

**BEFORE THE UNITED STATES DEPARTMENT
OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE**

In the Matter of :
Milk In the Florida, Southeast : **Docket Nos.:**
and Appalachian :
Marketing Areas : **AO-388-A16, AO-356-A38 and**
: **AO-366-A45; DA-04-07**
:

**BRIEF FOR DAIRY FARMERS OF AMERICA, INC.; LONE STAR MILK
PRODUCERS, INC.; MARYLAND & VIRGINIA MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.; AND SOUTHEAST MILK, INC.**

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I. INTRODUCTION AND BACKGROUND

A. Factual background

This hearing was called on an emergency basis to address the proposal of four cooperative associations marketing milk in the Southeastern United States requesting temporary amendments to Federal Orders 5, 6, and 7. The proponents seek reimbursement for a portion of the extraordinary costs incurred in transportation of milk for fluid use because of the four (4) hurricanes which battered Florida and the southeastern states during August and September 2004. The proponents wish to sincerely thank the Department for the speed with which this hearing has been called and held.

The circumstances surrounding the supply of milk to the southeast during August and September were described by the independent reporters at Dairy Market News during a portion of this period as follows:

Hurricane Charlie cut a wide swath of property damage and power outages across Florida last Friday and Saturday. Many towns and cities in the central and southern parts of the state are still without power. **Milk transportation schedules are in chaos.**

Dairy Market News, Volume 71, Report 33, August 20, 2004, p. 4 (emphasis added).

The same conditions were described by the witness from National Dairy Holdings in part as follows:

Now, earlier today someone said that this period was chaotic, and there were some question if that was the proper word. I assert to you that it is the proper word. The power outages that occurred were not the type of things, the plant shutdowns that are -- are predicted and are planned for. We had no idea when the power was coming back up. The initial estimates were from one week to three week -- three weeks. We didn't really expect it to be three weeks, but we really had no idea on an hour-by-hour basis,

day-by-day basis as to when that power would come back up again. **So indeed, the milk supply was chaotic; everything was chaotic.**

(Crishi, Tr. 250–51)(emphasis added)

The witness for Dean Foods described “the extreme chaos that has resulted from the Hurricanes Charley, Frances, Ivan and Jeanne.” (Kinser, Tr. 260)

These were not descriptions given by the proponents of the hearing proposals. But they accurately depict the circumstances which the proponent milk suppliers faced and which led to the request for this hearing.

B. Proponents and other participants

Proponents are four Capper-Volstead cooperative associations marketing milk for their dairy farmer members in Orders 5, 6, and 7.

DFA is a national dairy cooperative with more than 13,000 members. It markets milk to plants regulated under Orders 5, 6, and 7 and represents nearly 50% of the milk, and more than 50% of the producers, in Orders 5 and 7. (Johns, Tr. 185–187)

Lone Star Milk Producers, Inc. has approximately 353 members located in the states of Kansas, Oklahoma, Texas, Missouri, Arkansas, Louisiana, Mississippi, Tennessee, and Kentucky. Its members’ milk is currently marketed on Orders 5 and 7 and has been marketed to Order 6. (Baird, Tr. 218–220)

Maryland and Virginia Milk Producers Cooperative Association is composed of approximately 1450 producer members in eleven states and markets milk on both Orders 5 and 7. (Asbury, Tr. 233)

Southeast Milk Inc. is a dairy cooperative of 300 members based in Florida which markets its members’ milk under Order 7, as well as Order 6. (Covington, Tr. 156)

National Dairy Holdings, Inc., a hearing participant, is a handler in these Orders with 12 fluid milk distributing plants. Five fluid milk distributing plants are pooled on the Appalachian Federal Order located in London, Kentucky; in Madisonville, Kentucky; Charleston, South Carolina; Chattanooga, Tennessee; and Roanoke, Virginia. Five plants are pooled in the Southeast Federal Order, located in Cowarts and Pritchard, Alabama; in LaFayette, Louisiana and Baker, Louisiana; and in Hattiesburg, Mississippi. Two plants in the Florida Federal Order are located in Winter Haven, and in Miami, Florida. (Crishi, Tr. 246)

