

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Terri Fritz,)	Docket No. GWC-450/GW-2184
Grain Director, Grain Warehouse)	
Department, Nebraska Public)	
Service Commission,)	
)	
COMPLAINANT,)	ORDER SUSTAINING COMPLAINT
)	AND ASSESSING CIVIL
v.)	PENALTIES
)	
The Andersons, Inc., Kearney,)	
Nebraska,)	
)	
RESPONDENT.)	Entered: August 15, 2023

BY THE COMMISSION:

On August 12, 2022, Terri Fritz, Director of the Grain Warehouse Department ("Complainant") filed a Complaint against The Andersons, Inc. of Kearney, Nebraska ("Respondent"), alleging Respondent violated Neb. Rev. Stat. § 88-533 by failing to obtain the approval of the Commission before utilizing unapproved grain bins to store grain.¹ Specifically, Complainant alleges that on July 5, 2022, an inspector for the Department conducted an examination of Respondent's Paxton grain warehouse, and during that exam, the inspector determined that Respondent was storing 189,011 bushels of grain in six unapproved grain bins.² Complainant alleges that Respondent stored the grain in the unapproved bins between October 13, 2021 and July 5, 2022, for a total of 266 days.³ Complainant seeks an order assessing civil penalties against Respondent pursuant to Neb. Rev. Stat. § 75-156 and 291 Neb. Admin. Code § 8-002.19(I) for the violations alleged.⁴

An Answer to the Complaint was timely filed on September 7, 2022.⁵ In its Answer, Respondent denied that it was using six unapproved grain bins to store grain.⁶ As an affirmative defense, Respondent states that at all relevant times, it acted in good faith and in a reasonable manner, and that the alleged violation caused no harm and was of minimal gravity.⁷ Respondent requests

¹ Exhibit 1.
² Ex. 1 at 2.
³ *Id.*
⁴ *Id.* at 2-3.
⁵ Exhibit 2.
⁶ *Id.* at 2.
⁷ *Id.* at 3.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Docket No. GWC-450/GW-2184

Page 2

that the Commission dismiss the Complaint in its entirety with prejudice.⁸

On November 29, 2022, the Hearing Officer entered an Order postponing the planning conference scheduled in this matter to give the parties an opportunity to finalize a settlement agreement. The parties came to tentative agreement, and the agreement was presented to the Commission for approval. On March 28, 2023, the Commission entered an order rejecting the settlement agreement. Pursuant to 291 Neb. Admin. Code §§ 1-007.05A and 1-007.05B, the matter was then scheduled for hearing.

E V I D E N C E

A hearing on this matter was held on June 28, 2023 in the Commission Hearing Room in Lincoln, Nebraska. Trevor Matulka appeared on behalf of the Department. Jamie Reyes appeared as Commission advisory counsel. Jesse Linebaugh appeared on behalf of Respondent. Exhibits numbered 1-15 were entered into the record. Each party made an opening statement.

Following opening statements, the Department offered the testimony of Terri Fritz, Director of the Grain Department of the Commission.⁹ Ms. Fritz testified that she oversees the operations of the Department, including examinations and annual audits of grain warehouses.¹⁰ Ms. Fritz testified that the Respondent has a grain warehouse license in Nebraska.¹¹

Ms. Fritz testified that on July 5, 2022, she received notification that the Respondent possessed six grain bins which were not listed on its license.¹² Additionally, on audit, Respondent was over 200,000 bushels short on grain, while approximately 189,011 bushels were being held in the unlicensed bins.¹³ Ms. Fritz explained that while a grain warehouse might store grain in a ground pile on a temporary and emergency basis, any bins used to hold grain must meet the requirements of Commission regulations.¹⁴ Additionally, Ms. Fritz testified that grain that is stored in an unlicensed bin would not be insured.¹⁵

⁸ *Id.* at 4.

⁹ Transcript at 15.

¹⁰ *Id.* at 15-17.

¹¹ *Id.* at 22.

¹² *Id.* at 23.

¹³ *Id.* at 24.

¹⁴ *Id.* at 25-26.

¹⁵ *Id.* at 27.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Docket No. GWC-450/GW-2184

Page 3

Ms. Fritz stated that if a grain warehouse wishes to add additional storage space, that must be done prior to adding the space, and that the Department strives to license all spaces before they begin to be used.¹⁶

Ms. Fritz then reviewed Exhibit 10, consisting of a lease between Mary Ann Hansmeier and Respondent.¹⁷ The lease was dated October 13, 2021 and described a lease of the six grain bins at issue in this complaint.¹⁸ Ms. Fritz noted that the lease was designed to begin on October 1, 2021, and end on September 30, 2022.¹⁹ Ms. Fritz stated that the Department received an application to license these six bins on July 7, 2023.²⁰

