

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AMAA Docket No. 11-0334
)
Burnette Foods, Inc.,)
a Michigan corporation,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

Burnette Foods, Inc. [Burnette], instituted this proceeding by filing a petition¹ on August 3, 2011. Burnette instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [the AMAA]; the federal marketing order regulating the handling of “Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin” (7 C.F.R. pt. 930) [the Tart Cherry Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71).

¹Burnette entitles its petition “Petition by Burnette Foods, Inc. Challenging Application of Federal Marketing Order 930 to Burnette Foods, Inc.” [Petition].

The AMAA provides that a handler subject to an order may file a written petition with the Secretary of Agriculture stating the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with law and requesting modification of the order or exemption from the order.² Burnette, a “handler” as that term is defined in the Tart Cherry Order,³ requests modification of, and exemption from, the Tart Cherry Order.⁴

²7 U.S.C. § 608c(15)(A).

³7 C.F.R. § 930.11.

⁴Pet. ¶ V at 10-11.

Specifically, Burnette seeks: (1) an order declaring that CherrCo, Inc.,⁵ is a “sales constituency” as that term is defined in the Tart Cherry Order;⁶ (2) an order requiring the appointment of a new Cherry Industry Administrative Board⁷ which complies with the Tart Cherry Order;⁸ (3) an order revising the formula for determining the “optimum supply”⁹ of tart cherries to include cherry products imported into the United States; and (4) an order exempting Burnette from restrictions on the sale of tart cherries [volume restrictions] that Burnette processes into metal cans.¹⁰ On October 3, 2011, the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], filed “Answer of Respondent” requesting denial of the relief sought by Burnette and dismissal of Burnette’s Petition.¹¹

On May 15-22, 2012, Administrative Law Judge Jill S. Clifton [ALJ] conducted a hearing in Grand Rapids, Michigan. James J. Rosloniec, Verity Law, PLC, Grand Rapids, Michigan, represented Burnette. Sharlene A. Deskins, Office of the General Counsel, United States

⁵CherrCo, Inc., is an association of cooperatives that meet the requirements of the Capper-Volstead Act (7 U.S.C. §§ 291-292). CherrCo, Inc., engages, on a cooperative basis, in activities in connection with processing, preparing for market, handling, marketing, packing, storing, drying, manufacturing, and selling tart cherries.

⁶7 C.F.R. § 930.16.

⁷7 C.F.R. § 930.2.

⁸7 C.F.R. § 930.20.

⁹7 C.F.R. § 930.50(a).

¹⁰Pet. ¶ V at 10-11.

¹¹Answer of Respondent at 8.

Department of Agriculture, Washington, DC, represented the Administrator.¹² Burnette called 14 witnesses and the Administrator called five witnesses.¹³ Burnette introduced into evidence exhibits which are identified as “PX” and the exhibit number. The Administrator introduced into evidence exhibits which are identified as “RX” and the exhibit number. In addition, the ALJ took official notice of the rulemaking proceeding which established the Tart Cherry Order and the 1998, 2007, and 2011 rulemaking proceedings which resulted in amendments to the Tart Cherry Order.

¹²On June 6, 2014, Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, filed a Notice of Appearance as co-counsel for the Administrator.

¹³References to the transcript of the May 15-22, 2012, hearing are designated as “Tr.” and the page number.

On March 18, 2014, after the parties filed post hearing briefs, the ALJ issued a Decision and Order rejecting Burnette's contentions that: (1) CherrCo, Inc., is a "sales constituency" as that term is defined in 7 C.F.R. § 930.16;¹⁴ (2) the Cherry Industry Administrative Board is controlled by one sales constituency, CherrCo, Inc., in violation of 7 C.F.R. § 930.20(g);¹⁵ and (3) the formula for determining optimum supply of tart cherries is contrary to law because the formula does not include cherry products imported into the United States.¹⁶ However, the ALJ concluded two provisions of the Tart Cherry Order are not in accordance with law: (1) the application of volume restrictions to handlers who process tart cherries into metal cans; and (2) the requirement that handlers, who are not exempt from volume restrictions, absorb the share of volume restrictions that would have been the responsibility of other handlers had those other handlers not been exempt from volume restrictions.¹⁷ The ALJ ordered that: (1) tart cherries delivered from being harvested to a canner and canned with no processing other than canning shall be exempt from volume restrictions; and (2) tart cherry production exempt from volume restrictions must be subtracted from supply for the purpose of calculating restriction percentages.¹⁸

On April 3, 2014, the Administrator filed an appeal petition, followed on June 23, 2014, by Respondent's Appeal Petition and Brief in Support Thereof [Appeal Brief]. On June 20,

¹⁴ALJ's Decision and Order ¶ 13 at 13.

