RAIN AND HAIL INSURANCE SERVICE, INC.	)	**AGBCA Nos. 97-170-F**
and RAIN AND HAIL L.L.C.	)	**97-171-F**
(Interest under 1994 and 1995 SRAs),	)	
	)	
Appellants	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

December 9, 1999

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

On June 13, 1997, the Board received these appeals from Rain and Hail Insurance Service, Inc. (RHIS), and Rain and Hail L.L.C. (R&H)[1] (Appellants) of West Des Moines, Iowa, involving 1994 and 1995 Standard Reinsurance Agreements (SRAs) with the Federal Crop Insurance Corporation (FCIC or Government). Under the SRAs, Appellants sell and administer Multiple Peril Crop Insurance (MPCI) policies in furtherance of the Government's crop insurance program. The Risk Management Agency (RMA), an agency of the U. S. Department of Agriculture, oversees the FCIC

[1] RHIS asserts that pursuant to a plan of reorganization approved and adopted by RHIS shareholders, R&H replaced RHIS as the operational entity responsible for this agreement, effective May 1, 1996 (Amended Complaint at 2 (¶ 5)). The Government has not objected to the dual Appellants.

and provides administration and oversight of the programs authorized by the Federal Crop Insurance Act.[2]

The Board has jurisdiction over these appeals pursuant to 7 C.F.R. §§ 24.4(b) and 400.169(a) and (d). The Government did not request a hearing on this appeal. Originally, Appellants requested a hearing but, subsequently withdrew that request. Thus, these appeals are now before the Board for decision on the record, without a hearing, pursuant to Board Rule 11. The record consists of the Appeal File and supplement thereto, the pleadings, briefs of both parties, the Government's letter of May 10, 1999, containing joint stipulations and the June 18, 1999 letter of Michael J. Coleman authorizing RHIS to conduct litigation in RHIS name only on SRAs to which CIGNA is a joint signatory.

The SRAs provided for a payment of a percentage of the net book premiums on the MPCI policies as reimbursement for Appellants' expenses of sales and service. Appellants contend that they are entitled to $12,848.63 in interest on alleged late payments of funds paid by FCIC after previous reimbursement reductions. The Government asserts that interest is not payable because in these cases the payments were waivers of expense reimbursement reductions discretionary with FCIC and the Appellant gained no right to the funds until after FCIC decided to waive its remedies. For the reasons set out below, the claims are denied.

FINDINGS OF FACT

1. In 1993, FCIC entered into a 1994 SRA with CIGNA Property and Casualty Insurance Company and RHIS.[3] This 1994 SRA covered the period July 1, 1993, through June 30, 1994 (Amended Complaint Exhibit A). FCIC entered into an SRA for the following year, 1995, with CIGNA and RHIS as well. It covered the period July 1, 1994, through June 30, 1995 (Amended Complaint Exhibit B). The SRAs establish the terms and conditions by which FCIC provides premium subsidy, expense reimbursement, and reinsurance on MPCI policies sold or reinsured by CIGNA and RHIS under the Federal Crop Insurance Act, as amended, 7 U.S.C. § 1501 et seq.

2. The 1994 SRA contained the following provisions:

SECTION IV. EXPENSE REIMBURSEMENT

A. Expense Reimbursement

[2] The Risk Management Agency was established by the Secretary's May 3, 1996 Memorandum 1010-2. Prior to that time, the Consolidated Farm Service Agency had responsibility for supervision of the FCIC. Events relative to this appeal transpired both before and after May 3, 1996. Agencies and Offices will be referred to by the names in effect at the time of the event in question.

[3] Appellants have not included CIGNA as a named Appellant. Appellants have provided a June 18, 1999 letter signed by Michael J. Coleman of CIGNA Property & Casualty authorizing "Rain and Hail" to conduct litigation concerning SRAs to which Rain and Hail and CIGNA in Rain and Hail's name only.

