RAIN AND HAIL INSURANCE SERVICE, INC.	)	**AGBCA No. 99-117-F**
and RAIN AND HAIL L.L.C.,	)	
(Michael Hat Farming Company -- MGR 93-020)	)	
	)	
Appellants	)	
	)	
Representing the Appellants:	)	
	)	
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	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

June 30, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

On December 14, 1998, the Board received this appeal from Rain and Hail Insurance Service, Inc. (RHIS) and Rain and Hail, L.L.C. (R&H) (Appellants), of West Des Moines, Iowa, involving a 1994 Standard Reinsurance Agreement (SRA) with the U. S. Department of Agriculture, Federal Crop Insurance Corporation (FCIC). The Appellants seek to recover costs incurred in defending an arbitration action submitted by an insured under a multiple peril crop insurance policy issued pursuant to the SRA. The Appellants claim entitlement under Bulletin MGR 93-020. The Government has denied the request, stating that a prerequisite for relief under the bulletin has not been satisfied, namely, the arbitration action did not involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program.

Regulation authorizes the Board to resolve this timely-filed matter (7 C.F.R. §§ 24.4(b), 400.169(a)-(d)). The parties have submitted the case pursuant to Rule 11, without a hearing. The Board received briefs in May 1999.

The Appellants have not established entitlement to the relief requested. The SRA provides for the reimbursement of expenses based upon a percentage of the net book premium for all eligible crop insurance contracts. The SRA states that the payment constitutes full reimbursement for expenses associated with sales and service of eligible crop insurance contracts. Also, the SRA specifies that expenses incurred as a result of litigation are considered part of the expense reimbursement paid. Thus, the SRA assures no relief.

The facts do not dictate that relief is required under the bulletin. The Government correctly concluded that the arbitration action did not involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program. The arbitration action was case specific and not meant to establish precedent for other actions under the crop insurance program.

The Board denies the appeal.

FINDINGS OF FACT

1. For the reinsurance year beginning July 1, 1993, the FCIC entered into an SRA with CIGNA Property and Casualty Insurance Company and RHIS (Exhibit 3) (All referenced exhibits are in the Appeal File).[1] The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance under the authority of the Federal Crop Insurance Act, as amended, 7 U.S.C. §§ 1501 *et seq.* (Act) (Exhibit 3 at 1069).

2. The SRA contains a section dealing with expense reimbursement. One paragraph thereof states:

> 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.

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[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 (Complaint at 2 (¶ 5)). Hence, the dual appellants, to which the Government has not objected.

(Exhibit 3 at 1078 (¶ IV.A).) The referenced paragraph IV.B deals with reimbursement for excess loss adjustment expenses. (Exhibit 3 at 1078 (¶ IV.B).) The record, facts, and arguments presented do not suggest the applicability of that paragraph to this dispute.

3. A general provision of the SRA addresses litigation and assistance:

> The Company's expenses incurred as a result of litigation are considered part of the expense reimbursement paid in accordance with Section IV. of the Agreement. FCIC may at its option elect to provide assistance, direction, or intervene in any legal action. The Company agrees not to oppose such participation. Should the Company desire the assistance, direction, or intervention of FCIC in a legal action it must do the following:
>
> [four items are enumerated]
>
> FCIC will at is sole discretion, determine if the requested action under this section will be granted. The criteria to determine such action will be whether such action is in the best interest of FCIC and the crop insurance program.

(Exhibit 3 at 1087.)

4. In January 1994, Michael Hat Farming Company obtained from RHIS multiple peril crop insurance on varieties of grapes in California; the FCIC approved the policy (Complaint 4-5 (¶¶ 13, 18); Answer at 3 (¶¶ 13, 18)). The insurance agreement between Hat Farming and RHIS contains an arbitration clause. The clause establishes the procedures to be used if the parties "fail to agree on the production to be counted against the production guarantee due to damage." Under the clause, either party may demand, in writing, that an appraisal set the amount of production to be counted. Each party selects one appraiser. An umpire is selected. The appraisers set the production to be counted against the production guarantee. Absent agreement by the appraisers, a signed written agreement by two of the three individuals (the two appraisers and the umpire) establishes the production to be counted against the production guarantee. (Exhibit V at 295-96 (¶ 7).)

5. Dissatisfied with payments received from RHIS for losses, by a writing dated March 14, 1995, Hat Farming demanded arbitration. It phrased the issue of arbitration thusly: "The amount of grape production and the resulting quality adjustment provided for in the 'Special Provisions - Grapes - California' portion of said policy." (Exhibit A at 28.)

6. RHIS participated in the arbitration action, defending its denial of the indemnity sought by Hat Farming. By letter dated July 9, 1996, RHIS sought FCIC support "in the form of expense reimbursement, as well as any other support FCIC has to offer" regarding the on-going arbitration. (Exhibit A at 1-3).

