



1992

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### Recommended Citation

Barrett, David C. Jr. (1992) "Arbitrating Agricultural Disputes: The National Grain and Feed Association's Experience," *North Dakota Law Review*. Vol. 68: No. 2, Article 13.

Available at: <https://commons.und.edu/ndlr/vol68/iss2/13>

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# ARBITRATING AGRICULTURAL DISPUTES: THE NATIONAL GRAIN AND FEED ASSOCIATION'S EXPERIENCE

DAVID C. BARRETT, JR.\*

## I. INTRODUCTION<sup>1</sup>

The National Grain and Feed Association's (NGFA) Arbitration System is believed to be one of the oldest industry-based arbitration systems existing in this country. While it was formally established in 1901, it was created at the initial meeting of the Grain Dealers National Association (NGFA's original name) on November 9, 1896, in Chicago, Illinois.

The Association's original constitution and bylaws contained the beginnings of an arbitration system, and the minutes of board meetings in the early years of the organization disclose that disputes were both mediated and arbitrated by the secretary and the board. On November 2, 1898, members at the annual meeting voted to establish a formal arbitration committee to formulate rules on arbitration. On October 3, 1901, the Arbitration Rules were formally adopted. The Arbitration System has operated continuously since that time with various amendments to the Rules adopted over the years. A copy of the current Arbitration Rules is included as Appendix A.

Closely related to the NGFA's Arbitration System are the Trade Rules, which facilitate trade between NGFA members and all firms in the grain, feed and processing industry. The Trade Rules apply to transactions between members unless the parties agree otherwise.<sup>2</sup> Additionally, both members and nonmembers frequently make the Trade Rules applicable to transactions by specifically referencing them in contracts. The initial set of Trade Rules, first adopted in 1902, were the Grain Trade Rules. Today, the Grain Trade Rules have been supplemented by Feed Trade

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1. Paper based on speech delivered by Mr. Barrett on November 2, 1991 in Atlanta, Georgia at the TWELFTH ANNUAL MEETING AND EDUCATIONAL CONFERENCE OF THE AMERICAN AGRICULTURAL LAW ASSOCIATION.

2. The preambles to each set of the NGFA's Trade Rules (Grain, Feed and Barge Trade Rules and Barge Freight Trading Rules) provide that: "[a]ll Active members are free to agree upon any contractual provisions which they deem appropriate and these rules apply only to the extent that the parties to a contract have not altered the terms of the rules, or the contract is silent as to a matter dealt with by the pertinent rule." NATIONAL GRAIN AND FEED ASSOCIATION, TRADE RULES AND ARBITRATION RULES, 3, 15, 23 (1991).

Rules (adopted in 1921) and the Barge Trade Rules (adopted in 1964). The stand-alone Barge Freight Trading Rules (affreightment) were adopted in 1981 and are the most recent rules addition. The NGFA's Trade Rules Committee reviews the rules each year to ensure that they continue to be current and relevant. Importantly, the rules are designed to reflect trade practices, not to create or establish them.

The NGFA is a voluntary association of grain and feed firms. Membership is comprised of more than 1300 companies with over 5000 facilities that store, handle, merchandise and process more than two-thirds of all U.S. Grains. The NGFA also has a network of more than forty affiliated State and Regional Grain and Feed Associations comprising over 10,000 member companies. Included in NGFA's membership are local country elevators, terminal elevators, feed mills and processing plants, export elevators, commodity brokers and grain merchants and others who provide products or services to the industry. NGFA's members comprise the largest sector of American agri-business.<sup>3</sup>

## II. ENFORCEABILITY OF ABRITRATION

### A. GENERALLY

The enforceability of arbitration agreements is now well established under both federal and state law.<sup>4</sup> The United States is also a signatory to two international agreements on arbitration which are of particular importance to firms engaging in cross-border business with Mexico and Canada.<sup>5</sup>

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3. NATIONAL GRAIN AND FEED ASSOCIATION, 1991-92 DIRECTORY YEARBOOK, 337 (1991) (containing the NGFA's Bylaws). The NGFA's Bylaws provide for five classes of membership in the Association, namely: Active Members, Associate Members, Honorary Members, Affiliated Association Members and Allied Members. *Id.* Only Active and Affiliated Association Members have the right to vote at all meetings of the Association. *Id.* While Allied Members do not have the right to vote, they do have the right to serve on arbitration committees and the Barge Freight Trading Rules Subcommittee of the Trade Rules Committee. *Id.*

4. See 9 U.S.C. §§ 201-208 (1988). See also, The United States (Federal) Arbitration Act, 9 U.S.C. §§ 1-307 (1988) (the federal law regarding arbitration). A majority of the states have adopted the provisions of the Uniform Arbitration Act, 9 U.L.A. 1 (West 1985 and Supp. 1991). Doubts concerning the scope of arbitration are generally resolved in favor of arbitration. See *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Independence Bank v. Erin Mechanical*, 550 N.E.2d 198, 200 (1988).

5. *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 9 U.S.C. §§ 201-208 (1988), governs arbitrations with Canadian firms. The *Inter-American Convention on International Commercial Arbitration* governs arbitrations with Mexican firms. See 9 U.S.C. § 305 (1988) (Mexico is also a signatory to the *Convention on the Recognition of Foreign Arbitral Awards*, but the *Inter-American Convention* would apply to transactions between American and Mexican firms.) See 9 U.S.C. § 305 (1988).

## B. NGFA ARBITRATION

Members of NGFA consent to arbitrate disputes with each other when they apply for membership in the Association. The NGFA's bylaws require that Active<sup>6</sup> and Allied<sup>7</sup> members are to comply with the Trade Rules<sup>8</sup> (when applicable) and Arbitration Rules. The bylaws further require the expulsion of members who refuse to arbitrate a trade dispute with another member or fail to abide by a final arbitration decision.<sup>9</sup> The right of NGFA to expel a member for refusal to abide by an arbitration award was established early in the Association's history.<sup>10</sup>

## C. NGFA ARBITRATION JURISDICTION

The NGFA Arbitration Rules set forth the basis for jurisdiction over disputes filed with NGFA. The Arbitration System is always operational and is governed by procedures that ensure fairness for all types and sizes of companies. As noted previously, arbitration is mandatory for NGFA members involved in trade disputes with another Active or Allied member of the Association. However, NGFA's Arbitration System is also available for resolving disputes with nonmembers. Use of the Arbitration System in disputes between members and nonmembers can occur in one of three ways:

1. The contract between the NGFA member and non-member can include a clause that requires arbitration

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6. "An Active Member shall be any individual or firm engaged in the warehousing, processing, manufacturing, merchandising, or distribution of grain or feed, or feed ingredients, and whose membership in this corporation is independent of his membership in any other organization." NATIONAL GRAIN AND FEED ASSOCIATION BYLAWS, Art. II, § 2(a).

7. "An Allied member shall be any individual or firm which sells or leases barge freight to the grain industry, provided that no individual or firm which is eligible to be an active member may be an Allied member." BYLAWS *supra* note 6, Art. II, § 2(e).

8. In the case of Active members, the provisions of the Grain, Feed and Barge Trade Rules are applicable to transactions with other Active members "unless otherwise and specifically agreed to at the time of the trade, or subsequent thereto." See NATIONAL GRAIN AND FEED ASSOCIATION, *supra* note 2, at 3, 15, 23 (containing the Preambles of the NGFA Grain, Feed and Barge trade rules). Similarly, the Preamble to the Barge Freight Trading Rules provides they are applicable to all transactions between or among Active and Allied members "unless otherwise and specifically agreed to at the time of the trade, or subsequent thereto." Importantly, members may agree upon any contractual provisions which they deem appropriate.

9. "Neglect after written request by the Secretary of the Association, or refusal to submit to arbitration the subject matter of any controversy with another Member or failure to comply with the award of an Arbitration Committee, shall be deemed uncommercial conduct, and grounds for expulsion from membership of this Association." BYLAWS, *supra* note 6, Art. IX, § 2(b).

10. See *The Paddock Hodge Co. v. Grain Dealers' Nat'l Assoc.*, 18 Ohio App. 66 (1921); see generally 6 AM. JUR. 2d *Associations and Clubs* § 32 (1963 & Supp. 1991).

of disputes through the NGFA. Under Section 3(a)(2) of the Arbitration Rules, the parties are deemed to have consented to arbitration. Of course, in some instances a party might have to obtain a court order to force arbitration.<sup>11</sup>

2. The NGFA member and the nonmember can consent to have NGFA arbitrate the dispute after it arises, even though the contract between the parties does not require arbitration.
3. A court can order that a case between an NGFA member and nonmember be arbitrated through the NGFA. Normally a court will not order arbitration unless an arbitration clause of some sort was contained in the underlying contract.<sup>12</sup> Of course, if the contract contains even a broad, nonspecific arbitration clause, it is quite reasonable for a party to urge that NGFA's Arbitration System be used if one or both parties are NGFA members and the dispute involves an issue related to the grain or feed business.