In accordance with the provisions of the Act, FCIC agrees to pay the Company an amount equal to thirty-two and twenty-five hundredths percent (32.25%) of the net book premium for all eligible crop insurance contracts included under this Agreement except as may be reduced by Sections IV.C. and IV.D.4. or 5., or as may be increased by Section IV.B. This payment constitutes full reimbursement for expenses associated with sales and service of eligible crop insurance contracts.

. . . .

D. Payment of Expense Reimbursement

1. The expense reimbursement provided in Section IV.A. will be paid to the Company in two installments. The first installment, equal to twenty-two percent (22%) of the net book premium unless such amount is reduced or voided by Section IV.D.4. or 5., will be included in the Monthly Summary Report containing the data obtained from acreage reports (preliminary tonnage report for eligible raisin crop insurance contracts). The second installment, equal to ten and twenty five one-hundredths percent (10.25%) of net book premium unless such amount is voided by Section IV.D.5, will be included in the Monthly Summary Report on which the Company either reports the producer premium as collected or pays the uncollected premium to FCIC.

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5. ***Timely Submission of Acreage Report Data***

All data on which liabilities and premiums are based must be reported by the Company to FCIC not later than the transaction cut-off date for the tenth (10^{th}) full week after the week which includes the date the acreage report is due from the policyholder as specified in the Actuarial Data Master File. The first installment of the expense reimbursement for eligible crop insurance contracts reinsured under this agreement will be reduced to the percentages shown below:

DATA RECEIVED FOR TRANSACTION CUT-OFF DATES FOR:

Weeks After Acreage Report Due Week	Expense Reimbursement
11^{th} through 12^{th} Weeks	*20.5%*
13^{th} through 14^{th} Weeks	*19.0%*
15^{th} through 17^{th} Weeks	*17.5%*

> 6. Eligible crop insurance contracts reinsured under this Agreement for which acreage report data is received after the transaction cut-off date for the 17th week after the acreage report due week will not be eligible for any expense reimbursement.
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> **SECTION V. GENERAL PROVISIONS**
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> C. **Interest**
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> 1. FCIC will pay interest to the Company in accordance with the interest provisions of the Contract Disputes Act (41 U.S.C. 601 *et seq.*)....

(Amended Complaint Exhibit A.) The 1995 SRA contains similar provisions. It provides for a 31 percent expense reimbursement. The Government represents, and Appellants do not deny, that in actuality, as a result of legislation, expense reimbursements in both years were capped at 31 percent.

3. The SRA is silent regarding waivers or refunds of expense reimbursement reductions.

4. Part 3, section 2, paragraph 137 of the Service Office Handbook, M8-SO, authorizes FCIC regional offices to reinstate policies terminated for indebtedness only when the termination was in error because the insured had timely paid the premium, the amount billed was incorrect, or the bank committed an error (Attachment E to FCIC Brief).

5. Section 4, paragraph E (6)(d) of the 1994 and 1995 Crop Insurance Handbooks reads as follows: "Transfers of Coverage Forms are effective only to the end of the insurance year specified. For succeeding crop years, application must be made to insure the proper entity if insurance is to continue in effect" (Attachment B to FCIC Brief and FCIC Counsel's August 18, 1999 letter to the Board with attachments).

6. In a conference call on October 13, 1999, Appellants' counsel stated that Appellants do not dispute the applicability of the Service Office Handbook, M8-SO and the Crop Insurance Handbooks for the purposes of adjudication of this appeal.

7. FCIC acknowledges that, while the SRA makes no provision for waiving reductions in expense reimbursements, it does consider requests for such waivers and grants such requests when the reinsurance company can demonstrate that the delay in reporting was beyond its control (FCIC Brief, p. 2).

8. Of the $12,848.63 total claimed, $10,470.20 represents interest on $92,510.82 in payments on 1995 citrus tree policies. The remaining $2,378.43 is interest on three separate payments, $1,197.91 interest for transferred 1994 policies; $46.93 interest related to late filed data pertaining to 1994 policies; and $1,133.59 in interest for both citrus tree and transferred policies under both the 1994 and 1995 SRAs. (Appeal File (AF) tabs D, F, M and S and stipulations forwarded by Government May 10, 1999).

