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Sent: Wednesday, November 05, 2008 11:12 AM
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Subject: Peition for Rehearing in North Dakota Supreme Court No. 20080068 (PSC v. Minnesota Gain, et al.), filed October 22, 2008
Importance: High
Attachments: Petition_for_Rehearing_with_amended_TOC_11-05-08.pdf

Attached is courtesy copy of Appellants Petition for Rehearing, filed with the Court yesterday. The only change is an updated/corrected Table of Contents page, made at the Court's request, and re-filed this morning.

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151 GE-07-99 Filed: 11/4/2008 Pages: 13
Refiled Petition for Rehearing with Corrected Table of Contents

Sarah Vogel Law Firm, P.C.

Sarah Vogel

11/5/2008

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20080068
Bowman County District Court No.: 06-07-C-18-1
PSC Case No.: GE-07-99

PUBLIC SERVICE COMMISSION,

Petitioner and Appellee,

v.

**MINNESOTA GRAIN, INC., AND
HARTFORD FIRE INSURANCE CO.,**

Respondents and Appellees,

JIM BROTEN, ERIC BROTEN, AND BROTEN FARMS,

Appellants.

PETITION FOR REHEARING

**Petition for Rehearing from October 22, 2008 Decision of the Supreme Court Pursuant
to Rule 40 of the North Dakota Rules of Appellate Procedure**

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STATEMENT OF ISSUES

1. Was Minnesota Grain Inc. operating in violation of North Dakota law by purchasing grain from Brotens out of its East Grand Forks facility?
2. If so, was condition two of Hartford Fire Insurance Bond No. 41BSBBL3293 triggered?

ARGUMENT

3. Appellants Jim Broten, Eric Broten and Broten Farms ("Brotens") hereby submit this Petition for Rehearing which is limited to one issue only: whether Minnesota Grain, Inc. (the principal of the Hartford Fire Insurance Bond No. 41BSBBL3293 and the licensee of the Rhame, North Dakota warehouse) violated state law by purchasing Brotens' grain in North Dakota for shipment to its facility in East Grand Forks without a facility-based or roving grain buyer's license, and therefore violated a condition of the bond.
4. Mindful of the admonition of this Court that Petitions for Rehearing are rarely granted, and should be rarely attempted, this Petition does not challenge the court's rejection of Brotens' primary argument that they were "non-credit sale receipt-holders of the insolvent warehouseman." Decision, pages 7 - 11. Similarly, Brotens do not challenge the bottom line conclusion of the Court that "The language of the bond covers the principal, Minnesota Grain, for obligations incurred as operator of the Rhame warehouse doing business in North Dakota." Decision, p. 11. While Brotens disagree with those conclusions for the reasons state in their prior briefs, the focus of this Petition lies elsewhere.

5. This Petition requests the Court to address Brotens' *secondary argument* that if the purchases in question were not made as part of the "doing business" authority of the Rhome warehouse, the bond is nonetheless triggered because the purchases by Minnesota Grain, Inc. through its East Grand Forks facility were illegal and in violation of state law because Minnesota Grain, Inc. was not separately licensed as a facility-based or roving grain buyer under Chapter 60-02.1.
6. This secondary argument was made in the alternative at both the trial court and on appeal. *See*, Docket No. 19, Broten's August 7, 2007 Objection to Approval and Adoption of Report and Recommendation of Trustee and Brief in Support of Objection, pp. 10-14, arguing that Minnesota Grain was either acting under the umbrella of its North Dakota warehouse license, or was buying illegally as an unlicensed roving grain buyer, but that the bond was in either case triggered; *see also*, Appellants' Reply Brief, Section III , captioned "Minnesota Grain Inc. Violated North Dakota Law by Operating as an Unlicensed Grain Buyer and as a Result the Bond Conditions Are Triggered", Par. 13-22. However, the Court did not address this argument in its October 22, 2008 decision.
7. Accordingly, the Brotens respectfully request that the Court review N.D.C.C. 60-02-09(4)(b)¹ and the second conditions of the bond.
8. N.D.C.C. §60-02-09(4)(b) states:

¹ The Court's excerpted only subsections 3, 5, and 6 of §60-02-09 in its decision at pp. 8-9.