Importantly, the NGFA does *not* arbitrate disputes involving solely nonmember firms, even if both contractually agree to use the Arbitration System. In 1990, NGFA developed a sample grain purchase contract as a model for use between grain companies and producers which contains the following arbitration clause:

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11. A number of cases have been arbitrated by the NGFA after one of the parties obtained a court order. *See, e.g.*, *The Bunge Corporation v. Tucker*, NGFA Arbitration Case No. 1517 (May 28, 1975). Section 3(d) of the Arbitration Rules expressly provides for arbitration between a member and nonmember after issuance of a court order. *See* NATIONAL GRAIN AND FEED ASSOCIATION, TRADE RULES AND ARBITRATION RULES, § 3(d) (Appendix A) [hereinafter ARBITRATION RULES].

12. Some state laws now require arbitration clauses to be inserted in agricultural contracts under certain circumstances. Minnesota law provides that contracts involving agricultural commodities "must contain language providing for resolution of contract disputes by either mediation or arbitration." MINN. STAT. ANN. §§ 17.90-91 (1990) (emphasis added). The term "agricultural commodity" is broadly defined in the statute and appears to apply to both the purchase and sale of agricultural commodities by "a person who in the ordinary course of business buys agricultural commodities grown or raised" in Minnesota, "or who contracts with a producer to raise agricultural commodities" in Minnesota. *Id.* Arkansas now provides for a statutory form of notice of mandatory arbitration for disputes over "defective agricultural seed." ARK. CODE ANN. § 2-23-102 (Supp. 1991). If a buyer of agricultural seed provides the statutory notice, then, "within ten (10) days after the alleged defect or violation becomes apparent," the aggrieved buyer must file a complaint with the Director of the Arkansas State Plant Board. *Id.* The Director of the Arkansas Plant Board then refers the complaint to an arbitration committee composed of persons set forth by law. ARK. CODE ANN. §§ 2-23-104, 105 (Michie Supp. 1991); *see also* IDAHO CODE § 22-436 (Bobbs-Merrill 1988 & Supp. 1991). Quite frankly, the Arkansas law seems to primarily be a trap for the unwary buyer who fails to submit his arbitration complaint within the ten (10) day period and, thus, loses his right to litigate or arbitrate his claim.

**ARBITRATION:** The parties to this contract agree that the sole remedy for resolution of any and all disagreements or disputes arising under this contract shall be through arbitration proceedings before the National Grain and Feed Association (NGFA) under NGFA Arbitration Rules. The decision and award determined through such arbitration shall be final and binding upon the buyer and seller. Judgment upon the arbitration award may be entered and enforced in any court having jurisdiction thereof.<sup>13</sup>

Section 3(d) of the Arbitration Rules requires parties to file arbitration complaints within twelve months after the expiration date for performance of the contract or contracts involved in the dispute.<sup>14</sup> The time-bar rule for filing actions focuses on the time period during which performance could have occurred rather than actual performance of the contract(s).

### III. MECHANICS OF NGFA ARBITRATION

#### A. COMMENCING A CASE

Filing a case with NGFA for arbitration is rather simple. The party desiring to arbitrate files a complaint, which can be in the form of a letter, with the National Secretary. Section 5(a) of the Arbitration Rules merely requires that the claimant state the nature of the dispute, the defendant's complete name and address, applicable contract numbers, date of the incident giving rise to the dispute, and the amount of damages being claimed.

Once the NGFA receives an arbitration complaint, it is first

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13. NATIONAL GRAIN AND FEED ASSOCIATION, SAMPLE GRAIN PURCHASE CONTRACT NO. 1 (August 1990); NATIONAL GRAIN AND FEED ASSOCIATION, SAMPLE GRAIN PURCHASE CONFIRMATION MEMORANDUM NO. 2 (August 1990). The arbitration clause is, of course, also appropriate for use in contracts between commercial entities involved in domestic trades. Increasingly, the NGFA's Trade Rules and Arbitration Rules are referred to in contracts involving cross-border movements of grain and feed to Canada and Mexico. The United States, Canada and Mexico are signatories to *The United Nations Convention on Contracts for the International Sale of Goods* which requires an express provision excluding its applicability for a contract not to be governed by its provisions. See 52 Fed. Reg. 6262 (1987) (official publication). Parties involved in cross-border movements in North America should familiarize themselves with the provisions of the Convention and include appropriate provisions in their contracts.

14. Section 3(d) of the Arbitration Rules (Appendix A) also provides that when a case is being arbitrated between a member and nonmember "pursuant to court order, the complaint must be filed with the National Secretary by either or both parties within 30 days of issuance of court order." ARBITRATION RULES, *supra* note 11, § 3(d). Since members agree to arbitrate disputes with each other by becoming members of the NGFA, a court order is not ordinarily necessary to initiate an arbitration between members. Of course, if a member were a debtor in a bankruptcy case, a court order granting relief from the automatic stay provisions of 11 U.S.C. § 362 may be required in order for the plaintiff to file the complaint with the NGFA initiating the arbitration against the defendant-debtor.

determined whether at least one of the parties is an NGFA member. If so, an arbitration contract is then prepared by the National Secretary for execution by both parties to the dispute.<sup>15</sup> Once a case is accepted into the system, no distinction is made between member and nonmember firms.

## B. PROCESSING OF ARBITRATION CASES

All papers and pleadings relating to an arbitration case are filed by the parties with the National Secretary, who then sends copies to the other party or parties in the case by certified mail.<sup>16</sup> Time periods for responding to matters commence on the date a party receives notice from the National Secretary. Section 6 of the Arbitration Rules contains instructions to parties on preparing their cases for consideration.<sup>17</sup>

Once both parties have executed the arbitration contract, the National Secretary notifies the plaintiff to file its first argument. Thereafter, the defendant is notified to file its answer including any counterclaim or cross-complaint based on the same transaction. A rebuttal and surrebuttal are also permitted to be filed. A party may be held in default for failure to file arbitration papers in accordance with the time schedules contained in the rules which range from ten to twenty days.<sup>18</sup> The National Secretary may grant limited extensions of certain time limits. However, requests for extension must be made prior to expiration of the stated time period.<sup>19</sup>

As is the case with most arbitration systems, no formal rules for discovery are contained in the NGFA's Arbitration Rules. The general purpose of arbitration is to provide a fair, cost-effective and timely way to resolve disputes. Formal discovery procedures would likely lengthen the process considerably. While discovery is not provided for in the rules, a party is not prohibited from seeking informal discovery. An adverse party's refusal to comply with a reasonable request would probably show up as part of the requesting party's case and might lead the arbitrators to believe

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15. See Appendix B (an Arbitration Contract).

16. ARBITRATION RULES, *supra* note 11, § 5.

17. *Id.* § 6.

18. The authority to enter default judgments is exercised by the National Secretary. While it is rarely necessary, default judgment was entered in favor of a plaintiff when the defendant failed to file a timely answer to the plaintiff's first argument in a case. Both parties had signed the Contract for Arbitration and the defendant was represented by counsel. See *AGRI Indus., Inc. v. Independent Grain Dealers*, NGFA Arbitration Case No. 1593 (Oct. 28, 1982).

19. See ARBITRATION RULES, *supra* note 11, § 7(h).

that the adverse party is trying to hide something. On the other hand, unreasonable requests might backfire upon the requesting party. NGFA's experience has been that parties recognize the reasons for lack of discovery rules in arbitration and rarely seek discovery, whether formal or informal.

### C. PROCEDURE FOR DECIDING CASES AND APPOINTMENT OF ARBITRATORS

Once all papers in a case have been filed with the National Secretary, a three-member National Arbitration Committee is selected by the National Secretary and approved by the NGFA President.<sup>20</sup> The arbitrators should be NGFA members and must be commercially disinterested with respect to the particular dispute.<sup>21</sup> Great care is taken to choose a balanced panel of persons who have expertise in the issues involved in the particular case. The arbitrators serve voluntarily, without compensation. By donating their time and talents in such service, the arbitrators keep the costs of arbitration to a minimum.<sup>22</sup> Generally, the chairman of the arbitration committee is a person who has served as an arbitrator in the past.

The parties have five days after receipt of notice of the members of the National Arbitration Committee to challenge the appointment of any arbitrator "for prejudicial or other causes." The National Secretary rules on such challenges and replaces the committee member if the challenge is found to be valid.<sup>23</sup>

Arbitration committees handle the vast majority of the cases by simply reviewing the written materials submitted by the parties. Each arbitrator is sent the complete file of the case. Gener-

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20. *See id.* § 4(a).

