National Grain and Feed Association
Arbitration Decision
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March 4, 2022

CASE NUMBER 2862

PLAINTIFF: THE FORDVILLE CO-OPERATIVE MARKETING ASSOCIATION
FORDVILLE, ND

DEFENDANT: THE FARMERS ELEVATOR COMPANY OF HONEYFORD NORTH DAKOTA
GILBY, ND

STATEMENT OF THE CASE

The Fordville Co-operative Marketing Association (Fordville) and The Farmers Elevator Company of Honeyford North Dakota (Honeyford) are neighboring shuttle-loading co-operatives in eastern North Dakota that have a history of working together to load corn and soybeans on the Canadian Pacific Railway (CP).

In January 2019, the parties entered into a contract in which Fordville agreed to sell yellow soybeans (YSB) to Honeyford. When Honeyford paid for the YSB, it offset expenses it incurred against the proceeds due on the contracts. Fordville asked the NGFA to arbitrate the parties' performance under the contract.

Background

Late in 2018, Honeyford contacted the CP to arrange a dedicated train program whereby Honeyford was obligated to ship commodities to customers on the CP each month. CP agreed to take commodities from Honeyford, Fordville or both, but insisted that the billing document refers to a single origin.

At various times thereafter, Honeyford found buyers for the commodities. Honeyford sold 340,000 bushels of YSB as follows:

> to United Grain Corporation on December 18, 2018 [UGC#1] for delivery 1st half Feb
> to Louis Dreyfus Corporation on January 7, 2019 [LDC] for delivery 2nd half Feb
> to United Grain Corporation on January 7, 2019 [UGC#2] for delivery 1st half Mar

Honeyford periodically consulted with Fordville, via telephone calls and text messages about Fordville's interest in and ability to help fill various trains. On January 9, 2019, for example, the Honeyford manager sent a text message to the Fordville manager to say:

> "I traded some beans for us to make sure we can move some beans. Plans would be to split a train first
>
> half feb and first half March. Then corn last half March.
>
> … CP wants settlements and freight one single origin …

This will assure you getting rid of a trains worth of beans to p n w.

Paperwork is on the way"

Fordville's manager responded:

"Sounds good thank you"

Honeyford prepared "Basis Fixed" contract 16627 for 340K bu YSB delivered for delivery 2/15/2019 – 3/15/2019, with a destination of "PNW", which indicated that it was to be a "co-load if possible". [Fordville#1] [1] Fordville subsequently fixed the futures portion of the contract price on January 25 (contract 16668) [Fordville#2], February 5 (contract 16689) [Fordville#3], and February 13 (contract 16708) [Fordville#4].

The documentation provided by the parties in this case indicated that Fordville#2, Fordville#3 and Fordville#4 each contained the following contract term:

> "FINAL AND COMPLETE AGREEMENT: This contract shall represent the final, complete and exclusive statement of agreement between the parties and may not be modified, supplemented" [2]

In February 2019, Fordville was filling with YSB. In a telephone conversation, Fordville asked Honeyford if it could load out YSB sooner, rather than later. Honeyford, which controlled a number of trains, offered[3] to send a train earlier than it had planned, and may have told Fordville that this arrangement might cause it to incur additional costs on a later train and "discussed the need", in this eventuality, to make Honeyford whole. On February 19, 2019, Fordville loaded 340K YSB to fulfill the Fordville#1 sale to Honeyford and Honeyford's UGC#1 sale to UGC.

The discussions between the cooperatives continued on February 22. Honeyford's manager sent the following messages:

"After board meeting let me know if you think 4 or 5 trains

April, May, June July ?????"

"I need to let Dave Wood know by noon"

Fordville's manager responded:

"I would like to say 3 possible 4 haven't talked to growers yet"

And on February 25, Honeyford's manager sent:

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[1] Fordville#1 bears a date of January 8—which would have preceded the text messages—but was executed on January 9. The arbitrators assume that contract was printed on the execution date, after the exchange of text messages.

[2] The arbitrators noted the absence of standard punctuation and that this appeared to be an incomplete statement. However, none of the six versions of the documentation provided (three confirmations from two parties) included additional language or clarification for the arbitrators.

