UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	2003 AMA Docket No. F&V 989-7
	)	
LION RAISIN, INC., a California Corporation, and BOGHOSIAN RAISIN PACKING CO., INC., a California corporation,	)	
	)	**Order Dismissing Petition with Prejudice**
Petitioners	)	

These proceedings were initiated by two handlers of California Raisins filing a petition pursuant to 7 U.S.C. §608(c)(15)(A) requesting elimination of mandatory requirements that the raisins they handle be inspected by the United States Department of Agriculture's Processed Products Standardization and Inspection Branch. Petitioners contend that the cost to them of these inspections at the $9.00 per ton applicable rate is too high. They allege their plants have fast moving processing equipment that results in their paying $108.00 to $135.00 per hour for USDA inspection. They allege that this is excessive and unfair since USDA employs at their plants only one inspector and never more than two. Additionally, the resultant hourly charges to them by USDA are higher than USDA charges their less efficient competitors with slower processing equipment. They contend they can obtain cheaper and superior inspection privately, albeit their products would not be "USDA inspected." They claim that their customers aren't impressed by raisins that are USDA inspected.

But apparently the California Raisin industry as a whole believes otherwise. The handling of California raisins, at the behest of the industry, is subject to the requirements and restrictions of Marketing Order 989 (7 C.F.R. §§989.1-989.95). One of the provisions of Marketing Order 989 requires that:

> ...(handlers) shall cause an inspection and certification to be made of all natural condition raisins acquired or received..." And "(s)uch 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 (7C.F.R. §989.58(d)).

It is this provision of Order 989, together with section 989.59(e) and "related order provisions and regulations provisions mandating USDA Inspection Service" that Petitioners would eliminate or modify for being "arbitrary, capricious, not in accordance with the law and...over-priced...."

Federal Marketing Orders regulating the handling of various fruit 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 its terms. Upon a favorable vote by two-thirds of the growers, the Marketing Order is promulgated and is then administered, subject to USDA oversight and approval, by an industry committee. *See*, Glickman v. Wileman Bros. & Elliott, Inc., 117 S.Ct. 2130, 2134 (1997). Under the terms of Marketing Order 989, 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. (7 C.F.R. §989.26). This section of the Order, together with sections 989.27-989.39, describe in exquisite detail the way in which members are selected, their eligibility, term of office, powers, duties, obligations and other aspects of the Raisin Administrative Committee.

It is this committee which may seek to have inspection of raisins performed "...by another

agency (because it) would improve the administration of this amended subpart" (7 C.F.R. §989.58(d)). The Raisin Administrative Committee has not sought to have another agency perform these inspections. Apparently, it finds the inspectors employed by USDA'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 their product.

The actual charges for inspection were negotiated by the Raisin Administrative Committee with USDA's Processed Products Standardization and Inspection Branch. The Committee is so empowered by 7 C.F.R. §989.35(a). The Inspection Branch, operated by the Agricultural Marketing Services, was authorized to enter into such a memoranda of understanding by 7 C.F.R. §52.51(b), a regulation promulgated through notice-and-comment rulemaking. The resulting Memorandum of Understanding is attached as Exhibit B, and the fee schedule it established is attached as Exhibit C, to Respondent's Motion to Dismiss. Also there is an accompanying declaration (Exhibit A) by the Officer in Charge of USDA's Processed Products Branch Inspection Services, Agricultural Marketing Service.

As against these fees that were negotiated by the Raisin Administrative Committee which was selected to represent the California Raisin industry, petitioners simply allege that the fees are too high and disadvantage them in comparison to their competitors. So high apparently, that Petitioner Lion Raisins, Inc., believes itself compelled to charge its customers for the certifications that USDA furnishes to it free other than for the $9.00 per ton inspection fee.

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 pursuant to 7 U.S.C. §608 (c)(15)(A). Proceedings under this provision of the Act, do not afford "a forum to debate questions of policy, desirability or effectiveness of order provisions." In re: Daniel Strebin, et al., 56 Agric. Dec. 1095, 1133 (1997), citing 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).

Nor are arguments that competitors fare better than the Petitioners appropriate for consideration in these proceedings. As stated in Strebin, supra, citing Glickman v. Wileman Bros. & Elliott, Inc., 117 S.Ct. 213, 2134 (1997):

> "Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inappropriate 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 the arguments set forth by the Petitioners can be said to show that the Marketing Order, any regulation pertaining to it, or any action taken under it or in its respect are "not in accordance with law" as the Act requires for their Petition to be successful.

There are also technical deficiencies with the Petition which would require its dismissal and replacement by an Amended Petition. But the failure to state a legally cognizable claim is the fatal flaw that leads me to dismiss the Petition with prejudice. Petitioners' attorneys are experts in the laws that apply to the legal world of Marketing Orders. If the Petitioners had some cognizable claim, I am sure it would have been coherently expressed. To allow future amended petitions on this subject would be a pure waste of resources.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

Date: _____

VICTOR W. PALMER
Administrative Law Judge

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