In re: AMALGAMATED SUGAR COMPANY, L.L.C
SMA Docket No. 04-0003.
Order Denying Motions to Dismiss.
Petitioner and Motion For Summary Judgment
Filed June 23, 2004.[*]

SMA – Termination of operations, permanent – Sale of all assets – Allocation, transfer of.

Steven Z. Kaplan, David P. Bunde, Daniel C. Mott for Petitioners.
Jeffrey Kahn, for Respondent.
Kevin Brosch, David A. Beiging, Michael Greear for Intervenors
Order filed by Administrative Law Judge Victor M. Palmer.

Background

The parties in this case are, on one side, the Petitioner, Amalgamated Sugar Company, L.L.C. (Amalgamated), and two supporting Intervenors, Southern Minnesota Beet Sugar Cooperative L.L.C. (SMBSC), and Wyoming Sugar Company (Wyoming). On the other side are the Commodity Credit Corporation (CCC) and its supporting Intervenor, American Crystal Sugar Company (American Crystal).

Amalgamated filed a Petition on December 4, 2003, to challenge the action taken by CCC in a decision issued on November 14, 2003, by James R. Little, CCC's Executive Vice President. In the decision, Mr. Little responded to Amalgamated's Request for Reconsideration of CCC's decision of September 16, 2003, transferring the marketing allocation of Pacific Northwest Sugar Company (Pacific Northwest or PNW) to American Crystal. He stated that "after careful reconsideration, I cannot find justification to overturn CCC's decision." He justified his decision as in accordance with section 359d(b)(2)(F) and section 359d(b)(2)(E) of the Farm Security and Rural Investment Act of 2002 (the Act). The two subparagraphs read as follows:

> (F) SALE OF ALL ASSETS OF A PROCESSOR TO ANOTHER PROCESSOR – If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other beet processors under subparagraph (E)
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> (E) PERMANENT TERMINATION OF OPERATIONS OF A PROCESSOR- If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall -
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> (i) eliminate the allocation of the processor provided under this section; and
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> (ii) distribute the allocation to other beet sugar processors on a pro rata basis.

[*]This case was inadvertently left out of *63 Agric. Dec. Jan.* - Jun. (2004) – Editor.

Mr. Little's decision went on to state:

> CCC determined that PNW was certainly not dissolved nor liquidated in a bankruptcy proceeding, but instead permanently terminated in conjunction with the sale of its assets. The act of permanent termination was simultaneous with the act of closing the deal on the sale of PNW's assets. The former event did not precede the latter. If CCC had determined PNW was permanently terminated for reasons other than in conjunction with the sale of its assets, paragraph E would have dictated the outcome. While the statute does not define what it means to be 'permanently terminated', PNW was still recognized by CCC as a processor at the time of the sale, September 8, 2003.

As the beneficiary of CCC's decision, American Crystal has intervened to protect itself from losing the transferred Pacific Northwest marketing allocation. Petitioner and its two supporting Intervenors seek to eventually benefit from the overturn of the CCC decision as beet sugar processors who would share in the distribution of the marketing allocation under subparagraph E which should control if paragraph F does not.

Amalgamated filed its petition initiating this proceeding on December 4, 2003. CCC filed an Answer and a Motion to Dismiss on December 23, 2003. American Crystal filed a Notice of Intervention, Answer and Motion to Dismiss on January 14, 2004. Amalgamated filed a brief opposing the Motion to Dismiss on January 20, 2004. Both SMBSC and Wyoming filed Notices of Intervention on January 20, 2004. On March 2, 2004, Judge Jill S. Clifton who was then assigned to this case, held a telephone conference and set a schedule for the parties to follow in respect to a Motion for Summary Judgment American Crystal indicated it would file. On March 25, 2004, American Crystal filed a Memorandum in Support of its Motion to Dismiss the Petition or in the Alternative for Summary Judgment. Also filed at that time, was an affidavit attesting to facts by American Crystal's Counsel, Steven Z. Kaplan. SMBSC filed its response to the Motions on May 3, 2004. American Crystal filed a reply to SMBSC's response on May 21, 2004.

Upon consideration of these motions and the written arguments of the parties, I am denying the Motions to Dismiss and the Motion for Summary Judgment.

