



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: March 1, 2021

CBCA 6775-FCIC

In the Matter of ACE AMERICAN INSURANCE COMPANY
(In re: GIROUX ORCHARDS, LLC)

Kellen Corbett of Rain and Hail LLC, Johnston, IA, counsel for Appellant.

Aaron Fredrickson, Office of the General Counsel, Department of Agriculture, Harrisburg, PA, counsel for Federal Crop Insurance Corporation.

Before Board Judges **SHERIDAN**, **KULLBERG**, and **LESTER**.

LESTER, Board Judge.

The Department of Agriculture's Risk Management Agency (RMA), which supervises the Federal Crop Insurance Corporation (FCIC), has requested that we grant summary judgment in its favor in this crop reinsurance matter. RMA previously issued a final administrative determination finding that the crop insurance that Rain and Hail LLC (Rain & Hail) provided to an insured, Giroux Orchards (Giroux), for its 2016 apple crop production year incorrectly considered all of Giroux's entire apple groves to be eligible for fresh apple coverage and that a portion of the coverage should have been reduced to a lower-value processing apple coverage level. The dispute between the parties is entirely dependent on the proper interpretation of language incorporated by reference into the Standard Reinsurance Agreement (SRA) underlying this appeal. Having considered the parties' arguments and the documents of record in this appeal, we deny RMA's motion for summary judgment. Further, because no genuine issues of material fact exist regarding this matter of contract interpretation, we grant the appeal.

Background

The SRA at Issue

A part of the FCIC’s mission is to “encourage the sale of Federal crop insurance through licensed private insurance agents and brokers.” 7 U.S.C. § 1507(c) (2018). The FCIC is authorized to “insure, or provide reinsurance for insurers of, producers of agricultural commodities grown in the United States under 1 or more plans of insurance determined by the [FCIC] to be adapted to the agricultural commodity concerned.” *Id.* § 1508(a)(1). An “approved insurance provider,” or AIP, is “a private insurance provider that has been approved by the Corporation to provide insurance coverage to producers participating in the Federal crop insurance program.” *Id.* § 1502(b)(2). “This insurance ‘is sold and serviced by an [AIP] pursuant to a uniform contract agreement with the FCIC, referred to as the [SRA].’” *American Agri-Business Insurance Co.*, CBCA 4708-FCIC, 16-1 BCA ¶ 36,303; *see* 7 CFR 400.164 (2020). The RMA administers FCIC programs and other non-insurance-related risk management and educational programs on behalf of the Department of Agriculture.

The FCIC entered into an SRA with ACE American Insurance Company (ACE American) that “establishe[d] the terms and conditions under which the [FCIC] . . . will provide subsidy and reinsurance on eligible crop insurance contracts sold by [ACE American]” for the reinsurance year that the SRA in question covers. Appeal File, Exhibit 1 at i.¹ Rain & Hail, which serves as the managing general agent (MGA) of ACE American, sells and services crop insurance policies to agricultural producers on behalf of Ace Property and Casualty Insurance Company (ACE Property), which is a policy-issuing affiliate of ACE American, subject to the provisions of the SRA between ACE American and the FCIC. Under the SRA, the FCIC reimburses ACE American for crop insurance payments that ACE American or its affiliates (specifically, Rain & Hail and ACE Property) have made to agricultural producers in accordance with insurance policies that ACE American and its affiliates have sold.

Each SRA is a single-year agreement that covers a single reinsurance year. Exhibit 1 at i, 2. ACE American has held annual SRAs with the FCIC for many years, but the only SRA at issue here is for the 2016 reinsurance year. That SRA indicates that its terms include, in descending order of precedence, (1) the provisions of the Federal Crop Insurance Act (FCIA), 7 U.S.C. §§ 1501–1524 (2012); (2) the regulations implementing the FCIA in effect on July 1 of the 2016 reinsurance year, which are set forth at 7 CFR part 400 (2016); (3) the actual written provisions of the SRA and its appendices; and (4) “FCIC procedures,” which

¹ All exhibits referenced in this decision are found in the appeal file.

the SRA defines as meaning “the applicable handbooks, manuals, bulletins, memoranda or other written directives issued by FCIC related to an eligible crop insurance contract and this Agreement.” Exhibit 1 at 2, 4.