7. The arbitration resulted in a determination that RHIS was to pay Hat Farming $3,526,808.86 (Exhibit E at 82). RHIS did not appeal the determination; the FCIC agreed that the payment should be made and no appeal be taken by RHIS (Exhibits H, K). Hat Farming filed, with the San Joaquin County Superior Court of California, a petition to confirm the arbitrator's award. The petition was dismissed with prejudice at the request of Hat Farming upon receipt of payment of the amount awarded by the arbitrators. (Exhibits I, J).

8. By letter dated August 22, 1997, to the Government, RHIS requested reimbursement of $453,659.92 as its expenses incurred in the arbitration action. It sought this amount as a request for litigation assistance under MGR 93-020.

9. With a date of June 1, 1993, the FCIC issued MGR 93-020, which deals with requests for financial assistance for attorney fees and other court costs.[2] By its terms, the MGR 93-020 both rescinds MGR-009 (an earlier bulletin dealing with litigation assistance) and "does not amend any provisions of the Standard Reinsurance Agreement (SRA)." MGR 93-020 establishes criteria for providing financial assistance for certain litigation expenses; and outlines procedures for requesting financial assistance for litigation expenses. (Exhibit X at 1023.)

10. MGR 93-020 dictates that cases submitted for FCIC consideration must meet the following criteria:

> 1. The litigation must involve an attack on FCIC-approved program procedures, regulations and/or crop policies; and
>
> 2. The litigation must involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program.

(Exhibit X at 1023.) Further, "FCIC will make the final determination regarding amount of settlements, paying of judgments, the awarding of attorneys' fees and other court costs only after the court has rendered a decision or a formal settlement agreement has been presented by the parties involved" (Exhibit X at 1024).

11. By letter dated February 4, 1998, the Government denied the request for reimbursement, with the rationale that neither of the two criteria of MGR 93-020 were satisfied (Exhibit Q). Subsequent requests for review and Government determinations also resulted in denials (Exhibits S, T, U).

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[2] Effective beginning with the 1998 reinsurance year, which began July 1, 1997, Bulletin MGR 98-031 rescinded MGR 93-020. The new bulletin, which also does not affect the amount of administrative expense reimbursement paid under the SRA, details procedures for obtaining financial litigation assistance. MGR 98-031 is not here relevant; this decision addresses relief under the SRA and MGR 93-020, while considering the insurance agreement between Hat Farming and RHIS.

12. On December 14, 1998, the Board received this appeal. The Appellants seek to recover $453,659.92, objecting to the denial of the request for litigation support under MGR 93-020.

DISCUSSION

Rain and Hail maintains that it is entitled to reimbursement of its litigation expenses, said to be $453,659.92, incurred involving the Hat Farming arbitration.

The terms of the SRA appear to resolve the question of entitlement: "The Company's expenses incurred as a result of litigation are considered part of the expense reimbursement paid in accordance with Section IV. of the Agreement" (Finding of Fact (FF) 3). The SRA does not envision a reimbursement for litigation expenses separate from the stated reimbursement expense of 32.25 percent (FF 2, 3). That is, the established rate allocates the risks for litigation expenses to the insurance company: should the expenses be less than anticipated, the insurance company benefits; should they be greater, the insurance company bears the additional costs. MGR 93-020 "does not amend any provisions of the Standard Reinsurance Agreement (SRA)" (FF 9). Hence, the record does not demonstrate entitlement to the requested relief under the express terms of the SRA.

Consistent with a decision by this Board, Rain & Hail Insurance Service, Inc., AGBCA No. 97-143-F, 97-2 BCA ¶ 29,111, the parties focus upon MGR 93-020, which dictates the conditions for reimbursement. The facts do not support the claim of entitlement to reimbursement under the bulletin. The Board need focus only on the second prerequisite for reimbursement: "The litigation must involve the probability of a court ruling which may set legal precedent detrimental to the crop insurance program" (FF 10).

Hat Farming pursued its claim by invoking the arbitration provision of its insurance agreement (FF 4-5). The record does not demonstrate that the arbitration proceeding had any probability of establishing precedent. The fact specific results were binding on the parties involved; but, the stated procedures do not envision the issuance of a determination which establishes precedent for other disputes. The record does not demonstrate that the result of the arbitration would reach beyond the parties--that is, no precedent would be established.

The record also fails to demonstrate that the subsequent filing of a petition with the state court to confirm the award envisioned the establishing of precedent regarding any interpretation of law or consideration of the facts. That court action would not establish precedent as it was intended to address neither the facts nor merits of the dispute, it would simply confirm the award.

DECISION

The Board denies the claim for reimbursement by Rain and Hail.

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JOSEPH A. VERGILIO
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

_____
HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
June 30, 1999