Dean Foods Company, also a participant, is the owner of a number of fluid milk plants in each of Orders 5, 6, and 7. (Kinser, Tr. 259–260)

II. LEGAL BASIS FOR THE PROPOSALS

A. Sufficiency of Notice

The hearing notice, published at 69 Fed. Reg. 58368 (September 30, 2004) contained two typographical errors which originated in the office of the Federal Register. These errors were described by counsel for the Department at the hearing:

[T]here was a typographical error in the notice for this hearing, and just to correct it on the record, if you look at 1005.60(g)(5). In the second to last sentence, it has .09 per hundredweight. That should be .04. . . . And if you look on the next column under 1006.60(a), where it has, oh, I guess like in the -- toward the top of that paragraph, it has .04 per hundredweight, that should be .09.

(Deskins, Tr. 15–16). These typographical errors do not affect the validity of the hearing notice for several reasons. First, the participants, including the handlers who will be directly impacted, all understood the proposals to be as intended. (Crishi, Tr. 246; Kinser, Tr. 262) Secondly, any informed reader would have observed that there was an apparent error in the literal reading of the

proposals because the amounts of possible charge were stated differently within the same provision. (Sims, Tr. 99–101) On that basis alone, an interested and affected person would have had notice of the potential level of the additional charge on the Class I price. Finally, as recent litigation has made clear, the participants in the industry are made aware by a hearing notice that proposals will be considered concerning a particular subject or subjects and the literal text of the hearing notice is subject to modifications at the hearing by participants or by the Secretary.

Alto v. Veneman, 336 F.3rd 560 (7th Cir. 2003); see also Jones v. Bergland, 456 F.Supp. 635 (E.D.Pa. 1978).

B. Authority for the Proposal.

The Agricultural Marketing Agreement Act (AMAA), 7 U.S.C. §§ 601 et seq., provides clear authority for the adoption of Proposal 1. 7 U.S.C. § 608c(5)(J) indicates that provisions for milk marketing Orders are authorized where:

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but not limited to -

(i) providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;

(ii) handling on specific days quantities of milk that exceed the quantities needed by handlers; and

(iii) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

Proposal 1 plainly falls within the authorization of this section of the AMAA. The funds utilized will be paid to qualifying handlers from “the total sums payable by all handlers for milk . . . before computing uniform prices.” The payments will be for “transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification” as expressly authorized. While the specific payments involved are without precedent in the sense that there have not, to our knowledge, been any payments of this precise nature in a Federal Order previously, there can be no legitimate question that they are payments for the type of marketwide service contemplated in 7 U.S.C. § 608c(5)(J).

C. Authority for emergency action

The Administrative Procedure Act (APA) provides for emergency decisions in on-the-record rulemaking proceedings pursuant to 5 U.S.C § 557 (b)(2). It authorizes omission of a recommended decision as follows: “this procedure [a recommended decision] may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.” This APA provision is also codified in the Department’s rules of practice for Federal milk Order proceedings at 7 C.F.R. § 900.12(d) as follows:

(d) Omission of recommended decision. The procedure provided in this section may be omitted only if the Secretary finds on the basis of the record that due and timely execution of his functions imperatively and unavoidably requires such omission.

