

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) 2005 AMA Docket No. F&V 989-2  
)  
Lion Raisins, Inc., a California )  
corporation, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

Lion Raisins, Inc. [hereinafter Petitioner], instituted this proceeding by filing a Petition by Handler for Modification or Exemption [hereinafter Petition] on March 1, 2005. Petitioner instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of raisins produced from grapes grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

Petitioner challenges obligations and restrictions purportedly imposed as a result of the United States Department of Agriculture's interpretation of section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) and seeks modification of section 989.159(d) of the Raisin Order (7 C.F.R. § 989.159(d)) (Pet. ¶ V). On March 11, 2005, the Administrator,

Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a Motion to Dismiss Petition. Respondent contends Petitioner's Petition should be dismissed with prejudice because the Petition does not contain the information required by section 900.52(b)(2)-(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)-(4)) to be contained in each petition filed under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) and the Petition contains allegations and requests that cannot be addressed through a petition instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). On April 4, 2005, Petitioner filed Opposition to Respondent's Motion to Dismiss.

On May 3, 2005, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an Order Dismissing Petition With Prejudice. On June 3, 2005, Petitioner appealed the ALJ's May 3, 2005, Order Dismissing Petition With Prejudice to the Judicial Officer. On June 28, 2005, Respondent filed Respondent's Response to Petition for Appeal, and on June 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's May 3, 2005, Order Dismissing Petition With Prejudice. Therefore, I adopt the ALJ's May 3, 2005, Order Dismissing Appeal With Prejudice as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE—7 AGRICULTURE

....

#### CHAPTER 26—AGRICULTURAL ADJUSTMENT

....

#### SUBCHAPTER III—COMMODITY BENEFITS

....

#### **§ 608c. Orders regulating handling of commodity**

....

#### **(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The

pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 U.S.C. § 608c(15).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

....

**CHAPTER IX—AGRICULTURAL MARKETING SERVICE  
(MARKETING AGREEMENTS AND ORDERS;  
FRUITS, VEGETABLES, NUTS),  
DEPARTMENT OF AGRICULTURE**

....

**PART 989—RAISINS PRODUCED FROM GRAPES  
GROWN IN CALIFORNIA**

....

**SUBPART—ORDER REGULATING HANDLING**

....

**GRADE AND CONDITION STANDARDS**

....

**§ 989.59 Regulation of the handling of raisins subsequent to their  
acquisition by handlers.**

....

(d) *Inspection and certification.* Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and [sic] inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned

applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

....

**SUBPART—ADMINISTRATIVE RULES AND REGULATIONS**

....

**QUALITY CONTROL**

....

**§ 989.159 Regulation of the handling of raisins subsequent to their acquisition.**

....

(d) *Submission of inspection certificates to the Committee.* A copy of each inspection certificate which a handler is required to submit to the Committee pursuant to § 989.59(d) shall be submitted not later than Wednesday of the week following the week in which the certificate was issued. This may be accomplished by authorizing the inspection service in writing to submit a copy of each such inspection certificate directly to the Committee. A copy of such authorization shall be furnished to the Committee.

7 C.F.R. §§ 989.59(d), .159(d).

**ADMINISTRATIVE LAW JUDGE'S  
ORDER DISMISSING PETITION WITH PREJUDICE  
(AS RESTATED)**

Petitioner seeks to add language to an implementing regulation (7 C.F.R. § 989.159(d)), issued pursuant to section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)), to require the Processed Products Standardization and Inspection Branch, United States Department of Agriculture [hereinafter the Inspection Branch], to transmit certificates directly to handlers' customers upon request. Petitioner also seeks to be allowed to issue certificates to its customers that provide test results from multiple sources, including the Inspection Branch, which the Inspection Branch may not then construe to be improperly created facsimiles of United States Department of Agriculture certificates.

Petitioner premises its requests upon the fact that, since 1990, it has been preparing certificates for its customers that provide various test results from Petitioner, the Inspection Branch, and independent laboratories. Petitioner prepares certificates that provide various test results to satisfy customer requests because Petitioner believes information on the United States Department of Agriculture certificates prepared by the Inspection Branch is inaccurate. This practice has led to charges by the United States Department of Agriculture accusing Petitioner of issuing "facsimile" certificates misrepresenting United States Department of Agriculture test results to Petitioner's customers.

Section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)), the provision Petitioner specifies as supporting its right to file a petition under the AMAA, does not address the transmission of certificates by the Inspection Branch or the issuance of certificates that provide test results from multiple sources. The full extent of Petitioner's obligation under section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) is to have the raisins it handles inspected by the Inspection Branch and to submit copies of the certificates obtained from the Inspection Branch to the Raisin Administrative Committee.

