



issues will be forthcoming. This brief will discuss the Commission's position on the remaining two issues (issues one and two) and the basis for its position.

### **Statement of the Issues**

As the Commission understands the issues and the positions of the parties, and taking into consideration the evidence presented at the hearing, the four issues are:

1. Whether Mr. Schumacher has a valid credit-sale contract claim, if so, for what amount, and is the delay in timely filing excusable under North Dakota Century Code § 60-04-04?
2. Whether Platte River Insurance Company, as surety, is liable for payment of the valid cash claim of Paul Grzadzielewski?
3. Whether Merlyn and Dolores Grabanski have a valid credit-sale contract claim, and if so, for what amount?
4. Whether Mr. Louis Slominski, Jr. has a valid cash claim and if so, for what amount?

### **Analysis of Issues**

#### **1. Mr. Schumacher's Claim**

The Public Service Commission does not dispute that Grabanski Grain, Inc., the insolvent licensee, owes Mr. Schumacher for grain delivered to Grabanski Grain. *See* Tr. 9:53-9:55 and Exhibit #19 (Doc ID #99). As the record also indicates, Mr. Schumacher did not timely file a claim with the Public Service Commission, despite the Notice to File Claims and at least one reminder letter Exhibits #8 and #10 (Docs ID #85 and ID #87). The Commission was not informed that Mr. Schumacher was specifically claiming nonpayment until the Commission received the objection filed with the Court.

The Commission notes that under North Dakota Century Code § 60-04-04, when a potential claimant does not file a claim within the time prescribed by statute, “. . . the commission is relieved of further duty or action under this chapter on behalf of the receipt holder and the receipt holder may be barred from participation in the trust fund.” While the claimant doesn’t participate in the trust fund since his claim is not a cash claim, under North Dakota Century Code § 60-10-13 “. . . A claim concerning a state licensed grain warehouse must be administered in a manner consistent with chapter 60-04. . . .” The Commission recognizes that even though a claimant failed to timely file a claim, the Court may conclude that the late claimant be included as a beneficiary.

The Commission does not dispute Mr. Schumacher’s claim. The Commission fulfilled its duty in issuing the Notice, following up with potential claimants, and analyzing the information it had available to prepare its Report and Recommendation. It is the Commission’s position that it is the province of the Court to determine if Mr. Schumacher’s failure to file a timely claim is excusable. If the Court concludes that the failure is excusable, and that Mr. Schumacher has a valid claim, the Commission will revise the Report accordingly.

## **2. Mr. Grzadzielewski’s Claim - Platte River Insurance Company’s Objection**

Neither the Commission nor the surety disputes that Mr. Grzadzielewski is owed money for grain delivered to Grabanski Grain. Exhibits #16A and #16B (Doc ID#93, Doc ID#94). Further, neither the Commission nor the surety disputes the fact that the grain was delivered during a period when the licensee was bonded by a different surety, prior to the effective date of Platte River Insurance Company’s bond. Exhibit #1 (Doc ID #78) and Exhibits #16A and #16B (Docs ID #93 and ID#94). Finally, neither the Commission nor Platte River Insurance Company

disputes the fact that Grabanski Grain's breach occurred after the effective date of the Platte River bond. The issue is: which bond should pay the Grzadzielewski claim?

Platte River asserts that because grain was delivered prior to the effective date of Platte River's bond, Platte River is not liable. Based on statute, and Commission and court precedent in previous insolvencies, it is the Commission's position that the applicable bond is the bond in effect at the time of the breach, not the bond in effect at the time of delivery.

First of all, North Dakota grain licensing law requires that licensees obtain a bond for the ". . .specific purpose of: Protecting the holders of outstanding receipts. . ." North Dakota Century Code § 60-02-09(6)(a). North Dakota Century Code § 60-02-01(7) defines receipts as:

7. "Receipts" means grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract.

Further, North Dakota Century Code § 60-02-09(4) provides that the bond be conditioned:

- a. For the faithful performance of the licensee's duties as a public warehouseman.
- 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.

The claimant, Mr. Grzadzielewski, is a holder of receipts consistent with a cash claim, including an assembly sheet identifying the scale tickets issued for grain delivered and a basis fixed grain purchase contract that was not signed by both parties as required by North Dakota Century Code § 60-02-19.1. Therefore, Mr. Grzadzielewski is the holder of an outstanding receipt, and has been during the effective period of the Platte River Insurance Company bond. The Platte River bond is in place for the protection of Mr. Grzadzielewski and other claimants in like circumstances. Further, the condition that triggered resort to the bond, the Grabanski Grain

default and subsequent insolvency, i.e. the breach, occurred during the effective period of Platte River's bond.