Proponents are requesting that the Department invoke these provisions and omit a recommended decision in this proceeding. As Mr. Sims testified for proponents: “If four

hurricanes in six weeks do not create an emergency situation [allowing the omission of a recommended decision], the proponents are at a loss to understand what will.” (Sims, Tr. 72)

III. THE PROPOSALS AND THEIR OPERATION

A. Transportation demands caused by the hurricanes

The four hurricanes caused extraordinary demands for transportation of raw milk in several respects. Production, particularly in the State of Florida, was lost and had to be replaced. These losses occurred when milk could not be delivered from farms to plants and, also, with the loss of milking cattle. Much of the production was replaced from long distances at significant transportation expense. When plants were shut down in Florida, milk which would have been delivered to those plants, had to be supplied to other plants; and other plants throughout the extended region increased their volumes to get packaged milk to Florida to replace milk which could not be packaged there. All of these milk movements involved additional transportation expense which would not otherwise have been incurred. Furthermore, milk movements were “doubled” in many instances where milk was diverted from its usual destination to a holding plant or depot (such as the DFA plant in Franklinton, Louisiana) and then re-shipped from the holding area to a distributing plant where it could be processed. All of these movements, and the accompanying expense were incurred solely because of the hurricanes.

It must be noted that there are any number of categories of hurricane-related expense for which no reimbursement is sought in this hearing.¹ Operation of the Franklinton plant is a good

¹ Calvin Covington’s testimony touched on just some of the devastation which Southeast Milk members in Florida experienced from the hurricanes. See Tr. 157–165; Exh. 15.

example. This balancing facility is not used during August and September. However, because of the hurricanes this year, it was opened and used as a receiving and holding plant for milk movements. The Southeast Milk processing plant in Georgia also was used during a time when it would not ordinarily be used. On-farm expenses including loss of production, and loss of cattle and facilities are beyond the scope of the proposals and of this hearing.

The proposal seeks to address solely a discrete set of extraordinary expenses – extra transportation costs for raw milk totaling over \$1.5 million -- incurred by the cooperatives supplying fluid milk to consumers in the southeast. To meet that objective, a limited-time increase in the price of Class I milk under each Order is proposed to be distributed to handlers which document that they have incurred the additional transportation expenses.

B. Order amendments v. over-order charges

The question may be asked: Can these costs not be more readily recouped with over order charges than through amendments to the Federal Orders? The testimony at the hearing, from both handlers and cooperative suppliers, is that amending the Orders is the best, and most preferable option, for several reasons. First, over order charges are not necessarily available. The cooperatives' common marketing agency in the southeast utilizes a structured and predictable premium plan, upon which handlers have come to rely. Ad hoc changes to that premium structure lessen the predictability and price stability which it has fostered. The Federal Order base price, on the other hand, fluctuates in substantial increments monthly. The Federal Order announced price is transparent, published to handlers and their customers. Furthermore, over order charges lack the uniformity, transparency, and verifiability of Order amendments. Not all handlers are fully supplied by cooperatives. Consequently, handler equity is an issue in

any non-order attempt to recoup the expenses. The testimony of major handlers in support of the proposal; and the lack of opposition to it speaks to the confidence which handlers have in the Federal Order system, and to the appropriateness of this mechanism to address the costs involved.

C. Operation of Proposal 1

Criteria for reimbursement. There are several important aspects of the operation of Proposal 1 which we would like to address. First, reimbursement is contingent upon the Market Administrator being satisfied that the transportation involved was necessitated by the hurricanes. The transportation must have been incurred solely because of the hurricanes.² It is up to the handler to provide information to the Market Administrator's satisfaction that the qualifying criteria have been met. We would expect the Market Administrators to draw upon their own knowledge base to corroborate, or disqualify, claims presented. (Sims, Tr. 128) The party entitled to reimbursement is the handler who incurred the cost of the extraordinary transportation. We believe that in the overwhelming proportion of cases this is the supplying cooperatives; but the proposal makes clear that any handler with qualifying expenses is entitled to reimbursement.