¹⁵ALJ's Decision and Order ¶ 14 at 13-14.

¹⁶ALJ's Decision and Order ¶ 38 at 21.

¹⁷ALJ's Decision and Order ¶ 1A-B at 1-3.

¹⁸ALJ's Decision and Order ¶¶ 40-41 at 22.

2014, Burnette filed an Appeal Petition, a Brief in Support of Burnette Foods, Inc.'s Appeal Petition [Burnette's Appeal Brief], and a Request for Oral Argument. On August 14, 2014, Burnette filed a response to the Administrator's appeal petition, and the Administrator filed a response to Burnette's appeal petition. On September 3, 2014, Burnette filed a brief rebutting the Administrator's response to Burnette's appeal petition. On September 8, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Burnette's Request for Oral Argument

Burnette's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,¹⁹ is refused because Burnette and the Administrator have thoroughly briefed the issues. Thus, oral argument would serve no useful purpose.

Overview of the AMAA and Tart Cherry Order

Congress enacted the AMAA to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce.²⁰ To achieve orderly marketing of agricultural commodities, Congress authorized the Secretary of Agriculture, after notice and opportunity for hearing, to issue orders that would regulate the handling of agricultural commodities.²¹

¹⁹7 C.F.R. § 900.65(b)(1).

²⁰7 U.S.C. § 602(1).

²¹7 U.S.C. § 608c(1), (3)-(4).

The AMAA provides that any handler subject to an order may seek modification of or exemption from the order.²² A proceeding under 7 U.S.C. § 608c(15)(A) affords a means for adjudicating only whether an order, a provision of an order, or an obligation imposed in connection with an order is not in accordance with law. A proceeding under 7 U.S.C. § 608c(15)(A) is not a forum in which to consider questions of policy, desirability, or effectiveness of order provisions.²³ The burden of proof in a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the handler seeking modification of or exemption from an order.²⁴

The Secretary of Agriculture issued the Tart Cherry Order pursuant to the AMAA in 1996 after conducting hearings in 1993 and 1995.²⁵ Proponents of the Tart Cherry Order were concerned with the short term variation of the supply of tart cherries caused by climatic factors.

²²7 U.S.C. § 608c(15)(A).

²³American Dried Fruit Co., 69 Agric. Dec. 1003, 1011 (U.S.D.A. 2010); Lion Raisins, Inc., 64 Agric. Dec. 11, 22 (U.S.D.A. 2004); Lamers Dairy, Inc., 60 Agric. Dec. 406, 426 (U.S.D.A. 2001), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); Daniel Strebin, 56 Agric. Dec. 1095, 1133 (U.S.D.A. 1997); Sunny Hill Farms Dairy Co., 26 Agric. Dec. 201, 217 (U.S.D.A. 1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); Mosby, 16 Agric. Dec. 1209, 1220 (U.S.D.A. 1957); Roberts Dairy Co., 4 Agric. Dec. 84, 89 (U.S.D.A. 1945); Wright, 2 Agric. Dec. 327 (U.S.D.A. 1943).

²⁴American Dried Fruit Co., 69 Agric. Dec. 1003, 1010 (U.S.D.A. 2010); United Western Grocers, Inc., 63 Agric. Dec. 557, 573 (U.S.D.A. 2004); Stew Leonard's, 59 Agric. Dec. 53, 69 (U.S.D.A. 2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); Cal-Almond, Inc., 56 Agric. Dec. 1158, 1219 (U.S.D.A. 1997), *aff'd*, CV-98-05049-REC/SMS (E.D. Cal. Aug. 13, 1998), *printed in* 58 Agric. Dec. 708 (1999), *aff'd*, 192 F.3d 1272 (9th Cir. 1999), *reprinted in* 58 Agric. Dec. 734 (1999), *cert. denied*, 530 U.S. 1213 (2000).

²⁵61 Fed. Reg. 49,939 (Sept. 24, 1996).

Variations in the supply of tart cherries can result in gluts and shortages of tart cherries. When gluts occur, large inventories of tart cherries can decrease prices regardless of the anticipated size of the oncoming year's tart cherry crop. The Tart Cherry Order was designed to reduce the impact of fluctuating inventories of tart cherries by establishing an optimum supply to reduce price fluctuations and enhance and stabilize the tart cherry market.²⁶

²⁶61 Fed. Reg. 49,940-41 (Sept. 24, 1996).

The Cherry Industry Administrative Board administers the Tart Cherry Order.²⁷

Membership on the Cherry Industry Administrative Board is determined by geographic districts created by the Tart Cherry Order. District representation is based upon tart cherry production levels in the district and the number of members from each district varies from one member to four members.²⁸ In order to prevent the domination of the Cherry Industry Administrative Board by an entity, the Tart Cherry Order limits the number of Cherry Industry Administrative Board members from one district that can be from, or affiliated with, a single sales constituency, as follows:

§ 930.20 Establishment and membership.

....

(g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

7 C.F.R. § 930.20(g).

²⁷7 C.F.R. §§ 930.30-.31.

²⁸7 C.F.R. § 930.20.

One of the duties of the Cherry Industry Administrative Board is to set the optimum supply level for each crop year.²⁹ The optimum supply represents the desirable volume of tart cherries that should be available for sale in the upcoming crop year.³⁰ The optimum supply formula is a series of mathematical calculations using sales history, inventory, and production data to determine whether a surplus of tart cherries exists and, if a surplus exists, the volume of tart cherries that should be restricted to maintain optimum supply.³¹

If the Cherry Industry Administrative Board establishes restricted percentages, handlers are required to set aside a portion of their tart cherry production. The Tart Cherry Order provides numerous methods by which a handler can comply with volume restrictions. These methods include storing product in inventory reserves, redeeming grower diversion certificates, destroying product, donating product to charitable organizations, donating product for new market development or market expansion, and exporting product to countries other than Canada and Mexico.³² The form of the cherries (frozen, canned, dried, or concentrated juice) a handler places in inventory reserve is at the option of the handler.³³

Burnette's Appeal Petition

Burnette raises six issues in its Appeal Petition. These six issues relate to three conclusions by the ALJ to which Burnette assigns error. First, Burnette contends the ALJ

²⁹7 C.F.R. § 930.50(a).

³⁰77 Fed. Reg. 12,748-49 (Mar. 2, 2012).

³¹7 C.F.R. § 930.50.

³²7 C.F.R. § 930.159.

³³7 C.F.R. § 930.55(b).

erroneously concluded CherrCo, Inc., is not a “sales constituency” as that term is defined in 7 C.F.R. § 930.16.

The Tart Cherry Order limits the number of members of the Cherry Industry Administrative Board that may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Cherry Industry Administrative Board.³⁴ CherrCo, Inc., has multiple members on the Cherry Industry Administrative Board and the Cherry Industry Administrative Board would be constituted in violation of 7 C.F.R. § 930.20(g), if CherrCo, Inc., were a sales constituency.

The ALJ concluded CherrCo, Inc., is not a “sales constituency” as that term is defined in 7 C.F.R. § 930.16 and the Cherry Industry Administrative Board is constituted in accordance with the Tart Cherry Order.³⁵

The Tart Cherry Order defines the term “sales constituency” as follows:

§ 930.16 Sales constituency.

Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

7 C.F.R. § 930.16.

The ALJ based her conclusion that CherrCo, Inc., is not a sales constituency on CherrCo, Inc.’s status as a Capper-Volstead cooperative, as follows:

13. If Cherrco [sic] were not a Capper-Volstead cooperative, I might take Burnette’s insistence that CherrCo is a sales constituency more to heart. But

³⁴7 C.F.R. § 930.20(g).

³⁵ALJ’s Decision and Order ¶ 13 at 13, ¶¶ 30-31 at 17-18.

CherrCo is a Capper-Volstead cooperative, which necessitates that CherrCo do a lot of management on behalf of its members. I find that CherrCo is **not** a sales constituency. See paragraphs 30 and 31.

* * *

31. As CherrCo manages on behalf of its members, CherrCo exerts control, and the control exerted does not make CherrCo a sales constituency; CherrCo is more correctly characterized as a Capper-Volstead cooperative.

ALJ's Decision and Order ¶ 13 at 13, ¶ 31 at 17-18 (emphasis in original).

While I find CherrCo, Inc., is a federated Capper-Volstead cooperative, I do not find CherrCo, Inc.'s status as a Capper-Volstead cooperative dispositive of the issue of whether CherrCo, Inc., is a sales constituency. Instead, I conclude CherrCo, Inc., is not a "sales constituency" as that term is defined in 7 C.F.R. § 930.16 because, while CherrCo, Inc., is an organization which receives consignments of tart cherries from member-cooperatives, CherrCo, Inc., does not direct where the consigned tart cherries are sold.

CherrCo, Inc., was created to provide a uniform price structure for its member-cooperatives. CherrCo, Inc., provides a variety of services for its member-cooperatives, including establishment of a minimum price for tart cherries sold by its members, storage of tart cherries, inventory management, and release of tart cherries for shipment to buyers (Tr. at 550-52).

CherrCo, Inc.'s member-cooperatives select their own sales agents (Tr. at 550, 558, 572).

The sales agents agree to follow the terms established by CherrCo, Inc., to ensure that all tart cherries sold by CherrCo, Inc.'s member-cooperatives meet CherrCo, Inc.'s minimum conditions for the sale of tart cherries. Once a member-cooperative's sales agent sells tart cherries to a buyer, the sales agent notifies CherrCo, Inc., of the identity of the buyer, the quantity of tart

cherries purchased, the price, and other terms of sale (Tr. at 530-48). If the sale meets CherrCo, Inc.'s minimum criteria regarding price and terms, CherrCo, Inc., authorizes release of the tart cherries when the member-cooperative requests release to the member-cooperative's buyer. Thus, each member-cooperative of CherrCo, Inc., directs where its tart cherries are sold and CherrCo, Inc., is not a sales constituency because, while CherrCo, Inc., receives consigned tart cherries from member-cooperatives, CherrCo, Inc., does not direct where the member-cooperatives' tart cherries are sold. Therefore, I reject Burnette's contention that the ALJ's conclusion that CherrCo, Inc., is not a "sales constituency" as defined in 7 C.F.R. § 930.16, is error.

Second, Burnette contends the ALJ erroneously concluded the Cherry Industry Administrative Board is constituted in accordance with the Tart Cherry Order. Burnette's contention that the Cherry Industry Administrative Board is not constituted in accordance with the Tart Cherry Order is based upon Burnette's contention that CherrCo, Inc., is a sales constituency. Specifically, Burnette contends the Cherry Industry Administrative Board has more than one member from, or affiliated with, CherrCo, Inc., in violation of 7 C.F.R. § 930.20(g).

Burnette established, and the Administrator does not dispute, that multiple members of the Cherry Industry Administrative Board are also members of cooperatives that are members of CherrCo, Inc. However, as I reject Burnette's contention that CherrCo, Inc., is a sales constituency, I also reject Burnette's contention that the Cherry Industry Administrative Board, as constituted, violates 7 C.F.R. § 930.20(g).

Third, Burnette contends the ALJ erroneously concluded that imported tart cherry

products are not required to be included in the optimum supply formula.

The Tart Cherry Order provides the method by which optimum supply is determined, as follows:

§ 930.50 Marketing policy.

(a) *Optimum supply.* On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years reduced by average sales that represent dispositions of exempt cherries and restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is necessary to recommend otherwise with respect to sales of exempt and restricted percentage cherries, to which shall be added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

7 C.F.R. § 930.50(a). Nothing in 7 C.F.R. § 930.50(a) requires inclusion of imported tart cherry products in the optimum supply formula and Burnette cites no provision in the AMAA or the Tart Cherry Order requiring that the optimum supply formula include imported tart cherry products. Instead, Burnette asserts the optimum supply formula in 7 C.F.R. § 930.50(a) should be modified to include sales of foreign produced tart cherry products as a matter of policy, as follows:

Although the CIAB cannot provide a single compelling reason for not including sales of foreign produced tart cherry products in the Optimum Supply Formula, the CIAB simply refuses to include them. This results in foreign producers of tart cherry products gaining unrestricted access to the domestic tart cherry marketplace while placing high levels of restrictions upon domestic producers of tart cherry products.

Burnette's Appeal Brief at 14.

A proceeding under 7 U.S.C. § 608c(15)(A) is not a forum in which to consider questions

of policy, desirability, or effectiveness of order provisions³⁶ or to introduce evidence relating to the wisdom of order provisions or purporting to show that the petitioner has been damaged or disadvantaged by activities undertaken in accordance with an order.³⁷ Therefore, I reject Burnette's contention that the ALJ's conclusion that imported tart cherry products are not required to be included in the optimum supply formula, is error.

The Administrator's Appeal Petition

The Administrator raises five issues in the Administrator's Appeal Brief. First, the Administrator contends the ALJ erroneously concluded Tart Cherry Order volume restrictions, as applied to canners of tart cherries, are arbitrary and capricious and, consequently, unlawful (Administrator's Appeal Brief ¶ IA at 9-12).

The ALJ ordered modification of the Tart Cherry Order to exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and promptly processed into metal cans with no processing other than canning.³⁸ The ALJ found that requiring canners to meet volume restrictions is arbitrary and capricious and, consequently, unlawful, as follows:

B. It is fiction to state that tart cherries processed into metal cans can be stored and carried over from crop year to crop year. [They **cannot**; the canned tart cherries need to reach the consumer promptly and cannot be maintained in the

³⁶See note 23.

³⁷Lamers Dairy, Inc., 60 Agric. Dec. 406, 426 (U.S.D.A. 2001), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); Belridge Packing Corp., 48 Agric. Dec. 16, 46 (U.S.D.A. 1989), *aff'd sub nom.* Farmers Alliance for Improved Regulation (FAIR) v. Madigan, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991).

³⁸ALJ's Decision and Order ¶ 40 at 22.

processor's inventory from crop year to crop year; the "best before" and "best by" date is roughly one year from harvest.] It would be arbitrary and capricious, and consequently not in accordance with law, to persist in that fiction.

ALJ's Decision and Order ¶ 1B at 2 (emphasis in original).

The record establishes that the Agricultural Marketing Service and the Cherry Industry Administrative Board have considered and rejected the exemption of canners from volume restrictions and that the Agricultural Marketing Service and the Cherry Industry Administrative Board have a rational basis for rejecting the exemption.

On March 17, 2010, the Agricultural Marketing Service published a proposed rule to establish free and restricted percentages of tart cherries for the 2009-2010 crop year.³⁹ The Agricultural Marketing Service received two comments from persons representing processors of canned tart cherry products. The Agricultural Marketing Service set forth its basis for rejecting an exemption from volume restrictions for canned tart cherry products, as follows:

Two comments were received during the comment period in response to the proposal. The commenters, both representing processors of canned tart cherry products, opposed the increased volume regulation from the preliminary percentages to the final percentages.

....

In response to the commenters, the tart cherry marketing order regulations do not apply to handlers according to the type of cherry products they pack. The order applies to the industry as a whole, regardless of which market segment individual handlers are involved in. The reserve formula under the order is designed to ensure that the aggregate market needs can be met with free percentage cherries and does not differentiate between product types.

75 Fed. Reg. 29,651-52 (May 27, 2010).

In a letter to the Agricultural Marketing Service, dated June 28, 2011, Burnette requested that the Agricultural Marketing Service either suspend the Tart Cherry Order or exempt the

canned segment of the tart cherry industry from the Tart Cherry Order (RX 3). The Agricultural Marketing Service responded stating it would consider a Cherry Industry Administrative Board recommendation to exempt canned tart cherries from the Tart Cherry Order and a measure designed to exempt canners would be presented at the September 15, 2011, Cherry Industry Administrative Board meeting in Grand Rapids, Michigan (RX 4 at 2).

³⁹75 Fed. Reg. 12,702 (Mar. 17, 2010).

Mr. Thomas Facer, chairman of the Cherry Industry Administrative Board, testified that, on July 12, 2011, he had appointed an ad hoc committee to review all aspects of the Tart Cherry Order (Tr. at 1194). Market segmentation was one of the issues considered by the ad hoc committee (Tr. at 1200-01).⁴⁰ At the September 15, 2011, Cherry Industry Administrative Board meeting in Grand Rapids, Michigan, Mr. Ray Rowley, a Cherry Industry Administrative Board member and the chairman of the ad hoc committee to review the Tart Cherry Order, noted that the exemption of canned tart cherries from the Tart Cherry Order had been considered by the ad hoc committee, but that the exemption could not withstand the scrutiny or challenges presented to the ad hoc committee (PX 3 at 9). Mr. Roy Hackert, a Cherry Industry Administrative Board member and a member of the ad hoc committee, testified that the ad hoc committee thoroughly considered the issue of segmenting the canned part of the tart cherry industry and had developed a plan on segmentation, but, ultimately, the ad hoc committee rejected segmentation because segmentation would be difficult to administer and segmentation would be unlikely to be approved by the requisite percentage of industry members in the referendum which would be required to implement segmentation (Tr. at 254-57). Mr. Facer testified that segmentation was rejected because segmentation could only be implemented if the Tart Cherry Order were amended pursuant to a rulemaking proceeding and the Tart Cherry Order could be easily circumvented if segmentation were to be implemented (Tr. at 1200-01).

⁴⁰The term “market segmentation” refers to the disparate treatment of various segments of the tart cherry industry under the Tart Cherry Order, including segmentation of that part of the tart cherry industry engaged in canning and exemption of that part of the tart cherry industry from volume restrictions.

Market segmentation is an issue that is appropriately considered in the context of a formal rulemaking proceeding. The Tart Cherry Order, which is presumed lawful, must be judged on the evidence contained in the formal rulemaking record on which the Secretary of Agriculture based the Tart Cherry Order. If circumstances have changed so that the Tart Cherry Order no longer produces equitable results, the remedy is through an amendatory or termination process—not through a proceeding conducted pursuant to 7 U.S.C. § 608c(15)(A).⁴¹ Burnette cannot in this proceeding challenge the policy, desirability, or the effectiveness of the Tart Cherry Order or even introduce evidence relating to the wisdom of the program or purporting to show that Burnette has been damaged or disadvantaged by the lack of an exemption from volume restrictions for canned tart cherry products.⁴² The evidence contained in the formal rulemaking record supports the determination that the Tart Cherry Order should apply to all handlers of tart cherries, including canners. Therefore, I agree with the Administrator’s contention that the ALJ’s conclusion that the Tart Cherry Order volume restrictions, as applied to canners of tart cherries, are arbitrary and capricious and, consequently, unlawful, is error. Accordingly, I do not adopt the ALJ’s Order modifying the Tart Cherry Order to exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and promptly processed into metal cans with no processing other than canning.

⁴¹Sequoia Orange Co., Inc., 41 Agric. Dec. 1511, 1522 (U.S.D.A. 1982), *order transferring case*, No. 82-2510 (D.D.C. June 14, 1983), *aff’d*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983). Furthermore, courts have noted that marketing orders are not required to be completely equitable and that an order may cause some resultant damage to a handler without destroying the validity of the order. See Lamers Dairy, Inc., 60 Agric. Dec. 406, 439 (U.S.D.A. 2001), *aff’d*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff’d*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005), citing *United States v. Mills*, 315 F.2d 828 (4th Cir. 1963).

⁴²See note 37.

Second, the Administrator contends the ALJ erroneously gave credence to evidence relating to the shelf life of canned tart cherries (Administrator's Appeal Brief ¶ IB at 12-14).

Burnette alleges canned tart cherries have a shorter shelf life than frozen tart cherries making compliance with the Tart Cherry Order volume restrictions more difficult for the canned tart cherry segment of the industry than the frozen tart cherry segment of the industry:

Pursuant to the Order the Cherry Industry Administrative Board ("CIAB") is charged with administering the amount of tart cherries available in the market through a formula prescribed by the provisions of the Order. Depending on the factors used in the formula the CIAB can impose restrictions on handlers, such as Burnette, impeding their ability to sell what they produce. Burnette is one of the few handlers of tart cherries that receives tart cherries directly from its growers and immediately converts those cherries into finished canned products, which have limited shelf life. . . . Due to restrictions that can be placed upon Burnette's inventory (inventory that is finished and available for sale to retailers), Burnette is forced to purchase frozen tart cherries and/or "diversion credits" from suppliers that dominate the CIAB in order to comply with restrictions imposed by the CIAB. Burnette is often not able to use its own inventories for reserve requirements due to the limited shelf life of its finished canned inventory and the need to supply its customers on a just in time basis.

Pet. ¶ III 3 at 2. Burnette introduced evidence in support of its allegation that the shelf life of canned tart cherry products makes compliance with volume restrictions more difficult for the canned tart cherry segment of the industry than for the frozen tart cherry segment of the industry (Tr. at 1041-47). However, even if I were to find that compliance with volume restrictions is more difficult for the canned tart cherry segment of the industry than the frozen tart cherry segment of the industry, I would not conclude that the disparate burden of the volume restrictions renders application of the volume restrictions to the canned tart cherry segment of the industry unlawful.⁴³ The application of the Tart Cherry Order volume restrictions to the canned tart

⁴³Lamers Dairy, Inc., 60 Agric. Dec. 406, 426 (U.S.D.A. 2001) (a petitioner cannot, in a

cherry segment of the industry is a policy consideration for the Secretary of Agriculture to be undertaken in the context of a formal rulemaking proceeding. Therefore, I find evidence regarding the shelf life of canned tart cherry products compared to the shelf life of frozen tart cherry products, irrelevant; I do not adopt the ALJ's findings regarding the shelf life of tart cherry products; and I do not adopt the ALJ's Order exempting canned tart cherry products from volume restrictions.

Third, the Administrator contends the ALJ erroneously rejected alternatives to inventory reserves which can be used by handlers to meet Tart Cherry Order volume restrictions (Administrator's Appeal Brief ¶ IC at 14-15).

If the Cherry Industry Administrative Board establishes restricted percentages, handlers are required to set aside a portion of their tart cherry production. The Tart Cherry Order provides numerous methods by which a handler can comply with volume restrictions. These methods include storing product in inventory reserves, redeeming grower diversion certificates, destroying product, donating product to charitable organizations, donating product for new market development or market expansion, and exporting product to countries other than Canada and Mexico.⁴⁴ The form of cherries (frozen, canned, dried, or concentrated juice) a handler places in reserve is at the option of the handler.⁴⁵

proceeding under 7 U.S.C. § 608c(15)(A), introduce evidence purporting to show that the petitioner has been damaged or disadvantaged by activities undertaken in accordance with the order), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005).

⁴⁴7 C.F.R. § 930.159.

⁴⁵7 C.F.R. § 930.55(b).

The ALJ found that requiring a canner of tart cherries to use alternatives to inventory is confiscatory, as follows:

22. Frozen tart cherries keep well (at least three years and up to four or five years). The same cannot be said of tart cherries processed into metal cans. Requiring Burnette or any other processor to hold tart cherries in cans off the market until close to the “best by” date (one year after canning) would be the equivalent of confiscation. It would be equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory.

ALJ’s Decision and Order ¶ 22 at 15 (footnote omitted). Based, in part, on the finding that alternatives to inventory reserves, by which a handler may comply with the volume restrictions, are confiscatory, the ALJ ordered modification of the Tart Cherry Order to exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and promptly processed into metal cans with no processing other than canning.⁴⁶

The provision of alternate methods by which to comply with volume restrictions is a policy consideration for the Secretary of Agriculture to be undertaken in the context of a formal rulemaking proceeding. The alternative methods by which a handler may comply with volume restrictions are not rendered unlawful merely because Burnette finds all of the alternatives burdensome. Therefore, I do not adopt the ALJ’s conclusion that the alternative methods of complying with volume restrictions are unlawful and I do not adopt the ALJ’s Order exempting canned tart cherry products from volume restrictions.

Fourth, the Administrator contends the ALJ erroneously ordered modification of the Tart Cherry Order to require all exempt-from-restriction-tart-cherry-production subtracted from supply for the purpose of calculating restriction percentages (Administrator’s Appeal Brief ¶ II

⁴⁶ALJ’s Decision and Order ¶ 40 at 22.

at 15-19).

The ALJ concluded that requiring handlers, who are not exempt from volume restrictions, to bear greater volume restrictions by being required to absorb the share of volume restriction that would have been the responsibility of other handlers were those other handlers not exempt, is arbitrary and capricious and, consequently, not in accordance with law.⁴⁷ Based on this conclusion, the ALJ ordered the following modification to the optimum supply formula:

Order

. . . .

41. Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year] **exempt**-from-restriction-tart-cherry-production . . . must be subtracted from supply for purposes of volume control, including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed.

ALJ's Decision and Order ¶ 41 at 22 (emphasis in original).

