

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Public Service Commission, )  
 )  
 Petitioner, Appellee )  
 and Cross-Appellant, )  
 )  
 v. )  
 )  
 Grand Forks Bean Company, Inc., )  
 )  
 Respondent and Appellee, )  
 )  
 and )  
 )  
 Auto-Owners Insurance Company, )  
 )  
 Respondent, Appellee )  
 and Cross-Appellant, )  
 )  
 and )  
 )  
 Bremer Bank, National Association, )  
 )  
 Interested Party and Appellant, )  
 )  
 and )  
 )  
 Curt Amundson, )  
 )  
 Interested Party, Appellee, )  
 and Cross-Appellant )  
 )  
 and )  
 )  
 Brent Baldwin, Duane Altendorf, )  
 Ronald Adams, Nicholas Adams, Chuck )  
 Nelson, and WJS Nelson, )  
 )  
 Interested Parties and )  
 Appellees. )  
 )

Supreme Court No.: 20160303  
 Grand Forks Co. No.: 18-2015-CV-00240

**APPEAL FROM ORDER MODIFYING TRUSTEE'S REPORT AND  
RECOMMENDATION DATED MAY 3, 2016, ORDER CORRECTING  
CLERICAL MISTAKE/OVERSIGHT DATED MAY 5, 2016, ORDER  
RESOLVING POST-HEARING ISSUES DATED JULY 5, 2016, ORDER FOR  
JUDGMENT DATED JULY 22, 2016, AND JUDGMENT DATED JULY 22, 2016**

**THE DISTRICT COURT OF GRAND FORKS COUNTY, NORTH DAKOTA  
NORTHEAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE JON J. JENSEN, PRESIDING**

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**REPLY BRIEF OF PETITIONER, APPELLEE, AND CROSS-APPELLANT  
PUBLIC SERVICE COMMISSION**

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## **I. ARGUMENT**

The following is the PSC's reply to the briefs filed subsequent to the PSC's initial brief.

### **A. The district court erred in determining the insolvency date and, as a result, the amount of the growers' claims.**

[¶1] As explained in the PSC's initial brief, "[a] licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored." N.D.C.C. § 60-04-02. The statute addresses two situations, one where the warehouse does not pay for grain that has been purchased/marketed and one where the grain is stored. The PSC asserts, and the evidence reflects, that the beans at issue were not purchased or marketed by GFB, and therefore, the latter part of the statute applies. In addition, regardless of which portion of the statute applies, there was never a "proper demand" triggering insolvency until December 2014. Overall, there remained enough beans for GFB to accomplish redelivery to all growers throughout this proceeding. Therefore, GFB was not insolvent until it refused redelivery in December 2014.

[¶2] The PSC continues to rely on the arguments presented in its initial brief. In addition, the growers' replies contend GFB was insolvent in October 2013 because some of them called and demanded payment for beans they had delivered to GFB. This position is based primarily on the testimony of Duane Altendorf and/or Brent Baldwin, which the growers assert reflects a demand for payment. The district court relied on the testimony of Altendorf to reach the October 15, 2013, insolvency date. App. at 519-20.

However, a review of Baldwin's and Altendorf's testimony shows they did not demand payment from GFB in October 2013, but rather demanded their beans be sold.

[¶3] Specifically, Altendorf testified:

Q. After you delivered your beans in September of 2013, what did you do?

A. Waited a couple weeks and then started calling Tad to try [sic] sell them.

Q. Tad or Todd?

A. Todd, I mean, excuse me.

Q. And when was that?

A. Started about the first of October of 2013 and it went, well, it was every two weeks, ten days, where we call and ask him. He's either working on something or he just refused to.

.....

Q. In October of 2015 did you specifically ask Grand Forks Bean Company to sell your beans for \$38 per hundred weight?

A. In when?

Q. In October of 2013?

A. Yes.

Q. What was the response that you received?

A. He was working on it or he didn't have a market. He was a heck of a salesman.

*Tr.* at 196:8-18; 202:24 (emphasis added).<sup>1</sup> Similarly, Brent Baldwin testified:

Q. After the beans were delivered for you individually and Baldwin Farms, tell me what you did to try to get paid for these beans.

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<sup>1</sup> During other parts of Altendorf's testimony, his attorney's questions referred to "demanding payment" (see *Tr.* at 196:19-197:2), but Altendorf's specific testimony was that he requested GFB to sell the beans.