9. On March 28, 1995, the Director of FCIC's Delivery System Services (DSS) issued an Informational Memorandum outlining the findings of a review of procedures being used by several reinsured companies relative to transfer of coverage transactions. The term "transfer of coverage" refers to the situation where there is a change in the producer covered under a particular MPCI policy. The review had revealed that, contrary to published policy, reinsured companies were creating one or more policies for the transferee(s) and reporting new policy numbers to the FCIC Data Acceptance System. The memorandum recited that in the past DSS had required reinsured companies to furnish documentation to justify a waiver of the administrative expense reimbursement reduction regarding transfer of coverage applications. The memorandum cited section 1.6(c) of the 1995 M8-Crop Insurance Handbook as providing that transfers accomplished using the FCIC-21[4] are effective only to the end of the insurance period for the crop year specified and requiring new application for successive years. Reinsurance companies were directed to track such transfers internally only without reporting to FCIC. DSS would no longer consider requests to waive administrative expenses in such cases. (AF 1-2.) In a letter to the Board dated August 18, 1999, FCIC counsel stated that the cite in the March 28, 1995 memorandum was incorrect. The Crop Insurance Handbook is not designated as M8; it is designated as 18010.

10. Similarly to M8-SO (Finding of Fact (FF) 4), the Crop Insurance Handbook makes no provision for reinstatement of a policy properly terminated for nonpayment of the premium. It authorizes reinstatement only where the termination was in error because the insured had timely paid the premium, the amount billed was incorrect or the bank erred. (Attachment B to FCIC Brief.)

11. Section 15.c. of the General Crop Insurance Policy provides that federal crop insurance policies terminate as to any crop year if any amount due is not paid on or before the termination date preceding the crop year for the contract on which the amount is due (Attachment C to FCIC Brief).

12. The termination date for Texas Citrus Tree policies is May 31 (Attachment D to FCIC Brief).

[4] The context of the 1995 Crop Insurance Handbook, FCIC 18010 indicates that FCIC-21 is a form for reporting transfers of coverage.

13. On June 18, 1995, Appellants requested a refund of reimbursement reduction for 169 policies under the 1994 and 1995 SRAs.[5] Subsequently, the FCIC issued a series of letters approving or denying waivers.

14. Appellants, through counsel, wrote FCIC Acting Director of Insurance Services on July 26, 1996, concerning the "failure of FCIC to restore improperly assessed reductions in expense reimbursements and failure of FCIC to pay interest on the funds that were restored." After asking that this letter be considered an "official request for review of an administrative decision of FCIC," not in accordance with the SRA, pursuant to 7 C.F.R. § 400.169(a),[6] Appellants surveyed the correspondence between the parties beginning with the June 18, 1995 letter seeking the reimbursement reduction waivers for 169 policies. Included in the correspondence surveyed are letters between the parties dated August 28, October 24, and November 3, 1995. They do not appear to be directly on the subject of the waiver of reimbursement reduction for these 169 policies. Rather, Appellants appear to have submitted them as evidence that FCIC was experiencing delays in processing during the period in question due to shortages in staffing. Appellants also reported that previously promised reimbursements had not been received. Hence, Appellants sought review by the Director to resolve the following issues: (1) entitlement to a refund of expense reimbursements for MPCI policies still not addressed by the Reinsurance Services Liaison Branch of FCIC of $8,049.02 plus interest from March 25, 1996, at the rate of 5 7/8 percent; (2) whether FCIC must immediately pay to Appellant $9,166.99 which transfer of coverage funds should have been restored to Appellants in February 1996 along with interest from February 25, 1996, to the date of payment at the rate of 5 7/8 percent; (3) whether FCIC must immediately pay to Appellants $97,291.80 which Texas citrus policies funds should have been restored to Appellants in March 1996 along with interest from March 25, 1996, to the date of payment with interest at 5 7/8 percent; and (4) whether FCIC must pay to Appellants $361.65 as and for interest accrued on $37,436.82 from February 25, 1996, when the monies should have been credited to Appellants' account, through April 25, 1996 (AF 47-51).

