

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	2005 AMA Docket No. F&V 989-1
)	
Lion Raisins, Inc., a California)	
corporation,)	
)	
Petitioner)	Decision and Order

PROCEDURAL HISTORY

Lion Raisins, Inc. [hereinafter Petitioner], instituted this proceeding by filing a petition¹ on November 10, 2004. 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].

¹Petitioner entitles its petition “Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of USDA Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, to Exempt Petitioners [sic] from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law” [hereinafter Petition].

Petitioner requests: (1) that the requirement in sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) that United States Department of Agriculture inspect raisins be eliminated and that handlers be allowed to inspect their own raisins or to hire other qualified persons to inspect their raisins; (2)(a) that qualified companies or associations be allowed to conduct processed product inspection, or (b) that each handler be allowed to conduct its own processed products inspection under the observation and supervision of a qualified company or association, or (c) that handlers be allowed to use a program recognized by the United States Department of Agriculture for processed products inspection; and (3) that a finding be made that the United States Department of Agriculture's failure to permit the Dried Fruit Association to conduct raisin inspections is arbitrary and capricious (Pet. ¶ 17).

On December 29, 2004, 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: (1) Petitioner seeks to re-litigate issues decided in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Oct. 19, 2004), and the doctrine of *res judicata* bars re-litigation of those issues; (2) the Judicial Officer's Order dismissing with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Oct. 19, 2004), bars Petitioner from bringing further suit on the same claim; and (3) Petitioner's Petition does not contain (a) the corporate information required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)), (b) reference to provisions of the Raisin Order

Petitioner claims are not in accordance with law, as required by section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)), (c) a full statement of the facts upon which Petitioner's Petition is based, as required by section 900.52(b)(3) of the Rules of Practice (7 C.F.R. § 900.52(b)(3)), or (d) the grounds upon which the terms or provisions of the Raisin Order are challenged as not in accordance with law, as required by section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) (Mot. to Dismiss Pet.).

On February 9, 2005, Petitioner filed an amended petition.² On February 14, 2005, Respondent filed a "Motion to Strike Amended Petition, or in The Alternative, Motion for Extension of Time" [hereinafter Motion to Strike Amended Petition].

On March 3, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) granting Respondent's Motion to Strike Amended Petition; (2) granting Respondent's Motion to Dismiss Petition; and (3) stating Petitioner may file an amended petition within 20 days of service of the Order (ALJ's March 3, 2005, Order at 3).

On March 11, 2005, Respondent appealed the ALJ's March 3, 2005, Order. On March 30, 2005, Petitioner filed "Petitioner's Response to Respondent's Appeal

²Petitioner entitles its amended petition "Amended Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; Petition to Allow Buyers and Producers to Call for Inspection Services, and to Delete Certain Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Amended Petition].

Petition.” On April 11, 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 dismissing Petitioner’s Petition and striking Petitioner’s Amended Petition; however, I find some of the ALJ’s discussion irrelevant. Therefore, while I dismiss Petitioner’s Petition and strike Petitioner’s Amended Petition, I do not adopt the ALJ’s March 3, 2005, Order.

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 900—GENERAL REGULATIONS

....

**SUBPART—RULES OF PRACTICE GOVERNING
PROCEEDINGS ON PETITIONS TO MODIFY
OR TO BE EXEMPTED FROM MARKETING ORDERS**

....

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petition.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Motion to dismiss petition*—(1) *Filing, contents, and responses thereto*. If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, the Administrator may, within thirty days after the service of the petition, file with the Hearing Clerk a motion to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds of objection to the petition and if based, in whole or in part, on an allegation of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the Hearing Clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the motion to the Judge for consideration.

(2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing

clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

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

. . . .

SUBPART—ORDER REGULATING HANDLING

. . . .

GRADE AND CONDITION STANDARDS

§ 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 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 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.