In *Stutsman v. Cook*, 53 N.D. 162, 204 N.W. 976, 1925, the North Dakota Supreme Court stated at page 978 "the bond covers warehouse receipts that were outstanding at the time of its execution, as well as tickets issued after its execution." At page 979 the court further stated:

. . . under the decisions of this court, in the case of *State for use of Reilly v. Farmers' Co-operative Elev. Co.*, 39 N. D. 235, 167 N. W. 223, L. R. A. 1918E, 233, in the case of *Kastner v. Andrews Grain Co.* (N. D.) 194 N. W. 824, and in the case of *Carson State Bank v. Grant Grain Co.* (N. D.) 197 N. W. 146, the warehouseman and his bond are liable for outstanding storage tickets at the time of the issuing of the bond. . .

Other authorities agree. In *Zagar v. Columbia Cas. Co.*, 181 Wash. 487, 492-93, 43 P.2d 949, 951 (1935), the Washington Supreme Court stated:

It is a well-recognized principle of law that a principal, having several successive bonds covering different periods, upon committing a default renders liable that bond in force when the default is committed. 50 C. J. 88, § 142; 22 R. C. L. 513, § 199. The obligation to pay arises when the principal commits a breach of duty.

In the instant case, the statutes and case law clearly support the Commission's conclusion that Platte River Insurance Company, and not any other surety, is liable for the claim of Mr. Grzadzielewski.

Platte River next asserts that perhaps the Grzadzielewski claim is not a cash claim, for which the surety is liable, but rather a credit-sale claim. Platte River presented no direct evidence to support this assertion, but questioned the Commission's witness Timothy Erdman about his recommendations that the Grzadzielewski claim, and other claims with unsigned contracts, were credit-sale contract claims and not cash claims for which the surety is responsible.

A credit-sale contract is defined in North Dakota Century Code § 60-02-01(2) as follows:

2. "Credit-sale contract" means a written contract for the sale of grain pursuant to which the sale price is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale and which contains the notice provided in subsection 7 of section 60-02-19.1. If a part of the sale price of a contract for the sale of grain is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale, only such part of the contract is a credit-sale contract.

North Dakota Century Code § 60-02-19.1 sets forth specific requirements for a document to be a credit-sale contract. It provides:

**60-02-19.1 Credit-sale contracts.**

*A warehouseman shall not purchase grain by a credit-sale contract except as provided in this section.* All credit-sale contracts must be in writing and must be consecutively numbered at the time of printing the contract. The warehouseman shall maintain an accurate record of all credit-sale contract numbers, including the disposition of each numbered form, whether by execution, destruction, or otherwise. Each credit-sale contract must contain or provide for all of the following:

1. The seller's name and address.
2. The conditions of delivery.
3. The amount and kind of grain delivered.
4. The price per unit or basis of value.
5. The date payment is to be made.
6. The duration of the credit-sale contract.
7. Notice in a clear and prominent manner that the sale is not protected by the bond coverage provided for in section 60-02-09. However, if the warehouseman has obtained bond coverage in addition to that required by section 60-02-09 and such coverage extends to the benefit of credit-sale contracts, the warehouseman may state the same in the credit-sale contract along with the extent of such coverage.

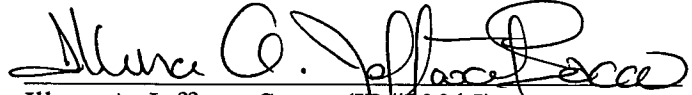
The contract must be signed by both parties and executed in duplicate. One copy shall be retained by the warehouseman and one copy shall be delivered to the seller. Upon revocation, termination, or cancellation of a warehouseman's license, the payment date for all credit-sale contracts shall, at the seller's option, be advanced to a date not later than thirty days after the effective date of the revocation, termination, or cancellation, and the purchase price for all unpriced grain shall be determined as of the effective date of revocation, termination, or cancellation in accordance with all other provisions of the contract. When a public warehouse is transferred under this chapter, credit-sale contracts may be assigned to another licensed public warehouseman or facility-based grain buyer. (*emphasis added*)

The statute specifically prohibits a licensee from purchasing on a credit-sale basis in any fashion other than as set out in the law. Consequently, there are only two “baskets” of possible grain sales claims in a licensee insolvency: those that qualify as credit-sale claims, and those that do not. The Commission has consistently concluded in its grain warehouse inspection program and in insolvency proceedings that when the credit-sale contract requirements in statute are not met, the sale should be treated as a cash sale not a credit-sale. Tr. 2012-06-20 02:39:36, 15:12:38 – 15:16:00.

This conclusion has been upheld. In an unreported Order Following Evidentiary Hearing in United States District Court in *United States v. Wimbledon Grain Company et al.*, Civil No, A3-02-46, p. 2 (D.N.D. 2002) (copy attached), Chief Judge Rodney S. Webb held “. . . for priority purposes sellers with unsigned contracts. . . should be treated in the same manner as those . . . with storage receipts.” In administering its responsibilities under the grain licensing and insolvency laws, the Commission has consistently treated sellers with unsigned credit-sale contracts and cash sellers in the same manner as those with storage receipts. Claimants with storage receipts, unpaid cash sales and unpaid, unsigned credit-sale contracts all can participate in the trust fund and all are protected by the required bond. Only claimants with fully executed, fully statutorily compliant credit-sale contracts are excluded from participating in the trust fund and therefore in the bond proceeds.