Before any license is issued to any public warehouseman under this chapter, the applicant for such license shall file a bond with the commission which shall:

4. Be Conditioned:

...

b. For compliance with the provisions of law and the rules of the commission relating to the storage and purchase of grain by such warehouseman.

9. The second condition of Bond No. 41BSBBL3293² contains virtually the same language as §60-02-09(4)(b):

“The conditions of this obligation is as follows: if the PRINCIPAL shall ... (2) comply with the provisions of law and the rules of the North Dakota Public Service Commission (Commission) relating to the storage and purchase of grain by a warehouseman”

10. The Court has already found that under the definition of "warehouseman", Minnesota Grain of Eagan, Minnesota was the warehouseman. See Decision, Par. 2, and N.D.C.C. 60-04-01(5) (a "warehouseman" is "the person owning or operating a public warehouse which is located or doing business within this state.") It is incontestable that the licensee on the license and all renewals was the corporate entity "Minnesota Grain, Inc." See Appendix, 134-141.

11. The Court has also found that Minnesota Grain's facility in East Grand Forks was neither licensed or bonded as a warehouse in North Dakota. Decision, Par. 2.

12. N.D.C.C. Chapters 60-02 and 60-02.1 comprehensively regulate grain buying in North Dakota. The Court has ruled that the Brotens' sales of barley were not made "by" or "in" the Rhame warehouse. It has also ruled that

² This condition was not excerpted or discussed in the decision. The text of the bond is at pp. 24-27 of the Appellants Appendix. For the court's ease of reference, the first page of the bond is reproduced as an attachment to this Petition.

Brotens' sales did not fall under the "doing business" clause of the definition of a grain warehouse under Chapter 60-02.

13. Because the Court has ruled the purchases of the Brotens' grain were not under the warehouse license, then these purchases must have been under some other authority in order to be legal, or, they are illegal. As explained below, these purchases were illegal.
14. Section 60-02.1-01(6) defines "grain buyer" as "any person, other than a public warehouseman as defined in chapter 60-02, who purchases or otherwise merchandises grain for compensation." This court has previously determined the Brotens' barley was not purchased by Minnesota Grain Inc. by or through the licensed warehouse in Rhame, which was the only licensed warehouse of Minnesota Grain, Inc. in North Dakota under Chapter 60-02. Since Brotens' barley was sold to Minnesota Grain, Inc. at its East Grand Forks facility, the question is, was Minnesota Grain, Inc. through its East Grand Forks facility "a person ... who purchases or otherwise merchandises grain for compensation" in buying Brotens' barley? Only one answer is possible. If Minnesota Grain Inc. purchases were through its East Grand Forks facility, it is therefore a "grain buyer" squarely within the definition of §60-02.1-01(6) and the scope of chapter 60-02.1.
15. Chapter 60-02.1 provides that a facility-based or roving grain buyer who buys grain in North Dakota must have a grain buyers license. See, N.D.C.C. 60-02.1-07, Grain buyer license -- How obtained -- Fee -- Financial statement. ("Grain buyers must obtain an annual license from the commission").

