RAIN AND HAIL INSURANCE SERVICE, INC. and RAIN AND HAIL L.L.C. (COASTAL BEND I, II, III and IV),	)	**AGBCA No. 2003-179-REM**
Appellants	)	
Representing the Appellants:	)	
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SUPPLEMENTAL DECISION OF THE BOARD OF CONTRACT APPEALS

September 15, 2003

Before VERGILIO and WESTBROOK, Administrative Judges.[1]

Opinion for the Board by Administrative Judge WESTBROOK.

[1] Judge Edward Houry, who was the presiding judge and third panel member in AGBCA Nos. 98-195-F, 98-196-F, 98-197-F and 99-125-F, has retired. The Board presently consists of three judges. The third, Judge Howard A. Pollack, acted as a neutral in an earlier consideration of the cases under Alternative Disputes Resolution (ADR) with the understanding that he would be ineligible to participate in further consideration of the matters. Because the two remaining members of the original panel are in agreement on this matter and constitute a majority, the Board has concluded that the addition of a third panel member is unnecessary.

This matter arose out of a 1996 Standard Reinsurance Agreement (SRA) between the Federal Crop Insurance Corporation (FCIC), U. S. Department of Agriculture (USDA), and Rain and Hail L.L.C. (RHLLC) of West Des Moines, Iowa (Rain and Hail). The SRA recites that it is a cooperative assistance agreement between the FCIC and Rain and Hail to deliver Multiple Peril Crop Insurance (MPCI) policies under the authority of the Federal Crop Insurance Act, 7 U.S.C. §§1501, et seq. The SRA establishes the terms and conditions under which FCIC will provide expense reimbursement, premium subsidy, and reinsurance on the MPCI policies issued by Rain and Hail.

The Board has jurisdiction to decide appeals of FCIC determinations under 7 CFR 24.2(b) and 400.169(d).

In 1996, Rain and Hail appealed to the Board determinations of non-compliance with FCIC-approved procedures and policies by the FCIC Deputy Administrator of Risk Compliance who had determined that Rain and Hail had made over-payments of indemnities to 45 MPCI policy holders in the Coastal Bend area of Texas. The parties engaged in extensive pre-trial practice including Board-assisted ADR and the Board conducted a two-day hearing in Dallas, Texas, in May 2000. In a unanimous decision issued July 26, 2001, the Board denied the appeals. Rain & Hail Insurance Service, Inc. (Coastal Bend I, II, II, and IV), AGBCA Nos. 98-195-F, et al., 01-2 BCA ¶ 31,534.

Subsequently, Rain and Hail sued FCIC in the U.S. District Court for the Southern District of Texas on the issues, Civil Action No. M-01-280. The Board furnished a "Certified List of Record" to the U. S. Attorney in Texas representing FCIC before the court. That certified list was erroneous because it failed to identify Appellant's Exhibits 11-26 which were part of the record, having been admitted during the hearing. However, the Board could not locate those documents as part of the record to forward when requested by the Government. These missing exhibits are the focus of this remand.

The parties filed numerous motions in the district court litigation. The court decided several motions and reserved ruling on others pending its determination of two issues:

> 1. How does the Agriculture Board of Contract Appeal's [sic] (ABCA) subsequent loss of Plaintiff's exhibits, previously admitted into evidence during the administrative appeal hearing but not now part of the administrative record, affect this Court's review of the ALJ's decision?
>
> 2. Was Plaintiff's "interest" claim considered by the ABCA and, if not, how should the Court proceed in considering the interest claim?

(Order of June 16, 2003, at 1.)

The court concluded that its resolution of the first issue required it to request clarification from the Board as to whether the panel considered Exhibits 11-26 in rendering its decision. In so doing, the court noted that Rain and Hail did not dispute that some of the information contained in certain exhibits (particularly 18, 25 and 26) is duplicated in other parts of the record. However, the court

states that Rain and Hail has detailed the importance of numerous other missing exhibits (particularly 17, 18, 20, 21, and 23). The court remanded that issue to the Board for clarification whether the panel reviewed "Plaintiff's exhibits 11-26 (AR#3918-4512) in rendering its final determination." Should the Board determine that it did not review the exhibits, the court requested that the Board undertake such review and prepare a brief, supplemental decision explaining how the missing exhibits affect, or do not affect, its previous determination. The Board received a copy of this order on August 7, 2003.

Regarding the interest issue, the court noted Rain and Hail's concession before it that the Board did not consider its interest claim because such did not arise and become ripe for consideration until after the Board issued its decision. The court concluded that the interest issue must be dismissed there and remanded to the Board for consideration.

