National Grain and Feed Association
Arbitration Decision
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March 21, 2014

CASE NUMBER 2606

Plaintiff: **Attebury Grain, LLC, Amarillo, Tex.**

Defendant: **Superior Grain Company, Vernon, Calif.**

STATEMENT OF THE CASE

This case involved a dispute over weights and measures for grain shipments made by Attebury Grain, LLC ("Attebury"), as the seller, to Superior Grain Company ("Superior"), as the buyer, under several contracts for white corn. Attebury claimed that Superior failed to pay for 115,000 bushels of U.S. No. 1 white corn that were delivered to Superior between March and May 2011. According to Attebury, these bushels conformed to the requirements of the contracts. After informal negotiations failed, Attebury filed a timely demand for arbitration.

Attebury and Superior are not strangers and have entered into a number of contracts over the years involving the sale and purchase of over 400,000 bushels of corn. This arbitration case involved two contracts issued in 2011 – contracts numbered 55854 and 56038. Contract 55854, dated Feb. 9, 2011, provided for March 2011 delivery of 55,000 bushels at $9.2125 per bushel. Contract 56038, dated May 3, 2011, provided for May 2011 delivery of 60,000 bushels at $9.5875 per bushel. Among other terms, each of these contracts also provided:

- All shipments were to be U.S. #1 white corn delivered by rail to Superior FOB Vernon, California, with weights determined "First Certified/ Official Origin."
- Payment for all conforming deliveries was due within 30 days. Late payments were subject to a late payment fee of $0.075 per bushel for every 4 days.
- Any dispute arising under the contract was to be submitted to arbitration under the rules adopted by the National Grain and Feed Association.

Attebury has shipping facilities at several locations, including Kress, Black, and Tulia in Texas. In this regard, Attebury originated most of the white corn shipments from Black and Tulia, which both utilize certified scales. However, Attebury billed $96,418.93 for 10,821.428 bushels of corn, which was shipped from its Kress location that did not have a certified scale. All of the weight tickets for the Kress shipments contained hand-written weights but also indicated that they were issued by a licensed inspector and weigher. On June 9, 2011, Superior received two cars from Attebury-Kress that purported to weigh exactly the same amount. Superior claimed that it had these shipments unloaded onto trucks and then weighed at a certified truck scale. Superior also claimed that the truck scale weights were 3,080 pounds (1%) less than the weights indicated on the scale tickets issued by Attebury-Kress.

Based upon the claimed weight discrepancies, Superior withheld further payment on all shipments from any Attebury location contending that all shipments from Attebury were suspect. Rather than conducting an audit of those facilities, Superior claimed an estimated credit of 17.11% of $108,553.52 against all sums due Attebury. While Attebury did offer some concessions, it objected to the credits claimed by Superior. Ultimately, Attebury filed its demand for arbitration against Superior claiming $825,706.95 for the corn, demurrage and late payment fees under the contract.

THE DECISION

A. JURISDICTION

With regard to Superior's motion to dismiss this arbitration case, the panel denied the motion and determined that it did have jurisdiction to consider and resolve this case. The parties are both merchants in the grain industry and have a history and course of dealing. Those dealings involve contracts which were issued and conducted under the NGFA rules. The contracts involved in this case were issued under the NGFA rules and expressly included an agreement to arbitrate disputes under those rules. The arbitrators reviewed the court's decision in the case of *Harper v. Ultimo*, 113 Cal.App.4th 1402 (Cal.2003), which Superior relied upon in its arguments. The arbitrators determined that it was not a grain trading case; it did not involve merchants on both sides of the dispute; and it did not involve a contract that included an express agreement to arbitrate. Unlike the consumer defendant in the *Harper* case, Superior expressly agreed to arbitrate any disputes arising under its contracts with Attebury. While the NGFA Arbitration Rules were only referenced and were not physically attached to the written agreement, those provisions and rules merely outline the procedure to be used to implement and effect the separate agreement to arbitrate. Both parties freely entered into these agreements. More importantly, the arbitration provisions in this case certainly do not leave either party without an effective remedy, which was the actual situation facing the court in *Harper*.

B. WEIGHTS AND MEASURES DISPUTE

Superior has failed to prove its claim to an offset based on erroneous weight tickets issued by Attebury. While Attebury concedes that its Kress scale is not a certified scale as required under its contracts with Superior, Superior never objected to the form of the weight tickets issued by Attebury, which contain hand-written weights as opposed to the printed weights issued by a certified scale. In fact, Superior did not send any objection to the weights on the two train cars until July 26, 2011 – over a month after the shipment was unloaded. Moreover, the arbitrators determined that the evidence and proofs submitted by Superior in relation to its claims were suspect.

Beyond the acceptance of the shipments of grain without protest, Superior wholly failed to prove its claim that those shipments were light. Superior submitted five certified weight tickets issued by the Bandini Truck Terminal in Los Angeles, Calif., which Superior claimed represented the same corn shipped in the two rail cars received from Attebury on June 9, 2011. However, three of the Bandini tickets were actually issued on June 8, 2011, *the day before* the shipments from Attebury. In addition, one of those tickets reflected that the commodity being weighed was actually "lime." While Attebury raised these issues in its Rebuttal, Superior failed to address them at all in its Surrebuttal. These facts raised serious questions about the validity of the claims and offset being advanced by Superior. As a result, the arbitrators were unable to grant any relief to Superior on that claim.

The contracts issued by Attebury specified that the weights of each shipment were to be determined by the first certified scale or the official origin weights. With respect to the shipments from the Attebury-Kress facility, there were no certified scale weights that complied with paragraphs (A) or (B) of NGFA Grain Trade Rule 14 [Weights]. The arbitrators determined that while they were certified, the weight tickets issued by Bandini and provided by Superior in this case were not reliable evidence of the actual weight of those shipments. The arbitrators further concluded that although they were not certified, the hand-written and signed weight tickets issued by Attebury at the time of shipment were the only reliable evidence of weights in the record of the case and that the arbitrators would rely upon those as the "Official Origin" weights in determining these claims.

THE AWARD

Based upon the evidence and the submissions of the parties, the arbitrators award to Attebury the sum of $825,706.95 on its claims against Superior. That award was intended to be inclusive of all amounts due for the corn shipped, demurrage charges, late fees, interest, and all other proper charges through the date of this award. Each party shall pay and be responsible for its own fees and costs including any attorney's fees incurred in these proceedings.

Decided: February 14, 2013

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

Steven Domm, *Chair*
General Manager
Central Farmers Cooperative
Marion, S.D.

Bart R. Banks
General Counsel
Dakota Mill & Grain, Inc.
Rapid City, S.D.

Craig Kilian
Grain Division Manager
Watonwan Farm Service Co.
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