

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. FV-10-0170

In re: AMERICAN DRIED FRUIT CO.,
a California Proprietorship,

Petitioner

OPINION AND ORDER

This action was brought by American Dried Fruit Co., a California proprietorship owned and operated by Kalem H. Barserian, on March 11, 2010 seeking relief under the provisions of 7 U.S.C. §608c(15)(A) of the Agricultural Marketing Agreement Act , as amended¹ (AMAA) and a determination that the Administrator of the Agricultural Marketing Service's application of certain obligations imposed in connection with the Federal Raisin Marketing Order (Marketing Order) are not in accordance with law. After seeking and receiving an extension of time in which to answer the Petition, on April 14, 2010, the Administrator moved to dismiss the Petition. The Petitioner filed its opposition to the Motion on May 11, 2010.

The Administrator seeks dismissal of the Petition on both procedural and substantive grounds. The Administrator argues that the Petition should be dismissed for failure to comply with the Rules of Practice, asserting that the Petition is deficient as it fails to contain information required by Sections 900.52(b)(2), (3), and (4).

¹ 7 U.S.C. §608c(15)(A).

The AMAA provides that “[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture...”² The Rules of Practice applicable to proceedings on such petitions require that such a petition contain the following information:

- (1) The correct name, address, and principal place of business of the petitioner. If the 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 of provisions of the marketing order, or the interpretation or application thereof, which are complained of;
- (3) A full statement of the facts...upon which the petition is based...setting forth clearly and concisely...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 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.³

The first deficiency suggested is that American Dried Fruit Co. is not a proper petitioner as it is not a “person” as defined by the Marketing Order. The Marketing Order defines “person” as an individual, partnership, corporation, association or any other business unit.⁴ The cited deficiency could in any case be cured by amendment and in view of the fact that the definition allows “any other business unit,” but the definition does appear to be sufficiently broad and encompassing as to include proprietorships. As Paragraph 2 of the Petition identifies Kalem H. Barsarian, d/b/a American Dried Fruit Co. as a sole proprietorship as do the numerous RAC Form 5s (RX-3) filed with by the Raisin

² *Id.*

³ 7 C.F.R. §900.52(b).

⁴ 7 C.F.R. §989.3

Administrative Committee, even if American Dried Fruit Co. is not a proper party, it will not preclude consideration and discussion of the other deficiencies raised.

The Administrator also argues that the Petition does not refer to specific terms complained of; however, the Petition does cite and complains of two provisions of the Marketing Order, to wit, 7 C.F.R. §989.58(d) and 989.59(d). While the Petition suggests that section 989.58(d) only requires inspection and certification “prior to the acquisition of natural condition raisins,”⁵ and sections 989.58(d) and 989.59(d) only require handlers to “cause” an inspection, but does not control who to pay for it,⁶ the current section 989.58(d) specifically states that the inspection obligation is triggered after acquisition or receipt of raisins (with certain specific exceptions), and both current sections 989.58(d) and 989.59(d) provide for the handler to pay for the inspection.

7 C.F.R. § 989.58

...

(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**, except with respect to: (i) an interplant or interhandler transfer of offgrade raisins as described in paragraph (e)(2) of this section, unless such inspection and certification are required by the rules and procedures made effective pursuant to this amended subpart; (ii) an interplant or interhandler transfer of free tonnage raisins as described in § 989.59(e); (iii) raisins received from a dehydrator which have been previously inspected pursuant to paragraph (d)(2) of this section; (iv) any raisins for which minimum grade and condition standards are not then in effect; (v) raisins received from a cooperative bargaining association which have been inspected and are in compliance with requirements established pursuant to paragraph (d)(3) of this section; (vi) any raisins, if permitted in accordance with such rules and procedures as the committee may establish with the approval of the Secretary, acquired or received for disposition in eligible nonnormal outlets. The handler shall be reimbursed by the committee for inspection costs incurred by him

⁵ Petition at 2-3; but compare Petition at 6, ¶ 13 (“Petitioner is merely obligated to cause “incoming” and “outgoing” inspections and to obtain “meeting” certificates, e.g. FR-ss Worksheet and/or FV-146 Certificate, prior to acquisition or shipment of raisins; 989.58 and 989.59 and 989.158 and 989.159.”)(emphasis added).