The regulation that the United States Department of Agriculture has applied to charge Petitioner with fraud or misrepresentation in its use of certificates and "facsimiles" (7 C.F.R. § 52.54(a)(1)) was promulgated pursuant to the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621-1627) [hereinafter the Agricultural Marketing Act].<sup>1</sup> Modifications of and exemptions from 7 C.F.R. pt. 52 cannot be sought or obtained in a proceeding instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Likewise, the refusal of the Inspection Branch to send certificates directly to Petitioner's customers, is not based upon powers conferred upon the Inspection Branch by the AMAA, but by the Agricultural Marketing Act. The two statutes are different, and the provisions of the AMAA for challenging marketing orders and obligations under marketing orders do not extend to other United States Department of Agriculture regulatory programs.

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<sup>1</sup>See authority citation for 7 C.F.R. pt. 52.

A proceeding under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) may not be used as a forum to debate questions of policy, desirability, or effectiveness of a marketing order's provisions.<sup>2</sup> So too, a section 8c(15)(A) AMAA (7 U.S.C. § 608c(15)(A)) proceeding may not be used to challenge the policy, desirability, or effectiveness of regulations and practices that are based upon a completely different statute.

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Petitioner raises two issues in Petitioner's Appeal to the Judicial Officer [hereinafter Appeal Petition]. First, Petitioner contends the ALJ erroneously held Petitioner did not challenge section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) (Petitioner's Appeal Pet. at 1-2).

Petitioner seeks to require the Inspection Branch to transmit certificates directly to handlers' customers upon request and seeks to be allowed to issue certificates to customers that include test results from multiple sources. However, section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) does not address the transmission of certificates by the Inspection Branch or the issuance of certificates that include test results from multiple sources. As the ALJ correctly states, the full extent of Petitioner's obligation

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<sup>2</sup>*In re Lion Raisins, Inc.*, 64 Agric. Dec. \_\_\_\_, slip op. at 15 (Apr. 25, 2005), *appeal docketed*, No. CIV-F-05-00640-AWI-SMS (E.D. Cal. May 13, 2005); *In re Lion Raisins, Inc.*, 63 Agric. Dec. \_\_\_\_, slip op. at 13 (Oct. 19, 2004); *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

under section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) is to have the raisins it handles inspected by the Inspection Branch and to submit copies of the certificates obtained from the Inspection Branch to the Raisin Administrative Committee.<sup>3</sup> Thus, section 989.59(d) of the Raisin Order (7 C.F.R. § 989.59(d)) imposes none of the obligations or restrictions that Petitioner alleges in the Petition.

Moreover, a review of the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52), promulgated pursuant to the Agricultural Marketing Act, reveals that 7 C.F.R. pt. 52, not the Raisin Order, contains the provisions which Petitioner challenges, including the provisions related to distribution of certificates. Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) does not provide a mechanism for seeking amendment of the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) promulgated under the Agricultural Marketing Act. Instead, the mechanism by which Petitioner may seek amendment of 7 C.F.R. pt. 52 is set forth in the Administrative Procedure Act and United States Department of Agriculture regulations, which read as follows:

**§ 553. Rule making**

....  
(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553(e).

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<sup>3</sup>See Order Dismissing Petition With Prejudice at third unnumbered page.

**§ 1.28 Petitions.**

Petitions by interested persons in accordance with 5 U.S.C. 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.

7 C.F.R. § 1.28.

Second, Petitioner contends the ALJ erroneously concluded Petitioner instituted the proceeding to debate questions of policy, desirability, or effectiveness of the Raisin Order (Appeal Pet. at 2-3).

I disagree with Petitioner's contention that the ALJ erroneously concluded Petitioner instituted the proceeding to debate questions of policy, desirability, or effectiveness of the Raisin Order. Instead, the ALJ concluded section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) could not be used to challenge the policy, desirability, or effectiveness of regulations and practices that are based upon the Agricultural Marketing Act.<sup>4</sup>

For the foregoing reasons, the following Order should be issued.

**ORDER**

Petitioner's Petition, filed March 1, 2005, is dismissed with prejudice.

This Order shall become effective on the day after service on Petitioner.

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<sup>4</sup>Order Dismissing Petition With Prejudice at third and fourth unnumbered pages.

**RIGHT TO JUDICIAL REVIEW**

Petitioner has the right to obtain review of this Order in any district court of the United States in which district Petitioner is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.<sup>5</sup> The date of entry of this Order is July 12, 2005.

Done at Washington, DC

July 12, 2005

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William G. Jenson  
Judicial Officer

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<sup>5</sup>7 U.S.C. § 608c(15)(B).