21. *See id.* § 4(b).

22. *See id.* § 4(a) and (b).

23. *See id.* § 8(a). Each challenge to the appointment of a member of an arbitration committee is carefully considered, and the National Secretary sometimes replaces an arbitrator to avoid even the appearance of impropriety or unfairness. Actual prejudice on the part of an arbitrator is rarely alleged or found likely to exist. The most frequent challenge takes the form an allegation that a particular arbitrator might not be objective because his employer is the competitor of a party. However, the Arbitration Rules contemplate that competitors may be appointed to arbitration committees. Section 4(b) of the Arbitration Rules provides that arbitrators are to be "experienced in the type of trade involved" and "should be commercially disinterested with respect to the particular dispute." *Id.* § 4(b). As a practical matter, almost everyone in the grain, feed and processing industry is an actual or potential competitor of every other firm. Thus, the mere fact that an arbitrator is employed by a competitor of a party is not ordinarily a sufficient "cause" to replace such arbitrator. It has been NGFA's experience that potential arbitrators carefully consider whether it would be appropriate to serve as such when contacted about accepting appointment to a particular arbitration committee. Likewise, the National Secretary reviews each arbitration file to identify any conflicts of interest that would not be apparent by simply identifying the parties and the issues.



ally, the chairman will hold one or more conference calls in which the arbitrators will discuss the case and reach a final decision. One person, usually the chairman, will prepare a written opinion containing the decision, which must be signed by each member of the committee. If a finding is not unanimous, the dissenter usually will write a minority opinion. Each party is notified of the decision by certified mail.

The parties have the right to request an oral hearing on their case. An official stenographic record of the oral hearings is taken and is made part of the record of the case. However, such a request must be filed on or before the filing date of the defendant's surrebuttal.<sup>24</sup> This ensures that persons contacted for service on a particular arbitration committee will know at the time of acceptance that the case will require extra time, including travel to an oral hearing. Ordinarily, oral hearings are held at the NGFA's Washington, D.C. office. The party or parties requesting an oral hearing must pay the costs of the hearing.

#### D. ARBITRATION PROCESS MOVES EXPEDITIOUSLY

An arbitration case is scheduled to move forward on the following time schedule:

1. Plaintiff files claim with NGFA.
2. NGFA prepares arbitration contract (usually on the day complaint is received) and mails to plaintiff for signature, then to defendant (each party has 15 days to return executed contract).
3. Plaintiff files first argument (20 days).
4. Defendant files answer (20 days).
5. Plaintiff files rebuttal (10 days).
6. Defendant files surrebuttal (10 days).
7. Arbitration Committee selected and parties notified (10 days).
8. Arbitration committee issues decision (30 days).

*Time from filing to decision (130 days).<sup>25</sup>*

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24. See *id.* § 8(f).

25. See ARBITRATION RULES, *supra* note 11, §§ 5(a), (d), § 7. See also *id.* § 8(k) (provides that arbitrators "shall endeavor to make their report within thirty (30) days after receipt of final papers from the National Secretary."). The 30-day rule set forth in Section 8(k) has been interpreted by the National Secretary to be a guideline for the arbitrators rather than a required time limit for making the report of the arbitrators' decision in a case.

### E. ARBITRATION APPEALS

The parties to an arbitration case have fifteen days after receipt of notice of the National Arbitration Committee's decision to comply with the terms of the award or appeal the decision.<sup>26</sup>

A party wishing to appeal files a notice of appeal within the fifteen-day period after being notified of the decision. Importantly, the notice of appeal must be accompanied by a certified check for the amount of the original award made payable to the prevailing party. The check will be held by the National Secretary pending a final decision by the appeals committee appointed to consider the case.<sup>27</sup> The notice of appeal should briefly state the reasons for the appeal. The appellant also must pay an appeal fee based on the amount in dispute but is not required to pay any service or filing fee. The appellee is sent a copy of the notice of appeal by the National Secretary and is permitted twenty days in which to file its answer.

At this point, the National Secretary assembles the entire record of the case, including the transcript of any oral hearing. An index of the file is prepared so that the appeals committee members can easily locate various pleadings in the record. Importantly, no new evidence may be submitted on appeal, and arguments on appeal must be confined to the facts already contained in the record.<sup>28</sup>

A National Arbitration Appeals Committee of five persons is then selected from a nine-member standing Arbitration Appeals Panel that is appointed annually by the NGFA President. Ordinarily, the members of the panel are persons who have considerable experience in both arbitration and the industry. The chairman of the Arbitration Appeals Panel serves as the chairman of each National Arbitration Appeals Committee unless he or she has a conflict. Occasionally, a person is appointed as an "acting member" of the Arbitration Appeals Panel if necessary to avoid conflicts which arise. The parties are given notice of the appeals committee members and have five days from receipt of notification to object to particular members of the committee for "prejudicial or other causes."<sup>29</sup>

The appellant then files its brief within ten days of the receipt of the record in the case (which usually takes the form of an index

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26. *See id.* § 8(k).

27. *Id.* § 9(d).

28. *See id.* § 9(a).

29. *Id.* § 9(e).

of the file since the parties have already received a copy of all papers filed in the case). Thereafter, the appellee is given seven days after receiving the appellant's brief from the National Secretary in which to file its brief.

Once the appellee's brief has been filed and the appeals committee is supplied with copies, the committee proceeds to rule on the appeal. The appeals committee ordinarily will confer through one or more conference calls. Oral hearings may be requested by the parties, but a request for oral argument must be made no later than the filing of the appellee's answer.<sup>30</sup> A written decision is prepared by the National Arbitration Appeals Committee and must be signed by each member of the committee. Majority and minority opinions may be prepared if the decision is not unanimous.

Decisions of a National Arbitration Appeals Committee are final and binding upon the parties. The parties must comply with the decision of the appeals committee within fifteen days of receipt of the decision. If the original prevailing party also prevails on appeal, the certified check in the amount of the original award is forwarded to that party with notice of the decision.

#### IV. STRING ARBITRATIONS, SPECIAL CIRCUMSTANCES AND OTHER ISSUES

##### A. STRING TRADES

Ordinarily, arbitration cases involve two parties with a contractual dispute. Occasionally, however, cases involve multiple parties with a multitude of claims, cross-complaints and counter-claims. The most frequent of these cases involve what the industry refers to as "string trades" or "paper trades." String trades involve subsequent purchase and sale of the same shipment occurring after formation of the original contract but before shipment is received by the final receiver. Thus, each party in the "string," except for the first and the last, is both a buyer and a seller. This practice is quite common in the domestic trade of grain moving by barge. The typical transaction may involve five or six companies in a barge shipment of grain which starts with a contract by the first seller for delivery to a gulf port location.<sup>31</sup> While there are a number of parties and contracts, only one physical delivery of the grain will occur. The major contractual terms such as the quan-

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30. See *id.* § 9(h).

31. For example, shipment f.o.b. New Orleans.

tity, quality and shipment period or delivery date should be the same. The price of grain in each contract obviously will vary, since the economic reason for the existence of the "string" is the change or anticipated change occurring in the market.

The first problem these cases present is that the time limits for ordinary two-party cases are not always appropriate. Thus, Section 5(e) of the Arbitration Rules provides that the normal time limits may be altered to accommodate the arguments between the parties.

Section 5(f) of the Arbitration Rules provides that the parties to the "string trade" may agree to permit exchange of arguments between the plaintiff and ultimate defendant on the theory that ultimate liability is being passed along the string. While this rule is sometimes invoked, parties are often reluctant to release others from the middle of a string because contractual terms between the various parties are not ordinarily identical and often contain different language on warranties and disclaimers, etc.<sup>32</sup> Of course, if a party in the middle of a "string" turned out to be insolvent, the party in contractual privity with the insolvent party may very well be left holding the bag.

## B. COMPLEX CASES

Occasionally, cases involve issues that require special handling. For example, in one recent three-party case, one of the parties sought discovery from a foreign corporation that was not a party to the arbitration proceeding. The arbitration case was held in abeyance while the one party successfully obtained a discovery order in a New York state court, which ordered the foreign corporation to make several of its employees available for depositions on issues related to the arbitration case.

Another example is where, as previously noted, arbitrators must be selected from the membership, which means that they are employees of member companies. It also means that many cases involve issues where knowledgeable nonattorneys serve as arbitrators. Obviously, the use of experts in the industry is one of the strengths of the system. Nevertheless, an attorney employee of a member firm is occasionally appointed to serve as a member

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32. This comment is based on the author's experience as NGFA's National Secretary in reviewing the files of arbitration cases and discussing these matters with parties. For example, in one case which was ultimately settled prior to the rendering of an arbitration decision, the contract between two of the parties provided for a different shipment period than the contracts of the other four parties in the string.

of an arbitration committee when, for example, complex warranty issues under the Uniform Commercial Code are being considered.