⁶ Petition at 2-3.

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 reconditioning, each handler shall obtain an inspection certification showing whether or not the raisins meet the applicable grade and condition standards; *Provided*, That the initial inspection for infestation shall not be required if the raisins are fumigated in accordance with such rules and procedures as the committee shall establish with the approval of the Secretary. 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 certification by a handler.⁷ (emphasis added)

7 C.F.R. § 989.59

...

(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.”⁸ (emphasis added)

Contrary to the Petition, section 989.58(d) provides for post-acquisition and post-receipt inspection of natural condition raisins (with certain enumerated exceptions not mentioned

⁷ 7 C.F.R. § 989.58(d).

⁸ 7 C.F.R. § 989.59(d)(2010).

by Petitioner) and sections 989.58(d) and 989.59(d) provide that the cost of inspections is borne by the handler.

The Administrator also suggests that the Petition neither contains a full statement of facts nor does it state the grounds upon which the Order's Terms are challenged are not in accordance with Law. Although the facts alleged in the Petition may not be as complete as the Administrator might wish, it nonetheless clearly appears that the claims set forth in the Petition have already been heard and adjudicated, in a case instituted in the United States District Court for the Eastern District of California by Lion Bros., an non-handler affiliate of Lion Raisins, Inc.,⁹ and in an administrative case brought by Mr. Barsarian's former (if not present) employer, Lion Raisins, Inc., against the Secretary of Agriculture.¹⁰

Discussion

The Petitioner raised financial issues related to disparities in the marketing order related to inspection costs depending on who seeks the inspection. (See Petition at p. 4).

The doctrine of *stare decisis* makes it clear that I need not consider these issues.

Arguments about costs are not appropriate for consideration in these proceedings. 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[.]" *In re: Lion Raisins, Inc., and Boghosian Raisin Packing Co., Inc.*, 64 Agric. Dec. 11, 22 (2003), citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-62 (1997).

⁹ *Lion Bros v. U.S. Dep't of Agriculture*, Not reported in F.Supp.2d, 2005 WL 2089809 (E.D. Cal. 2005)(Order Dismissing Case for Lack of Subject Matter Jurisdiction).

¹⁰ *In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005)(Decision and Order); *See Lion Raisins, Inc., v. U.S. Dep't of Agriculture*, Case No. 1:05-CV-00640 OWW SMS, Not reported in F.Supp.2d, 2008 WL 783337 (E.D. Cal. 2008) (Memorandum Decision re Granting in Part and Denying in Part Cross-Motions for Summary Judgment) and 2008 WL 2762176 (E.D. Cal. 2008)(Memorandum Decision re Denying Motion to Amend/Motion for Reconsideration).

Petitioner seeks to exploit the nuances of the two verbs “shall cause” and “shall obtain” in the two cited sections related to raisin inspection certificates. The Administrator has promulgated the regulations after public hearings and has chosen to interpret the duties of the raisin handler related to obtaining an inspections certificate by resolving the word “cause” as defined the Webster’s Seventh New Collegiate Dictionary “something that occasions or effects a result” as synonymous with “obtain”¹¹

Conclusion

Accordingly, rather than finding any technical deficiency to the Petition, the Motion to Dismiss is **GRANTED** upon the grounds that the Petition fails to state a claim upon which relief might be granted, the issues having previously been raised and found to be without merit. *Lion Bros v. U.S. Dep’t of Agriculture. op. cit; In re: Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005)(Decision and Order); *See Lion Raisins, Inc., v. U.S. Dep’t of Agriculture. op. cit*

Copies of this Opinion and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
May 27, 2010

PETER M. DAVENPORT
Acting Chief Administrative Law Judge

Copies to: Kalem Barsarian
Colleen A. Carroll, Esquire

¹¹ See *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (holding that "agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."(internal quotations and citations omitted)).