[3] Honeyford stated that Fordville said that it was full. Rather than deny that it was full, Fordville claims that there was no evidence that it was full. Absent such a denial, the arbitrators find that Fordville was full and that, although under no obligation to do so, Honeyford caused a train to travel to Fordville to accommodate Fordville's need to unload a full train load of beans. Fordville claims, on the other hand, that Honeyford asked Fordville to load the whole train.

"…Do you want to split a PNW sale?

Net about -95/July"

Fordville's manager responded:

"I have a 2nd half March booked with Gavilon so far I only did 50 cars will need to cover that 100 first"

In late February, Honeyford sought to load a YSB train to fill Honeyford's LDC contract. After contacting UGC and LDC, Honeyford determined that the least expensive option would be to pay a carrying charge and a $0.40 bushel discount to LDC to ship the YSB in July and to deliver the UGC#2 bushels as scheduled. Honeyford sent text messages to Fordville saying that the LDC load would be discounted. Honeyford subsequently loaded the train to fill the UGC#2 contract, apparently without incident.

Honeyford explained the $75,600 offset[4] in an April 4, 2019 letter to Fordville, saying that "the discount was very fair as it is only right that we should share the risk when I allowed you to use the first train".

Fordville demanded payment for the YSB it loaded on Honeyford's behalf and denied responsibility and liability for the discounts and carrying charges attributable to another train. Fordville subsequently submitted contract Fordville#1 and pricing memoranda Fordville#2, Fordville#3 and Fordville#4 for arbitration.

THE DECISION

Honeyford offered to purchase 340K bushels of YSB from Fordville in February and March. Fordville agreed. Honeyford sent four confirmations that, collectively, covered and priced the 340K bushels. Honeyford directed a train to Fordville. Fordville loaded 340K bushels of YSB into the train.

Honeyford says that before it agreed to send the train to Fordville the parties "discussed the need" to make Honeyford whole. Whether or not the parties "discussed the need" or "agreed" to make Honeyford whole, neither party confirmed an amendment to the contracts in question, as required by NGFA Grain Trade Rule 3(B). The arbitrators find nothing in the contracts submitted for arbitration, that entitles Honeyford to set off expenses incurred in connection with a subsequent transaction. If Honeyford is entitled to offset its expenses against the proceeds due Fordville, its right must come from another source.

Honeyford claims that it negotiated a program with the CP through which Honeyford and Fordville could load both corn and soybeans out of both locations. "The co-load program", Honeyford says, "was a joint venture between Honeyford and Fordville."[5] Honeyford asserts that it is entitled to offset the expenses of the joint venture against the proceeds due Fordville. Fordville, on the other hand, denies that it entered into any sort of joint venture.

A question pertaining to the existence of a joint venture is not obviously a matter over which the NGFA has jurisdiction. Nonetheless, because Honeyford raised the question and Fordville objected neither (a)

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4. Carrying charges of $7600 and one-half of a $0.40 discount on 340K bushels.

5. Defendant's Exhibit A ¶5.

that the question exceeded the scope of its agreement to arbitrate nor (b) that Honeyford should have raised the question in a counterclaim,[6] the NGFA takes jurisdiction by way of the consent of the parties.[7]

Honeyford has not produced a contract between the parties setting forth the terms of a joint venture. No reference to a joint venture appears in the more than twenty pages of text messages between the parties. Honeyford does not refer to a joint venture in its April 4, 2019 justification of the discount. Instead, Honeyford argues that the conduct of two North Dakota cooperatives demonstrates the existence of a joint venture as a matter of North Dakota law. The parties agree that the North Dakota Supreme Court set forth the applicable standard for determining the existence of a joint venture. A North Dakota joint venture requires that there be:

> (1) contribution by the parties of money, property, time, or skill in some common undertaking, but the contributions need not be equal or of the same nature; (2) a proprietary interest and right of mutual control over the engaged property; (3) an express or implied agreement for the sharing of profits, and usually, but not necessarily, of losses; and (4) an express or implied contract showing a joint venture was formed.

Thompson v. Danner, 507 N.W.2d 550 (N.D. 1993) at 556.