Ms. Fritz then recommended to the Commission that the Respondent receive a fine of \$53,200, based upon \$200 per day for 266 days.²¹ Ms. Fritz reiterated that this violation carried a risk of loss due to the lack of insurance on the bins, and that the Department did not know whether the bins met all of the required qualifications for grain storage.²² Ms. Fritz also noted that a lengthy amount of time passed between the beginning of the use of the grain bins and notification to the Department of the bins, and that the Department was unaware of the lease agreement for the bins until the Department's inspectors found them being used for storage.²³ However, Ms. Fritz also testified that none of the bins were noted to be in dangerous condition, and that the only issue was that the bins were not reported as part of the storage facility.²⁴

Following Ms. Fritz's testimony, the Department called Matt Gross, a grain examiner for the Department. Mr. Gross testified that he was tasked with visiting the Paxton location of the Respondent's facilities to measure the licensed space.²⁵ Mr. Gross stated that upon inspection, the Respondent was short 182,620.51 bushels of corn, or negative 5.9 percent.²⁶ Mr. Gross further stated that upon arrival at the Paxton facility, the Respondent's

¹⁶ *Id.* at 27-28.

¹⁷ *Id.* at 29-30.

¹⁸ *Id.* at 30.

¹⁹ *Id.* at 32.

²⁰ *Id.* at 32-33.

²¹ *Id.* at 33.

²² *Id.* at 33-34.

²³ *Id.* at 34, 67.

²⁴ *Id.* at 46.

²⁵ *Id.* at 77.

²⁶ *Id.* at 75-76.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Docket No. GWC-450/GW-2184

Page 4

representative showed him six bins which were not listed on Mr. Gross's documentation.²⁷ Mr. Gross stated that he did not feel that the Respondent attempted to conceal the bins from him.²⁸ Mr. Gross stated that upon inspection, each bin contained grain, but he was unable to determine how much because there was grain in the bins already.²⁹ Mr. Gross stated that the Department was concerned about the unapproved space used by the Respondent.³⁰ Following Mr. Gross's inspection, an exception report, referred to as a 701, was issued on the matter.³¹

The Department then called Bruce Liddy, a grain examiner for the Department, to testify. Mr. Liddy testified that he has previously issued a 701 against the Respondent, in 2021, relating to some in-transit grain that was not accurately listed in their daily position report.³² Mr. Liddy testified that he did not recall whether the Respondents ever resolved that 701 report.³³ Following Mr. Liddy's testimony, no further witnesses for the Complainant were called.

The Respondent then called to testify Mark Hobrock, Vice President of The Andersons. Mr. Hobrock testified that Respondent was licensed to hold in its Paxton facility approximately one million bushels of grain.³⁴ Mr. Hobrock stated that in the summer of 2021, Respondent filed an emergency storage application for another million bushels.³⁵ Mr. Hobrock stated that this was because the Village of Paxton had directed Respondent not to use a ground pile west of Paxton due to odor.³⁶ Respondent therefore obtained more storage space in the six bins at issue in this proceeding.³⁷ Mr. Hobrock stated that Respondent began using the six bins on November 5th or November 8th, 2021.³⁸ Mr. Hobrock stated that there was no grain stored in the bins on October 13, 2021, when the lease was signed.³⁹

²⁷ *Id.* at 77-78.

²⁸ *Id.* at 84.

²⁹ *Id.* at 78-79.

³⁰ *Id.* at 76.

³¹ *Id.* at 79; Exhibit 13.

³² Transcript at 89-91.

³³ *Id.* at 94-95.

³⁴ *Id.* at 100-101.

³⁵ *Id.* at 101.

³⁶ *Id.* at 102, 113-114.

³⁷ *Id.* at 102.

³⁸ *Id.* at 103.

³⁹ *Id.*; Exhibit 10.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Docket No. GWC-450/GW-2184

Page 5

Mr. Hobrock also testified that Respondent held insurance and bond for all of its licensed space, as well as emergency ground space.⁴⁰ Mr. Hobrock believed that the grain held in the six bins at issue would have likely been Respondent's grain.⁴¹ Mr. Hobrock stated that Respondent did not intend to fail to notify the Department of the use of the six bins, and that Respondent had believed its emergency storage application would cover the use of the six bins.⁴²

Following Mr. Hobrock's testimony, no further witnesses were called. Each party offered a closing statement. In its closing statement, the Department recommended a fine of \$53,200 based upon 266 days of the violation, at a rate of \$200 per day.⁴³ Respondent recommended a lower fine, stating that the violation was not severe, and that the Respondent acted in good faith in resolving the matter.⁴⁴ The hearing was then adjourned.