² We are not certain that the time period involved is susceptible to precise start and end dates, as the Department inquired. The record suggests that the time for preparation for Charley, the first hurricane, was about 3 days before it made land on August 13. (Sims, Tr. 114); Crishi, Tr. 254) The last date would be some period of days after Jeanne exited the region. That period may have extended a few days into October, as indicated by the witness from NDH. (Crishi, Tr. 254)

Milk movements eligible. The proposal language, as modified at the hearing,³ identifies a number of specific milk movements which would qualify for reimbursement. These include: (1) loads of producer milk delivered or rerouted to a pool distributing plant; (2) loads of producer milk delivered or rerouted to a pool supply plant which was then transferred to a pool distributing plant; (3) loads of bulk milk delivered or rerouted to a pool distributing plant from a pool supply plant; (4) loads of bulk milk delivered or rerouted to a pool distributing plant from an other order plant; and (5) loads of bulk milk transferred or diverted to a plant regulated under another Federal order or to other nonpool plants. The proponents' detailed records of various milk movements caused by the Hurricanes (Exhibits 15–18) show these permutations of transportation, including movements to other order and other nonpool plants which were the subject of the modification to the proposed language. The modification provides coverage for milk being moved “out of a market to get it out of harm’s way.” (Sims, Tr. 108) These movements are no less extraordinary and caused by the hurricane than those involving extraordinary movements of milk into a market and should be subject to reimbursement where the Market Administrator is satisfied that the hurricane caused the movement.

Rate of reimbursement. The rate of reimbursement for hauling expenses is capped at \$2.25 per loaded mile. There were loads of milk hauled during this period at higher rates of expense, and some at substantially higher rates.⁴ However, we believe that the testimony establishes that a cap of \$2.25 is reasonable and will assure that no reimbursement is provided for any unusually high rates. Furthermore, reimbursement is limited to the actual cost of the

³ This modification is set out at Tr. 74, 85–86 and further explained at Tr. 106–107.

⁴ See, e.g., Baird, Tr. 226–228 (rates of \$2.75 per loaded mile).

hauling. If the qualifying haul cost \$2.00, that is the reimbursable rate. Finally, proponents wish to make clear that there can be no “double-dipping” with payments from the existing transportation credit fund in the Order. If any milk movements would qualify for credits under both programs, reimbursement should come from the Hurricane fund, and the other credits should be returned.

Administration of the fund. We want to comment briefly on several aspects of administration of the fund. If the proposal is adopted, the funds will be collected from Class I handlers during January, February and March of 2005. Prior to announcing the price of milk for January, therefore, the Market Administrator(s) will request and receive applications for reimbursement. It is the responsibility of the applying handler to demonstrate entitlement to the payment in terms of documenting the milk movements involved, their necessity from the hurricanes, and the cost of transportation incurred.

Upon receiving the reimbursement claims, the Market Administrator will be in a position to set the Class I price for January. It is expected that the rate of price assessment will be as nearly equal as possible for the three months of January through March. However, the Market Administrator will have the latitude to adjust the prices to be set in February and March at the time of those price announcements. For this purpose, the Market Administrator may set the rate of assessment at a fraction of a cent per hundredweight of skim milk, and a fraction of a cent per pound of butterfat.

It is the intent of the proponents that there be no blend price enhancement from the increases in the Class I price. Thus, the Market Administrators should set the final month’s rate so that there are no funds unclaimed. As Mr. Sims testified for the proponents, we would prefer

to leave a few dollars “on the table” than generate more funds than are needed. However, if there are any unclaimed funds, they should be returned pro-rata to the handlers who paid in the funds.

IV. CONCLUSION

The hurricanes of 2004 in the Southeast caused unprecedented havoc in the dairy industry. The proposal in this hearing will allow for reimbursement of a discrete segment of expenses incurred by the suppliers of raw milk for the benefit of the Southeast consuming public. The reimbursement of extraordinary hauling expenses can be accomplished promptly, fairly, and efficiently through the three Federal Orders in the region by modestly increasing the Class I price for three months and utilizing the revenues so-generated to directly reimburse handlers for extraordinary hauling expenses which they can document to the Market Administrator.

Proposal 1 is simple; short-term; unopposed; and much needed.

The members of the proponent cooperatives express their deep appreciation to the Department for expediting this hearing process and request that Proposal 1 be implemented on an emergency basis.

Respectfully Submitted,

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