15. Subsequently, in August 1996, FCIC approved and denied additional requests for waiver. In September, FCIC stated that all requests for waiver had been addressed (AF 52-58).

16. In a letter dated March 20, 1997, the Acting Deputy Administrator of the Reinsurance Services Division, Risk Management Agency, responded to the July 26, 1996 request for a review of an administrative decision pursuant to 7 C.F.R. § 400.169(a). The Acting Deputy Administrator

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[5] The record does not contain a copy of this letter. At the request of the Board, both parties searched and each reported that it was unable to locate a copy. The December 18, 1995 letter from the Chief of Delivery System Services, Consolidated Farm Service Agency refers to it as a June 16, 1995 letter. All other references reflect the date of the letter as June 18, 1995, and the Board will refer to it as such.

[6] Title 7, C.F.R. § 400.169(a), provides that a company may request the Director of Insurance to make "a final administrative determination."

referred to Appellants' request as a "request for appeal."[7] The letter contained the final administrative determination that Appellants were not entitled to interest on previously granted waivers of administrative expense reimbursements on 71 transfer of coverage policies and 24 transfer of coverage and citrus tree policies all from the 1994 insurance year. The Acting Deputy Administrator construed the SRA provision that FCIC will pay interest to the Company in accordance with the interest provisions of the Contract Disputes Act (41 U.S.C. §§ 601-613, as amended) to conclude that there was no underlying right to payment and therefore interest was not payable (AF 67-69).

17. By letter of April 8, 1997, the Deputy Administrator, Risk Management Agency, provided "the appeal decision" on Appellants' request for waiver of premium reimbursement on 11 1995 Texas citrus tree policies. The original request for waiver had been denied because Appellant failed to follow the reinstatement procedures in the Service Office Handbook (M8-SO), part 3, section 2, paragraph 137. The Deputy Administrator concluded that Appellants improperly reinstated the policies which had been canceled for nonpayment of premium. However, in addition, he determined that the penalty for the improper reinstatement was too severe and therefore the administrative expense reimbursement on the 11 1995 citrus tree policies would be restored to Appellants (AF 70-71).

18. On June 13, 1997, the Board received a Notice of Appeal from the March 20, 1997 final administrative determination. According to the Notice of Appeal, the amounts in controversy were: (1) $8,049.02 plus interest from March 25, 1996, at the rate of 5 7/8 percent; (2) $9,166.99 in restoration of transfer of coverage funds with interest from February 25, 1996, at the rate of 5 7/8 percent; (3) $97,291.80 in restoration of Texas citrus policies funds with interest from March 25, 1996, at 5 7/8 percent; and (4) $362.65 in interest on $37,436.82 from February 25, 1996, until April 25, 1996, when it was credited to Appellants' account. Appellants made the same allegations in its original Complaint (Complaint, pp. 8-9). Subsequently, the parties settled all claims other than claims of interest.

19. Appellants then filed an Amended Complaint[8] in which it alleged amounts due as interest in the following amounts: (1) interest of $1,197.91 on principal of $35,353.78 from August 19, 1995, until February 29, 1996; (2) interest of $46.93 on $1,049.69 from August 19, 1995, until May 1, 1996; (3) interest of $1,133.59 on $16,105.07 from August 19, 1995, until September 25, 1996; and (4) interest of $10,470.20 on $92,510.82 from August 19, 1995, until

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[7] While the regulatory language in effect when the parties entered into the 1994 and 1995 SRAs referenced an "appeal" to the Deputy Manager of FCIC, 7 C.F.R. § 400.169 (53 FR 31826, Aug. 22, 1988), the terminology used in 7 C.F.R. § 400.169(a) (60 FR 21036, May 1, 1995) is a request for "a final administrative determination." Title 7 C.F.R. § 400.169 provides for an "appeal" only in paragraph (d) where it grants a right of appeal of final administrative determinations to the Board of Contract Appeals.