While Burnette seeks revisions to the formula for determining volume restrictions set forth in 7 C.F.R. § 930.50,⁴⁸ Burnette did not request the modification ordered by the ALJ. Moreover, the ALJ sets forth no basis for the ALJ's conclusion that requiring handlers, who are not exempt from volume restrictions, to absorb the share of volume restriction that would have been the responsibility of other handlers were those other handlers not exempt, is arbitrary and capricious.

⁴⁷ALJ's Decision and Order ¶ 1A at 1-2.

⁴⁸Pet. ¶ V F at 11.

In contrast, the optimum supply formula in the Tart Cherry Order was devised after the Agricultural Marketing Service considered evidence presented during the rulemaking proceeding which resulted in the promulgation of the Tart Cherry Order. The proponents of the Tart Cherry Order provided sufficient evidence for the Secretary of Agriculture to conclude that the volume restrictions would result in a supply management program which would compensate for the erratic natural production cycles of tart cherries and which should provide the market with a more stable supply of tart cherries.⁴⁹ The Tart Cherry Order, which is presumed lawful, must be judged on the evidence contained in the formal rulemaking record on which the Secretary of Agriculture based the Tart Cherry Order. If circumstances have changed so that the Tart Cherry Order no longer produces equitable results, the remedy is through an amendatory or termination process—not through a proceeding conducted pursuant to 7 U.S.C. § 608c(15)(A).⁵⁰ Accordingly, I do not adopt the ALJ's Order modifying the optimum supply formula.

Fifth, the Administrator contends the ALJ erroneously exempted all tart cherry canners from volume restrictions. The Administrator asserts, as Burnette was the only petitioner in this proceeding, any order issued by the ALJ should have been limited to Burnette. (Administrator's Appeal Brief ¶ III at 19-20).

As I deny all relief requested by Burnette and dismiss Burnette's Petition with prejudice, I find the issue of the scope of the ALJ's exemption from volume restrictions, moot.

⁴⁹60 Fed. Reg. 61,310 (Nov. 29, 1995).

⁵⁰See note 41.

Findings of Fact

1. Burnette is a Michigan corporation with a principal place of business in Elk Rapids, Michigan.
2. Burnette produces tart cherries, buys tart cherries from other producers, and processes tart cherries.
3. Burnette processes tart cherries into finished products in metal cans.
4. Burnette is a handler subject to the Tart Cherry Order.
5. CherrCo, Inc., is a federated Capper-Volstead cooperative.
6. CherrCo, Inc., receives consigned tart cherries from its member-cooperatives.
7. CherrCo, Inc., does not direct where consigned tart cherries are sold.
8. Multiple members of the Cherry Industry Administrative Board are also members of cooperatives that are members of CherrCo, Inc.
9. Imported tart cherry products are not included in the optimum supply formula in the Tart Cherry Order.
10. The Tart Cherry Order does not exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and processed into metal cans.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.
2. CherrCo, Inc., is not a “sales constituency” as that term is defined in 7 C.F.R. § 930.16.
3. The membership of the Cherry Industry Administrative Board complies with 7 C.F.R. § 930.20(g).

4. The Secretary of Agriculture is not required by the AMAA, the Tart Cherry Order, or any other law to include imported tart cherry products in the optimum supply formula in the Tart Cherry Order.

5. The Secretary of Agriculture is not required by the AMAA, the Tart Cherry Order, or any other law to exempt from volume restrictions in the Tart Cherry Order tart cherries delivered from harvest directly to a canner and processed into metal cans.

6. The Secretary of Agriculture is not required by the AMAA, the Tart Cherry Order, or any other law to modify the optimum supply formula in the Tart Cherry Order so that handlers, who are not exempt from volume restrictions, are not required to absorb the share of volume restriction that would have been the responsibility of other handlers were those other handlers not exempt from volume restrictions.

For the foregoing reasons, the following Order is issued.

ORDER

1. The relief requested by Burnette in its Petition, filed August 3, 2011, is denied.
2. Burnette's Petition, filed August 3, 2011, is dismissed with prejudice.

This Order shall become effective upon service on Burnette.

RIGHT TO JUDICIAL REVIEW

Burnette has the right to obtain judicial review of this Order in any district court of the United States in which district Burnette is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within 20 days from the date of entry of this Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.⁵¹ The date of entry of this Order is June 19, 2015.

Done at Washington, DC

June 19, 2015

William G. Jenson
Judicial Officer

⁵¹7 U.S.C. § 608c(15)(B).