A. Well, right away in September after I delivered the first 3,000 I called Todd and said that we got the first 3,000 there and do you want to pay on the contract. And then we talked about that and then I said well, we'll get the overage in here within the next few weeks. And then starting in October I called to sell them, the balance, because we were done.

Q. Why call to sell them?

A. Because I wanted the cash.

Q. And what was the response from Grand Forks Bean?

A. Okay. Let me get on it. Let me work at it.

*Tr.* at 202:7-20 (emphasis added).

[¶4] As can be seen by this testimony, the district court's decision misapplied the law in determining the insolvency date. Neither Altendorf nor Baldwin were demanding payment for beans purchased or marketed by GFB, but Altendorf and Baldwin were requesting the beans be sold. Under N.D.C.C. § 60-04-02, a licensee is insolvent under the first part only if it fails to pay, after proper demand, for grain purchased or marketed by the warehouseman. A warehouseman is not insolvent for not selling beans. Instead, the second part of the statute applies because GFB had the option of paying for or redelivering the beans. However, no proper demand was made and refused under this part of the statute until December 2014. As a result, the district court erred by concluding the first part of the insolvency statute applied, and the *Judgment* must be reversed and remanded for calculation of the amounts due to the growers under the correct insolvency date.

**B. Bremer's argument is contrary to the applicable law.**

[¶5] In its reply, Bremer makes several policy arguments asserting what it contends will be the dire result of the district court's decision. The PSC does not agree

with Bremer's stated consequences, and regardless, Bremer's arguments are policy arguments for the Legislature, not the Court. Likewise, Bremer's arguments regarding what any particular legislator's understanding of the law may have been does not change this Court's standards for interpreting the law.

[¶6] The PSC asserts the law and evidence in this case establish the growers (with the possible exception of Amundson depending on the Court's interpretation of N.D.C.C. § 60-02-19.1) did not enter into credit-sale contracts. As a result, those growers, as receiptholders, have the protections afforded by N.D.C.C. § 60-02.25.1. Neither conversion nor lack of conversion implicates this policy. North Dakota Public Service Comm'n v. Central States Grain, Inc. 371 N.W.2d 767, 778 (N.D. 1985) ("a grain warehouseman's failure to convert scale tickets into either cash or storage tickets as required by § 60-02-11, N.D.C.C. (2013), does not result in a loss to the producers, but constitutes a violation of the warehouseman of § 60-02-09, N.D.C.C., for which the surety is liable") (citing North Dakota Public Service Comm'n v. Valley Farmers, 365 N.W.2d 528, at 545,548 (N.D. 1985). Bremer's argument is contrary to the statutory scheme and this Court's prior case law, particularly Valley Farmers. Legislative amendments to the insolvency statutes since Valley Farmers have not impacted the portions of that decision which are fatal to Bremer's position in this appeal.

[¶7] Bremer's argument also ignores the district court's factual findings with respect to whether the growers had credit-sale contracts. The only grower that actually signed a PLMA was Curt Amundson, and the district court held he was a credit-sale claimant. The district court found one of Baldwin's truck drivers presumably signed the PLMAs associated with Brent Baldwin and Baldwin Farms, without authorization. App.



at 504. As a result, the district court determined Baldwin/Baldwin Farms did not sign or agree to credit-sale contracts. With respect to the remaining growers, the district court found that they did not sign or agree to the terms of the PLMAs associated with them. Bremer argues this will allow growers to unilaterally make and break contracts with the elevator. However, this is not the case.

[¶8] Rather, the district court reviewed the entire evidence to determine whether each particular grower had a credit-sale contract. The district court did not agree with all of the positions taken by the growers. While the PSC disagrees with some of the district court's analysis of the growers' claims as discussed herein and in its initial brief, it does agree the district court correctly concluded the growers did not have credit-sale contracts. Regardless, the district court's analysis does not lead to the dire results asserted by Bremer.

[¶9] Rather, the district court's analysis recognizes there are certain requirements to a credit-sale contract, one of which is that the parties must have mutually agreed to a contract satisfying the legal requirements of a credit-sale contract. If there is not a valid credit-sale contract, then the growers are receiptholders because they have "scale tickets . . . or other memoranda [] given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain." N.D.C.C. § 60-04-01(6). Once they are receiptholders, they have a first priority lien under N.D.C.C. § 60-02-25.1. Bremer's argument that failure of conversion should obliterate this lien protection ignores the statutory scheme.