The 2016 Crop Insurance Handbook (2016 CIH), which “provides the official FCIC-issued underwriting standards for policies insured” by the FCIC was issued by the RMA and constitutes one of the “FCIC procedures” that form a part of the SRA. Exhibit 3 at 1. Pursuant to the 2016 CIH, the land on which an insured grows its crops can be segregated for crop insurance purposes in several ways. An insured automatically qualifies for coverage as a “basic unit,” which is defined as “all insurable acreage of the insured crop in the county on the date coverage begins for the crop year in which the insured has . . . 100 [p]ercent [s]hare in the [c]rop.” *Id.* at 51. Nevertheless, for certain types of crops, including, as relevant to this appeal, apples, “[l]and that would otherwise be one [basic unit] may be divided into” more segregated farm units, or “optional units” (OUs). *Id.* at 54.

The Insurance Policy at Issue

Giroux, which owns and operates apple orchards in Clinton County, New York, purchased crop insurance for the 2016 crop year from Rain & Hail that was subject to the 2016 SRA. Historically, Giroux has segregated the acres of land that it has devoted to apple production and grouped them into several OUs for crop insurance purposes. Each OU consists of one or more apple orchards. Giroux maintains production records, but not sales records, by OU for each crop year. When the apples grown on Giroux’s OUs are sold, it is typically difficult, if not impossible, to identify from which OU each apple came, but Giroux maintains separate sales records for each crop year for its apple crop as a whole, showing what proportion of the apples it produced was sold as “fresh” apples or what proportion was sold as “processing” apples.

Generally, fresh apples, which are eventually sold directly to consumers, have a higher quality standard than processing apples, and apples that do not meet the fresh apple standard are sold as processing apples. Fresh apples are worth more than processing apples. Consequently, both the crop insurance premium for fresh apple coverage and any payments on crop insurance claims for OUs that produce fresh apples are higher than those for processing apples. If processing apples are mischaracterized as fresh apples and a crop insurance claim is paid on them, it will result in an overpayment to the producer. Proper categorization of crops as primarily fresh apples or processing apples is dependent upon the insured’s actual production history (APH), which is to be identified through rules set forth in the 2016 CIH defining how to calculate the APH.

The portion of the 2016 CIH relevant to this appeal is section 1943, which contains provisions that specifically address insurance for apple orchards. Section 1943(B) of the 2016 CIH, titled “OUs by Fresh and/or Processing Types,” identifies the manner in which an insured that has divided its apple orchards into OUs may establish entitlement to fresh apple coverage for crop insurance purposes (rather than processing apple coverage). Under that section, the insured will be entitled to fresh apple coverage if a portion of its total apple acreage is reported as fresh *and* at least 50% of the total amount of its production was sold as fresh during one or more of the four most recent crop years:

OUs are available for Apples by Fresh and/or Processing types as specified in the [special provisions of the SRA]. *In order to establish OUs for the Fresh type, the insured must certify and, if requested by the AIP, provide verifiable records to support that at least 50 percent of the production from acreage reported as Fresh apple acreage from each unit, was sold as Fresh apples in one or more of the four most recent crop years.* These records must indicate the crop, name of the insured, name of the buyer, the minimum production sold as fresh, date the production was sold, the amount of production sold in the applicable unit of measure, and the price. Verifiable records may include: packer or buyer records, daily sales records, and records from a State Marketing Program.

If only a portion of the total apple acreage is reported as fresh, the total amount of production sold must reflect at least 50 percent of the production being sold as fresh. Such records may be used as verifiable records attributable to that portion of the acreage as fresh.