Motions to Dismiss

1. Subject Matter Jurisdiction

CCC and American Crystal assert that I do not have subject matter jurisdiction to hear and decide the petition under section 359i of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. § 359 i). The section states:

> An appeal may be taken to the Secretary from <u>any decision under section 359d establishing allocations of marketing allotments,</u> or under section 359 f, by any person adversely affected by reason of any such decision. (Emphasis supplied)

CCC and American Crystal contend that the words "establishing allocations" limits the appeal process to those decisions under 359 d(b)(2)(A) that "make allocations" of beet sugar each year after allotments are determined, and do not allow appeals of decisions respecting a "transfer" of an allocation under 359d(b)(2)(F).

However, there is nothing in the Act or CCC's regulations that so define "establishing", or in any way restrict appeals from <u>"any decision under section 359 d"</u> to only those under 359d (b)(2)(A).

> The word 'any' is generally used in the sense of 'all' or 'every' and the meaning is most comprehensive. *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3rd Cir.

1992).

Moreover, CCC's own regulations specifically direct, at 7 C.F.R. §1435.319 (b), that:

> For issues arising under §§ 359d, 359f (b) and (c), and 359 (i)... a person adversely affected by a reconsidered determination may appeal such determination by filing a written notice of appeal... with the Hearing Clerk.

Whereas the regulation expressly limits appeals arising under section 359 f to paragraphs (b) and (c), it places no limitation upon appeals under section 359 d. It is a basic rule of construction that when a limitation is expressed in one part of a statute or regulation, no further limitation will be implied. *See e.g., Russello v. United States*, 464 U.S. 16, 23 (1983).

Furthermore, the word "establish" that is undefined in both the statute and the implementing regulations, must be given its normal and ordinary meaning. *Richards v. United States*, 369 U.S. 1, 9 (1962); and *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority*, 964 F. Supp. 416, 428 (D.D.C. 1997).

Both Webster's Third New International Dictionary (1986) and the Oxford English Dictionary, Second Edition, Vol V, p 404, state that "establish" is a word that is used to denote the legal settlement of rights or privileges.

Webster lists as a meaning of "establish":

"to settle (as an estate) upon someone; secure (as rights) to a group."

So too, the Oxford English Dictionary lists as a principal meaning of "establish":

"to secure or settle (property, privileges, etc.) to or upon persons."

The Oxford English Dictionary (p 404, 2b) explains that this usage was employed and recognized in the English common law.

It stands to reason that the Secretary secures the rights or privileges of marketing certain amounts of sugar by a particular entity vis-a-vis other competing interests whenever she <u>makes</u> or <u>transfers</u> marketing allotments.

One must conclude that in allowing affected parties to file an administrative appeal from "any decision under section 359 d", Congress intended to provide such recourse from any decision that secures or settles the benefits of a marketing allocation upon a particular person or group of persons.

2. Cognizable Claim Under the Act

CCC and American have also moved to dismiss the petition for failure to state a legally cognizable claim.

The Act specifically allows any one affected by an adverse decision respecting a marketing allocation established pursuant to Section 359d, to file an appeal to obtain a hearing by an Administrative Law Judge pursuant to the Administrative Procedure Act. When Mr. Little denied Amalgamated's request for reconsideration of CCC's transfer of Pacific Northwest market allocation to American Crystal, his denial adversely affected Amalgamated in two ways. First, a major competitor had been given added market share. Second, as Mr. Little acknowledged, if he had not granted the transfer of the market allocation under Paragraph F, the allocation would have been available under Paragraph E to Amalgamated and the Intervenor Processors.

A legally cognizable claim under the Act does exist and the Motions to Dismiss alleging the contrary are denied.

3. Judicial Estoppel

CCC and American Crystal further contend that in a prior proceeding in which Pacific Northwest Sugar Company sought to increase its 2003 crop year allocation, Amalgamated asserted facts and circumstances inconsistent with those now set forth in its petition. In the prior proceeding, Amalgamated along with American Crystal and other affected parties, argued against the increase sought, but did not argue that Pacific Northwest's existing allocation should be distributed to other beet sugar processors because Pacific Northwest had permanently terminated its operations. For this reason, CCC and American Crystal contend that Petitioner is now barred, under the doctrine of judicial estoppel, from making this assertion in this proceeding.