7 C.F.R. §§ 900.52(a)-(c)(2); 989.58(d), .59(d).

DECISION

Respondent's Motion to Strike Amended Petition

Section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) provides, when a motion to dismiss has been filed, a petitioner may file an amended petition after the Hearing Clerk serves the petitioner with the administrative law judge's order dismissing the petitioner's petition or any portion of the petitioner's petition. Petitioner filed the Amended Petition on February 9, 2005, 33 days prior to the date the Hearing

Clerk served Petitioner with the ALJ's March 3, 2005, Order dismissing Petitioner's Petition.³ Therefore, Petitioner's Amended Petition should be stricken as premature.

Respondent's Motion to Dismiss Petition

Petitioner's Petition raises the same claims Petitioner raised in the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Oct. 19, 2004). I dismissed with prejudice the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Oct. 19, 2004). A dismissal with prejudice has the effect of a final adjudication on the merits favorable to the defendant and bars future suits brought by the plaintiff on the same cause of action.⁴ A dismissal with prejudice constitutes a final judgment with the preclusive effect of *res judicata* not only as to all matters litigated and decided by the dismissal, but as to all relevant issues that could have been raised and litigated in the suit.⁵ Therefore, Petitioner's Petition is barred by *res judicata* and should be dismissed with prejudice.

³See United States Postal Service Domestic Return Receipt for Article 7004 1160 0001 9221 3106 establishing the Hearing Clerk served Petitioner with the ALJ's March 3, 2005, Order on March 14, 2005.

⁴*Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *FEC v. Al Salvi For Senate Comm.*, 205 F.3d 1015, 1020 (7th Cir. 2000); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Wainwright Securities, Inc. v. Wall Street Transcript*, 80 F.R.D. 103, 105 (S.D.N.Y. 1978).

⁵*Heiser v. Woodruff*, 327 U.S. 726, 735 (1946); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Teltronics v. L M Ericsson Telecommunications, Inc.*, 642 F.2d 31, 35 (2d Cir. 1981).

Moreover, Petitioner's Petition does not comply with the requirements of section 900.52(b)(1)-(2), (4) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(2), (4)). Specifically, section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)) requires that a petition contain the names, addresses, and respective positions held by a corporate petitioner's officers. Petitioner identifies one officer, its president Alfred Lion, Jr. (Pet. ¶ 1A). Petitioner's Amended Petition identifies multiple officers, each officer's position, and each officer's address (Amended Pet. ¶ 2). Therefore, I find Petitioner's Petition does not comply with the requirements of section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)).

Section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)) requires that each petition contain a reference to the specific terms or provisions of the marketing order, or the interpretation or application of the marketing order, about which the petitioner complains. Petitioner "challenges §§ 989.58(d) & 989.59(d) and any corollary marketing order provisions or regulation provisions that depend upon §§ 989.58(d) & 989.59(d), such as 989.102" (Pet. ¶ 6). I find Petitioner's Petition does not comply with the requirements of section 900.52(b)(2) of the Rules of Practice (7 C.F.R. § 900.52(b)(2)) because the Petition does not specifically reference all of the "corollary" Raisin Order terms or provisions which Petitioner challenges.

Section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) requires that each petition contain a statement of the grounds upon which the terms or provisions

of the marketing order, or the interpretation or application of the marketing order, about which the petitioner complains, are challenged as not in accordance with law.

Petitioner requests elimination of the requirement that the raisins it handles be inspected by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. Petitioner contends the cost of United States Department of Agriculture inspections, at the \$10-per-ton rate, is too high. Petitioner alleges it processes about 15 tons of raisins per hour resulting in the payment of approximately \$135 per hour for United States Department of Agriculture inspection. Petitioner alleges the hourly rate it pays for United States Department of Agriculture inspection is excessive and unfair since the United States Department of Agriculture generally provides two inspectors and, on many occasions, one inspector for the inspection of Petitioner's raisins. Additionally, Petitioner asserts the resultant hourly charges to Petitioner by the United States Department of Agriculture are higher than the United States Department of Agriculture charges "consumer-pack oriented" processors and handlers. Further still, Petitioner contends the United States Department of Agriculture provides better inspection service to Petitioner's competitors, the United States Department of Agriculture negligently performs inspections, and Petitioner's quality control program is better than the inspection service provided by the United States Department of Agriculture. (Pet. ¶¶ 8-14.)