Exhibits 11-26

Introductory Comments

Each member of the original panel, including retired Judge Edward Houry, have examined exhibits 11-26. No individual can state with certainty that all of the individual documents were reviewed in the course of rendering the decision. However, in agreeing upon the initial opinion, no judge noticed
the absence of the documents. In short, if the documents were not at the Board, the factual and legal issues, particularly as raised in the briefing process (and detailed below), did not demand that the individual documents be reviewed or be specifically referenced in the opinion. However, the Board now undertakes a specific review as requested by the court.

In so doing, we make several observations at the outset. One is that although these appeals involved 45 separate compliance cases, Rain and Hail litigated them in a general or macro manner. Testimonial references to individual cases were few and, when made, were by way of example, not to prove the facts of a particular compliance case.

Also, in opening the hearing, Judge Houry, who presided, gave the following advice regarding post-hearing briefs:

> Just a word about the briefs. The briefs will include findings of fact upon which each of you rely and each of those findings should be cited to the record, very specifically, as a matter of fact. Each fact should be supported to a citation, to an appeal file page, a transcript page, an exhibit, or some combination thereof. And I have to tell you that failure to support alleged facts may result in the Board's failure or refusal to consider such unsupported facts in its decision.

(Transcript (Tr.), pages (pp.) 6-7.)

He reiterated that advice at the close of the hearing:

> And as I indicated at the beginning of the hearing and as I reiterated when we were off the record, the board and the other judges that are going to have to sit and read this and read my draft decision when I do draft it, will appreciate the fact that all factual representations made in the brief will be very specifically cited to the record.

(Tr., p. 455.)

When the briefs were received and the record closed, Judge Houry commenced to review the record and write the draft opinion for circulation to the panel. It became evident that rendering a cogent decision required an individual examination of each compliance case on its own merits, a departure from Rain and Hail's apparent theory of the case. Neither party provided analysis in testimony or briefing of the specificity or thoroughness found at Board Finding of Fact (Board FF) 32. Rain & Hail at pp. 155,693-97.

The exhibits

The Board is asked to consider 16 exhibits (11-26) in this remand. Three of the exhibits, 18 (an RMA response to audits), 25 (Cotton Handbook), and 26 (cotton appraisal worksheets and related documents) are contained in their entirety elsewhere in the record making these duplicative. Exhibit 22 (policy review checklists for policy numbers reviewed under a given compliance case) is derivative and contains only information found elsewhere in the record. Those four exhibits were considered in rendering the initial decision. After specifically reviewing each of the remaining documents as requested in the remand, the Board determined that none of the specific findings or conclusions in the opinion need be altered. The Board held that the insurance company had failed to support its payment of indemnities because it was either practical to replant the initial crop, and the insurance company paid indemnities when no such replanting occurred, or the seed viability determinations lacked adequate sampling or determination. As detailed below, the documents do not change these conclusions.

That the materials in the 12 remaining exhibits (11-17, 19-21, 23-24) are inconsequential is highlighted by the limited references to them by the insurance company. Rain and Hail did not cite to exhibits 14, 15, 16, 19 or 24 in its opening brief or reply brief. Upon specific review, none merit further comment now. What remains to be discussed are exhibits 11, 12, 13, 17, 20, 21 and 23.

Exhibit 11 discusses a county extension service report of a seed viability test on acreage at the "Perry location" which is not shown to be relevant to any of the insurance policies at issue.

Exhibits 12, 13, 17, and 21 contain documents internal to the Government concerning the alleged abuses in the Coastal Bend area of Texas. None of these documents impact the application of the SRA and related documents to the facts at issue, or alter the specific obligations of the Government or insurance company.

Exhibit 20 is an action memorandum dated March 31, 1998, from a compliance field office of RMA

to the deputy administrator of research and development containing recommendations to change and/or clarify the loss adjustment manual to include instructions on the handling of pre-emergent crop appraisals. The discussions contained in the memorandum do not alter the need for an insurance company to have supported any determinations regarding pre-emergent losses for the crop year in question.

Exhibit 23 is October 1992 FCIC Directive, Delegations of Authority. Nothing in this document merits citation in any finding.

Rain and Hail cited Exhibit 12 in its opening Brief Finding of Fact Nos. 11, 34, 35 (Brief FF 11, 34, 35) in strings of citations for the fact that on April 19, 1996, FCIC realized that it may be impractical to replant cotton, but practical to plant a second crop, such as grain sorghum, which is more drought hardy. In the reply brief, Rain and Hail also cited this document for the fact that government employees agreed that a producer might find it practical to replant a more drought resistant crop. Rain and Hail did not point to a particular producer where the appraisal took into account this fact and therefore the compliance officials' finding of overpayment may have been in error.

