

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AMA Docket No. FV-10-0170
)
American Dried Fruit Co.,)
a California proprietorship,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

On March 11, 2010, American Dried Fruit Co. instituted this proceeding by filing a Petition.¹ American Dried Fruit Co. instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA], and 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]. 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] apply to petitions filed under 7 U.S.C. § 608c(15)(A).

¹American Dried Fruit Co. entitles its petition “Petition Challenging USDA’s Unlawful Interpretation and Application of Marketing Order Provisions and Regulations; Petition to Enforce and/or Modify Raisin Marketing Order; and Petition to Allow Handler’s [sic] to Cause Inspection and Certification by Compelling Other Interested Parties to Apply and Pay for Marketing Order Inspection Services” [hereinafter Petition].

American Dried Fruit Co. contends USDA's interpretation of the Raisin Order as requiring that only a handler may apply for, and obtain, inspection and certification of raisins pursuant to 7 C.F.R. §§ 989.58(d)(1) and 989.59(d), is unlawful (Pet. ¶¶ 4-6).

American Dried Fruit Co. requests that the Secretary of Agriculture: (1) direct the United States Department of Agriculture [hereinafter USDA] to perform raisin inspection and certification for any financially interested party that a raisin handler compels to apply for inspection and certification in satisfaction of the requirements in 7 C.F.R. §§ 989.58(d)(1) and 989.59(d); (2) declare that American Dried Fruit Co. may cause inspection and certification in accordance with 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) by compelling other financially interested parties to apply to, and pay, USDA for inspection and certification; and (3) modify the Raisin Order to define the term "cause an inspection and obtain a certificate" as used in 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) to include circumstances in which a raisin handler compels another financially interested party to apply to USDA for inspection and certification (Pet. ¶ 18).

On April 14, 2010, the Administrator, Agricultural Marketing Service, USDA [hereinafter the Administrator], filed a Motion to Dismiss Petition seeking dismissal of the Petition on the grounds that: (1) American Dried Fruit Co. is not a proper petitioner; (2) the Petition does not contain all of the information required by 7 C.F.R. § 900.52(b) to be contained in a petition; and (3) the issues raised by American Dried Fruit Co. have previously been adjudicated and rejected. On May 17, 2010, American Dried Fruit Co.

filed Petitioner's Opposition to Respondent's Motion to Dismiss stating the Administrator's Motion to Dismiss Petition should be denied and the Petition should be decided on its merits.

On May 27, 2010, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] granted the Administrator's Motion to Dismiss Petition on the ground that the Petition fails to state a claim upon which relief might be granted because the issues raised by American Dried Fruit Co. have previously been adjudicated and found without merit (Chief ALJ's Opinion and Order at 6).

On June 25, 2010, American Dried Fruit Co. appealed the Chief ALJ's Opinion and Order to, and requested oral argument before, the Judicial Officer.² On August 13, 2010, the Administrator filed Respondent's Response to Appeal Petition. On August 16, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the Chief ALJ's Opinion and Order dismissing American Dried Fruit Co.'s Petition.

²American Dried Fruit Co. entitles its appeal petition "Petitioner's Appeal Petition to Decision and Order and Brief in Support Thereof and Petitioner's Request for Oral Argument" [hereinafter Appeal Petition].

DECISION

American Dried Fruit Co.'s Request for Oral Argument

American Dried Fruit Co.'s request for oral argument, which the Judicial Officer may grant, refuse, or limit,³ is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

American Dried Fruit Co.'s Appeal Petition

American Dried Fruit Co. instituted the instant proceeding pursuant to 7 U.S.C. § 608c(15)(A) which provides that a handler subject to an order may file a written petition with the Secretary of Agriculture stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting modification of the order or exemption from the order. American Dried Fruit Co. contends USDA's interpretation of the Raisin Order as requiring that only a handler may apply for, and obtain, inspection and certification of raisins pursuant to 7 C.F.R. §§ 989.58(d)(1) and 989.59(d), is unlawful (Pet. ¶¶ 4-6). American Dried Fruit Co. requests that I declare USDA's interpretation of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) unlawful and direct USDA to perform inspection and certification under 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) for any financially interested party that a raisin handler compels to apply for inspection and certification (Pet. ¶ 18).

³7 C.F.R. § 900.65(b)(1).

The Raisin Order provides that each handler shall cause inspection and certification of raisins, as follows:

§ 989.58 Natural condition raisins.

....

(d) *Inspection and certification.* (1) Each handler shall cause an inspection and certification to be made of all natural condition raisins acquired or received by him. . . . The handler shall be reimbursed by the committee for inspection costs incurred by him and applicable to pool tonnage held for the account of the committee. Except as otherwise provided in this section, prior to blending raisins, acquiring raisins, storing raisins, reconditioning raisins, or acquiring raisins which have been reconditioned, each handler shall obtain an inspection certification showing whether or not the raisins meet the applicable grade and condition standards[.]. . . The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

....