[¶10] Bremer relies on Stockman Bank v. AGSCO, Inc., in support of its argument that failure of conversion should result in the growers being considered credit-

sale claimants or otherwise not entitled to recover from the trust fund. However, Stockman does not support Bremer's position. In Stockman, the Court recognized it "has long held that a seed lien is a statutory lien and cannot be obtained or enforced unless there is substantial compliance with the statute." Stockman Bank v. AGSCO, Inc., 2007 ND 27, ¶11, 727 N.W.2d 742. This is comparing apples to oranges. Regardless, there is substantial compliance with N.D.C.C. § 60-02-25.1 in this case (and any other applicable statutes) because the growers' claims were supported by scale tickets or other memoranda showing the delivery of beans. Failure of conversion does not equal lack of substantial compliance with the statutes by the growers. In fact, this Court has recognized the consequences of failure to convert is borne by the warehouseman, not the growers. Central States Grain, 371 N.W.2d at 778.

[¶11] Bremer's argument that its postings require the growers to be considered credit-sale claimants ignores the entirety of GFB's postings. The postings are contained at pages 385 and 491 of the Appendix. They include comments that all beans will be considered "price later" unless specified by the grower; a listing of storage, service, and redelivery fees; and that credit-sale contracts are not covered by the bond. As a whole, what these postings reveal is that GFB would store beans, enter into different types of contracts, and that a grower is not protected by the bond in a credit-sale contract. The nature of the postings does not result in conversion to a credit-sale contract when that was not the agreement with the grower in the first place. They simply reflect GFB would enter into various types of contracts and the implications (i.e. bond protection or storage fees) associated with those different types of contracts. Bremer fails to support, and it

would be an extreme result, for this Court to hold postings displayed in a warehouse that was never even visited by most of the growers results in a contractual relationship.

**C. The district court erred by awarding Altendorf \$45 per hundredweight.**

[¶12] In its initial brief, the PSC explained why the district court clearly erred in awarding Altendorf \$45 per hundredweight for his beans. In response, Altendorf asserts the PSC ignores his credible testimony. Altendorf does not specify what testimony the PSC has ignored. In fact, the PSC's position is based on Altendorf's testimony. Altendorf testified he sold some beans for \$45 per hundredweight and the rest at an open price. He was paid for the beans he sold at \$45, and his claim was only for the remainder. *Tr.* at 207:23-208:1, see also *Tr.* at 192:1-2 (Altendorf testifying "our agreement was I sold 2,000 bags at \$45 and I was to deliver another 2,000 bags at open market or market price"). The remaining beans were sold at an open price and he testified he was requesting payment of \$38 per hundredweight for those beans in this case. There is no evidence he was entitled to \$45 per hundredweight on the beans he had remaining at GFB.

**D. The district court erred by not calculating the value of Amundson's claim.**

[¶13] Amundson has not responded to the PSC's argument that the district court erred by not valuing his claim. The district court had subject matter jurisdiction, and this case is the only forum under the applicable law to address his claim. Therefore, the PSC requests a remand to the district court to value Amundson's claim—whether under the trust fund or the indemnity fund depending upon the Court's resolution of other issues.

## II. CONCLUSION

[¶14] For the foregoing reasons, the PSC requests the *Judgment* be reversed and the case be remanded to the district court for proceedings consistent with the Court's decision.

Dated this 28<sup>th</sup> day of February, 2017.

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**CERTIFICATE OF COMPLIANCE**

[¶15] The undersigned, as one of the attorneys representing Petitioner, Appellee and Cross-Appellant, Public Service Commission and one of the authors of the above and foregoing Reply Brief of Petitioner, Appellee, and Cross-Appellant Public Service Commission, hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the Reply Brief was prepared with proportionate typeface and that the total number of words does not exceed 2,000 from the portion of the Brief entitled Argument to the signature block at the end of the Brief. The word count was verified with the assistance of the undersigned's word processing software, which also counts abbreviations as words.

Dated this 28<sup>th</sup> day of February, 2017.

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**CERTIFICATE OF SERVICE**

[¶16] I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER, APPELLEE, AND CROSS-APPELLANT PUBLIC SERVICE COMMISSION** was on the 28<sup>th</sup> day of February, 2017, served as follows:

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