O P I N I O N A N D F I N D I N G S

Pursuant to the Grain Warehouse Act, Neb. Rev. Stat. §§ 88-525 to 88-552, grain warehouses in Nebraska are regulated by the Commission. The Grain Warehouse Act states that "[n]o warehouse licensee shall increase storage capacity without first obtaining the approval of the commission and effecting such revisions in its security as may be required by the commission."⁴⁵

The Commission finds that the Respondent, The Andersons, Inc., is a grain warehouse licensed to operate in Nebraska.⁴⁶ Respondent has a grain warehouse facility located in Paxton, Nebraska.⁴⁷ Respondent entered into a lease for the use of six grain bins between the dates of October 13, 2021 and September 30,

⁴⁰ Transcript at 104.

⁴¹ *Id.* at 104-105.

⁴² *Id.* at 106.

⁴³ *Id.* at 141.

⁴⁴ *Id.* at 142-146. Although the Respondent introduced evidence of a settlement amount contemplated in this proceeding, the Commission declines to consider it for purposes of this Order. "[E]vidence of negotiations and compromise or settlement of a claim is irrelevant because the transaction is motivated by a desire for peace rather than from the strength or weakness of a claim." *McGill Restoration, Inc. v. Lion Place Condo. Ass'n*, 309 Neb. 202, 228, 959 N.W.2d 251, 272 (2021).

⁴⁵ Neb. Rev. Stat. § 88-533.

⁴⁶ Exhibit 11.

⁴⁷ Transcript at 37-38.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Docket No. GWC-450/GW-2184

Page 6

2022.⁴⁸ Respondent did not store grain in the bins immediately upon signing the lease, but that it began storing grain in these bins on or around November 8, 2021.⁴⁹ On July 5, 2022, the Department discovered that Respondent was using these six grain bins.⁵⁰ The Department had not been aware of Respondent's use of these six grain bins prior to July 5, 2022, nor had Respondent applied to add the six grain bins to its grain warehouse license.⁵¹ On July 7, 2022, the Respondent filed an application to add the six bins to its grain warehouse license.⁵²

Based upon the evidence presented, the Commission finds that between the dates of November 8, 2021, and July 7, 2022, Respondent was in control of and had stored grain in six bins which were not listed on Respondent's grain warehouse license for its Paxton facility, in violation of Neb. Rev. Stat. § 88-533. The Commission additionally finds that Respondent acted in good faith to resolve this matter immediately upon the Department's discovery of the violation. The Commission finds that while there was a substantial risk of loss due to Respondent's use of an unlicensed space, no such loss actually occurred in this instance. Therefore, although this matter is serious in nature and should not be taken lightly, the Commission will exercise discretion in assessing civil penalties.

Pursuant to Neb. Rev. Stat. § 75-156, the Commission may, upon a finding that the violation is proven by clear and convincing evidence, assess a civil penalty of up to ten thousand dollars per day against any grain warehouse in violation of the laws of Nebraska. The Complainant recommended a fine be levied against Respondent in the amount of \$53,200, based upon a fine of \$200 per day for each day between October 13, 2021 and July 7, 2022. However, the Commission finds that the severity of the violation does not merit the full amount of penalties recommended by the Department. Additionally, the Commission finds that the evidence presented is insufficient to conclude that any grain was actually stored in the six bins at issue until November 8, 2021. The Commission therefore finds that a penalty of \$100 per day is sufficient, for each day between November 8, 2021 and July 7, 2022.

⁴⁸ Exhibit 10. The lease states that its term begins on October 1, 2021, rather than October 13, 2021; however, the starting date of the lease as October 13, 2021 was undisputed at hearing.

⁴⁹ Transcript at 103. Respondent stated that it began storing grain in the six bins on either November 5th or November 8th.

⁵⁰ Transcript at 77-78.

⁵¹ *Id.* at 34.

⁵² *Id.* at 32-33.

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

Docket No. GWC-450/GW-2184

Page 7

The total amount of civil penalties to be assessed against Respondent is therefore \$24,100.

291 Neb. Admin. Code § 1-007.06B requires a civil penalty assessed to be paid within thirty (30) days from the date the Order issuing the penalty is mailed. Failure to pay the penalty within thirty days may result in the matter being referred to the Nebraska Attorney General's office for collection through the District Court of Lancaster County. Respondent is therefore advised to pay the above-described civil penalty in full prior to **September 15, 2023**.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that The Andersons, Inc. is hereby assessed a civil penalty of \$24,100.

IT IS FURTHER ORDERED that the civil penalty assessed in this Order must be paid in full within thirty (30) days from the date of the mailing of this Order. Failure to pay this penalty **on or before September 15, 2023** may result in additional action against the Respondent, including but not limited to a suspension of the Respondent's operating authority, and collection of outstanding amounts in the District Court of Lancaster County.

ENTERED AND MADE EFFECTIVE in Lincoln, Nebraska this 15th day of August, 2023.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Eric M. Hamler

Tim Schram

Kevin Stocker

David W. Anderson

Chair

ATTEST:

Thomas W. Golden
Executive Director