Exhibit 3 at 435 (emphasis added). Section 1943(B)(2) provides that, because it is difficult to keep records of which apples were sold from each OU, the AIP considering an insured’s claim can consider the total combined production from all of the OUs (rather than having to look separately at each individual OU) from one of the four most recent crop years:

While insureds can and do maintain records of production by unit, once apples are delivered to a warehouse (which is often a third party) for later sales and distribution, it may be impractical to track apples by unit. Therefore, insureds who do not have separate records by unit of fresh apple production in one or more of the last four years but do have records of total fresh apple production, may use these records to qualify for the fresh apple price. *AIPs may consider records of total production (rather than by unit) from one of the four most recent crop years that reflect fresh apple sales.*

Id. at 436 (emphasis added).

Prior to 2012, Giroux had organized its orchards into three OUs. In 2012, Giroux planted apple trees on 37.5 acres of additional land – outside of those three OUs – which, by 2015, had become known as “Unit 1.01.” Because apple trees take time to mature, Giroux did not produce any saleable fresh or processing apples on Unit 1.01 until 2015. Although Giroux produced apples from Unit 1.01 in 2015, it apparently did not add Unit 1.01 to its crop insurance policy with Rain & Hail until the 2016 crop year, at which time it identified Unit 1.01 as an OU separate from the other three.

Giroux later filed a claim against its 2016 crop insurance policy, which Rain & Hail paid. In doing so, Rain & Hail treated all of Giroux’s claim as covering fresh apple production, including Unit 1.01. RMA reimbursed Rain & Hail under the SRA.

Subsequently, as permitted by the terms of the SRA, RMA initiated a review of the 2016 reinsurance year. Giroux was asked to provide records from any one of the preceding four crop years to establish that all four of its OUs qualified for fresh apple coverage in 2016. Giroux selected the 2014 crop year as its basis for establishing fresh apple coverage. Giroux provided production records to RMA for the three OUs that were producing apples in 2014, but, since Unit 1.01 had not produced saleable apples in 2014, provided no production records for Unit 1.01. Giroux also provided sales records showing that more than 50% of its total apple sales in 2014 (from all of its OUs) was for fresh apples.

On November 7, 2017, RMA issued “Initial Findings,” determining that, because there was no record of any apple production from Unit 1.01 in the year that Giroux had selected for evaluation, Unit 1.01 only qualified for processing apple coverage for the 2016 crop year:

[RMA] determined one of four units insured as “fresh” . . . in 2016 did not qualify for fresh apple coverage. More specifically, the apple crop provisions define fresh apple production as being produced from acreage that you certify, and if requested by us, provide verifiable records to support at least 50 percent of the production from acreage reported as fresh apple acreage from each unit, was sold as fresh apples in one or more of the four most recent crop years. Giroux failed to provide acceptable records showing at least 50 percent of the production from Unit [1.01] was sold as fresh, from any of the 4 previous crop years.

Exhibit 8. RMA concluded that, because Rain & Hail had mistakenly provided fresh apple coverage to Unit 1.01 when it only qualified for processing apple coverage, Rain & Hail had

overpaid Giroux's loss claim on its 2016 crop insurance policy by \$79,768 and had overcharged \$7318 for Giroux's 2016 crop insurance premium and, further, that the FCIC was entitled to reimbursement in those amounts.

On March 23, 2018, RMA issued "Final Findings" rejecting Rain & Hail's challenge to the initial findings and, on January 28, 2020, issued a final administrative determination rejecting Rain & Hail's further challenge. RMA based its final administrative determination on its belief that, "[w]hen Giroux Orchards designated four units as fresh apple acreage on its 2016 acreage report, it [had] certified" – incorrectly – "that at least 50 percent of the production from each unit was sold as fresh apples in one or more of the 2015, 2014, 2013, or 2012 crop years and that it has records to support such production." Exhibit 13.

Both Rain & Hail and ACE Property appealed this dispute to the Board in accordance with the provisions of 7 CFR 400.169(d). ACE American was not named as an appellant in the notice of appeal.

