

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

In Re:	)	
	)	
MILK IN THE NORTHEAST	)	Docket Nos. AO-14-A77, et al.
AND OTHER MARKETING	)	DA-07-02
AREAS; CLASS III & IV	)	
MILK PRICING ISSUES	)	RULINGS ON MOTIONS

At the reconvened hearing held in this Class III/IV milk price formula hearing, in Indianapolis, Indiana on April 9-13, 2007, John Vetne, Esq. moved on behalf of his clients, Agrimark, et al., that documents and testimony from a prior milk “make allowance hearing” should be admitted by reference without the witnesses who gave the original testimony, or who sponsored the documents being again present for examination. The motion requested that I reconsider my prior rulings of April 10, 2007 on proposed Exhibits 36 and 37 limiting the evidentiary use of the prior testimony and cost study report of Dr. Mark Stephenson, and my earlier denial (Transcript of Hearing in Strongsville, Ohio, on March 2, 2007, at pp.1156-59) of a request to incorporate by reference the record of the prior “make allowance hearing” (Docket Nos. AO-14-A74, et al.) Mr. Vetne filed a memorandum of law in support of his motion, and I gave all parties until June 4, 2007 to file memoranda of law on the issue.

Marvin Beshore, Esq. on behalf of Dairy Farmers of America and DairyIlea Cooperative Inc. filed a memorandum of law opposing the motion. Steven J. Rosenbaum, Esq. filed a response on behalf of Dairy Foods Association supporting Mr. Vetne’s analysis and requesting that proposed Exhibit 59, marked and used during Mr. Rosenbaum’s cross examination of Benjamin Yale, also be admitted into evidence. The

exhibit contained the written testimony of Dr. David Barbero at a prior Class III-IV formula hearing, and is contended to be relevant to the proposal advanced at this hearing by Mr. Yale to change the present pricing formulas that are based in part on Dr. Barbero's testimony regarding the amount of true protein contained in casein.

Though Mr. Vetne advanced four reasons why I should reverse my rulings, his principal argument, the argument that is supported by Mr. Rosenbaum, is that the following rule of practice contemplates the receipt of the rejected evidence:

(4) *Exhibits*. All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon satisfactory showing of the authenticity, relevancy, and materiality of the contents thereof, be numbered as exhibits and received in evidence and made a part of the record....If the testimony of a witness refers to a statute, or to a report or document (including the record of any previous hearing) the judge, after inquiry relating to the identification of such statute, report, or document, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. If relevant and material matter offered in evidence is embraced in a report or document (including the record of any previous hearing) containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the presiding officer.

7 CFR § 900.8(d). The rule makes it clear that whatever is received in evidence, either as an exhibit, or by being incorporated by reference, must be both relevant and material to the proceeding then being heard. The Secretary has chosen to address the milk pricing issues that are the subject of this proceeding separately from those he is addressing in the earlier, still pending "make allowance hearing". The Secretary did not reopen the earlier proceeding, but instead has ordered this new and separate proceeding. Therefore, even though various methodologies and practices in the pricing of milk and its ingredients may be arguably relevant to the milk pricing issues in both proceedings, the

evidence that is received in the present proceeding must also be material to its specific issues as framed by the Secretary in the governing notice of hearing.

As Mr. Beshore argues on behalf Dairy Farmers of America and Dairy Lea Cooperative, Inc., “the incorporation in this record of the testimony of some 19 witnesses (who testified in the earlier “make allowance hearing”).... ”would compromise the separate status of the two hearings as noticed by the Secretary. Presumably, the issues addressed in the make allowance hearing will be first resolved in that proceeding and the Secretary’s decision in that proceeding will be subject to official notice and use in this proceeding. On the other hand, to have the same evidence and issues addressed, *ab initio*, in this hearing will complicate rather than facilitate the decisions to be made by the Secretary.

In that context, Mr. Vetne has not shown the evidence from the pending “make allowance hearing” that he seeks to have received in this proceeding to be material to the specific issues framed by the Secretary in the governing notice of hearing. His motion is accordingly, denied.

Mr. Rosenbaum requests the receipt in evidence of a statement by an expert on the protein contained in casein given at a prior Class III/IV formula hearing that Mr. Rosenbaum used in his cross examination of a witness. He submits that the cited Rule of Practice (7 CFR § 900.8(d)(4)) requires the exhibit’s present receipt. It does not. The statement has so far only been used for the purpose of cross examination. Before the statement can be received, a showing of relevance and materiality needs to be made. I have nothing before me to show that its premises are presently at issue or are still considered valid by Dr. Barbero, or anyone else, so as to be relevant and material to the

issues now before the Secretary. Possibly the relevance and materiality of the exhibit will be shown at the reopened hearing in Pittsburgh, but, for the present, Mr. Rosenbaum's motion is denied.

These rulings shall be published on the Dairy Division's website in advance of the reconvening of the hearing in Pittsburgh, PA.

Dated: _____

Victor W. Palmer
Administrative Law Judge