§ 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 an[] 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.

7 C.F.R. §§ 989.58(d)(1), .59(d).

The Chief ALJ, citing four decisions,⁴ rejected American Dried Fruit Co.'s Petition on the ground that it failed to state a claim on which relief could be granted, as the issues raised by American Dried Fruit Co. had previously been adjudicated and found without merit (Chief ALJ's Opinion and Order at 6). American Dried Fruit Co. contends the four decisions relied upon by the Chief ALJ are inapposite and the issues raised by American Dried Fruit Co. in the Petition have never been adjudicated (Appeal Pet. at first through fifth unnumbered pages).

In *Lion Bros. v. U.S. Dep't of Agric.*, No. CV-F-05-0292 REC-SMS, 2005 WL 2089809 (E.D. Cal. Aug. 29, 2005), the Court specifically rejected the position advanced by American Dried Fruit Co., as follows:

⁴*Lion Raisins, Inc. v. U.S. Dep't of Agric.*, No. 1:05-CV-00640 OWW-SMS, 2008 WL 2762176 (E.D. Cal. July 14, 2008); *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, No. 1:05-CV-00640 OWW-SMS, 2008 WL 783337 (E.D. Cal. Mar. 20, 2008); *Lion Bros. v. U.S. Dep't of Agric.*, No. CV-F-05-0292 REC-SMS, 2005 WL 2089809 (E.D. Cal. Aug. 29, 2005); *In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005).

Lion argues that the sole issue before the court is a legal one: can “Lion Bros., a producer of raisins [] governed by the Raisin Marketing Order receive and pay for the same inspection that a handler, also regulated by the same Marketing Order, can receive and pay for under the grade and condition requirements of the Marketing Order.” Pl.’s Opp’n at 7. In other words, Lion argues that because it is entitled to inspections under the Raisin Marketing Order it was wrongful for the RAC to refuse to perform the requested inspection.

A. Lion Is Not Entitled to Inspections Under the Order

The Raisin Marketing Order is specific; it states that “Each *handler*, shall cause an inspection to be made. . . .” 7 C.F.R. § 989.58(d) (emphasis added). It is undisputed that Lion is a producer and not a handler of raisins. Lion has cited no language in the Raisin Marketing Order under which it could be arguable that a producer such as Lion is required to procure inspections under the Order in the same manner and at the same rate as handlers. Nor is there any language in the Raisin Marketing Order that could be said to entitle a producer to receive inspections pursuant to the Order. This is precisely what Mr. Worthley communicated to Lion in October of 2004. Compl. Ex. B. Because Lion was not required or entitled to receive inspections under the Order, there can be no argument that such an inspection was wrongfully denied.

Lion Bros. v. U.S. Dep’t of Agric., No. CV-F-05-0292 REC-SMS, slip op. at 8-9, 2005 WL 2089809, at *4 (E.D. Cal. Aug. 29, 2005).

In *In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005), Lion Raisins, Inc., challenged USDA’s construction of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d); however, I did not reach the merits of Lion Raisins, Inc.’s petition. Instead, I dismissed the petition because the petition did not comply with the requirements in 7 C.F.R. § 900.52(b) and on *res judicata* grounds. On review, the Court denied Lion Raisins, Inc.’s cross-motion for summary judgment stating:

Lion's cross-motion for summary judgment, requests the Court issue an order relieving it from obligations imposed under the Raisin Marketing Order, specifically that [Lion]:

(1) can comply with the incoming and outgoing inspection obligations of the Raisin Marketing Order by "causing" its grower (for incoming) and customer (for outgoing) to apply for inspections from USDA[.]

....

The Judicial Officer did not address any relief requested by [Lion], because the petition was dismissed before its merits were adjudicated. The Judicial Officer found [Lion's] November Petition barred by *res judicata* based on its similarity to a previously filed petition. . . .

Specifically, the November Petition was dismissed with prejudice upon the Judicial Officer's finding that the petition was barred on *res judicata* grounds and the petition failed . . . "to state a legally-cognizable claim" because it challenged inspection obligations under the raisin marketing order, which the Judicial Officer found to be a matter of policy, desirability and a challenge to the effectiveness of the order provisions. The Judicial Officer found proceedings under AMAA section 8c(15)(A) (7 U.S.C. § 608c(15)(A)[]) did not afford relief for such claims.