The handling of California raisins, at the behest of the California raisin industry, is subject to the requirements of the Raisin Order. Sections 989.58(d) and 989.59(d) of the

Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) require inspection and certification of raisins by the United States Department of Agriculture. Petitioner requests elimination of these inspections and certification provisions of the Raisin Order (Pet. ¶ 17A).

Marketing orders regulating the handling of various fruits and vegetables come into being only when specifically requested by the industry. Upon industry request, a rulemaking hearing is held which may result in the formulation of a proposed marketing order. Grower members of the affected industry then must vote on whether they wish the handling of their fruits or vegetables to be subject to the terms of the proposed marketing order. Upon a favorable vote by two-thirds of the growers, the marketing order is promulgated and is then administered, subject to oversight by the Secretary of Agriculture and approval by an industry committee.⁶ Under section 989.26 of the Raisin Order (7 C.F.R. § 989.26), the Raisin Administrative Committee was established to consist of 47 members, 35 of whom represent producers (growers), 10 represent handlers, 1 represents the Cooperative Bargaining Association, and 1 is a public member. This section of the Raisin Order, together with sections 989.27 through 989.39 of the Raisin Order (7 C.F.R. §§ 989.27-.39), describe the way in which members are selected, their eligibility, term of office, powers, duties, obligations, and other aspects of the Raisin Administrative Committee.

⁶See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997).

Sections 989.58(d) and 989.59(d) of the Raisin Order (7 C.F.R. §§ 989.58(d), .59(d)) provide that the Raisin Administrative Committee may seek to have inspection of raisins performed by another agency because it would improve the administration of the subpart (7 C.F.R. §§ 989.1-.95). The Raisin Administrative Committee has not sought to have another agency perform raisin inspections. Apparently, the Raisin Administrative Committee finds the inspectors employed by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch to be trustworthy and the certificates they issue to afford industry members and their customers a valuable form of protection that promotes the image of the product.

The actual charges for inspection were negotiated by the Raisin Administrative Committee with the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. The Raisin Administrative Committee is so empowered by section 989.35(a) of the Raisin Order (7 C.F.R. § 989.35(a)). The Processed Products Standardization and Inspection Branch, operated by the Agricultural Marketing Service, is authorized to enter into an agreement regarding inspection charges by 7 C.F.R. § 52.51(b), a regulation promulgated through notice-and-comment rulemaking.

Compared with these fees negotiated by the Raisin Administrative Committee, which was selected to represent the California raisin industry, Petitioner simply alleges the fees are too high, disadvantage Petitioner in comparison to its competitors, have not been properly adopted, and are arbitrary and capricious. But whether inspections could

be performed more cheaply or more efficiently by others and better assure the quality of California raisins are not matters that may be decided in proceedings instituted pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)). Proceedings under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) do not afford a forum to debate questions of policy, desirability, or effectiveness of order provisions.⁷

Moreover, Petitioner's argument that competitors fare better than Petitioner is not appropriate for consideration in these proceedings. As stated in *In re Daniel Strebin*, 56 Agric. Dec. at 1136, citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997):

Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action[.]"

Simply put, none of Petitioner's arguments can be said to show that the Raisin Order, any regulation pertaining to the Raisin Order, or any action taken under the Raisin Order, or in its respect, are "not in accordance with law" as section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) requires for Petitioner's Petition to be successful. The failure to state a legally-cognizable claim is the fatal flaw that leads me to dismiss Petitioner's Petition with prejudice.

⁷*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).

RESPONDENT'S APPEAL PETITION

Respondent raises five issues in Respondent's Appeal Petition. First, Respondent contends "[t]he ALJ erred in assuming an 'oversight or omission' in the Rules of Practice" (Respondent's Appeal Pet. at 2).

Section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that a pleading may be amended, as follows:

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

(a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a).

The ALJ correctly states the Rules of Practice does not include a provision for the amendment of pleadings identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)). The ALJ asserts the absence of such a provision in the Rules of Practice is "an apparent oversight or omission." (ALJ's March 3, 2005, Order at 2.)