16. Chapter 60-02.1 also provides various penalties for violation of the chapter, ranging from an infraction to a class A misdemeanor. Petitioners do not know which of the various penalties apply in light of the failure of the PSC to bring any enforcement action against Minnesota Grain, Inc. or its principals, but it is clear that failure to obtain a license in the first instance is *at least* an infraction pursuant to Section 60-02.1-13.
17. From facts drawn from the PSC's brief and the court's own decision, it is established that Minnesota Grain, Inc. was not licensed as a facility based or roving grain buyer under Chapter 60-02.1. The Public Service Commission advised the court that "[t]he East Grand Forks facility could have been licensed and bonded in North Dakota as a roving grain buyer under chapter 60-02.1 but Minnesota Grain, Inc. never applied for a North Dakota roving grain buyer license to authorize it to purchase grain in North Dakota through its East Grand Forks facility." PSC Brief, p. 9. The court observed "there is no evidence that Minnesota Grain was licensed as either a facility-based or roving grain buyer in North Dakota." Decision, Par. 24.
18. Given the factual and legal predicates in the foregoing paragraphs, it is plain that Minnesota Grain Inc. violated N.D.C.C. 60-02.1 by purchasing Brotens' grain without a valid grain buyers license, and thereby violated the laws of the state of North Dakota regarding purchase of grain by a warehouseman.
19. The bond issued by Hartford to Minnesota Grain is attached to this Petition. See also Appellees Appendix, p.24. It states: "The conditions of this obligation is as follows: if the PRINCIPAL shall ... (2) comply with the provisions of law

and the rules of the North Dakota Public Service Commission (Commission) relating to the storage and purchase of grain by a warehouseman”

20. Here, Minnesota Grain, Inc. - that was both the warehouseman and principal of the bond - operated illegally in North Dakota by purchasing grain from Brotens without a grain buyers license and it failed to pay for such illegally purchased grain. It has failed to comply with the provisions of law and the rules of the PSC relating to the purchase of grain by a warehouseman since these purchases did not arise out of the licensed and bonded warehouse at Rhame. The conditions of the bond are plainly triggered. When the bond conditions are triggered, the bond proceeds must be paid to the trust fund and paid out to claimants injured by Minnesota Grain Inc.'s failure to pay for North Dakota grain.

21. The conclusion of the court that "Brotens were not entitled to payment from the trust fund established under N.D.C.C. 60-04" is in error. This Petition for Rehearing should be granted and directions issued for appropriate relief.

CONCLUSION

22. Because this Court’s decision did not address the violations of North Dakota law by Minnesota Grain, Inc., and the resulting violation of condition two of Hartford Fire Insurance Bond No. 41BSBBL3293, Petitioners respectfully request that this Court restore the case to the calendar for reargument on these issues.

Word Count: (1605 – 22 Par. #s =) 1583

Dated this 4th day of November, 2008.

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/s/

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No.: 20080068
Bowman County District Court No.: 06-07-C-18-1
PSC Case No.: GE-07-99

The following document was electronically served on this date to John J. McDonald and Joel Wiegert of Meagher & Geer, P.L.L.P. at jwiegert@meagher.com, Illona Jeffcoat-Sacco at ijs@nd.gov, for William W. Binck who has retired, and Gary R. Wolberg at gwolberg@flecklaw.com.

Petition for Rehearing

The above-noted document was also served by U.S. Mail on this date to:

Thomas Mensing
Minnesota Grain, Inc.
P.O. Box 69
Afton, MN 55403

Dated this 4th day of November, 2008.

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/s/

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Derrick Braaten (ID #06394)



**GRAIN ELEVATOR WAREHOUSE BOND
PUBLIC SERVICE COMMISSION**
SFN 7573 (4-85)

BOND NO: 41BSBBL3293

PRINCIPAL	Name MINNESOTA GRAIN, INC.			
	Address 1380 CORPORATE CENTER CURVE #105	City EAGAN	State MN	Zip Code 55121-1200
SURETY	Name HARTFORD FIRE INSURANCE COMPANY			
	Address HARTFORD PLAZA, 690 ASYLUM AVE	City HARTFORD	State CT	Zip Code 06115

We, the above named PRINCIPAL and SURETY are bound to the State of North Dakota in the penal sum of SEVENTY FIVE THOUSAND AND NO/100 Dollars. The payment of the penal sum shall bind ourselves, our heirs, legal representatives, successors, and assigns, jointly and severally.