Discussion

Authority and Standard of Review

Until its dissolution in 2007, one of our predecessor boards, the Department of Agriculture Board of Contract Appeals (AGBCA), heard appeals from final administrative determinations issued by the RMA (on behalf of the FCIC) arising under SRAs issued pursuant to the FCIA. The AGBCA's FCIC review authority arose not under the Contract Disputes Act, 41 U.S.C. §§ 7101–7109, but under FCIC regulations that granted the AGBCA that authority. *American Agrisurance, Inc.*, AGBCA 98-169-F, 99-1 BCA ¶ 30,237. Pursuant to 41 U.S.C. § 7105(b)(4)(B)(ii) and the request of the Secretary of Agriculture, this Board assumed that function upon its creation in 2007. *Nau Country Insurance Co.*, CBCA 5169-FCIC, 17-1 BCA ¶ 36,769; 72 Fed. Reg. 31437, 31437 (June 7, 2007). The Board has adopted the AGBCA's decisions as binding precedent in this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486. The Board reviews the RMA's final administrative determination on such a dispute *de novo*. *Nau Country*.

The Proper Appellant In This Matter

This appeal was originally filed by, and in the names of, two appellants: Rain & Hail, and ACE Property. Although they represented in their notice of appeal that Rain & Hail was the SRA holder and in their complaint that ACE Property was the SRA holder, the Board's review of the SRA showed that the named contracting party was actually ACE American,

a non-party to the appeal, even though the SRA was signed upon ACE American's behalf by a representative of Rain & Hail. Nevertheless, the demand letter that the RMA issued was addressed and directed to Rain & Hail, not ACE American. In response to the Board's inquiry about this discrepancy, the original appellants informed the Board that ACE American, ACE Property, and Rain & Hail are all wholly owned affiliates of Chubb Limited; that ACE Property is a policy-issuing company of ACE American; and that Rain & Hail is the MGA of ACE American. The original appellants further represented that, in this appeal, Rain & Hail was responding on behalf of and representing the interests of both ACE Property and ACE American. They acknowledged, though, that, technically, the SRA is between the RMA and ACE American.

As the Board recognized in *Michael Hat*, CBCA 1455-FCIC, 09-2 BCA ¶ 34,145, “[i]n matters involving the Federal Crop Insurance Act, 7 U.S.C. §§ 1501–1524, this Board’s authority . . . is limited to hearing disputes ‘between an insurance company that is a party to an SRA (or other reinsurance agreement) and the RMA, and the term ‘appellant’ means the insurance company filing an appeal.’” (quoting Board Rule 202(a)(1) (48 CFR 6102.202(a)(1) (2008)). The Board further recognized that “[a]n appeal brought by any party other than those insurance companies that have executed an SRA with the FCIC will be dismissed.” *Id.* As support for that determination, the Board relied on an earlier decision of the AGBCA in *Crop Growers Insurance, Inc.*, AGBCA 98-171-F, 00-2 BCA ¶ 30,976, in which the AGBCA held that, to be a proper party, the appellant must show, for the crop year in question, that it had an SRA with the FCIC or was reinsured by the FCIC. The AGBCA in *Crop Growers* expressly held that the MGA of an SRA holder may not bring an action in its own name either on its own behalf or as the representative of another entity.

Nonetheless, the AGBCA also recognized in *Blakely Crop Hail, Inc.*, AGBCA 2001-153-F, et al., 02-1 BCA ¶ 31,796, and *North Central Crop Insurance, Inc.*, AGBCA 2001-154-F, et al., 02-1 BCA ¶ 31,831, that the MGA is not prohibited from *acting* on behalf of the SRA holder where the holder has granted the MGA broad powers. So, even though the MGA may not pursue appeals under the SRA in its own name, it may file an appeal on behalf of the SRA holder, which “will be styled only in the name of the [SRA holder], the party to the SRA authorized by regulation to bring an appeal to the Board.” *North Central Crop*.

To eliminate any question about whether the proper appellant is before the Board, the original appellants and ACE American have now filed a motion requesting that the Board substitute ACE American into this appeal. In appropriate circumstances, like those here, we are authorized to add the real party in interest to a previously filed appeal and, to eliminate any concern about the timeliness of the appeal, relate that party’s substitution back to the date on which the appeal was originally filed. *Eastco Building Services v. General Services*

Administration, CBCA 5272, 17-1 BCA ¶ 36,670. The Board grants the appellants' motion. The appeal is recaptioned to designate "ACE American Insurance Company" as the sole appellant.