(1) A common undertaking

The arbitrators struggled with what Honeyford believed to be scope of the common undertaking. Did the common undertaking consist of (a) the trains the parties actually co-loaded,[8] (b) the train or trains containing the 340K bushels of soybeans to be co-loaded "if possible",[9] (c) the trains the parties agreed to co-load, irrespective of how those trains were loaded,[10] or (d) all trains the CP approved for co-loading. The contracts and text messages suggest, on the other hand, that Fordville merely agreed to supply commodities to Honeyford from time to time as its situation warranted. The arbitrators find that—although it is clear that the parties agreed to do *something*—Honeyford has failed to demonstrate the existence of any particular common undertaking.

(2) A proprietary interest and right of mutual control over the engaged property

If Honeyford had demonstrated the existence of a common undertaking, the next task would be to show that there was a proprietary interest and a right of mutual control over the engaged property. Faced with such a task, Honeyford would fail. Each party controlled its own grain. Honeyford controlled the freight and the destination. When Honeyville needed grain for a customer in the Pacific Northwest, it did not use "joint venture" property, but rather purchased the grain it needed from Fordville. Each party, as Honeyford observed, had an interest in cooperation, but the same may be said of any bilateral grain contract. In any event, an interest in cooperation is not the same as mutual interest and control over

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6. NGFA Arbitration Rule 2(A).

7. NGFA Arbitration Rule 1(A)(2).

8. If the agreement was as to trains actually co-loaded, none of the trains at issue was actually co-loaded, in which case Honeyford's claim to offset damages arising from the joint venture must fail.

9. If the agreement was as to the trains carrying the bushels identified in Fordville#1, those soybeans appear to have been loaded and delivered without any sort of loss.

10. The January 9 text message exchange suggests that the parties agreed to co-load one soybean train in the first-half of February, another soybean train in the first-half of March and a corn train in the last half of March. If so, those would appear to be the trains used to fill the UGC#1 and UGC#2 contracts and another corn train about which the parties presented no evidence. Honeyford has not presented evidence that convinces the arbitrators that Fordville agreed that its responsibilities extended to the LDC train that generated the loss that Honeyford seeks to offset against the proceeds of the Fordville#1 contract.

property contributed to a joint venture. The arbitrators find that the parties did not have mutual control of any property.

(3) An express or implied agreement for the sharing of profits

Honeyford marketed the grain. From time to time Honeyford purchased grain from Fordville in a traditional bi-lateral grain contract. Fordville's gain was limited to the profit, if any, it made on grain that it sold to Honeyford, rather than from the profits "the joint venture" realized from marketing the grain. The hope, as Honeyford puts it, that "both parties would share in the benefits of a better freight rate and greater net proceeds by working together" is not an agreement to share profits. Insofar as losses are concerned, Honeyford says that the parties "discussed the need" to make Honeyford whole and, when losses materialized, that it would be "fair" and "right" to share the risk. That Honeyford felt the need to discuss the topic and then to appeal to fairness suggests that there was no pre-existing arrangement whereby the parties had agreed to share expenses. The arbitrators find that the parties did not have an agreement to share profits or losses.

After reviewing the text messages between the parties, the arbitrators find that the parties cooperated, on a train by train basis, when they found it convenient to do so, rather than by way of an agreement to engage in a common undertaking that involved mutual control of property that provided for an arrangement whereby the parties agreed to share profits and expenses. Absent the existence of a joint venture agreement that would permit Honeyford to require Fordville to share its losses, Fordville is entitled to the bargained for performance on the Fordville contracts submitted to arbitration.

THE AWARD

The arbitrators award $75,600.00 to Fordville from Honeyford and 5.25% interest from the date of the award.[11]

Decided: May 28, 2021

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

Craig Haugaard, *Chair*	**Simon Buckner**	**Mike Traxinger**
Vice President of Grain	Corporate Counsel	General Counsel
Sunrise Cooperative Inc.	Bartlett Grain Company	Agtegra Cooperative
Fremont, OH	Kansas City, MO	Aberdeen, SD

[11] . Fordville asks for "[i]nterest accruing from the date this Complaint is filed, to the extent allowed under the NGFA Arbitration Rules and NGFA Trade Rules". The NGFA rules permit such an award, but the four Fordville contracts do not provide for such an award.