### C. DAMAGE AWARDS

NGFA's Arbitration System was designed primarily to resolve contractual claims between parties in the grain and feed industry. Consequently, most of the arbitration decisions involve calculation of compensatory damages based upon a disputed agreement. However, the Arbitration Rules do not limit parties to compensatory damages, and occasionally a party will seek special damages including costs and attorney fees.<sup>33</sup>

Several conclusions can be drawn from part arbitration decisions.

1. Arbitrators often do award interest on claims to the prevailing party based upon commercial interest rates in effect during the period since the dispute arose. Of course, if the party doesn't ask for interest, it probably won't be awarded.
2. Occasionally, the prevailing party will be awarded attorney fees. These instances appear to be limited to situations where the arbitrators believe one party has taken an unreasonable position. Also, one of the advantages of arbitration is that a party does not need an attorney in order to arbitrate a dispute. Thus, arbitrators are unlikely to award attorney fees to a prevailing party absent some special circumstance.
3. Arbitrators do not award prevailing parties their arbitration service fees, since each party is expected to bear such costs as part of the arbitration process.
4. Arbitrators award substantial compensatory damages when justified.

### D. ADVANTAGES OF ARBITRATION

Arbitration of disputes has a number of advantages including:

1. it is easy to initiate and pursue;

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33. See, e.g., *Kinsho Int'l Corp. v. A.R. Smith & Co.*, NGFA Arbitration Case No. 1667 (Sept. 6, 1990) (granting defendant's request for attorney fees); but see *Little Egypt Grain Co. v. Consolidated Grain and Barge Co.*, NGFA Arbitration Case No. 1674 (May 23, 1991) (denying plaintiff's claim for punitive damages). The Arbitration Rules do not limit the types of damages recoverable in an arbitration case. Rather, it is up to the parties to set forth in the arbitration complaint the type of damages being sought. See ARBITRATION RULES, *supra* note 11, § 5(a).

2. lawyers are not required;
3. cases are reviewed by experts in industry who ordinarily have experience in the particular subject matter surrounding the dispute;
4. the result is binding on both parties;
5. arbitration is generally quicker than the courts; and
6. the costs of arbitration are fairly inexpensive. Each side pays a service fee to NGFA based on the size of the plaintiff's claims. Fees range from \$200 for claims up to \$5,000 to a maximum fee of \$800 on claims in excess of \$50,000.<sup>34</sup>

## V. ADMINISTRATION OF THE ARBITRATION SYSTEM

### A. ROLE OF THE NATIONAL SECRETARY

Under the Arbitration Rules, the National Secretary is charged with administering the Arbitration System.<sup>35</sup> The National Secretary is a full-time staff person who is elected to that position by the Board of Directors or the Executive Committee in accordance with the NGFA's Bylaws.<sup>36</sup> As such, the National Secretary makes most procedural decisions in connection with arbitration cases including making the initial decisions as to the composition of arbitration committees. The selection of members to serve on arbitration committees is subject to approval by the industry-elected President of the Association.<sup>37</sup>

The National Secretary does *not* become involved with the substantive decisions in arbitration cases. It is the exclusive province of the original arbitration committee or appeals committee appointed to consider a case, and each arbitration committee must make its own decision on the merits of that particular case.<sup>38</sup>

### B. PUBLICATION OF DECISIONS

The Arbitration Rules provide that the decisions rendered in arbitration cases shall be published and disseminated to the membership of the Association. Thus, the written opinion of each arbi-

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34. See ARBITRATION RULES, *supra* note 11, § 5(c).

35. See *id.* § 1.

36. See BYLAWS, *supra* note 6, Art. VI, § 3.

37. See ARBITRATION RULES, *supra* note 11, § 4(c). The membership of the National Grain and Feed Association voted to change the titles of various NGFA officers at the annual convention on March 24, 1992. Under the changes, the industry-elected chief executive officer will be known as Chairman. Also, the term "President" in the present Arbitration Rules has been replaced by the term "Chairman."

38. See *supra* notes 15, 29, 30 and accompanying text.

tration committee and arbitration appeals committee is published. Decisions are not published until final. Thus, if a case has been appealed, both the original and appellate decisions will be published together.<sup>39</sup>

It has always been the custom of NGFA arbitration committees to write opinions which disclose the underlying facts, issues, conclusions and reasoning of the arbitration committee. This is reflected in Section 8(k) of the Arbitration Rules and stands in contrast to the custom in domestic commercial arbitrations conducted by the American Arbitration Association.<sup>40</sup>

Written opinions serve a number of useful functions. First, parties are better able to understand and accept the basis for a decision when the arbitrators have articulated the reasons. Second, it forces the arbitrators to more thoroughly think through their reasoning. Third, the publication of written opinions helps to self-police the system because arbitrators know that their decisions will be published and read by others in the industry. Fourth, the published decisions serve as an educational tool for the industry by communicating how particular disputes have been resolved. While arbitration decisions are not formal precedent as to subsequent disputes, they are especially instructive to the membership because arbitration cases often involve issues faced by others on a daily basis. The arbitration decisions which interpret various provisions of the trade rules both educate and act as a check on the trade rules by identifying areas which need clarification or have simply become outdated because of changes in trade practices. The arbitration decisions rendered during the past fifteen years have been compiled and indexed by subject matter, trade rule and description and are available for purchase from NGFA by both members and nonmembers.<sup>41</sup>

## VI. TYPES OF TRADE DISPUTES ARBITRATED

NGFA arbitrations typically involve disputes between mem-

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39. A copy of a recent opinion is attached as Appendix C.

40. See, e.g., AMERICAN ARBITRATION ASSOCIATION, *Guidelines for Expediting Larger, Complex Commercial Arbitrations*.

41. The cases are contained in Part II of a two-volume NGFA publication, *Protecting Your Company's Interests In Trading Agricultural Commodities* (1991) (a supplement to the published cases and an updated index is available for purchase on a yearly basis). Part I contains the proceedings of a two-day seminar on NGFA's Trade Rules and Arbitration System held in August 1990. In 1920, the Grain Dealers National Association (NGFA's former name) published all the decisions (along with a full index and a syllabus of each decision) rendered from 1902 until 1920. Additionally, the NGFA maintains what appears to be a complete set of every NGFA arbitration decision rendered since 1902.

ber companies on domestic trades. However, a number of disputes between member and nonmembers are arbitrated each year. Some of these cases are between member commercial firms and farmers. Occasionally, cases involve international transactions, and the Arbitration System is especially adaptable for cross-border transactions involving Canadian and Mexican firms.<sup>42</sup> While cases usually deal with mainstream grain contracts, NGFA has arbitrated cases involving matters as diverse as whether corn cob meal sold for use as a mushroom medium to a Japanese buyer met contract specifications and a dispute over an almond hull and shell contract.<sup>43</sup>

On average, approximately fifteen cases per year result in published decisions. However, this understates the actual use of the arbitration system, because a number of cases are settled by the parties between the filing of an arbitration complaint and the rendering of a final arbitration decision. The Arbitration System was extremely busy during 1990 when as many as twenty-one cases were active at one point. During the last fifteen years, the most common trade disputes have involved issues related to the meaning of different terms contained in contracting parties confirmations (the old battle of the forms), interpretations of "custom of the trade" where the parties have not explicitly provided for some matter, and disputes over quality differences (these usually arise when the parties fail to address the method to be used to determine quality).

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42. While NGFA will arbitrate international transactions, disputes arising from North American grain exports (other than cross-border movements between the United States, Canada and Mexico) are also arbitrated under other systems. North American exports are also patterned on standard formats developed by the North American Export Grain Association (NAEGA), Washington, D.C. (NAEGA contracts reference the Grain Arbitration Rules of the American Arbitration Association); The Grain and Feed Trade Association, Ltd. (GAFTA), London, England; and the Federation of Oils, Seeds and Fats Association, Inc. (FOSFA), London, England. See Albert Slabotzky, *Grain Contracts and Arbitration* (Lloyds of London Press Ltd. 1984) (an excellent discussion of international grain contracts and their arbitration).

43. See *Kinsho Int'l Corp. v. A.R. Smith & Co.*, NGFA Arbitration Case No. 1667 (Sept. 6, 1990); *ConAgra, Inc. v. BOS Commodities*, NGFA Arbitration, Case No. 1627 (Oct. 16, 1986).