[8] Both Complaints have the identifying label "1994 Late Processing Charges" but the parties have stipulated that both the 1994 and the 1995 SRAs are pertinent.

May 28, 1996 (Amended Complaint, p. 8). While the May 10, 1999 letter containing the parties' stipulations fails to include the amount of interest claimed for each payment made, it can be extrapolated that the $1,197.91 amount pertains to transferred policies for the 1994 insurance year; the $46.93 pertains to neither transferred policies nor to citrus tree policies, but to 1994 policies involving data filed late for various reasons; the $1,133.59 pertains to both transferred policies and citrus tree policies for both the 1994 and 1995 insurance years; and, the $10,470.20 pertains to 1995 Texas citrus tree policies. Appellants use August 19, 1995 as a start date for their interest calculations because that date is 60 days after the June 18, 1995 request for refund of reimbursement reduction. Appellants consider the first 60 days after August 18, 1995 as a grace period. (AF 207 and Appellants' May 18, 1999 letter to the Board.)

DISCUSSION

Appellants claim a right to interest on waivers of premium reduction reimbursements made by the Government in three different sets of circumstances. The largest sum claimed is for interest in the amount of $10,470.20 on waivers on 1995 Texas citrus tree policies. The amount of $1,197.91 is interest claimed on waivers relative to 1994 policies in "transfer of coverage cases," situations where Appellants assigned new MPCI policy numbers where the insurance coverage on a single crop was transferred from one producer to another. Appellants claim the combined amount of $1,133.59 in interest for waivers related to transfers of coverage on 1994 policies and for waivers on nine Texas citrus tree policies. A small amount of the interest claimed ($46.93) is for waivers of premium reduction reimbursements due to late filed data on 1994 policies where the late filing was found not to be the fault of the company.

Transfer of Coverage Cases

Regarding the transfer of coverage cases, RHIS' practice of issuing new policies where the coverage was transferred to another producer was contrary to procedures set out in the Crop Insurance Handbook (FF 5, 9). By a March 28, 1995 Memorandum, the Director, Consolidated Farm Service Agency clarified that such transfers should be tracked internally by reinsurance companies but not reported to FCIC; nor should new MPCI numbers be assigned. Effective immediately, thereafter, DSS would not consider requests to waive the administrative expense reimbursement reduction for transfer of coverage policies. Regarding the transfer of coverage cases, RHIS' practice of issuing new policies where the coverage was transferred to another producer was contrary to procedures set out in the Crop Insurance Handbook (FF 5). The March 28, 1995 Memorandum did not change policy; it reiterated policy and informed reinsurance companies that waivers of administrative expense reimbursement reductions would no longer be considered.

Appellants claim $1,197.91 interest on reimbursements of reductions on 1994 policies and a portion of the $1,133.59 in interest claimed for a reimbursement pertaining to 1994 and 1995 policies (FF 8).

Texas Citrus Tree Policies

In these cases, Appellants had canceled the policies for nonpayment of premium for the 1994 crop year. After the insureds paid the 1994 premiums, Appellants reinstated them for the 1995 crop year. According to the Government, Appellants did so without accepting new applications or inspecting the 1995 crops, in contravention of the reinstatement procedures in the Service Office Handbook (M8-SO), part 3, section 2, paragraph 137. (FF 4.) Appellants assert in their brief that they were authorized to reinstate under the plain language of the citrus policies. Appellants speculate that had they not reinstated the policies, the policyholders "would have most likely sued Rain and Hail for failing to reinstate them." Appellants provide no citation to or quote from the policy language on which they rely nor do they provide evidence of the threat of litigation. The interest claim of $10,470.20 and an unspecified portion of the $1,133.59 claim involved 1995 Texas citrus tree policies. These policies were terminated for nonpayment of the 1994 premium and upon payment of back premiums reinstated for the 1995 year. This reinstatement was contrary to the procedures in FCIC 18010 allowing reinstatement only where the termination for indebtedness was in error.

