

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. APP-03-0004
)	
Charles R. Brackett and)	
Tom D. Oliver,)	
)	Ruling on Respondent's Appeal
Petitioners)	Limited to Procedural Issue

PROCEDURAL HISTORY

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued determinations that Charles R. Brackett and Tom D. Oliver [hereinafter Petitioners] were responsibly connected with Atlanta Egg & Produce Co. during the period February 2001 through March 2002, when Atlanta Egg & Produce Co. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]. On March 13, 2003, Petitioners filed a Petition For Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's

February 12, 2003, determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co.

On September 30, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] held a conference call with Petitioners and Respondent. During the conference call Petitioners requested an opportunity to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA as alleged in a complaint filed in the disciplinary administrative proceeding instituted against Atlanta Egg & Produce Co. on October 23, 2002, and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA. On October 2, 2003, the Chief ALJ ordered that Petitioners and Respondent submit briefs regarding Petitioners' request.

After Petitioners and Respondent submitted briefs,¹ the Chief ALJ: (1) issued a decision in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), concluding Atlanta Egg & Produce Co. failed to make full payment promptly to 80 sellers of the agreed purchase prices in the total amount of \$923,475.96 for 683 lots of perishable agricultural commodities in violation of the PACA; and (2) granted Petitioners' request

¹“Brief of the PACA Branch Regarding Petitioners’ Request to Assert the Alleged Defenses of Atlanta Egg & Produce Co., Inc.,” filed by Respondent on October 15, 2003; “Reply Brief of Charles R. Brackett and Tom D. Oliver to Complainant’s Response in Opposition to Petitioners’ Request to Intervene in the Matter of Atlanta Egg & Produce Co., Inc.,” filed by Petitioners on October 30, 2003; “Notice of Errors in Petitioners’ Reply Brief,” filed by Respondent on November 3, 2003; and “Response of Charles R. Brackett and Tom D. Oliver to Complainant’s Notice of Errors in Petitioner’s Reply Brief,” filed by Petitioners on November 5, 2003.

for an opportunity to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA.²

On June 30, 2004, the Chief ALJ conducted an oral hearing in Atlanta, Georgia. Andrew M. Greene, Troutman Sanders, LLP, Atlanta, Georgia, represented Petitioners. Andrew Y. Stanton, Office of the General Counsel, Washington, DC, represented Respondent. On March 17, 2005, after Petitioners and Respondent filed post-hearing briefs, the Chief ALJ filed a Decision: (1) concluding Petitioners were responsibly connected with Atlanta Egg & Produce Co. during the period February 2001 through March 2002, when Atlanta Egg & Produce Co. violated the PACA; and (2) ruling Petitioners have the right to introduce evidence that Atlanta Egg & Produce Co. had not violated the PACA and to argue Petitioners were not responsibly connected with Atlanta Egg & Produce Co. because it had not violated the PACA (Chief ALJ's Decision at 11-12, 23-24).

On April 13, 2005, Respondent appealed to the Judicial Officer, but limited the appeal to the Chief ALJ's ruling providing Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003). Petitioners did not file a

²“Three Rulings,” filed by the Chief ALJ on December 5, 2003.

response to Respondent’s appeal petition, and on July 14, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and a ruling.

Exhibits in the agency record upon which Respondent based his responsibly connected determination as to Petitioner Charles R. Brackett, which is part of the record in this proceeding,³ are designated “BCRX”; and exhibits in the agency record upon which Respondent based his responsibly connected determination as to Petitioner Tom D. Oliver, which is part of the record in this proceeding,⁴ are designated “OCRX.”

APPLICABLE STATUTORY PROVISION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

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(b) Definitions

For purposes of this chapter:

. . . .

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a

³See 7 C.F.R. § 1.136(a).

⁴See note 3.

partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

RESPONDENT'S APPEAL PETITION

Respondent contends the Chief ALJ erroneously provided Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003) (Respondent's Appeal Pet. Limited to Procedural Issue).

The Chief ALJ permitted Petitioners to introduce evidence contesting the PACA violations previously found to have been committed by Atlanta Egg & Produce Co. (Chief ALJ's Decision at 2). However, the Chief ALJ concluded the issue of whether Petitioners should be allowed to introduce evidence that Atlanta Egg & Produce Co. did not violate the PACA is largely moot, since Petitioners failed to introduce evidence establishing that Atlanta Egg & Produce Co. did not violate the PACA (Chief ALJ's Decision at 7, 11). I agree with the Chief ALJ's conclusion that the issue is moot. However, this issue has come before me in the recent past,⁵ and the issue may arise in

⁵See *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005).

future PACA responsibly connected proceedings. Therefore, despite my agreement with the Chief ALJ that the issue is moot, I briefly address the issue.