NATIONAL GRAIN AND FEED ASSOCIATION Appendix A

## ARBITRATION RULES

Adopted October 3, 1901  
 Revised January 1, 1906  
 Amended October 17, 1908  
 Revised October 12, 1910  
 Amended October 16, 1913  
 Revised September 27, 1916  
 Amended September 25, 1918  
 Amended October 15, 1919  
 Amended October 13, 1920  
 Amended October 5, 1921  
 Amended October 3, 1922  
 Amended October 3, 1923  
 Amended October 20, 1926  
 Amended September 26, 1928  
 Amended October 15, 1940

Amended September 16, 1947  
 Amended October 11, 1949  
 Amended September 26, 1950  
 Amended September 22, 1953  
 Amended March 14, 1963  
 Amended March 25, 1971  
 Amended March 20, 1975  
 Amended March 23, 1977  
 Amended March 31, 1978  
 Amended March 8, 1979  
 Amended March 23, 1982  
 Amended March 13, 1984  
 Amended September 12, 1986  
 Amended March 27, 1990  
 Amended March 12, 1991

### The Arbitration System Description and Purpose

Section 1. The arbitration system of this Association shall comprise as many National Arbitration Committees consisting of three members each as may be required by the nature and variety of disputes arising among the members, and an Arbitration Appeals Committee. These committees will be formed as provided in Section 4.

The administrative work in connection with arbitration shall be handled by the National Secretary.

The purpose of arbitration in this Association is to reduce friction among its members, avoid litigation, prevent misunderstandings and adjust unsatisfactory conditions.

### Matters to be Arbitrated

Section 2. The term dispute as used, herein, shall be deemed to cover the original complaint as filed, and also any cross complaint, counterclaim, or offset as set forth by the defendant, but in no case shall the matters submitted by the defendant be any other than those directly related to the transaction on which the original complaint is made.

### Jurisdiction

#### Section 3.

(a) A National Arbitration Committee may

properly consider a case involving a dispute between or among any of the following:

(1) Active members or Allied members of the National Association (among whom arbitration is made compulsory by the Association Bylaws);

(2) Members of the National and nonmembers, by consent of both parties or by court order. In the absence of a court order a case between a member and a nonmember may not be properly considered by the National Arbitration Committee without the consent of both parties. If the contract in dispute between a member and nonmember provides for arbitration by the National Association or under its Arbitration Rules, the parties to the contract shall be deemed to have consented to arbitration under these Arbitration Rules.

(b) No National Arbitration Committee shall, except by consent of both parties, assume jurisdiction over transactions between members of the same regularly organized Board of Trade or Grain Exchange when such transactions are subject to the terms of such Board of Trade or Grain Exchange.

(c) When transactions by their express provision are made subject to the terms of a regularly organized Grain Exchange, the National Arbitration Committee shall render their decisions in accordance with the terms of such Board of Trade or Grain Exchange, and such terms shall be binding upon the Arbitration

## ARBITRATION RULES

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and Appeals Committees of the National Grain and Feed Association. All other decisions shall be in accordance with the Bylaws and Trade Rules of this National Association, and all definitions included in the Trade Rules shall apply under these Arbitration Rules, likewise.

(d) The original complaint in connection with any disputed matter proposed for arbitration must be filed with the National Secretary within twelve (12) months after expiration date for performance of the contract or contracts involved. For cases, between a member and nonmember arbitrated pursuant to court order, the complaint must be filed with the National Secretary by either or both parties within 30 days of issuance of court order.

(e) The term member(s) as used in these Arbitration Rules shall mean Active or Allied member. The term nonmember(s) shall mean any individual or firm that is not an Active or Allied member.

### Formation of Committees

#### Section 4.

(a) Each National Arbitration Committee of three arbitrators shall be selected by the National Secretary and approved by the President with respect to each case to be referred to said committee.

(b) These arbitrators shall be selected from the membership with a view to forming each committee of prominent people experienced in the type of trade involved in cases to be brought before it. To qualify as an arbitrator, a member should be commercially disinterested with respect to the particular dispute intended to be presented to him for judgment.

(c) Each Arbitration Appeals Committee shall consist of five persons selected by the National Secretary from the Arbitration Appeals Panel and approved by the President with respect to each case to be referred to said committee.

(d) In the event of the absence, resignation, refusal to act or disqualification of a regular member of a National committee, the President of the National shall fill the vacancy with any eligible member who will consent to serve, and said appointee shall have the same power and duties as such regular member. The acts of a committee so formed shall be of the same

effect as the acts of a regular committee.

### Procedure for Instituting Cases

#### Section 5.

(a) To commence a case, a complaint must be submitted to the National Secretary. This complaint should state specifically the nature of the dispute; including the defendant's name and address, applicable contract numbers, date of incident giving rise to the dispute, and the amount of damages claimed.

(b) The National Secretary then will prepare and submit to the disputants a contract for arbitration, to be signed by a responsible officer of each firm which is party to the dispute. This contract shall provide that the disputants will agree to abide by the award of the National Arbitration Committee or of the Arbitration Appeals Committee, if the original verdict is appealed by one or more of them; and to release the Association and the members of said committee(s) from all responsibility for any errors in judgment that may occur in any respect whatsoever, and from any damage or loss resulting from their acts.

(c) Upon signing said arbitration agreement, each disputant must pay an arbitration service fee based on the amount of the Plaintiff's claims as follows: Claim up to \$5,000 (\$200 arbitration service fee); Claim of \$5,001 to \$25,000 (\$400 arbitration service fee); Claim of \$25,001 to \$50,000 (\$600 arbitration service fee); Claim of \$50,001 and up (\$800 arbitration service fee). In the event a case is settled prior to the request to the plaintiff for rebuttal, parties will receive as refund of arbitration fees, fifty percent (50%) of the previously submitted fees. For cases settled following submission of the rebuttal, fees are non-refundable.

(d) In the event of a complaint being submitted by an Active member or Allied member against another Active member or Allied member, or nonmember by consent of both parties, or by virtue of a court order, it shall be the duty of both parties to complete the contract for arbitration within fifteen (15) days from the date the party receives the contract from the National Secretary.

(e) In the event a party against whom a complaint has been filed desires to file a cross-complaint, counterclaim, or offset, arising out of the same transaction upon which the com-

## ARBITRATION RULES

plaint is based, he shall be permitted to do so, and same shall be passed upon by the National Arbitration Committee, all with the same force and effect as though the cross-complaint was the original complaint. The cross-complaint shall be filed at the same time the answer is due. The complaint and the cross-complaint shall be heard as one case. For cases involving a string trade (a trade with subsequent purchase(s) and sale(s) of the same shipment occurring after formation of the original contract but before shipment is received by the final receiver), the time limits established in Rule 7 may be amended by the National Secretary to permit the exchange of arguments between original plaintiff and ultimate defendant.

(f) If all parties to a string trade agree, and consent to abide by the ultimate decision, the original plaintiff and ultimate defendant will be permitted to release the parties in the middle of the string from participating in the Arbitration.

### Procedure for Preparing a Case

#### Section 6.

(a) In preparing either side of a case for submission to a National Arbitration Committee a party will be expected to furnish:

(1) A concise and clear statement of all that is claimed. Parties to the arbitration are responsible for clearly presenting all aspects of their case (the National Secretary and the Arbitration panel are not responsible for undertaking fact-finding searches or discovery);

(2) The contract or contracts, if any, including all written evidence, letters, and telegrams, tending to establish the terms and conditions (or photostatic or verified copies thereof).

The contract is the basis of most of the cases in dispute between grain and feed firms, and special care should be exercised to establish the terms and conditions of it, in the preparation of a case of arbitration. An offer by one party to buy or sell, and the acceptance of the offer by the other party, may constitute the contract. The confirmation of the contract may be essential in determining what the agreement was, and should always be included.

It is all-important that the contract, when

there is one, should be clearly and definitely established;

(3) Shipping directions, if any;

(4) Bills of lading, if any;

(5) Inspection certificates from point of shipment, if any;

(6) Inspection certificates from point of destination, if any;

(7) Freight expense bills, if there is any dispute regarding freight paid;

(8) Confirmation of freight rates, when that question enters into the case;

(9) Authority for freight rate, when difference of rate is involved;

(10) Proof of market difference when there is any probability of the market difference affecting the rights of the parties to the case, either because of discounts for grade, delay in shipment, or non-fulfillment of contract. The proof of market difference might be the price bulletin of the market to which the grain in question was shipped, or intended to be shipped, of those dates on which the price is to be established; but in case it is necessary to establish such difference in a market where no price bulletin is regularly issued, affidavits by disinterested persons should be furnished.

(b) All evidence should be arranged in chronological order to present a clear history of the case.

(c) Evidence and argument must be submitted by all parties.

(d) When the original papers concerning the case cannot be supplied and copies are substituted, a statement should be made under oath that the original papers have been lost or are beyond the control of the party offering copies as evidence and that the copies, so offered, are true copies.

(e) All papers should be fastened together securely to avoid loss.