Lion Raisins, Inc. v. U.S. Dep't of Agric., No. 1:05-CV-00640 OWW-SMS, slip op. at 14-16, 2008 WL 783337, at *7 (E.D. Cal. Mar. 20, 2008). The Court's decision denying Lion Raisins, Inc.'s motion to amend and motion for reconsideration of the March 20, 2008, decision, again addressed Lion Raisins, Inc.'s challenge to USDA's construction of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d), as follows:

USDA also argues that the issue of whether growers and customers can "call for" or "cause" inspections on Lion's behalf has already been adjudicated against such an interpretation of the Raisin Marketing Order in other cases and administrative proceedings. The unpublished Eastern District of California case of *Lion Bros. v. U.S. Dep't of Agriculture*, No. CVF050292RECSMS, 2005 WL 2089809 (E.D. Cal. Aug. 29, 2005), determined that one must be a handler, not a grower or customer of a

handler, to receive the “handler” rate for inspections, and to obtain inspections that meet the Raisin Marketing Order’s inspection and certification requirements[.]

Lion Raisins, Inc. v. U.S. Dep’t of Agric., No. 1:05-CV-00640 OWW-SMS, slip op. at 12-13, 2008 WL 2762176, at *6 (E.D. Cal. July 14, 2008).

Based upon my reading of the four decisions cited by the Chief ALJ, I reject American Dried Fruit Co.’s contention that the decisions cited by the Chief ALJ are inapposite. Instead, I conclude that, with the exception of *In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005), each decision cited by the Chief ALJ addresses the issues raised by American Dried Fruit Co. in the Petition. Moreover, each of these three decisions supports the Administrator’s contention that USDA’s construction of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) is lawful.

American Dried Fruit Co. also contends USDA’s current construction of the word “cause” in 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) is inconsistent with USDA’s prior construction of the word “cause.” (Appeal Pet. at fifth through seventh unnumbered pages.) American Dried Fruit Co. asserts USDA has historically “interpreted ‘cause’ to communicate the obligation to perform an act or compel someone else to perform that act.” (Appeal Pet. at fifth unnumbered page.)

American Dried Fruit Co. does not cite, and I cannot identify, a single instance in which USDA has construed the word “cause” in 7 C.F.R. § 989.58(d)(1) or 7 C.F.R. § 989.59(d) as meaning the obligation to perform an act or compel someone else to

perform that act. Instead, it appears that USDA has consistently interpreted 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) as requiring a handler to apply for, and obtain, inspection and certification.

It is well settled that the burden of proof in a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the petitioner.⁵ American Dried Fruit Co. has the burden of proving that USDA's construction of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) is "not in accordance with law" (7 U.S.C. § 608c(15)(A)). Based upon a careful consideration of the record, I find American Dried Fruit Co. has not met its burden of proof that USDA's construction of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) is not in accordance with law. Moreover, American Dried Fruit Co.'s position appears to be that USDA's construction of 7 C.F.R. §§ 989.58(d)(1) and 989.59(d) is not as desirable as the construction advanced by American Dried Fruit Co. A proceeding under 7 U.S.C. § 608c(15)(A) affords a means for adjudicating only whether an order, a provision of an order, or an obligation imposed in connection with an order is not in accordance with law. A proceeding under

⁵*In re United Western Grocers, Inc.*, 63 Agric. Dec. 557, 573 (2004); *In re Stew Leonard's*, 59 Agric. Dec. 53, 69 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Cal-Almond, Inc.*, 56 Agric. Dec. 1158, 1219 (1997), *aff'd*, CV-98-05049-REC/SMS (E.D. Cal. Aug. 13, 1998), *printed in* 58 Agric. Dec. 708 (1999), *aff'd*, 192 F.3d 1272 (9th Cir. 1999), *reprinted in* 58 Agric. Dec. 734 (1999), *cert. denied*, 530 U.S. 1213 (2000).

7 U.S.C. § 608c(15)(A) is not a forum in which to consider questions of policy, desirability, or effectiveness of order provisions.⁶

For the foregoing reasons, the following Order is issued.

ORDER

American Dried Fruit Co.'s Petition, filed March 11, 2010, is dismissed with prejudice. This Order shall become effective upon service on American Dried Fruit Co.

RIGHT TO JUDICIAL REVIEW

American Dried Fruit Co. has the right to obtain review of this Order in any district court of the United States in which district American Dried Fruit Co. 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

⁶*In re Lion Raisins, Inc.*, 64 Agric. Dec. 11, 22 (2004); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 426 (2001), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); *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); *In re Charles P. Mosby, Jr.*, 16 Agric. Dec. 1209, 1220 (1957); *In re Roberts Dairy Co.*, 4 Agric. Dec. 84, 89 (1945); *In re William S. Wright*, 2 Agric. Dec. 327 (1943).

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.⁷ The date of entry of this Order is August 20, 2010.

Done at Washington, DC

August 20, 2010

William G. Jenson
Judicial Officer

⁷ U.S.C. § 608c(15)(B).