The PRINCIPAL is the operator of a public warehouse(s) doing business in North Dakota. The warehouse(s) operated by the PRINCIPAL (are) located as follows: #1 HIGHWAY 12, RHAME, ND 58651

The warehouse(s) described above (are) to be operated pursuant to the law for receiving grain for buying, selling, storing, or chipping for compensation. The surety bond shall cover the warehouse(s) operated by the PRINCIPAL as a whole and not a specific amount for each.

The condition of this obligation is as follows: If the PRINCIPAL shall (1) faithfully perform all duties as a public warehouseman, (2) comply with the provisions of law and the rules of the North Dakota Public Service Commission (Commission) relating to the storage and purchase of grain by a warehouseman, and (3) pay for all grain purchased and all sums for which the PRINCIPAL shall become liable to the holders of receipts, then this obligation shall be void, otherwise it shall remain in effect, provided, however, that this surety bond shall not accrue to the benefit of any person entering into a credit-sale contract with the PRINCIPAL.

Liability for this undertaking commences on AUGUST 8, 2002, and shall be continuous unless the SURETY by certified mail notifies the PRINCIPAL and the Commission that the surety bond has been canceled. The cancellation notice shall state that the surety bond will be canceled ninety (90) days after the receipt of the cancellation notice or on a later date specified by the SURETY. In no event shall the aggregate liability of the SURETY accumulate for each successive annual license renewal period during which the bond is in force but, for losses during any annual license renewal period, shall be limited in the aggregate to the bond amount stated or changed by appropriate endorsement or rider.

The liability of the SURETY for any violation of the obligations hereof by the PRINCIPAL during the period of time the bond remains in effect, shall remain in force thereafter for each period of time as may be permitted under the laws of the State of North Dakota.

This bond, including definitions of the terms used herein, are governed by the provisions of Chapter 41-21 of the North Dakota Century Code.

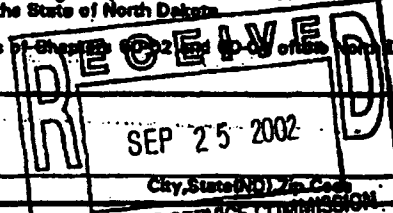
Countersigned by North Dakota Resident Agent:

NOT APPLICABLE

Name/Signature

Address

City, State (ND), Zip Code



THIS SECTION TO BE COMPLETED BY PRINCIPAL

ACKNOWLEDGMENT OF PRINCIPAL

State of Minnesota)
County of DAKOTA) ss.
On this 25th day of September, 2002
before me personally appeared Thomas Mensing
known to me to be the person or said corporation described in and who executed the within instrument as PRINCIPAL and acknowledged to me that he/she or said corporation executed the same.

Thomas Mensing
Signature of Principal

[Signature]
Notary Public

My Commission expires 1-31-06

(SEAL) **KAREN G. BOOKLER**

THIS SECTION TO BE COMPLETED BY SURETY

ACKNOWLEDGMENT OF SURETY
(Corporate Officer)

State of MN)
County of MARTIN) ss.
On this 8th day of AUGUST, 2002
before me personally appeared CHARLOTTE A. DAVIS
known to me to be ATTORNEY IN FACT
of said corporation that is described in and that executed the within instrument as SURETY, and acknowledged to me that such corporation executed the same.

CHARLOTTE A. DAVIS, ATTORNEY IN FACT
Name and Title of Person Signing for Surety

Charlotte A. Davis
Signature

[Signature]
Notary Public

My Commission expires _____

(SEAL) **DONNA M. RYAN**
NOTARY PUBLIC - MINNESOTA
MY COMMISSION EXPIRES 1-31-06

North Dakota Public Service Commission
State Capital Building
Bismarck, ND 58105-0000
Telephone 701-328-4067
My Comm. Expires Jan. 31, 2006

ATTORNEY IN FACT MUST ATTACH VALID POWER OF ATTORNEY FROM SURETY.