(f) Samples should not be submitted in evidence as the arbitrators will not act as inspectors or compare samples. If the grade or quality of commodities is in dispute, inspection certificates or other documentary evidence must be submitted.

## ARBITRATION RULES

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### Procedure for Handling a Case Prior to Committee

#### Section 7.

(a) Each case shall be filed in writing with the National Secretary, and shall include all the evidence and a set of pleadings as described above.

(b) The plaintiff shall have twenty (20) days from the date he receives notification from the National Secretary to prepare and file his first argument.

(c) Upon receipt of the first papers from the plaintiff, the National Secretary shall within ten (10) days thereafter forward to the defendant a duplicate copy of all papers filed by the plaintiff.

(d) The defendant shall have twenty (20) days to forward its answer from the date it receives the plaintiff's pleadings and evidence from the National Secretary and to submit a cross complaint or counterclaim.

(e) Upon receipt of such answer and of the cross pleadings, if any, of the defendant, the National Secretary shall forthwith and within five (5) days forward a copy of same to the plaintiff, who shall have ten (10) days after receipt thereof to file a rebuttal.

(f) Upon receipt of the rebuttal the National Secretary shall forthwith and within five (5) days forward a copy to the defendant, who shall have ten (10) days from date of receipt to file a surrebuttal to the National Secretary.

(g) Upon receipt of the surrebuttal the National Secretary shall within five (5) days of receipt thereof forward a copy to the plaintiff.

(h) Where a party has failed to file arbitration papers in accordance with the time limits specified in this Section, the delinquent party shall be deemed to be in default, except there is no obligation to file a rebuttal or surrebuttal. The National Secretary may for good cause shown extend the time limits specified herein for a period no longer than twenty (20) days from the end of the specified time period. Requests for extension of time must be made prior to expiration of the specified time period. Any extension so granted must be in writing, and a copy thereof sent to both parties.

### Procedure in Committee and in Announcing Awards

#### Section 8.

(a) When a case is fully prepared and ready to be assigned for hearing, the National Secretary shall assign it to one or another qualified committee as he may deem advisable for the expeditious handling of the case in the Association. A member of the committee shall disclose to the National Secretary any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration. Upon receipt of any such information from a committee member, the National Secretary shall transmit such information to both parties and replace said member if either party requests such action within five (5) days from receipt of such information or after the voluntary withdrawal of such committee member. Upon assigning a case as herein provided, the National Secretary shall notify each party of the names and addresses of the chairman and members of the National Arbitration Committee processing said case. Upon receipt of such notice, either party to the case may challenge the appointment of a member of the National Committee for prejudicial or other causes within five (5) days of receipt of this notice. Upon determination that such challenge is valid the National Secretary shall replace such member.

(b) The Chairman of a National Arbitration Committee may choose for his committee to determine its awards, or otherwise dispose of the cases submitted to it by one or more of the methods hereinafter set out provided however, that if either disputant requests an oral hearing same must be held:

(1) By passing the papers from one to another by mail;

(2) By calling a meeting of the members of a Committee;

(3) By calling a meeting of members of the Committee to hear oral argument;

(4) By such other means as the Chairman may deem necessary.

(c) A decision of the members of an Arbitration Committee shall be by majority vote.

(d) A Committee cannot be called together

## ARBITRATION RULES

more than once each calendar month, except by the consent of every member of a Committee.

(e) A Committee cannot act at a meeting thereof, unless all members are present.

(f) When either party to an arbitration requests an oral hearing, the same must be held. Such written request must be made to the National Secretary on or before the filing of the defendant's surrebutal.

(g) The party requesting such an oral hearing must pay whatever amounts, in addition to the regular deposits as provided in Section 5(c), as shall be necessary to cover the additional expenses of the Committee for the hearing. The amount of such additional expenses shall be determined and fixed by the Committee. In the event the party requesting an oral hearing is a nonmember, said party shall advance the amount determined necessary to cover approximately the additional hearing expenses, including a stenographic record as set forth in subsection (h) and travel expenses as set forth in subsection (j). The National Secretary shall notify the requesting nonmember within ten (10) days after receipt of an oral hearing request what the approximate expenses of the hearing will be. If both parties request an oral hearing, the amount to be paid by each in advance shall not exceed one-half of the estimated amount. The amount specified by the National Secretary shall be advanced no later than fifteen (15) days before the date set for the hearing. Failure to advance expenses may be grounds for denying a request for an oral hearing or rendering the noncomplying party in default. After the Committee determines and fixes the actual amount of additional expense incurred, the nonmember shall be refunded or billed by the National Secretary for the difference between the amount advanced and actual costs.

(h) In the event of an oral hearing, the National Secretary shall make the necessary arrangements for the taking of an official stenographic record of the hearing. The party or parties requesting the oral hearing shall pay the cost of such record directly to the National Secretary in accordance with the normal procedure for paying the hearing costs. The National Secretary shall pay the reporting agency in accordance with their agreement. The stenographic record shall be made a part of the official transcript of the case.

(i) When a case is to be considered as in (b)(3) above, the Chairman of the Committee shall fix a time and a place for its hearing, and shall give the National Secretary fifteen (15) days notice of the date and the place so fixed, so as to enable the National Secretary to give the parties to the arbitration ten (10) days notification of the date and the place of the hearing. In the event of a nonmember request for oral hearing, the date so fixed shall be no sooner than fifteen (15) days from the date the amount advanced for approximate expenses is received by the National Secretary. Neither party shall seek to postpone the hearing of a case longer than ten (10) days after such date has been set, unless good cause, satisfactory to the Committee, can be shown therefor. Requests for postponement must be received by the Chairman of the National Arbitration Committee at least five (5) days prior to the date set for hearing.

(j) The members of the National Arbitration Committee, the National Secretary, and the Association's legal counsel shall receive the amount of their actual traveling and hotel expenses when attending meetings to consider a case or to hear oral testimony.

(k) The National Arbitration Committee shall act promptly on all cases submitted, and shall endeavor to make their report within thirty (30) days after receipt of final papers from the National Secretary. The awards of the National Arbitration Committee shall be dated on the day they are received at the office of the National Secretary, and copies of said awards shall be mailed by the National Secretary to the parties to the arbitration within five (5) days after receipt thereof. Each award shall contain a concise statement of the pertinent facts and the conclusions of the National Arbitration Committee and the reasons therefor. The parties to the arbitration shall file a notice of appeal, or comply with the terms of the National Arbitration Committee's Award within fifteen (15) days from the receipt of said award.

(l) All money received by the National Secretary for account of arbitration shall be placed with the general funds of the National Association, and the expenses of said arbitration shall be paid out of said general fund.

(m) A bulletin shall be published as frequently as is necessary to give the details, as hereinafter provided, of all cases arbitrated, awards made, and any other information rela-

## ARBITRATION RULES

tive to the subject of arbitration which may be deemed of interest to the members of the Association. Copies of the bulletin shall be mailed to all active members of the National Association and to the Secretaries of all Affiliated Associations. Said bulletin shall set forth:

(1) The names of the plaintiff and the defendant;

(2) The award(s) of the Committee, giving the names of the plaintiff and the defendant in each case, the nature of the case and the amount involved, the award and such other information as may be of interest to the members;

(3) Notice of failures to comply with the terms of awards, giving a record of each case;

(4) Notice of refusals to arbitrate, giving a record of each case, and any reasons offered for said refusals;

(5) Notice of failures to answer the correspondence of the National Secretary relative to arbitration.

### Appeal Procedure

#### Section 9.

(a) A decision of the National Arbitration Committee shall be final unless appealed by either party. If timely and properly appealed, the case shall be reviewed by the Arbitration Appeals Committee and affirmed, modified, reversed or it may be remanded for reconsideration by the National Arbitration Committee. There shall be no appeal under these rules from the decision of the Arbitration Appeals Committee. The party or parties to the appeal shall comply with the terms of the National Arbitration Appeals Committee award within fifteen (15) days from the receipt of said award. Arguments on Appeal shall be confined only to the facts contained in the record of the case. Any new evidence submitted in violation of this rule may be removed from the argument upon request of the National Secretary, or if necessary the chairman of the Arbitration Appeals panel shall instruct the panel to disregard the new evidence.

(b) Any decision of the Arbitration Appeals Committee must be signed by a majority of the members thereof.

(c) The appeal fee, payable only by the appellant, shall be \$400 for a claim up to \$5,000; \$800 for a claim of \$5,001 to \$25,000;

\$1,200 for a claim of \$25,001 to \$50,000; and \$1,600 for a claim of \$50,001 or more. The fee shall be deposited with the National Secretary by the appellant before the case will be considered. Said appeal fee shall be deposited at the time notice of appeal is given. If not deposited, the award of the National Arbitration Committee shall be affirmed or the appeal dismissed. Any overage of the deposit above actual costs shall revert to the general treasury of the National Association.