The Chief ALJ states denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA, the Rules of Practice, and Petitioners' due process rights (Chief ALJ's Decision at 11-12).

I disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with the PACA. The Chief ALJ does not cite and I cannot locate any provision of the PACA that provides a person alleged to have been responsibly connected with a commission merchant, dealer, or broker, which has previously been found to have violated the PACA, an opportunity to introduce evidence in the responsibly connected proceeding that the commission merchant, dealer, or broker has not violated the PACA. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as a person affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association. The burden is on a petitioner, who is a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association to

demonstrate by a preponderance of the evidence that he or she was not responsibly connected with the commission merchant, dealer, or broker, despite his or her position at, or ownership of, the commission merchant, dealer, or broker.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The only issue in a responsibly connected proceeding in which the petitioner admits that he or she is a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association, is whether the petitioner has met his or her burden, as set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), to rebut the determination that the petitioner was responsibly connected.

I also disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric.

Dec. 459 (2003), would be inconsistent with the Rules of Practice. The Chief ALJ cites section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) as the basis for his conclusion.

Section 1.137(b) of the Rules of Practice requires joinder of pending responsibly connected proceedings and any related pending PACA disciplinary proceeding instituted against a commission merchant, dealer, or broker alleged to have violated the PACA, as follows:

**§ 1.137 Amendment of complaint, petition for review, or answer;
joinder of related matters.**

....

(b) *Joinder.* The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b). The Chief ALJ filed his Decision in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), on December 5, 2003, and the Chief ALJ's Decision became final and effective in January 2004. Therefore, at the time of the hearing in the instant responsibly connected proceeding, *In re Atlanta Egg & Produce Co.* was not pending and section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) requiring joinder of a pending disciplinary proceeding with related responsibly connected

proceedings is not applicable. Thus, section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) provides no basis for the Chief ALJ's ruling permitting Petitioners to raise defenses to Atlanta Egg & Produce Co.'s PACA violations.

Finally, I disagree with the Chief ALJ's conclusion that denial of Petitioners' request for an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), would be inconsistent with Petitioners' due process rights.

Atlanta Egg & Produce Co. and Petitioners were afforded due process. The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, instituted the disciplinary administrative proceeding against Atlanta Egg & Produce Co. by filing a complaint on October 23, 2002. The Hearing Clerk served Atlanta Egg & Produce Co. with the complaint, but Atlanta Egg & Produce Co. elected not to file an answer resulting in the Chief ALJ's filing a decision without hearing by reason of default on December 5, 2003. Atlanta Egg & Produce Co. did not appeal the Chief ALJ's December 5, 2003, Decision and the Chief ALJ's Decision became final and effective in January 2004.

On October 29, 2002, Bruce W. Summers, Assistant Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, issued initial determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co., when Atlanta Egg & Produce Co. violated the PACA and provided Petitioners the opportunity to request determinations by Respondent (BCRX 6;

OCRX 6). Petitioners requested determinations by Respondent, who, on February 12, 2003, issued determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co., when Atlanta Egg & Produce Co. violated the PACA. Respondent informed Petitioners in the February 12, 2003, determination letters that they had the right to file petitions for review (BCRX; OCRX). On March 13, 2003, Petitioners filed a Petition For Review pursuant to the Rules of Practice seeking reversal of Respondent's February 12, 2003, determinations that Petitioners were responsibly connected with Atlanta Egg & Produce Co. Thereafter, Petitioners fully participated in a responsibly connected proceeding conducted by the Chief ALJ in accordance with the Rules of Practice. Even if the Chief ALJ had not afforded Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co., Petitioners would have been afforded due process in accordance with the Constitution of the United States. A responsibly connected proceeding is not the proper forum to relitigate factual or legal issues resolved in an earlier PACA disciplinary proceeding and the denial of a petitioner's request to relitigate issues resolved in an earlier PACA disciplinary proceeding does not violate that petitioner's right to due process.

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

RULING

The Chief ALJ's ruling providing Petitioners an opportunity to raise defenses to the PACA violations found to have been committed by Atlanta Egg & Produce Co. in *In re Atlanta Egg & Produce Co.*, 63 Agric. Dec. 459 (2003), is vacated.

Done at Washington, DC

April 4, 2006

William G. Jenson
Judicial Officer