Mr. Grzadzielewski’s claim should be treated as a cash sale claim. The bond in effect at the time of Grabanski Grain’s breach is the bond that protects Mr. Grzadzielewski and Platte River Insurance Company is responsible for payment of Mr. Grzadzielewski’s claim.

Respectfully submitted this 20<sup>th</sup> day of July, 2012.

A handwritten signature in black ink, appearing to read "Illona A. Jeffcoat-Sacco". The signature is written in a cursive style with a horizontal line underneath the name.

Illona A. Jeffcoat-Sacco (ID#03315)  
Special Assistant Attorney General  
State Capitol – 12th Floor  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
701-328-2400

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHEASTERN DIVISION

RECEIVED  
JUL - 2 2002  
NORTH DAKOTA  
PUBLIC SERVICE  
COMMISSION  
EXECUTIVE SECRETARY

United States of America, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Wimbledon Grain Company; Kenneth )  
Hoggarth; Gerald Hoggarth; North )  
Dakota Public Service Commission; )  
Security State Bank; Employers )  
Mutual Casualty Company; Archer )  
Daniels Midland Company; Cargill, )  
Inc.; and All Claimants to the )  
Liquidated Grain Proceeds of )  
Wimbledon Grain Company, )  
 )  
Defendants. )

Civil No. A3-02-46

FILED  
JUL 1 2002  
EDWARD J. KLECKER, CLERK  
U.S. DISTRICT COURT-NORTH DAKOTA

ORDER FOLLOWING EVIDENTIARY HEARING

On June 28, 2002, this Court held an evidentiary hearing to determine whether unsigned contracts and forged contracts were truly unsigned and forged. The Court made oral findings at the conclusion of the hearing. This written order follows.

As a preliminary matter, the Court adopts the characterization of the five classes of claimants as delineated by the Public Service Commission ("PSC"). The first class contains claimants holding cash-sale or deferred payment contracts. The second class consists of those with open-storage receipts. Those claims where the grain was stored on an unsigned contract for sale make up the third class. The fourth class is the forged contract claimants. Finally, the fifth class consists of all claims in which grain was sold on a credit-sale contract.

From the evidence received at the hearing, the Court concludes that all allegedly unsigned contracts<sup>1</sup> were truly unsigned. This conclusion is based not only on the affidavits provided to the Court by the sellers but also on the testimony of Timothy Erdmann, a grain warehouse inspector for the North Dakota Public Service Commission, who testified that, while some of the contracts were signed by a representative of the elevator, none of them were signed by the seller. The Court further concludes that for priority purposes sellers with unsigned contracts (Class III) should be treated in the same manner as those claimants in Class II, those with open storage receipts.

Class IV consists of those claimants alleging that their grain sale contracts were forged.<sup>2</sup> Affidavits and testimony at the evidentiary hearing indicate that the signatures on these contracts were forged. As with the unsigned contracts, the Court finds that for priority purposes sellers with forged contracts

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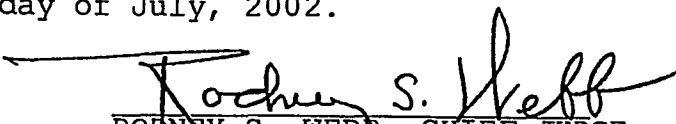
<sup>1</sup> Except as modified herein, the Court's ruling on unsigned contracts refers to those contracts delineated as unsigned in a spreadsheet prepared by the PSC. Exh. A to doc. # 30.

<sup>2</sup> The Court's ruling on forged contracts refers to those contracts delineated as forged in a spreadsheet prepared by the PSC, Exh. A to doc. # 30, with the following modifications. Charlotte Henning's contract 25197, Dale Jorissen's contracts 9502 and 9530, and Joanne Tucker's contracts 7784 and 7785, should be reclassified to the class of claimants delineated by the PSC as Class V. Delores Kerber's contract 25057 was characterized by the PSC as forged. However, the Court finds that this contract should be properly categorized as unsigned, since it was not signed by Ms. Kerber or her authorized representative. Likewise, Alice Mutschler's contracts 25172 and 25191 were also not signed by her or her authorized representative and thus should be reclassified from the forged contract class (Class IV) to the unsigned contract class (Class III).

(Class IV) should be treated in the same manner as those with open storage receipts (Class II).

IT IS SO ORDERED.

Dated this 1<sup>st</sup> day of July, 2002.

  
RODNEY S. WEBB, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

**NOTICE OF ENTRY**

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 1<sup>st</sup> day of

July 20 02  
EDWARD J. KLECKER, CLERK

By: Shelley M. Givens  
Deputy