(d) Notice of appeal from an award of a National Arbitration Committee accompanied by a statement in duplicate of the reasons therefore shall be filed with the National Secretary within fifteen (15) days from the date of receipt of the said award. The said notice of appeal shall be accompanied with the appellant's appeal fee and his certified check for the amount of the National Arbitration Committee's award in dollars and cents, if any, payable to the adverse party, to be held by the National Secretary pending the decision of the Arbitration Appeals Committee.

(e) Within ten (10) days from the receipt of a notice of appeal at his office, the National Secretary shall forward to the appellee, by registered or certified mail, a copy of the appellant's statement of reasons and the appellee shall have twenty (20) days from the date of receipt of the said statement of reasons in which to file his answer. Upon receipt of the appellee's answer, the National Secretary shall assemble a record of the case, indexed and with pages numbered consecutively, including the aforementioned statements of appeal and answer and any other papers he deems pertinent to the case. Immediately upon the completion of the numbered transcript, the National Secretary shall submit the complete file of papers to the National Arbitration Appeals Committee, the appellant, and the appellee.

At the same time the National Secretary sends copies of the transcript to the appellant and appellee, he shall inform them of the names of the members of the Arbitration Appeals Committee and giving notice that a challenge for prejudicial or other causes would be entertained for five (5) days from receipt of such notice. Upon a valid challenge being made, the President must immediately name a replacement or replacements to the Committee.

## ARBITRATION RULES

(f) Within ten (10) days of receipt of the record of the case, the appellant shall file ten (10) copies of a brief of his case with the National Secretary, each argument keyed to facts contained in the record of the case. Appellee shall file his brief, in the same form and number as the appellant's brief, within seven (7) days after date of receipt of appellant's brief from the National Secretary. Upon receipt of the appellee's brief, the National Secretary shall send a copy to the appellant, and copies of both briefs to the Arbitration Appeals Committee.

(g) The Arbitration Appeals Committee shall meet at the call of the chairman, at a place to be designated by him, at which meeting the Committee shall consider and decide such cases as are properly pending before the Committee; provided, however, that the chairman may submit any such cases to members of the Committee by mail, for their decision by mail as he may consider proper. On request of either disputant the Arbitration Appeals Committee shall hear oral argument, but no new evidence shall be heard in the appeal of any case.

(h) Request for oral argument may be made at any time from filing of the notice of appeal until the appellee files his answer. Except when a nonmember has requested an oral hearing, the chairman of the Arbitration Appeals Committee shall set the date for oral argument as soon as practical. In the event of a nonmember request for oral argument, the time limits in the preceding sentence shall not commence until after the requesting party has advanced the approximate expenses of the meeting as provided for in this section. Appellant shall have one hour for opening statement; appellee shall have one hour and fifteen minutes for his argument; and the appellant shall have fifteen minutes confined to rebuttal argument.

(i) The expenses incurred incident to the meeting of the Arbitration Appeals Committee shall be borne by the Association, unless the Committee meeting is held pursuant to a request for oral argument. All expenses incident to a committee meeting held to hear oral argument shall be met by the party or parties requesting oral argument. In the event a party requesting oral argument is a nonmember said disputant shall be required to advance the amount necessary to cover the approximate

expenses of the meeting, including a stenographic record as set forth in subsection (j) and the travel expenses set forth in section 8(j). Within ten (10) days of receipt of a nonmember's request for oral argument the National Secretary shall notify said nonmember of the approximate expenses thereof. The amount specified shall be advanced by the requesting nonmember no later than ten (10) days after notification from the National Secretary. If both parties request oral argument, the amount paid in advance by one party shall not exceed one-half of the estimated amount. Failure to advance approximate expenses required hereunder may be grounds for dismissal or affirmation of the appeal. After the Committee determines and fixes the actual amount of additional expense incurred the nonmember advancing expenses hereunder shall be given a refund or billed by the National Secretary for the difference between the approximate amount advanced and actual costs.

(j) In the event of oral argument, the National Secretary shall make the necessary arrangements for the taking of an official stenographic record of the appeal arguments. The party or parties requesting the oral argument shall pay the cost of such record directly to the National Secretary in accordance with the normal procedure for paying the hearing costs. The National Secretary shall pay the reporting agency in accordance with their agreement. The stenographic record shall be made a part of the official transcript of the case.

(k) Where a party has failed to file appeals papers in accordance with the time limits specified in this section that party shall be deemed in default except that the National Secretary may for good cause shown extend the time limits specified herein for a period no longer than twenty (20) days from the end of the specified time period. Requests for extension of time must be made prior to expiration of the specified time period. No extension of time shall be granted for filing of a notice of appeal. Any extension so granted must be in writing, and a copy thereof sent to both parties.

## Miscellaneous

## Section 10.

(a) Whenever any papers, documents, or pleadings are required to be filed, there should be filed with the National Secretary ten (10)

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**ARBITRATION RULES**

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copies thereof, which said copies shall be disposed of as follows: the original shall be retained by the National Secretary; one copy shall be mailed to each of the members of the National Arbitration Committee; one copy shall be mailed to the adverse party; five copies shall be retained by the Secretary, and if an appeal be taken from the award of the National Arbitration Committee, said five copies shall be mailed to the members of the Arbitration Appeals Committee. This rule shall apply with equal force and effect to the petition, complaint, exhibits, answers, and cross complaints, and any and all other papers that either party desires to or may be required to file.

(b) In computing time, the first day shall be excluded and the last day included. If, however, the first or last day falls on a Saturday, Sunday, or a national legal holiday, then the

next business day shall be considered the first or last day. The final date for filing required documents or papers in any proceedings under these rules shall be midnight of the stated final day.

(c) Registered, certified or express receipts shall be used to determine the timeliness of any filing in accordance with the several periods of time specified in Sections 7, 8 and 9 of these Arbitration Rules. As used throughout these Rules, the term "filing" shall mean the time at which the document is mailed, first class mail, postage prepaid, or by a recognized overnight delivery service. No extension of time shall be granted for filing a notice of appeal. All time limits placed on the National Secretary shall begin on the date the National Secretary receives the document or request which triggers his obligation.



NATIONAL GRAIN AND FEED ASSOCIATION  
CONTRACT FOR ARBITRATION

For the purpose of avoiding litigation and in consideration of saving time and expense, we the undersigned parties, hereby agree to submit the following controversy to arbitration by the National Grain and Feed Association for its decision and award in writing.

(insert description of the case here)

We agree that we will comply with all of the National Grain and Feed Association Rules, including, but not limited to those rules requiring nonmembers of the Association to approximate expenses in advance when an oral hearing is requested by a nonmember. We understand that noncompliance with the rules may result in a default judgment.

We further agree that we will abide by the decision of said committee, and that its decision shall be final, subject to the Arbitration Rules of the National Grain and Feed Association relating to appeals.

We hereby release all members of the committee (including any appeals committee) from any responsibility for error in judgment in any respect whatsoever and from any damage or loss allegedly suffered by reason of their acts. In case any member of the regularly constituted committee cannot take part in the hearing of this case, the Association in compliance with the Arbitration Rules may appoint another member of the Association to so act; and in that event all the terms of this agreement shall be binding on us as though all the members of the regular committee had taken part in the hearing of this case. Even in such a case compliance with the award shall be in accordance with the rules of the Association applicable thereto.

COMPANY \_\_\_\_\_

ADDRESS \_\_\_\_\_

DATE \_\_\_\_\_

BY \_\_\_\_\_

WITNESS \_\_\_\_\_

TITLE \_\_\_\_\_

COMPANY \_\_\_\_\_

ADDRESS \_\_\_\_\_

DATE \_\_\_\_\_

BY \_\_\_\_\_

WITNESS \_\_\_\_\_

TITLE \_\_\_\_\_



# Arbitration Decision

National Grain and Feed Association

August 29, 1991

## Arbitration Case Number 1672

**Plaintiff:** Danvers Farmers Elevator, Danvers, Ill.  
**Defendant:** Midwest Marine Management Co., St. Louis, Mo.

### Statement of the Case

This dispute involved two barge affreightment transactions.

Concerning the first contract, the plaintiff, Danvers Farmers Elevator, on Sept. 7, 1989 purchased from the defendant, Midwest Marine Management Co., through a broker, Advance Trading Inc., Bloomington, Ill., one barge affreightment for delivery in December 1989, Illinois River, excluding Chicago, at 140 percent of tariff. Danvers Farmers Elevator did not issue a confirmation of purchase. Midwest issued a confirmation of sale and the broker issued both parties a contract confirmation noting the following:

**"Payment:** Invoice net upon cancellation"  
**"Conditions:** Subject to: The National Grain and Feed Association Trade Rules. No Application. Cancellation by first week in December."