Late Filed Data Cases

Finally, $46.93 in interest involved reimbursement reductions due to late filed data for other reasons. These are cases where a reduction in premium reimbursement was taken under section IV.D.5. of the SRA (FF 2) because of late reporting and the reduction was later waived because FCIC determined that the late reporting was not due to an action or inaction of the Company. No provision of the SRA requires waiver, but FCIC acknowledges that it considers and grants waivers where late reporting was beyond the control of the reinsurance company (FF 7).

Arguments and Discussion Common to all of the Types of Cases

In essence, Appellants argue that all these cases involve late remission of a payment required by the SRA. Appellants rely on the Board's decision in Rain and Hail Insurance Service, Inc., AGBCA No. 97-172-F, 99-1 BCA ¶ 30,218. That decision established that the interest clause in the SRA is applicable to late payments by the Government of amounts due under the expense reimbursement provision of the SRA where the late payment was due to the Government's delayed approval of the Plan of Operation. Approval of the Plan of Operation set the effective date of the Agreement and triggered subsequent deadlines including deadlines for payment of the principal amounts there in question.

The Government argues that in the instant appeals the Appellants were never entitled to the expense reimbursements because of Appellants' failure to comply with required procedures.

While the parties' characterizations of the claims underlying the interest claims are not dispositive, it is instructive to consider their contemporaneous assessments. The Government has consistently referred to Appellants' claims underlying the interest claims as claims for waiver of reimbursement reduction. The Board is unable to review Appellants' original June 18, 1995 claim to determine

Appellants' original characterization. However, in their March 26 and 29, 1996 letters, Appellants also used the term waiver to describe their request (FF 14). Later, Appellants began to employ the terms refund or restoration as well as waiver. The factual circumstances here support the conclusion that the repayments at issue constituted waivers by FCIC rather than entitlements of RHIS. In the case of 71 of the policies for which waivers were granted, the original expense reduction involved the situation where the coverage under the initial policy was transferred to another producer and Appellants created a new policy and transmitted the data on the new policy after the reporting deadline. This practice did not comply with the policy transfer procedures in the Crop Insurance Handbook, section 4.E.(6) (July 1993) (FF 5).

In the case of the canceled citrus policies, section 15.c. of the General Crop Insurance Policy provides for termination of the policy where any amount owed by the producer is not paid by the termination date (FF 11). Under those terms, cancellation of the citrus tree policies was appropriate. In the cases involving facts other than transfers of coverage and citrus tree policies, Appellants have not proved that any of the refunded amounts were other than waivers of reductions properly taken by FCIC. Appellant has failed to point to a provision in the SRA which requires the Government to refund expense reimbursement reductions in these cases.

The fact that the refunds here were waivers distinguishes this case from the Board's decision in Rain and Hail Insurance Service, Inc. The late payment there was for funds to which the reinsurance company was entitled under the SRA and for which the SRA had set payment deadlines for payment with which the FCIC had failed to comply. In contrast, here the Appellants have demonstrated no right to payment of any of the money in dispute at any given time. The SRA specified when the Government could reduce payments or not make payments (FF 2). The record reveals no impropriety by the Government in taking a reduction or not making a payment. To the extent that the Government later determined that a waiver of the SRA provision was appropriate, the Appellants have pointed to no provision in the SRA or elsewhere which obligated the Government to make a payment by a given date. Because the Government was not required to make any of the payments, the interest provision of the SRA does not entitle the Appellants to interest on monies the Government could have withheld.

DECISION

The appeals are denied.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
December 9, 1999