



CALIFORNIA WALNUT COMMISSION

101 Parkshore Drive, Suite 250

Folsom, CA 95630-4726

(916) 932-7070

Fax: (916) 932-7071

info@walnuts.org

An Equal Opportunity Employer and Provider

CALIFORNIA WALNUT COMMISSION

Issues Management Committee Meeting Minutes

Friday, June 11, 2010

The California Walnut Commission Issues Management Committee met on Friday, June 11, 2010 at the Marriott Hotel in Rancho Cordova, California. The meeting was called to order by Committee Chair Jack Gilbert at 9:03 a.m. Ms. Steindorf called the roll and informed the Chair that a quorum was present. All Committee members were present:

Jack Gilbert, Chairperson
Jack Mariani, Vice-Chairperson
Bill Carriere
Bob Lea
Jerry Siebert

Also present were Commission Chairperson Chuck Crain and Commission member Donald Norene; attorney Dale Stern; Commission attorney representative Ann Grottveit of Kahn, Soares and Conway; Agatha d'Esterhazy, Branch Chief of the CDFA Market Enforcement Branch; and CWC staff members Dennis Balint and Dana Steindorf.

The first order of business was the approval of the minutes from the previous Issues Management Committee meeting held on December 18, 2008. Mr. Mariani made a motion to approve the minutes as mailed, Mr. Lea seconded the motion and it carried unanimously.

The next order of business was CDFA Enforcement Issues. Mr. Balint introduced Mr. Dale Stern to explain the situation that prompted the Commission to address the issue of CDFA Enforcement. Mr. Stern stated that he is counsel for a couple of walnut handlers in the industry; however, he does not represent the California Walnut Commission in legal matters. Recently there was a Market Enforcement case against a walnut handler. In the decision on that case there was some discussion about contracts between handlers and growers and, to Mr. Stern, it appears unclear exactly what is required of handlers and growers in their contracts. In talking with Ms. d'Esterhazy in Market Enforcement, Mr. Stern believes there may be a difference of understanding, a difference of interpretation and a difference of opinion between some handlers and the Market Enforcement Branch about what is required in a contract between growers and handlers. Mr. Stern stated that the issue has come up in previous cases he has handled as well, in 1998 and 1999. Ms. d'Esterhazy confirmed it has been a long-term problem. Mr. Stern wanted to have this discussion in order to have mutual education between the Market Enforcement Branch and the industry. There are things that both parties could benefit from by coming together.

Mr. Balint stated that one of the biggest issues the walnut industry faces on an annual basis is knowing what the crop will be in order for handlers to determine prices. The CASS estimate is an indicator of the crop, however, that report is issued at the beginning of September each crop year and is not 100% accurate. Also compounding the issue are U.S. and world economic conditions, global competition and currency movement. Economic cycles greatly impact the walnut industry as the majority of the crop goes overseas.

Ms. d'Esterhazy explained that she has been with Market Enforcement for 33 years. In recent years with the economic situation, when a grower feels that he has not been paid fairly, he is more likely to file a complaint with Market Enforcement. The majority of handlers have written contracts with their growers, but there are some that deal in both oral and written contracts. Food and Ag Code section 62801 states that any purchase of edible nuts must be in a written contract. The complaints Market Enforcement handles include situations such as: oral contracts; no price set; partial payments made anywhere from 30, 60 or 90 days after delivery, and the balance the following spring. That poses another problem with Market Enforcement because section 55601 of the Food and Ag Code states that every processor must pay within 30 days of delivery unless specified in a written contract. A lot of growers are accepting partial payments and then final payment later in the year, because they understand that is the industry norm. Ms. d'Esterhazy's role as the regulatory agent is to determine whether or not there was a violation of the contract between the two parties when a complaint is filed.

Ms. d'Esterhazy stated that if the written contract between the grower and handler does not have a waiver of 62801 and 62802, the pricing issue can become a problem. She has seen contracts that have ambiguous statements such as "we will pay you the best price for the area." A grower cannot determine if they received the best price until the USDA releases its average pricing report in October of the following year. Market Enforcement also has no resources for determining fair prices. Ms. d'Esterhazy understands the problem facing the industry regarding not being able to set the price at time of delivery because the crop size and quality is undetermined at that time. Market Enforcement will allow for a waiver of 62801 in handler contracts for producers.

Ms. Grottvit asked if there is specific language regarding the waiver that Market Enforcement would like to see in the contracts and whether or not to reference price in the contract even if there is a waiver in the contract. Ms. d'Esterhazy stated that price calculation is not necessary to include in the contract, however, handlers should keep well-documented paper trails on how price is calculated and handling fees are deducted. The paper trail is important if Market Enforcement contacts the handler for investigation into a complaint, which is really the only time that Market Enforcement gets involved.

