



National Grain and Feed Association

# Arbitration Decision

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November 15, 2001

## NGFA Arbitration Case No. 2003

**Plaintiff: Ag Processing Inc., Omaha, Neb.**

**Defendant: Burlington Northern Santa Fe Railway Co., Fort Worth, Texas**

### Statement of the Case

This case concerned which party, Ag Processing Inc. (AGP) or Burlington Northern and Santa Fe Railway Co. (BNSF), bore the responsibility for a "lost" railcar of wheat.

AGP claimed that it delivered a car loaded with wheat to BNSF, which it alleged the carrier failed to deliver to its destination. AGP therefore claimed that BNSF owed AGP the value of the wheat, as well as a refund of freight charges paid for transportation of the car. AGP also argued that the electronic bill of lading accepted by BNSF created an irrebuttable presumption that the car was delivered loaded to BNSF and that BNSF was liable unless it could demonstrate that one of the Carmack amendment exceptions applied.

BNSF countered that the bill of lading created, at most, a rebuttable presumption of delivery and that its records demonstrated that the car was empty when tendered to BNSF.

Most of the facts in this case were undisputed. AGP finished loading a 54-car wheat train at Superior, Neb., on

Dec. 14, 1999. Each car was certified as to weight and grade by an employee of an independent grain inspection service, including the car (PTLX 17111) that was the subject of this dispute. The electronic bill of lading was sent to BNSF at 4:16 p.m. on Dec. 14, 1999 and was accepted shortly thereafter at 4:38 p.m. The train was tendered to BNSF for delivery to CSXT at Memphis, Tenn., (for subsequent movement by CSXT to destination). BNSF car records showed that PTLX 17111 was "loaded" on Dec. 14 at 4:16 p.m. and 4:38 p.m., but "empty" as of 10:35 a.m. on Dec. 15 when BNSF Train LK 0115 departed Superior, Neb., bound for Newton, Kan. At Newton, PTLX 17111 was separated from the train and placed for loading at the facilities of another shipper. The other 53 cars were delivered to CSXT at Memphis, Tenn., and then moved to destination. AGP paid all freight charges, including freight charges for PTLX 17111, and never recovered the wheat.

The only fact in dispute was whether PTLX 17111 was empty or loaded when tendered by AGP to BNSF on Dec. 14.

### The Decision

The arbitrators determined that this dispute was subject to Section 2(b)(3) of the NGFA Rail Arbitration Rules, which provides for the arbitration of "disputes arising under receipts and bills of lading governed by 49 U.S.C. § 11706 (e.g., *Carmack disputes such as loss-and-damage claims, etc.*)"

Under the Carmack amendment, once the shipper demonstrated that it tendered lading to a rail carrier in sound condition but failed to receive the lading from the carrier or received the lading in a deteriorated condition, the shipper has established a *prima facie* case. In that case, the carrier would be liable for the lost rail car, unless it could establish that the

loss resulted from an act of God, an act of the public enemy, an act of the shipper, an act of the public authority or the inherent vice or nature of the lading.

AGP argued that once BNSF accepted the electronic bill of lading, the railroad was liable for what the bill of lading stated was being transported, unless BNSF demonstrated that one of the exceptions to Carmack liability applied. Since BNSF did not claim any such exception, BNSF was liable, AGP asserted. BNSF argued that the electronic bill of lading created, at most, a rebuttable presumption that it was liable and that there had been a mistake of fact, which voided the contract for carriage.

The arbitration panel determined that the carrier's acceptance of an electronic bill of lading cannot, in and of itself, demonstrate beyond doubt that delivery had been made. Mistakes are part of commerce. An individual may mistakenly enter the wrong car number, commodity and/or loaded/empty status. However, mistakes can be corrected for purposes of Carmack liability, especially where due diligence is shown by the party that made the mistake. Whether the correction had been made by BNSF in an appropriate manner such that it could avoid liability was a matter of proof.

In this case, the evidence presented by AGP created a strong presumption that PTLX 17111 was tendered loaded to the BNSF. BNSF accepted the bill of lading and the third-party inspection certificate showed both the weight and grade of the wheat loaded in PTLX 17111. BNSF presented evidence to support its position that PTLX 17111 was empty when received by BNSF. When PTLX 17111 was inspected by BNSF in Newton, Kan., the BNSF car records were changed to reflect a change in the status of the car from loaded to empty. Since such a short time had passed between departure and inspection and nothing out of the ordinary was reported as the train moved between Superior, Neb., and Newton, BNSF argued that the car had to have been empty when delivered by AGP to BNSF.

Although BNSF's evidence was not without merit, it was insufficient to overcome the presumption that the rail car was loaded that was created by the bill of lading and augmented by the weight and grade certificates. Specifically, there were three significant weaknesses in BNSF's evidence:

▶ First, BNSF did not notify its customer that one car which the customer thought was loaded was, in fact, empty. A. E. Gaeddert, trainmaster for BNSF's Kansas Division, stated on page two of his affidavit that, "It is probable that the BNSF train crew on Dec. 15 advised the BNSF Customer Quality Support Center in Topeka that all of the cars in Train L-KAN002-1-15 then pulled from Superior were loaded but for PTLX 17111. Hence, the status thereafter of PTLX 17111 changed from 'loaded' to 'empty.'" If such an event had occurred, the arbitration panel believed that, as a commercial matter, BNSF should (and presumably would) have so notified AGP. There was no indication in the record of such notice having occurred. As a matter of proof, lack of notification affected the weight afforded this testimony. Indeed, there was no evidence in the record that prior to the initiation of this

arbitration, BNSF did anything to correct the bill of lading or any other documents (other than its car records) to reflect its view that PTLX 17111 was received empty from AGP.

- ▶ Second, the record failed to reflect the reason the status of PTLX 17111 was changed from "loaded" to "empty." In particular, there was no statement in the record that someone from BNSF visually inspected inside the car and saw that it was empty.
- ▶ Finally, there was a question as to the accuracy of BNSF car records. AGP presented evidence that in the past BNSF had sent cars for loading that were, according to its car records, empty but which, according to AGP personnel inspecting the cars, were loaded. Moreover, the records for PTLX 17111 near the time of the dispute had discrepancies. The car-tracing records (submitted by both parties as part of their filings) showed that on Dec. 21, 1999, PTLX 17111 was released at 11 a.m. on a train moving from Memphis, Tenn., to Charlotte, N.C., and at 3 p.m. on the same day was released on a train moving from Wright, Kan. to Kinpark, Calif.

## The Award

Therefore, it is ordered that:

- ▶ BNSF pay AGP the value of the contents of the car (\$9,918.33) and refund the freight charges AGP paid to BNSF (\$1,730) in connection with the movement of the car.
- ▶ AGP also is entitled to collect from BNSF interest from Dec. 15, 1999 at the rate of 8 percent per annum until paid in full.

Submitted with the unanimous approval and consent of the arbitrators, whose names are listed below:

**George A. Aspatore**, *Chairman*  
General Solicitor  
Norfolk Southern Corp.  
Norfolk, Va.

**James W. Whitaker**  
Vice President, Grain Marketing Division  
Southern States Cooperative Inc.  
Richmond, Va.

**Elizabeth J. Hall**  
Counsel  
The Andersons Inc.  
Maumee, Ohio