A succinct explanation of the use of estoppel doctrines by courts was given by the United States Court of Appeals for the District of Columbia Circuit in *Konstantinidis v. Chen*, 626 F. 2d 933, 936-940 (1980).

The court first explained that "judicial estoppel" differs from "equitable estoppel". For equitable estoppel to apply, the invoking party must have been an adverse party in the prior proceeding and must have acted in reliance upon his opponent's prior position and would be harmed if his opponent were now to change positions. Judicial estoppel, however, does not require proof of privity, reliance or prejudice. Whereas, equitable estoppel looks to the integrity of the relationship of parties to each other, judicial estoppel focuses on the integrity of the judicial process. Of particular concern is the sanctity of the oath and the placing of a restraint upon reckless and false sworn testimony and even if prior inconsistent statements were not made under oath, the doctrine may be invoked to prevent a party from playing fast and loose with the courts.

Under both estoppel doctrines, there must be a prior judicial acceptance of a factual assertion made by the party who now advances an inconsistent contention. A review of testimony and the filings in the prior proceeding in which Pacific Northwest sought to have its 2003 crop allocation increased, shows that Amalgamated, American Crystal and others referenced facts which are not inconsistent with the Petition's allegations. The President of Amalgamated, Ralph Burton, testified in respect to Pacific Northwest's operations as of June of 2003, (Ex. H, pages 70-71 attached to Response of Intervenor, SMBSC):

> ...the crop hasn't been grown for 2 years, nothing planted this year. Probably other portions of the farm bill will soon come into play in this regard, and at such time as that operation becomes viable, then I think the new processor portion of the farm bill can come into play.

His concerns about the viability of Pacific Northwest as a sugar processor were shared by others at the hearing. John Richmond, the President of Southern Minnesota Beet Sugar Cooperative testified (Id, pp 74-76):

> ... However, we also believe that the CCC should clarify when an entity is no longer a beet sugar processor that should receive an allocation. The 2002 farm bill says, and I quote, if a processor has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations other than in conjunction with the sale or disposition of the processor or assets of the processor, the allocation is to be eliminated and distributed pro rata to the other processors.
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> The regulations, however, take a more limited approach, saying under paragraph (a) of this section, where growers can take their crop to other locations, that CCC will eliminate the allocation of a processor who has been dissolved or liquidated in a bankruptcy proceeding, a bit narrower definition, and the allocation distributed to other processors on a pro rata basis.

> From the information we have, it would appear that Pacific Northwest has been dissolved within the meaning of the 2002 farm bill, since we understand that the factory have (sic) also been sold, and that no sugar beets have been planted for 3 years.

If that is true, then it does not matter whether Pacific Northwest suffers a substantial quality loss or if it opened a molasses desugarization facility, because it wouldn't have any allocation to be adjusted at all.

In short, there is not only a lack of evidence of prior inconsistent statements by Amalgamated or by any of the Intervenors who support its Petition, but in fact their concerns about Pacific Northwest's viability as a sugar processor were specifically brought to the attention of CCC at the prior hearing. It so happens that CCC used a different reason for denying the application of Pacific Northwest for an increase in its sugar allocation. But this was not because the Petitioner or any of the Intervenors misled CCC. Without evidence of Amalgamated having acted in bad faith, judicial estoppel is inappropriate. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F. 3d 355, 362 (3rd Cir. 1996)

> Additionally as the *Konstantinidis* decision further elaborated, at 938:
> Moreover, judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a discernible modern trend in that direction.

. . .

> Furthermore, we agree with the Tenth Circuit that utilization of the judicial estoppel theory would be out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately.

Parkinson v. California Co., 233 F. 2d at 438.

The *Konstantinidis* Court concluded that (supra at 940):

> Judicial estoppel has yet to make its way into the law of this jurisdiction, and we do not believe that there is any tendency in favor of its adoption. Furthermore, the District of Columbia Court of Appeals would not adopt the doctrine on the facts before us.

On the basis of the facts before me, I do not find that the adoption of this doctrine is warranted or appropriate in this proceeding.

Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986). It will not be granted if "... there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson, supra,* at 250. As will be demonstrated, the present record does not support such a resolution of this proceeding.

