

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) 2002 AMA Docket No. F&V 989-5
)
Lion Raisins, Inc., a California)
corporation,)
) **Order Vacating Order Granting**
) **Motion to Dismiss and Remand Order**
Petitioner)

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], filed an Amended Petition¹ on May 16, 2003. Petitioner filed the Amended Petition under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California” (7 C.F.R. pt. 989); 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].

¹Petitioner entitles its Amended Petition “Amended Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Set Aside Reserve Percentages of All Varieties of Raisins Established for the 2002-2003 Crop Year, Pursuant to 7 C.F.R. § 989.1 *et seq.* and to Exempt Petitioner from Various Provisions of the Raisin Marketing Order and/or Any Obligations Imposed in Connection Therewith with Respect to the Reserve Requirements, That Are Not in Accordance with Law” [hereinafter Amended Petition].

On June 27, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss Amended Petition.” On September 29, 2003, Administrative Law Judge Leslie B. Holt [hereinafter the ALJ] dismissed the Amended Petition on the ground that Petitioner failed to file a timely response to Respondent’s Motion to Dismiss Amended Petition (Order Granting Motion to Dismiss).

On October 27, 2003, Petitioner appealed to the Judicial Officer.² On November 7, 2003, Respondent filed a response to Petitioner’s Appeal Petition. On November 18, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner states that it never received Respondent’s Motion to Dismiss Amended Petition and requests that I vacate the ALJ’s Order Granting Motion to Dismiss and grant Petitioner 20 days to respond to Respondent’s Motion to Dismiss Amended Petition. Petitioner cites three bases for its requests. (Petitioner’s Appeal Pet. at 1-3.)

First, Petitioner asserts that its attorney, Brian C. Leighton, has probably filed more petitions pursuant section 8c(15)(A) of the Agricultural Marketing Agreement Act of

²Petitioner entitles its appeal petition “Petitioner’s Motion for the Court to Revoke Its Order Granting Motion to Dismiss the Second Amended Petition and Allowing Petitioner to Respond to the Motion to Dismiss” [hereinafter Appeal Petition].

1937, as amended (7 U.S.C. § 608c(15)(A)), than any other attorney and that Mr. Leighton always files timely responses to motions (Petitioner's Appeal Pet. at 2).

Mr. Leighton has appeared before me as counsel in numerous administrative proceedings.³ While there is no record evidence to support Petitioner's contention that Mr. Leighton always files timely responses, I do not recall any proceeding in which Mr. Leighton filed a late response to a motion. However, Mr. Leighton's punctilious adherence to the time requirements in the Rules of Practice in previous proceedings is not relevant to Petitioner's requests in this proceeding. Therefore, I reject Petitioner's contention that Mr. Leighton's diligence in previous proceedings is a basis for vacating the ALJ's Order Granting Motion to Dismiss and providing Petitioner 20 days to respond to Respondent's Motion to Dismiss Amended Petition.

³See, e.g., *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. May 29, 2003); *In re Saulsbury Enterprises*, 59 Agric. Dec. 28 (2000) (Decision on Remand), *rev'd*, CV-97-5136-REC (E.D. Cal. July 12, 2000), *appeal withdrawn*, No. 00-16854 (9th Cir. Oct. 10, 2000); *In re Gallo Cattle Co.*, 57 Agric. Dec. 357 (1998), *dismissed*, No. CIV S-98-1619 EJG/JFM (E.D. Cal. Oct. 1, 1998), *printed in* 57 Agric. Dec. 890 (1998), *aff'd*, 189 F.3d 473 (Table), 1999 WL 547427 (9th Cir. 1999), *printed in* 58 Agric. Dec. 828 (1999); *In re Cal-Almond*, 57 Agric. Dec. 24 (1998); *In re United Foods, Inc.*, 57 Agric. Dec. 329 (1998), *aff'd*, Nos. 96-01252, 98-01082 (W.D. Tenn. 1998), *rev'd*, 197 F.3d 221 (6th Cir. 1999), *reprinted in* 58 Agric. Dec. 822 (1999), *aff'd*, 553 U.S. 405 (2001), *reprinted in* 60 Agric. Dec. 147 (2001); *In re Daniel Strebin*, 56 Agric. Dec. 1095 (1997); *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567 (1997), *aff'd*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Mar. 26, 1998), *printed in* 57 Agric. Dec. 11 (1998); *In re Midway Farms, Inc.*, 56 Agric. Dec. 102 (1997), *aff'd*, No. CV F 97-5460 (E.D. Cal. May 18, 1998), *printed in* 58 Agric. Dec. 1 (1999), *rev'd and remanded*, 188 F.3d 1136 (9th Cir. 1999), *reprinted in* 58 Agric. Dec. 714 (1999).