Handwritten notations on various confirmations show: "1,400 tons, Peoria Rate Base" and "Cancellation by Dec. 15."

On Sept. 19, 1989, Danvers Farmers Elevator made another purchase, through broker Advance Trading Inc., from Midwest Marine Management Co. of two barge affreightments for last half of October 1989, Illinois River, excluding Chicago, at 182 1/2 percent of tariff. Danvers did not issue a purchase confirmation. Midwest issued a sales confirmation and the broker issued a contract to the parties noting, in particular:

**"Quantity:** Two barges, 1,400 ton each"  
**"Price:** Peoria Rate Base"  
**"Payment:** Invoice net upon cancellation"  
**"Condition:** Subject to: The National Grain and Feed Association Rules. No Application. Cancellation by Oct. 20, 1989."

On Oct. 20, 1989, Midwest Marine Management Co. issued to Danvers Farmers Elevator an amendment for the first contract noting: "The contract period changes from 1st (sic) half October to December" and "The rate changes from 182 1/2 percent to 137 1/2 percent."

On Nov. 30, 1989, Midwest Marine Management Co. issued another amendment for the two sales confirmation stating: "The cancellation date changes from Dec. 1, 1989 to Dec. 15, 1989," and "The rates remain unchanged."

Under the provisions of NGFA Barge Freight Trading Rule 14, the plaintiff, Danvers Farmers Elevator made claim against the defendant, Midwest Marine Management Co. for nonperformance, and demanded \$18,518.50 less \$4,208.75 paid by Midwest Marine Management Co. on or about Feb. 10, 1990 or \$14,309.75 net. The claim was based upon a barge freight value of 230 percent of tariff established on Jan. 8, 1990. Midwest Marine Management Co. sought recovery from Danvers Farmers Elevator of the \$4,208.75 it paid Danvers in error, plus interest.

### The Decision

The arbitrators found no evidence whereby Danvers Farmers Elevator provided notice to Midwest Marine Management Co. for actual/constructive placement of barges at a specific origin point on the Illinois River during the time period of the contracts. The arbitrators believed each party entered into a paper transaction with no intention of actual performance, i.e. the broker's contract stated, "No application" and, by stating that any invoicing for market difference would be, "Invoice net upon cancellation." Because the parties originally agreed to "No application," the provisions of NGFA Barge

Freight Trading Rule 14 addressing failure to place are not applicable to this arbitration matter.

It is not the arbitrators' responsibility to determine the values for cancellation from the time the initial contracts were entered into and Dec. 15, the last day agreed upon for cancellation.

### The Award

The committee denied Danvers Farmers Elevator's claim against Midwest Marine Management Co. The committee found Midwest Marine Management Co.'s payment to Danvers Farmers Elevator in February, almost

two months after the last date for cancellation, to be in error and awarded the \$4,208.75 to Midwest Marine Management without interest.

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

William Schmidt Jr., *Chairman*  
Bunge Corp.  
St. Louis, Mo.

Stephen Logsdon  
Gabe Logsdon & Sons Inc.  
Canton, Mo.

Peter Hubbard  
Midland Enterprises Inc.  
Cincinnati, Ohio

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## Arbitration Appeals Case Number 1672

**APPELLANT:** Danvers Farmers Elevator, Danvers, Ill.  
**APPELLEE:** Midwest Marine Management Co., St. Louis, Mo.

### Majority Opinion

The Arbitration Appeals Committee individually and collectively reviewed all the evidence submitted in arbitration case number 1672 and reviewed the findings and conclusions of the original arbitration committee.

The Arbitration Appeals Committee, by majority, voted to reverse the findings of the original arbitration committee and to make an award to the plaintiff (appellant) Danvers Farmers Elevator.

The majority of the Arbitration Appeals Committee agreed with the original arbitration committee that Barge Freight Trading Rule 14, addressing failure to place a barge, is not applicable to the facts in this case. However, the Arbitration Appeals Committee believed that the trade practice between these parties, when in default, was to: 1) extend the contract period; or, 2) after giving notice, then cancel the contracts at a fair market value.

The majority of the appeals committee found that both parties contractually agreed to a barge freight contract with no expectation of actual placement, but with the expectation that the value of the contract would parallel the value of the physical barge freight market.

The amended contracts called for cancellation by Dec. 15, 1989, with the net (difference between the originally contracted rate and the cancellation rate) to be paid when invoiced.

Because of the extreme river conditions of low water and ice and the varying barge freight quotes depending upon location and the ability of the barge(s) to move, the parties were unable to agree upon a cancellation rate. By their action, both parties apparently agreed to extend the contract period until Danvers Farmers Elevator, through a broker, formally declared Midwest Marine Management Co. in default on Dec. 29, 1989.

Danvers Farmers Elevator invoiced Midwest Marine Management Co. on Jan. 8, 1990, for the difference between the original rates and 230 percent of tariff which Danvers claimed be the then-current market. The invoice was refused by Midwest, which claimed the market was not defined. During the arbitration process, Midwest argued the contracts were vague and unenforceable.

The appeals committee believed these contracts were enforceable and a barge freight market determination for contract cancellation must be made. Otherwise, the contracting party who is disadvantaged by a subsequent market would simply deny his contractual liability.

Market determination was undoubtedly difficult, but other contract cancellations did occur in late December 1989 and early January 1990.

### The Award

To determine the barge freight market, the appeals committee considered that Midwest Marine Management Co. had cancelled four barges with other customers at 195 percent on Dec. 26, 1989 and purchased three barges on Jan. 4, 1990 at 230 percent and decided to use the average of 212.5 percent to calculate the award.

The award to the Appellant, Danvers Farmer Elevator, is as follows:

1. Barge(1400 short ton)	Bought at 140 percent Sold at 212 1/2 percent 72.5 percent x 4.81=	\$ 4882.15
2. Barge(2800 short ton)	Bought at 137 1/2 percent Sold at 212 1/2 percent 75 percent x 4.81=	10,101.00
Net cancellation difference due Danvers:		14,983.15
Previous payment to Danvers:		4,208.75
Balance due Danvers:		\$10,774.40

The appeals panel also awarded interest at 10 percent per annum from Feb. 9, 1990 (30 days after invoiced) until paid.

Submitted with the consent and majority approval of the Arbitration Appeals Committee whose names appear below.

L. Scott Hackett  
General Mills Inc.  
Minneapolis, Minn.

Dan B. Miller  
Kokomo Grain Co. Inc.  
Kokomo, Ind.

DeVan C. Janssen  
Consolidated Grain  
and Barge Co.  
St. Louis, Mo.

Robert W. Obrock  
Mid-States Terminals Inc.  
Toledo, Ohio

### Minority Opinion

As a member of the Arbitration Appeals Committee that reviewed this case, it was my opinion that the original decision of the arbitration committee should be affirmed.

It clearly was not the intention of either party to enter into a contract for affreightment. Rather, as evidenced by the written contracts and by the actions of both parties, they intended to create a contractual instrument that

would be a measure of the value of Illinois River barge freight. It was, in fact, intended to be a substitute for barge freight. Unfortunately, the contract terms were seriously deficient for accomplishing their intended purpose. In particular, and very significantly, the contracts were silent regarding dispute resolution in the event the parties could not agree on fair market value for the purpose of pricing contract cancellations. This was indeed a serious oversight.

The situation was then significantly complicated by the parties' failure to exercise in a timely manner their rights on Dec. 16, 1989, after the "drop-dead" cancellation date of Dec. 15, 1989 had passed.

It is the view of this committee member that since these contracts were not contracts for transportation—but rather were risk-shifting instruments—that "custom-of-trade" and not the Trade Rules should be relied upon to resolve this dispute.

The problem for Danvers Farmers Elevator and Midwest Marine Management Co. was to define the value of the contracts. That was not an easy task, since the underlying market that these contracts were expected to parallel was not active and rich with transactions for barge freight during the affected time period. Rather, most transactions were for guaranteed performance during a very tight time frame or were for "on-station" equipment.

Accordingly, since Danvers Farmers Elevator Co. believed itself the aggrieved party, trade practice would dictate that on Dec. 16, 1989 that it pass notice of default to Midwest Marine. Then, the next day Danvers Farmers Elevator Co. should have:

- attempted to discover a representative bona fide transaction that replicated the contract terms in the barge freight market; or
- executed a bona fide representative transaction.

Either action would have established the market without question. In this situation, Danvers Farmers Elevator's failure to definitively define the market on or about Dec. 16, 1989, led me to conclude that Danvers failed to satisfactorily identify its damages, if any.

Accordingly, Danvers' appeal should be denied and the original decision of the arbitration committee should be affirmed.

Paul Krug, *Acting Chairman*  
Continental Grain Co.  
Chicago, Ill.