I find irrelevant the reason for the absence in the Rules of Practice of a provision for the amendment of pleadings identical to that found in section 1.137(a) of the Rules of

Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)). Therefore, I do not adopt the ALJ's assertion regarding the apparent reason for the absence of a provision in the Rules of Practice identical to that found in section 1.137(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137(a)).

Second, Respondent contends the ALJ erroneously refers to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130-.151) as "the usual provisions of the rules" and erroneously characterizes the Rules of Practice that apply to petitions to modify or to be exempted from marketing orders as "obscure" (Respondent's Appeal Pet. at 2-3).

The ALJ refers to section 1.137 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137), under which a party may amend a pleading, as "the usual provisions of the rules" and characterizes the provisions relating to the amendment of petitions in the Rules of Practice as "the more obscure provisions" (ALJ's March 3, 2005, Order at 2).

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) are applicable to adjudicatory proceedings instituted under more than 40 statutes.⁸ The Rules of Practice

⁸7 C.F.R. § 1.131.

(7 C.F.R. §§ 900.50-.71) are only applicable to proceedings instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) to modify or to be exempted from marketing orders. United States Department of Agriculture administrative law judges conduct substantially more proceedings in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes than they conduct in accordance with the Rules of Practice that apply to petitions to modify or to be exempted from marketing orders. I infer the ALJ's reference to section 1.137 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.137) as "the usual provisions of the rules" and the ALJ's characterization of provisions relating to the amendment of petitions in the Rules of Practice as "the more obscure provisions" merely reflect the frequency with which the ALJ conducts proceedings under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes as compared to the frequency with which the ALJ conducts proceedings under the Rules of Practice. Therefore, while I do not adopt the ALJ's references to "the usual provisions of the rules" and "the more obscure provisions," I reject Respondent's contention that the ALJ's reference to "the usual provisions of the rules" and "the more obscure provisions" are error.

Third, Respondent contends the ALJ erroneously ignored Respondent's principal argument in Respondent's Motion to Dismiss Petition: namely, the Petition filed in the instant proceeding is the same as the petition filed by Petitioner in *In re Lion Raisins*,

Inc., 63 Agric. Dec. ____ (Oct. 19, 2004), and should be dismissed with prejudice (Respondent's Appeal Pet. at 4-5).

The ALJ did not directly address Respondent's argument that the Petition filed in the instant proceeding is the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Oct. 19, 2004). However, I infer from the ALJ's March 3, 2005, Order that he found the Petition in the instant proceeding was not the same as the petition filed by Petitioner in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Oct. 19, 2004), because the ALJ refers to the "ultimate resolution of this case" and states Petitioner may, consistent with section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)), "file any amended petition" (ALJ's March 3, 2005, Order at 3). Therefore, I reject Respondent's contention that the ALJ erroneously ignored Respondent's principal argument in Respondent's Motion to Dismiss Petition.

Fourth, Respondent contends, although the ALJ agreed with Respondent that the Petition did not comply with the requirements of the Rules of Practice, the ALJ erroneously failed to clearly state his reasons for the March 3, 2005, Order (Respondent's Appeal Pet. at 5).

I disagree with Respondent. The ALJ granted Respondent's Motion to Strike Amended Petition, granted Respondent's Motion to Dismiss Petition, and clearly stated the reasons for granting Respondent's motions. I find no reason to reiterate the ALJ's reasons for the March 3, 2005, Order here.

Fifth, Respondent contends the ALJ erroneously refers to procedures applicable in other jurisdictions or forums and erroneously states Respondent sought strict compliance with procedural requirements. Respondent states the Secretary of Agriculture promulgated the Rules of Practice which apply exclusively to petitions to modify or to be exempted from marketing orders and requires petitions initiating proceedings under the Rules of Practice to contain certain specified information. (Respondent's Appeal Pet. at 5.)

The ALJ references "other forums" and states Respondent sought strict compliance with procedural requirements, as follows:

The Petitioner failed to directly respond to the Motion to Dismiss, but rather sought to correct the deficiencies with the Amended Petition. Such a failure likely would not be fatal in other forums or for that matter in most federal practice; however, strict compliance with procedural requirements has been sought by the Respondent.

ALJ's March 3, 2005, Order at 3.

I agree with Respondent's contention that the Secretary of Agriculture promulgated the Rules of Practice to apply to proceedings to modify or to be exempted from marketing orders and rules of practice applicable in other forums are not relevant to this proceeding. Moreover, I agree with Respondent that each petition to modify or to be exempted from a marketing order must comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) because the Rules of Practice state that each petition "shall" contain certain specified information, not because strict compliance with procedural requirements has been sought by a respondent. However, I do not find the ALJ erred. I agree with the ALJ that Respondent's Motion to Dismiss Petition sought

strict compliance with the Rules of Practice. Moreover, I agree with the ALJ that Petitioner's filing an Amended Petition, rather than a response to Respondent's Motion to Dismiss Petition, would not be fatal in all forums. Therefore, while I do not adopt the ALJ's discussion, I do not conclude the ALJ's references to other forums and Respondent's request in Respondent's Motion to Dismiss Petition, are error.

PETITIONER'S RESPONSE TO RESPONDENT'S APPEAL PETITION

Petitioner filed very helpful responses to each of the specific issues raised by Respondent in Respondent's Appeal Petition. In addition, Petitioner raises two fundamental issues regarding the Respondent's Appeal Petition. First, Petitioner contends Respondent's Appeal Petition should be dismissed because "Respondent, in an effort to waste judicial (and party) resources, has filed an appeal from the ruling in Respondent's favor" (Petitioner's Response to Respondent's Appeal Pet. at 1).

The ALJ's March 3, 2005, Order is favorable to Respondent. Nonetheless, Respondent disagreed with parts of the ALJ's March 3, 2005, Order. Section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)) provides "[a]ny party who disagrees with a judge's decision *or any part thereof*, may appeal the decision to the Secretary" (emphasis added). Further, nothing on the record before me establishes that Respondent filed Respondent's Appeal Petition in an effort to waste judicial and party resources, as Petitioner asserts. Therefore, while I find some of Respondent's disagreements with the ALJ's March 3, 2005, Order trivial, I find no basis upon which to dismiss Respondent's Appeal Petition merely because it is an appeal from a ruling favorable to Respondent.

Second, Petitioner contends Respondent's Appeal Petition should be dismissed because Respondent did not number each issue set forth in the appeal petition, as required by section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)) (Petitioner's Response to Respondent's Appeal Pet. at 4-5).

I agree with Petitioner that Respondent did not properly number each of Respondent's issues in Respondent's Appeal Petition. However, I find Respondent's Appeal Petition substantially conforms to the requirements of section 900.65(a) of the Rules of Practice (7 C.F.R. § 900.65(a)); therefore, I reject Petitioner's request that I dismiss Respondent's Appeal Petition.⁹

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

ORDER

1. Petitioner's Amended Petition, filed February 9, 2005, is stricken.
2. Petitioner's Petition, filed November 10, 2004, is dismissed with prejudice.
3. This Order shall become effective on the day after service on Petitioner.

⁹Generally, appeal petitions which do not remotely conform to the requirements of the applicable rules of practice are dismissed. *E.g., In re Kermit Breed*, 50 Agric. Dec. 675, 676 (1991); *In re Bihari Lall*, 49 Agric. Dec. 895 (1990). However, requests to dismiss appeal petitions which do not precisely, but substantially, conform to the requirements of the applicable rules of practice are rejected. *See, e.g., In re Norea Ivelisse Abreu*, 61 Agric. Dec. 259, 265-66 (2002) (rejecting the complainant's request that I dismiss the respondent's appeal petition on the ground that the respondent failed to number the issues raised in the appeal petition).

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.¹⁰ The date of entry of this Order is April 25, 2005.

Done at Washington, DC

April 25, 2005

William G. Jenson
Judicial Officer

¹⁰7 U.S.C. § 608c(15)(B).