Second, Petitioner urges that I vacate the ALJ's Order Granting Motion to Dismiss and grant Petitioner 20 days to respond to Respondent's Motion to Dismiss Amended Petition on the ground that vacating the ALJ's order and granting Petitioner time to respond to Respondent's motion will not prejudice Respondent (Petitioner's Appeal Pet. at 2-3).

The lack of prejudice to an opposing party is not a basis for vacating a properly issued order granting a motion to dismiss and granting a party additional time to respond to the motion to dismiss.⁴

Third, Petitioner contends the Hearing Clerk has never served Petitioner's counsel with Respondent's Motion to Dismiss Amended Petition (Petitioner's Appeal Pet. at 2-3).

Section 900.69(b) of the Rules of Practice (7 C.F.R. § 900.69(b)) provides three methods by which the Hearing Clerk may serve a document or paper on a party's attorney of record: (1) by delivering a copy of the document or paper to the attorney; (2) by leaving a copy of the document or paper at the principal office or place of business of the attorney;

⁴*Cf. In re Heartland Kennels, Inc.*, 61 Agric. Dec. 549, 551-52 (2002) (stating the lack of prejudice to the complainant is not a basis for postponing the proceeding) (Ruling Denying Motion to Postpone Proceedings); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating, even if the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to the complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

or (3) by registering and mailing a copy of the document or paper addressed to the attorney at the attorney's last known principal office, place of business, or residence. Moreover, section 900.69(b) of the Rules of Practice (7 C.F.R. § 900.69(b)) provides that proof of service shall be made by the affidavit of the person who actually made the service and that the affidavit shall be filed with the Hearing Clerk and the fact of filing shall be noted on the docket of the proceeding.

The record does not indicate that the Hearing Clerk served Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with section 900.69(b) of the Rules of Practice (7 C.F.R. § 900.69(b)). Instead, the record establishes that the Hearing Clerk sent Petitioner's attorney a copy of Respondent's Motion to Dismiss Amended Petition by regular mail on June 27, 2003.⁵ Moreover, I cannot locate, and neither Respondent nor Petitioner cites, any notation in the record of the filing of an affidavit of the person who actually served Petitioner with Respondent's Motion to Dismiss Amended Petition.

Therefore, as the record does not contain any indication that the Hearing Clerk served Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance

⁵See Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form, stating that the Hearing Clerk sent Respondent's Motion to Dismiss Amended Petition by regular mail on June 27, 2003, to:

Mr. Brian C. Leighton, Esquire
701 Pollasky Avenue
Clovis, CA 93612

with the Rules of Practice, the ALJ's September 29, 2003, Order Granting Motion to Dismiss should be vacated, the Hearing Clerk should serve Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice, and Petitioner should be given an opportunity to respond to Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice.

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

ORDER

1. The ALJ's September 29, 2003, Order Granting Motion to Dismiss is vacated.
2. The proceeding is remanded to the ALJ to:
 - a. order the Hearing Clerk to serve Petitioner with Respondent's Motion to Dismiss Amended Petition in accordance with the Rules of Practice; and

b. provide Petitioner with an opportunity to respond to Respondent's

Motion to Dismiss Amended Petition in accordance with the Rules of Practice.

Done at Washington, DC

December 4, 2003

William G. Jenson
Judicial Officer