A discussion ensued about boiler-plate language that should be in all contracts. Ms. d'Esterhazy stated that Market Enforcement will review a contract for a handler if there are concerns about whether the contract is in compliance. Also, she commented that if the contract contains a reference to sections of the California Food & Agricultural Code, including a waiver, a copy of those sections should be attached to the contract.

Ms. Grottvit will send Mr. Balint a summary of the discussion today and the recommendations from her office on the contractual and statutory requirements in walnut handler contracts in order to avoid complaints with CDFA Market Enforcement Branch (copy of document attached).

There being no other business, Chairperson Gilbert stated that the time and place of the next meeting will be left to the discretion of the chair. There was no need for a closed session. The meeting adjourned at 10:01 a.m.



KAHN, SOARES & CONWAY, LLP

ATTORNEYS AT LAW

ANN M. GROTTVEIT
(916) 448-3826

EMAIL:
agrottveit@kscsacramento.com

MEMORANDUM

June 15, 2010

TO: DENNIS BALINT
CALIFORNIA WALNUT COMMISSION

FROM: ANN M. GROTTVEIT

CC: GEORGE H. SOARES

RE: HANDLER CONTRACTS AND CAL. FOOD AND AGRICULTURAL CODE
SECTION 62801

ISSUE

What are the contractual and statutory requirements in walnut handler contracts to avoid complaints with the California Department of Food and Agriculture (CDFA) Market Enforcement?

ANSWER

In addition to requiring all contracts in writing, if the contract fails to state the full purchase price in a definite sum as required by Cal. Food & Ag. Code section 62801, the contract should have an express waiver, also required by the same code section. In addition, the contract should provide a basis for payment or price formula and the handler should maintain good written documentation how the price was established for future review.

ANALYSIS

Market Enforcement recently brought an action against a walnut handler based on a complaint filed by a grower seeking payment due on its contract. One of the specific issues in this case was the violation of section 62801 which provides as follows:

“Except as otherwise provided in Section 62803, or unless the parties agree otherwise, every contract for the sale of edible nuts shall be in writing and shall state the full purchase price in a definite sum which is to be paid in accordance with the terms of the contract and, if the price is to be paid upon the basis of units or measures, the contract shall specify or describe the unit and state the full unit

price. Written contracts under this section shall state the method by which the price is to be determined.”

Based on this and other complaints received over the past year, the California Walnut Commission Issues and Management Committee invited Agatha D’Esterhazy to discuss industry practices. From this meeting, there are a few guidelines to follow and some sample language suggested.

1) No Oral Contracts.

Section 62801 requires that all contracts shall be in writing. This is a better practice as it avoids the ambiguity of trying to determine the intent of the parties long after the arrangement is made and memories have failed or been influenced by intervening factors.

2) Written Waiver.

As is industry practice, the contract will rarely state the actual purchase price to be paid. It is imperative that the contract contain a waiver of sections 62801 and 62802 to avoid a violation.

The following language was cited by Market Enforcement as adequate.

“The price shall be set forth herein in lieu of Cal. Food and Agricultural Code sections 62801 and 62802, **which are hereby expressly waived.**” (emphasis added.)

When in doubt, Market Enforcement will review the contract for the handler if there are concerns about whether the contract is in compliance.

3) Price Formula

Historically, there has been disagreement on whether the waiver includes the price formula as well. Ms. D’Esterhazy indicated at the meeting that she was less concerned about the exact formula being included in the contract and more concerned about adequate documentation (discussed below).

We recommend including the formula and basis for payment in the contract to avoid future disagreement over the intentions of the parties. If no formula is provided, Market Enforcement must determine a fair and reasonable price, which gives them great discretion.

4) Documentation

The contract should provide a basis for determining the price and more importantly, the handler should maintain the documentation as to how the price was calculated. In the instance of a complaint, Market Enforcement will want to review the paperwork to determine how the price was calculated and if it accurately reflects the contractual basis for price or a fair and reasonable price based upon fair market values.

Market Enforcement does not require an itemization or description of handler deductions in the contract. They will review records to determine if the handler deductions are fair and reasonable, based on custom and practice. It is better to itemize these costs so there is no confusion or disagreement about what deductions are allowed at a later date.

CONCLUSION

Based upon industry practices and the lengthy marketing season, it is unlikely the purchase price will be set forth in contracts. Accordingly, the above guidelines will protect the handler by providing notice to the grower. With more detail there is greater protection for both sides of the contract. It should be remembered that litigation filed by a grower seeking payment from a handler will be treated by Market Enforcement as a violation which may result in a licensing action.