The Merits of RMA's Unit 1.01 Processing Apples Determination

The sole issue in this appeal is whether the AIP properly determined that Giroux was entitled to fresh apple coverage for the entirety of its 2016 apple production, including but not limited to production from the OU called Unit 1.01. RMA does not dispute that Giroux's 2016 loss was properly covered by its insurance, but asserts that recovery for any losses associated with Unit 1.01 should have been limited to the coverage available for processing apples, not fresh apples, and that Rain & Hail overstated and overcollected a fresh apple coverage premium for Unit 1.01.

Under section 1943 of the 2016 CIH, "[i]f only a portion of [an insured's] total apple acreage is reported as fresh, the total amount of production sold must reflect at least 50 percent of the production being sold as fresh" if the insured is to recover for crop losses at the higher rates available for fresh apples rather than the lower processing apple rates. Exhibit 3 at 435. Although Giroux has records of the amount of apple production from each of its four OUs for the years in question, it understandably does not have records of the number of fresh apples, as opposed to processing apples, sold from each OU. The apples from all of the OUs are mixed together before sale, and it is impossible to track which fresh apples sold came from which OU. Recognizing that the manner in which an apple producer with several orchards typically gathers and sells apples "may [make it] impractical to track apples by unit," *id.* at 436, section 1943(B) of the 2016 CIH provides that "insureds who do not have separate records *by unit* of fresh apple production in one or more of the last four years but *do* have records of total fresh apple production, may use these records to qualify for the fresh apple price." *Id.* (emphasis added). Section 1943(B) further provides that "AIPs may consider records of total production (rather than by unit) from one of the four most recent crop years that reflect fresh apple sales." *Id.*

Rain & Hail followed section 1943(B) to the letter in determining that Giroux was entitled to fresh apple status for the entirety of its 2016 apple crop. Giroux selected the 2014 crop year as the representative year for its apple sales, and it provided records showing that more than 50% of the total production from its four OUs, inclusive of Unit 1.01 (in which apple trees had been planted but were not yet producing saleable apples), was sold as fresh apples. Interpreting section 1943 (which was incorporated into ACE American's 2016 SRA) by reference to its plain language, as we must, *see ACE American Insurance Co.*, CBCA 2876-FCIC, et al., 14-1 BCA ¶ 35,791 ("Contract interpretation begins with an examination

of the plain language of the contract.”), Rain & Hail correctly determined that Giroux’s total 2016 crop was entitled to fresh apple coverage.

RMA asserts that Giroux was required to establish that *each* of its OUs *individually* produced more fresh apples than processing apples in one or more of the four most recent crop years and that, because “Giroux failed to provide acceptable records showing [that] at least 50 percent of the production from Unit [1.01] was sold as fresh, from any of the 4 previous crop years,” Exhibit 8, Unit 1.01 was not entitled to fresh apple coverage for the 2016 crop year. RMA’s argument conflicts with the plain language of section 1943(B) of the 2016 CIH, which permits consideration of the *totality* of the insured’s apple sales from *all* units from one of the four most recent crop years and applies the resulting fresh-versus-processing apple determination to that insured’s OUs in their totality. Even though Giroux knew that it had sold no apples from Unit 1.01 in the selected 2014 comparison year, RMA does not dispute that Giroux did *not* have segregated individualized fresh-versus-processing sales records for each of the other three OUs for 2014. Accordingly, Giroux was correct in combining *all* of its existing OUs, including Unit 1.01, in identifying a total 2014 crop sales analysis figure. Nothing in section 1943 carves out and removes an individual OU from the total overall acreage analysis simply because there were no actual sales for that one particular OU in the comparison year in question.