Exhibit 13 is a one-page FCIC decision memorandum providing comments on a proposed managers bulletin. Along with a transcript page, it was cited in Rain and Hail's Brief FF 3 for the fact that light showers caused many cotton seeds to swell and crack, and in some cases even sprout, but failed to produce enough moisture for the seed to emerge from the soil. While the memorandum was on the subject of moisture and seed germination, it does not contain the language for which it was cited. In the argument portion of the brief, Rain and Hail failed to cite to either the finding or the underlying document itself to explain how this information should affect the outcome of the appeals.
Exhibits 17, 18 and 20 are three of the exhibits Rain and Hail detailed to the court as particularly important. Rain and Hail cited none of these in its opening brief. In Reply Brief FF 10, these exhibits were cited for the following assertion: "Neither did the FCIC's procedures require representative strips. For this reason, the FCIC admitted it had to clarify or change its procedures to require representative strips if loss occurs before emergence." (Reply Brief, p. 20.) The argument portion of the brief also cites these exhibits as it repeats the same assertion:

> Most importantly, the FCIC has even admitted that its procedures did not require farmers to leave representative strips under the circumstances in the Coastal Bend in 1966. The FCIC realized and conceded that its rules needed to be clarified or changed to require representative strips when loss occurred prior to emergence.

(Reply Brief, p. 69.)

In the briefs, Rain and Hail does not enumerate cases which would have had a different outcome if the compliance officials had not been guided by the procedures described as needing clarification in these documents. Reply Brief FF 10 refers to cases where "loss occurs before emergence." The argument section is much more general, referring only to "under the circumstances in the Coastal Bend in 1996," a phrase which could apply to all cases. References to representative strips in the documents, however, are applicable only to situations with pre-emergent crops. The Board's opinion

deals with pre-emergent crops in Board FFs 33-35 and in the discussion section of the opinion at pp. 155,700-02. The Board there acknowledged that representative sample strips were not required, and went on to analyze the question of fact whether the seed viability determinations provided an "accurate" appraisal, and whether a delay in the appraisal would have resulted in a more accurate appraisal. Thus, because the Board conceded the point Rain and Hail sought to prove by exhibits 17, 18, and 20, it is evident that examination of those exhibits would have not changed the outcome of the appeals.

Exhibit 21 is an April 30, 1998 memorandum from the Administrator of the Risk Management Agency (RMA) to a non-FCIC USDA official. RMA is the agency created to provide the day-to-day operations of FCIC. The two names are often used interchangeably by all parties. This document, which post-dates by two years the events at issue in the appraisal of 1996 crops, is a response to recommendations growing out of the Inspector General investigation into this matter. Rain and Hail cited it in Brief FF 46 and at Reply Brief p.16 for the conclusion by FCIC that laboratory testing of seed is not a step toward simplification of the crop insurance appraisal process. In neither brief did Rain and Hail point out a case the appraisal of which was confirmed by the contents of this document. Because it was not contemporaneous, but in the nature of a subsequent "lessons learned" analysis, it would not have changed the outcome of the appeals, or any one compliance case.

Exhibit 23 is the 92-page FCIC Directive of Authority. Rain and Hail cited two pages of the directive in its opening brief (Brief FFs 17, 18), but did not address any particular portion of the content of those two pages nor explain how it wished the Board to consider them in deciding the appeals. We find nothing in this exhibit which would change the outcome of the appeals.

Interest Issue

The court acknowledges that the claim for interest has not been presented to the Board because it did not arise until after we rendered our decision. The court's Order at pp. 5-6 states: "The facts herein demonstrate that the Court must dismiss the interest claim and remand such back to the ABCA for consideration because the Court is without jurisdiction to entertain Plaintiff's interest claim until Plaintiff has exhausted this claim administratively. . . . Plaintiff's claim challenging the FCIC's offset of interest moneys is HEREBY DISMISSED WITHOUT PREJUDICE to refiling at a later date after plaintiff has exhausted the issue before the ABCA."

A prerequisite to Board jurisdiction is that the insurance company obtain an adverse determination in accordnce with regulation 7 CFR 400.169. We have no jurisdiction to consider a matter which has not previously been presented to the required official and appealed to the Board in a timely manner. We infer from the court's Order that such a determination may have been made ("such 'final administrative determinations' regarding interest were not made until after the ABCA decision and so were not ripe to bring before the ABCA until that time"). To date, we have received no such appeal. Thus, while respectful of the court's remand on the interest issue, we are bound by our own jurisdictional limits and have no authority to consider the matter without an appeal having been filed.

SUPPLEMENTAL DECISION

Having reviewed Exhibits 11-26, the Board affirms its previous denial of Appellants, Rain and Hail's appeals AGBCA Nos. 98-195-F, 98-196-F, 98-197-F and 99-125-F. The Board lacks jurisdiction to consider the remanded interest issue because Rain and Hail has not filed an appeal after obtaining a determination in accordance with regulation, 7 CFR 400.169.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
September 15, 2003