

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) ACPA Docket No. 12-0040
)
Resolute Forest Products,)
)
Petitioner) **Ruling on Certified Question**

The Certified Question

On July 27, 2012, Resolute Forest Products [hereinafter Resolute] filed an application requesting issuance of a subpoena duces tecum requiring David R. Shipman, or his representative, to produce documents showing the names of manufacturers, importers, and voters described in Resolute’s application. On January 14, 2013, pursuant to Resolute’s application, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a subpoena duces tecum requiring Mr. Shipman, or his representative, to appear before her and bring with him the following documents:

1. Documents showing the names of manufacturers and importers the Agricultural Marketing Service (“AMS”) had considered potentially eligible to vote in the May/June 2011 referendum on the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Program (“Softwood Lumber Check-off”);

2. Documents showing the names of voters whom AMS deemed eligible to receive ballots for the May/June 2011 referendum on the Softwood Lumber Check-off and the AMS rationale for their eligibility; [and]
3. Documents showing the names of voters who submitted ballots to AMS during the May/June 2011 referendum on the Softwood Lumber Check-off[.]

Subpoena Duces Tecum at 1-2.

On January 14, 2013, the ALJ certified the following question to the Judicial Officer:

Certified Question: Shall I be permitted to require that the **names** be disclosed at the Hearing, pursuant to the *Subpoena Duces Tecum* (attached)?

ALJ's Certification to Judicial Officer at 1 (emphasis in original)).¹

Discussion

The Rules of Practice provide that an administrative law judge may issue a subpoena duces tecum upon written application, as follows:

§ 900.62 Subpenas.

(a) *Issuance of subpoenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpoena, be required at any designated place of hearing. Subpenas may be issued by the Secretary or by

¹The ALJ certified the question to the Judicial Officer in accordance with the Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted from Research, Promotion and Information Programs (7 C.F.R. §§ 1200.50-.52) [hereinafter the Rules of Practice]. Section 1200.52(d) of the Rules of Practice incorporates 7 C.F.R. § 900.52(c)(2)-.71 and 7 C.F.R. § 900.59(b) authorizes administrative law judges to certify questions to the Judicial Officer.

the judge, under the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity, and reasonable scope thereof.

(b) *Application for subpoena duces tecum.* Subpenas for the production of documentary evidence, unless issued by the judge upon his own motion, shall be issued only upon a certified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, and materiality and the necessity for their production.

7 C.F.R. § 900.62(a)-(b).

Resolute contends the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (7 C.F.R. §§ 1217.1-.108) [hereinafter the Softwood Order] is not in accordance with law because it is unconstitutional and premised upon an arbitrary and capricious decision to accept results of a referendum tainted by fraud and bias (First Amended Pet. at 1). Resolute contends referendum participants were misled as to the nature of the Softwood Order and the Secretary of Agriculture manipulated the voter pool in a manner that distorted results of the referendum such that the referendum was incapable of reflecting true industry preferences (First Amended Pet. at 1, 12-14, 24, 28).

Based upon a careful review of the record before me, I conclude Resolute's application does not show the relevancy of, the materiality of, or the necessity for the production of documents that show the names of manufacturers, importers, and voters described in Resolute's application. Resolute's application does not show how the documents sought are relevant to, material to, or necessary to prove the allegations in Resolute's First Amended

Petition regarding the constitutionality of the Softwood Order, fraud, bias, or the Secretary of Agriculture's purported manipulation of the voter pool. I agree with the Administrator's suggestion that the names of manufacturers, importers, and voters described in Resolute's application might result in discovery of competent, relevant, material, and necessary evidence (Respondent's Memorandum in Opposition to Issuance of Subpoena Duces Tecum at second unnumbered page). However, the Rules of Practice do not allow discovery,² and, pursuant to 7 C.F.R. § 900.62(b), the applicant for a subpoena duces tecum must show that the actual documents sought are themselves competent, relevant, material, and necessary not merely that the documents sought will result in the discovery of competent, relevant, material, and necessary evidence.

Response to the ALJ's Certified Question

1. The ALJ is not permitted to require Mr. Shipman, or his representative, to bring documents to the hearing in this proceeding that disclose the names of manufacturers,

²See *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1094 (1997) (stating the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) do not allow discovery). *But see In re H. Naraghi* (Order Dismissing Interlocutory Appeal), 40 Agric. Dec. 1687, 1688 (1981) (stating the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) should be amended to expressly preclude the use of depositions for discovery purposes otherwise it is by no means certain that the position that depositions cannot be used for discovery purposes will be sustained).

importers, and voters pursuant to the January 14, 2013, subpoena duces tecum attached to the ALJ's Certification to the Judicial Officer.

2. The ALJ must quash the January 14, 2013, subpoena duces tecum attached to the ALJ's Certification to the Judicial Officer.

Done at Washington, DC

January 22, 2013

William G. Jenson
Judicial Officer