To the extent that RMA is attempting to create a separate rule for a newly-added OU (like Unit 1.01) that did not produce *any* saleable apples in the crop year selected for comparison, that attempt must fail not only under the section 1943 provisions discussed above, but also in light of another part of section 1943 – section 1943(B)(1) – that deals with an insured’s addition or incorporation of another producer’s apple groves into its own groves. Although Giroux did not acquire another producer’s pre-existing grove and add it to its own groves here, but instead itself planted and developed a new grove in Unit 1.01, the rationale of section 1943(B)(1) is relevant by analogy. Under section 1943(B)(1), the insured is allowed to combine added acreage that it has recently purchased (and to count any apple sales from that acreage by the prior owner in preceding years) with its previously insured existing acreage for purposes of conducting the fresh-versus-processing apple comparison:

An insured may obtain verifiable sales records from the previous producer of the acreage, regardless of whether the previous producer has a share in the current crop year’s acreage. *The prior producer’s verifiable sales records may be used by a carryover insured for any added acreage or by a new insured for insured acreage to meet the fresh apple requirements.*

Exhibit 3, § 1943(B)(1), at 436 (emphasis added). The example that accompanies section 1943(B)(1) makes clear that the fresh-versus-processing comparison is conducted by adding

the selected year's records for *all* acreage together – both the previously existing acreage and the newly acquired acreage – and making the 50% determination by review of the *total* acreage, considered as a whole:

Insured H is a carryover insured who has certified 5 years of acreage and production for 10 acres of apples. Insured H has added an additional 10 acres of neighboring farm land from Producer I to his operation with existing mature apple trees to this same unit for the current crop year. *Because the acres insured for Insured H has changed from 10 acres to 20 acres for the current year, the insured must be able to show that 50 percent of production from 20 acres was sold as fresh apples in 1 or more of the 4 most recent crop years.*

Since the fresh option is based on records of sold production, as long as Insured H provides the AIP with verifiable sales records indicating that *50 percent of the production from the 20 acres was sold as fresh apples in 1 or more of the 4 most recent crop years* it is insurable. This may require Insured H to obtain verifiable sales records from Producer I demonstrating that apples from Producer I's 10 acres have been sold as fresh apples in 1 or more of the 4 most recent crop years.

Id. (emphasis added). That is, the 50% determination is made by combining all of the OUs – both the old and the new – and comparing fresh versus processing apple sales. RMA's belief that Giroux was required to establish that *each* of its four OUs individually had at least 50% fresh apple production in the selected year of 2014 directly conflicts with the rationale underlying the section 1943(B)(1) example. RMA's determination that Rain & Hail overpaid Giroux's loss claim on its 2016 crop insurance policy by \$79,768 and overstated Giroux's 2016 crop insurance premium by \$7318 conflicts with the language of the 2016 SRA.²

Neither ACE American nor the original two appellants in this appeal filed a motion seeking summary judgment in their favor, but instead have only requested that we deny RMA's motion. "Where, however, as here, there is no dispute over relevant material facts and where judgment is appropriate as a matter of law, the [tribunal], sua sponte, may enter summary judgment for a nonmoving party." *Standard Oil Co. of California v. United States*,

² Paragraphs 57 and 58 of the complaint filed in this appeal indicate that, in 2018, RMA amended the CIH to distinguish between insurable and uninsurable acreage for purposes of the 50% fresh-versus-processing apple analysis, suggesting that the new rules, if applicable, might have affected the result here. The dispute before us is covered by the 2016 CIH, not later-year CIHs, rendering any post-2016 CIH changes irrelevant to our analysis.

685 F.2d 1337, 1346 (Ct. Cl. 1982); *see Rocky Mountain Trading Co.*, GSBCA 8671-P, 87-1 BCA ¶ 19,406 (1986); *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (“[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.”). “To conclude otherwise would result in unnecessary trials and would be inconsistent with the objective of Rule 56” of the Federal Rules of Civil Procedure, as well as of Board Rule 1(a) (48 CFR 6101.1(a) (2019)), “of expediting the disposition of cases.” 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2720.1 (4th ed. 2020). Because our resolution of the contract interpretation issue here fully resolves the dispute underlying this appeal, and because RMA has had a full opportunity to present its case on that interpretation issue, there is no reason to require another round of summary judgment briefing, this time from ACE American. We grant summary judgment in ACE American’s favor.

Decision

For the foregoing reasons, this appeal is recaptioned to designate ACE American as the sole appellant. RMA’s motion for summary judgment is denied. ACE American’s appeal is **GRANTED**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge

We concur:

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge