only timely transloading by Hansen-Mueller could have eliminated or reduced accrual of the container per diem fees. Hansen-Mueller shall be responsible for paying the container per diem fees and the escrow of $395,000 shall be returned to SureSource.

Regarding the remaining claims, the Arbitration Committee concludes there was ample opportunity for both sides to mitigate damages. Neither party sought to come to a meeting of the minds regarding performance or extending the Agreement before damages occurred. SureSource never put Hansen-Mueller on notice for potential damages with its customer. Hansen-Mueller never put SureSouce on notice for potential per diem fees due to logistical problems. According to NGFA Trade Rule 28 [Failure to Perform] both parties are responsible for notifying the other when unable to complete a contract. If not notified, the counter-party has the obligation through the exercise of due diligence to

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[5] SureSource obtained and produced statements from four outside industry professionals to support its claims. Hansen-Mueller did not meaningfully refute these statements.

[6] The Agreement (Section 1. Handling Services) states that Hansen-Mueller "shall provide such services in accordance with customary usage and the best standards for this type of facility."

[7] NGFA Grain Trade Rule 28. [Failure to Perform] charges with both parties the responsibility of notifying the counter party and mitigating damages. At times in this case, both parties may have attempted to act within this spirit of these rules, but neither followed the structure outlined in the rules.

initiate action. Better communication, coming to clear agreements as circumstances warranted, and a strict following of NGFA rules for non-performance all would have led to better outcomes. Thus, regarding all other claims by both parties, the Arbitration Committee makes no award.

THE AWARD

Hansen-Mueller shall return the escrow of $395,000 to SureSource, and all other claims and counterclaims by the parties for container per diem fees, legal fees, interest and lost profits are denied.

Decided: September 15, 2022

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Ben Baer, *Chair*
President
Livestock Nutrition Center
Memphis, TN

Ryan Warner
Rail Trading Group Manager
CGB Enterprises Inc.
Covington, LA

Tom Lynch
Commodity Merchandiser
Ingredion Canada Corporation
Cardinal, Ontario, Canada

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December 9, 2024

APPEAL CASE NUMBER 2882

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OMAHA, NE

APPELLEE/DEFENDANT: **SURESOURCE COMMODITIES, LLC**
PETROLIA, ONTARIO, CANADA

DECISION OF THE APPEALS COMMITTEE

The original three-member Arbitration Committee unanimously decided that Hansen-Mueller Co. (Hansen-Mueller) bore responsibility for paying container per diem fees and that $395,000 held in escrow shall be returned to SureSource Commodities, LLC (SureSource). The original Arbitration Committee decided awards for the claims and counterclaims filed by either party to the arbitration were not warranted. After that decision, the plaintiff, Hansen-Mueller filed an appeal.

The Arbitration Appeals Committee, both individually and collectively, reviewed all the arguments and supporting documents provided in the record of the case for Arbitration Case 2882, including the findings and the conclusions reached by the original Arbitration Committee. The Arbitration Appeals Committee further reviewed the briefs of the appellant and the appellee filed in the appeal and convened to hear the presentation of oral arguments by the parties.

The statement of the case as presented by the original Arbitration Committee in its written decision detailed the essential facts of the parties' agreement. The essence of the dispute, as well as the basis for appeal, is which party bears responsibility for container per diem charges, a fee that was not specifically addressed in the Transload and Handling Agreement ("Agreement") between the parties.

The original Arbitration Committee viewed Hansen-Mueller's Transload and Handling Agreement as the basis of the responsibilities of each of the parties. SureSource did not provide any documentation that it created a Transload and Handling Agreement of its own. As such, Hansen-Mueller's Transload and Handling Agreement is applicable, pursuant to NGFA Grain Trade Rule 3 [Confirmation of Contracts] (B), which states as follows:

> *If either the Buyer or the Seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party, as described in Rule 3 (A), of any disagreements with the confirmation received.*

The original Arbitration Committee referenced and relied upon language that was in the Agreement between the parties in its written decision. When the decision was published, a line from that

Agreement was inadvertently omitted. The complete passage from the Agreement is cited below and is what the original Arbitration Committee used to formulate its decision.

Terms of Handling Services

1. TRANSLOAD FEES

Company [SureSource] shall pay HM a transload fee (the "Transload Fee") of $[redacted] per container of Grain unloaded from container direct to railcar. The Transload Fee shall be inclusive of terminal handling and drayage. Company shall be responsible for ordering and supplying transportation and railroad equipment to the Facility and shall pay all freight on inbound and outbound movements. All additional expenses, including but not limited to railcar demurrage, chassis charges, and Grain inspection or grading fees, are to the account of Company.

Clearly, the transload fees called for Hansen-Mueller to be the party responsible for terminal handling and drayage; picking up the containers at the Port of Houston; unloading the containers into railcars; and returning the container back to the Port of Houston when it was empty. SureSource bears responsibility for freight on getting the containers delivered to the Port of Houston and freight on railcars from Hansen-Mueller's facility once the railcars are loaded to SureSource's customer destination. While the Transload and Handling Agreement did not specifically address loading/unloading schedules, numerous emails as noted by the original Arbitration Committee, quantified the schedule as 8-12 containers loaded onto 2-3 railcars per week. Neither party objected that the schedule was not to their understanding.

Multiple changes were made by both SureSource and Hansen-Mueller to the original Transload and Handling Agreement. Any alteration of the original agreement must be mutually agreed upon by the parties and then confirmed by written communication by both parties pursuant to NGFA Grain Trade Rule 4 [Alteration of Contract]. Since neither party objected to the changes, the Arbitration Appeals Committee concluded that both parties verbally agreed to the changes and, thus, there was no unilateral change initiated by only one party.

If Hansen-Mueller found that it was not able to meet that agreed upon schedule, it bore the responsibility to contact SureSource concerning the delay. As the original Arbitration Committee stated, only timely transloading by Hansen-Mueller could have eliminated or reduced the container per diem fees. If something in SureSource's container and railcar arrival logistic plan went awry and did not match what was agreed to, Hansen-Mueller could have put SureSource on written notice concerning the transloading delay. Hansen-Mueller did not provide evidence of written notice being given to SureSource in meeting the agreed upon schedule of the pickup and return of containers. Had written notice been provided to SureSource, container per diem charges would accrue against SureSource until logistics improved to match the schedule as called for in the Agreement.

There was strong consensus among the members of the Arbitration Appeals Committee that there was shared fault between Hansen-Mueller and SureSource for the container per diem fees that were assessed. However, neither party presented a basis for an equitable calculation or rationale for splitting the costs. Both parties' positions were that they were totally blameless for the per diem fees. Since responsibility for container per diem fees was not addressed in the Transloading and Handling Agreement and there is no NGFA Trade Rule that is applicable, the arbitrators would need to apply trade custom, which is that the drayman – Hansen-Mueller, the party picking up and returning the container – would be responsible for any per diem charges unless written notice is given to the contrary.

AWARD

For these reasons, the Arbitration Appeals Committee affirmed the decision of the original Arbitration Committee.

Decided: August 23, 2024

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE APPEAL ARBITRATORS, WHOSE NAMES APPEAR BELOW:

Jay Mathews, *Chair*
CEO
Prairieview Grain Trading
Champaign, IL

Jean Bratton
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Centerra Co-op
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Craig Haugaard
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