CCC and American Crystal argue that the plain meaning of section 359d(b)(2)(F) required CCC to transfer Pacific Northwest's market allocation to American Crystal because a finding had not yet been made that Pacific Northwest had permanently terminated operations and its market allocation had not been distributed to other sugar beet processors under section 359d(b)(2)(E).

However, before such a result may be said to be required, section 359d(b)(2)(F) specifies that one

of two conditions must exist. Either the processor of beet sugar itself must be the subject of the sale to another processor of beet sugar; or the sale must be for "all of the assets of the processor."

American Crystal did not buy Northwest Pacific itself, and the present record does not identify the assets that were treated as still being Pacific Northwest assets at the time CCC transferred its market allocation to American Crystal.

The factory and the processing equipment had been previously sold to others. Pacific Northwest had no outstanding contracts for sugar beet crops and its production supply and processing operations had ended years before. Petitioner and SMBSC state that for these reasons alone, the statutory provision failed to authorize the transfer of market allocation to American Crystal. They contend that for the provision to be applicable, Pacific Northwest must have still been a viable processor selling assets it still owned.

I take it that CCC and American Crystal believe, to the contrary, that it is sufficient under the section for American Crystal to have acquired the assets Pacific Northwest formerly used to function as a sugar beet processor and the fact that they were owned and sold by entities other than Pacific Northwest did not matter. But the decision that is the subject of the Petition for Review does not elucidate reasoning that supports such an interpretation.

It may be that the market allocation itself was considered by CCC to be a marketable asset of Pacific Northwest which Pacific Northwest could pass to American Crystal because CCC had not yet redistributed the market allocation to others. If so, CCC's basis for such an interpretation needs to be supplied

All that the Executive Vice President's decisional letter of November 14, 2003, tells us is that he denied Amalgamated's request for reconsideration on the basis that Pacific Northwest "was permanently terminated in conjunction with the sale of its assets". But the decision does not specify what assets he considered to still be Pacific Northwest assets and to be the subject of the sale. Also, the decision does not clarify why assets that were acquired secondhand so to speak from others were treated as constituting a sale of Pacific Northwest assets.

There is also a troubling, apparent inconsistency that needs explanation. When Washington Sugar Company previously sought the transfer of Pacific Northwest's market allocation as part of its contemplated acquisition of virtually all of the assets of Pacific Northwest, CCC on October 11, 2002, advised it (Ex D, attached to Affidavit of Steven Z. Kaplan):

> ... Therefore, CCC will transfer Pacific Northwest's 2002 allocation of 15, 000 tons, raw value, to the Washington Sugar Company upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company ... (emphasis supplied)

Inasmuch as American Crystal did not acquire Pacific Northwest's factory, this requirement was evidently dropped. But why?

American Crystal has also argued that in the event I believe the statutory provisions to be silent or ambiguous with respect to the specific issues before us I should accord *Chevron* deference to CCC's interpretation as set forth in Mr. Little's letter. *See Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837 (1984).

It is customary in USDA adjudicatory proceedings to look for guidance from those officials who administer the day-to-day operations of the various programs entrusted to USDA. *See*, *Greenville Packing Co., Inc.*, 59 *Agric. Dec.* 194, 226 (2000) and In re: 50 *Agric. Dec.* 476, 497 (1991), *aff'd*, 991 F.2d 803, (9th Cir. 1993) (not to be treated as a precedent under 9th Circuit Rule 36-3). But controlling deference of the sort American Crystal urges should now be given the Executive Vice President's decision would be excessive and would vitiate the very review I am presently conducting on behalf of the Secretary. *Chevron* deference is only accorded to final action by an agency. That has not yet occurred. Additionally, before an agency interpretation may receive *Chevron* deference, it must be found to be

reasonable and based on a permissible construction of the statute. *See Chevron, supra* 467 U.S. 843-844.

There must also be a reasoned analysis demonstrating a rational connection between the facts and the decision made. *Orengo Caraballo v. Reich,* 11 F. 3d 186, 193 (D.C. Cir. 1993).

Without taking further evidence, I am as yet unable to come to that conclusion.

Accordingly, the Motions to Dismiss and the Motion for Summary Judgment are each denied.

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